Guideline Sentencing Update

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Adjustments

Role in Offense

Fourth Circuit holds that abuse of trust enhancement cannot be based on a coconspirator's actions. Two defendants pled guilty to conspiracy and mail fraud and were given § 3B1.3 enhancements for abuse of trust. The appellate court held that the enhancements could not be given for abusing positions of trust in their own company because that company was not a victim of the fraud. "It is well-established that 'the question of whether an individual occupies a position of trust should be addressed from the perspective of the victim.'"

The government argued that the enhancements were warranted as relevant conduct under § 1B1.3—a third conspirator occupied a position of trust in the victimized company and the abuse of his position was both reasonably foreseeable to defendants and in furtherance of the conspiracy. The appellate court disagreed. "By its own terms, § 1B1.3 holds a defendant responsible only for reasonably foreseeable 'acts and omissions' of his co-conspirators . . . . [T]he abuse of trust enhancement is premised on the defendant's *status* of having a relationship of trust with the victim. . . . A co-conspirator's status cannot be attributed to other members of the conspiracy under § 1B1.3."

The court also concluded that "the abuse of trust provision falls under an exception to § 1B1.3," which states that § 1B1.3 does not apply if "[o]therwise specified." "It is clear that § 3B1.3 'specifie[s]' that abuse of trust enhancements be individualized, not based on the acts of co-conspirators. . . . [Section] 3B1.3 specifically states that the two-level enhancement will apply if '*the defendant* abused a position of public or private trust.' U.S.S.G. § 3B1.3 (emphasis added)."

U.S. v. Moore, 29 F.3d 175, 178–80 (4th Cir. 1994) (remanded).

See *Outline* at III.B.8.a.

Multiple Counts—Grouping

Ninth Circuit holds that rape and murder counts involving same victim and transaction should have been grouped. Defendant was convicted of aggravated sexual abuse and felony murder. Defendant struck the victim with his truck and raped her, and she died from her injuries soon after. He was sentenced to concurrent life sentences, but argued on appeal that the two offenses should have been grouped because the "counts involve the same victim and the same act or transaction," § 3D1.2(a). The government argued that rape is not "the same act or transaction" as being murdered.

The appellate court held that the language of § 3D1.2(a) and the commentary require grouping. Application Note 3 "states that 'double counting' should be avoided where two counts 'represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim,' provided the counts arise from conduct occurring on the same day. . . . Example (2) to Note 3 . . . provides that where '[t]he defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping . . . [t]he counts are to be grouped together.' . . . [T]his illustration indicates that grouping is also appropriate for murder and aggravated sexual abuse, at least where they are inflicted contemporaneously on a single victim or result in an essentially single composite harm."

U.S. v. Chischilly, 30 F.3d 1144, 1160–61 (9th Cir. 1994).

See *Outline* at III.D.1.

Offense Conduct

Calculating Weight of Drugs

Tenth Circuit holds that government must prove that D- rather than L-methamphetamine was involved before sentence can be based on stricter calculation for D-methamphetamine. Defendant was convicted of methamphetamine offenses. Although the government presented no evidence as to what kind of methamphetamine was involved, defendant's offense level was based on the calculation for methamphetamine—which in the Guidelines means D-methamphetamine—rather than for L-methamphetamine, which is treated less severely. *See* § 2D1.1(c) at n.* and comment. (n.10.d).

The appellate court held that "[t]he government has the burden of proof and production during the sentencing hearing to establish the amounts and types of controlled substances related to the offense. . . . Since the criminal offense makes no distinction between the types of methamphetamine, it cannot be assumed that Deninno was convicted of possession of D-methamphetamine." *Accord U.S. v.*

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Patrick, 983 F.2d 206, 208–10 (11th Cir. 1993) (remanded: government failed to prove D-methamphetamine was involved). The appellate court affirmed the sentence, however, because defendant had failed to object at sentencing. His claim is thus reviewed only for plain error, and because "factual disputes do not rise to the level of plain error," defendant "in effect waived the issue for appeal."

U.S. v. Deninno, 29 F.3d 572, 580 (10th Cir. 1994).

See *Outline* generally at II.B.1.

Estimating Drug Quantity

Eighth Circuit affirms use of purity of seized drugs to estimate purity of unrecovered drug amounts. Defendant sold two "eight-balls" of methamphetamine to an undercover agent and indicated that he had eight others to sell. "Using percentages of purity from the methamphetamine actually seized on November 24, 1992, the [district] court concluded that each eight-ball amounted to 1.2 grams of actual methamphetamine. Although appellant argues that the exact purity level of the [eight] unrecovered eight-balls is impermissibly uncertain, the guidelines do not require an exact computation of the drug quantity. Instead, the guidelines provide that where the amount seized does not reflect the scale of the offense, the court 'shall approximate the quantity of the controlled substance.' U.S.S.G. § 2D1.1, application note 12. The court may extrapolate drug quantity from the drugs and money actually seized . . . . In making its calculation of the purity level of the drugs in appellant's possession at the time of the November 24th purchase, the district court properly relied on the purity level of the drugs actually seized."

U.S. v. Newton, 31 F.3d 611, – (8th Cir. 1994).

See *Outline* at II.B.4.d.

General Application Principles

Amendments

First Circuit affirms use of "one book" rule. Defendant was sentenced in 1993 but was sentenced under the 1988 Guidelines—which were in effect when the offense was committed—because using later Guidelines would have caused ex post facto problems. Defendant argued that the district court should have considered whether to grant him a third offense level reduction for acceptance of responsibility, which was not available until Nov. 1, 1992. The appellate court affirmed: "The 1992 Guidelines set forth what has been referred to as the 'one book' rule. *See* U.S.S.G. § 1B1.11(b)(2) (Nov. 1992). This provision instructs the district court that when it looks to an earlier version of the Guidelines to calculate a sentence, it must apply *all* of the Guidelines in that earlier version. It provides that a court cannot 'apply . . . one section from one edition . . . and another guideline section from a different edition.'" The court noted that defendant received a lower sentence than he could have if the 1992 Guidelines had been used in their entirety.

U.S. v. Springer, 28 F.3d 236, 237–38 (1st Cir. 1994).

See *Outline* at I.E.

Appellate Review

Discretionary Refusal to Depart Downward

Tenth Circuit will only review a refusal to depart downward if the sentencing court clearly states that it has no authority to depart. After rejecting defendant's claim that the district court's statement at sentencing indicated the court did not believe it had authority to depart downward, the appellate court added that "we no longer are willing to assume that a judge's ambiguous language means that the judge erroneously concluded that he or she lacked authority to downward depart. We think that 'the district courts have become more experienced in applying the Guidelines and more familiar with their power to make discretionary departure decisions under the Guidelines.' . . . Accordingly, unless the judge's language unambiguously states that the judge does not believe he has authority to downward depart, we will not review his decision. Absent such a misunderstanding on the sentencing judge's part, illegality, or an incorrect application of the Guidelines, we will not review the denial of a downward departure."

U.S. v. Rodriguez, 30 F.3d 1318, 1319 (10th Cir. 1994).

See *Outline* at X.B.1.

Departures

Mitigating Circumstances

Fourth Circuit holds that definition of "non-violent offense" in § 5K2.13 is not the same as "crime of violence" in § 4B1.2. Defendant was convicted of sending threatening communications, but did not carry out the threats. The district court held that defendant was suffering from "a major depressive episode" that warranted departure under § 5K2.13 for "significantly reduced mental capacity." The government appealed, arguing that this was not a "non-violent offense" as required under § 5K2.13.

The appellate court affirmed. Although defendant's offense would be considered "violent" under § 4B1.2, the same definition should not be used for

§ 5K2.13 departures: "U.S.S.G. § 5K2.13 is intended to create lenity for those who cannot control their actions but are not actually dangerous; U.S.S.G. § 4B1.2 is intended to treat harshly the career criminal, whether or not their actual crime is in fact violent. Moreover, the choice of different phrasing, the absence of a cross-reference, and the careful definitions attached to one section but not the other, all suggest that the Sentencing Commission did not intend to import its definition from one section into another." Therefore, because defendant's offense was not actually violent, he was eligible for departure under § 5K2.13. *Accord U.S. v. Chatman,* 986 F.2d 1446, 1448–53 (D.C. Cir. 1993). *Contra U.S. v. Dailey,* 24 F.3d 1323, 1327 (11th Cir. 1994); *U.S. v. Poff,* 926 F.2d 588, 592 (7th Cir. 1991) (en banc).

U.S. v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994).

See *Outline* at VI.C.1.b.

D.C. Circuit holds that departure might be permissible if a defendant's conditions of confinement will be more severe solely because of his status as a deportable alien. Defendant argued that his status as a deportable alien likely rendered him ineligible for certain benefits, such as being assigned to serve any part of his sentence in a minimum security prison or serving the last 10% of his sentence in some form of community confinement. The district court ruled that these were not grounds for departure. The appellate court remanded, even though it indicated that "circumstances justifying a downward departure on account of the deportable alien's severity of confinement may be quite rare. . . . For a departure on such a basis to be reasonable the difference in severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence. . . . [E]ven a court confident that the status will lead to worse conditions should depart only when persuaded that the greater severity is undeserved." Other circuits have rejected similar arguments. *See, e.g., U.S. v. Mendoza-Lopez,* 7 F.3d 1483, 1487 (10th Cir. 1993); *U.S. v. Nnanna,* 7 F.3d 420, 422 (5th Cir. 1993); *U.S. v. Restrepo,* 999 F.2d 640, 644 (2d Cir. 1993).

U.S. v. Smith, 27 F.3d 649, 651–55 (D.C. Cir. 1994) (Sentelle, J., dissented).

See *Outline* at VI.C.5.b.

Sixth Circuit rejects "totality of circumstances" departure where individual circumstances did not warrant departure. "[W]e conclude that the district court erroneously aggregated factors in order to depart downward. Even if we were to adopt the totality of circumstances approach to downward departures, the district court erred by accumulating typical factors 'already taken into account' by the sentencing guidelines, in order to arrive at an atypical result. . . . Because the guidelines clearly contemplated all of the factors considered by the district court, no downward departure was justified."

U.S. v. Dalecke, 29 F.3d 1044, 1048 (6th Cir. 1994).

See *Outline* at VI.C.3.

Eleventh Circuit holds that § 5K2.10 downward departure based on victim's conduct was warranted. Defendant was convicted of an extortion offense after making a threat of harm to the victim. "[T]he evidence suggested that Dailey's victim had defrauded him out of tens of thousands of dollars. Dailey only threatened physical harm after he and his family came under financial distress. . . . We cannot say that the district court clearly erred in finding that the conduct of Dailey's victim contributed significantly to provoking his offense."

U.S. v. Dailey, 24 F.3d 1323, 1328 (11th Cir. 1994).

See *Outline* at VI.C.4.b.

Determining the Sentence

Consecutive or Concurrent Sentences

Ninth Circuit affirms refusal to change federal sentence to run concurrently with later, consecutive state sentence for same conduct. Defendant pled guilty in state court and federal court to firearms offenses arising out of a single incident. He was sentenced first in federal court, with no reference to the pending state sentence. His state sentence was then imposed to run consecutive to the federal sentence. Defendant claimed that the district court "should have changed the federal sentence to make it run concurrently with the state sentence once a state sentence was imposed, because the federal Sentencing Guidelines express a general policy against consecutive sentences for the same underlying conduct. *See* U.S.S.G. § 5G1.3."

The appellate court affirmed the district court's refusal to change the sentence. "The state court . . . specifically stated that its sentence would be consecutive to the existing federal sentence. . . . Had the state court not made its sentence consecutive to the federal sentence, it might have imposed a harsher sentence; changing the federal sentence in this case would undermine the state court's sentencing scheme. Therefore, as a matter of comity, we shall not order modification of Mun's federal sentence."

U.S. v. Mun, No. 93-30286 (9th Cir. July 18, 1994) (Boochever, J.).

See *Outline* at V.A.2 and 3.

Violent Crime Control and Law Enforcement Act of 1994

Following is a brief summary of selected changes in the 1994 crime bill related to sentencing under the Guidelines, listed in order of the relevant *Outline* section. Except as noted, the changes took effect Sept. 13, 1994. Some provisions may apply to defendants who committed offenses before the effective date, but ex post facto problems may arise. Crime bill section numbers are in parentheses.

II.A.3: New 18 U.S.C. § 3553(f) provides a limited exception to mandatory minimum sentences for certain nonviolent drug offenses. The amendment applies to defendants who are *sentenced* on or after Sept. 23, 1994. A new guideline, § 5C1.2, implements the change. (Sec. 80001)

IV.B: The "three strikes" provision that mandates life imprisonment for a third "serious violent felony," 18 U.S.C. § 3559(c), will have to be distinguished from the career offender provisions in the Guidelines. For example, "serious violent felony" and "serious drug offense" differ from "crime of violence" and "controlled substance offense." (Sec. 70001)

V.E.2: 18 U.S.C. § 3572(a) is amended by adding new paragraph (6) directing courts to consider "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence" in determining a fine. (Sec. 20403)

VII: 18 U.S.C. § 3553(a)(4) now states that courts "shall consider . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission." (Sec. 280001) This provision, and the changes below, indicate that courts must follow the Chapter Seven policy statements when sentencing after revocation.

VII.A: For sentences imposed after revocation of probation, 18 U.S.C. § 3565(a)(2) has been amended by replacing the "available . . . at the time of the initial sentencing" language with "resentence the defendant under subchapter A" (18 U.S.C. §§ 3551–3559). Along with new § 3553(a)(4)(B) above, this indicates that courts are no longer limited to the guideline range that applied at defendant's original sentencing.

Along with drug possession, § 3565(a) now also mandates revocation of probation for possession of firearms or refusal of required drug testing. "A term of imprisonment" is required, but the "not less than one-third of the original sentence" language has been deleted. (Sec. 110506)

VII.B: 18 U.S.C. § 3583(g) now requires revocation of supervised release for firearm possession or drug test refusal, as well as drug possession. A term of imprisonment must be imposed, but the "not less than one-third of the term of supervised release" requirement was deleted.

Reimposition of supervised release after revocation is now authorized by new § 3583(h), if defendant is sentenced to less than the maximum prison term available. "The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation." (Sec. 110505)

Note to readers: The format of *Guideline Sentencing Update* has been revised to allow larger type for improved legibility. The larger size also allows more cases per issue and thus fewer issues per year, which will lower the Center's overall printing and mailing costs.

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General Application

Amendments

Eighth Circuit affirms use of amended guideline for pre-amendment counts where other count for similar conduct occurred after amendment. Defendant pled guilty to two counts of being a felon in possession of a firearm and one count of possession of a short-barrelled shotgun. One of the felon in possession offenses occurred after the Nov. 1, 1991, amendments that increased the base offense level for that offense and changed the grouping rules for firearms offenses; the other two offenses occurred before the amendment. Defendant was sentenced under the amended guidelines on all three counts and, because his sentence was greater than it would have been under the pre-amendment guidelines, argued on appeal that this was an ex post facto violation.

The appellate court affirmed. "At the time Cooper elected to commit the third firearms violation he was clearly on notice of the 1991 amendments to the Sentencing Guidelines and the fact that they increased the offense levels for the firearm crimes in question and required the aggregation of firearms in Counts I, II and IV. In our view, Cooper had fair warning that commission of the January 23, 1992, firearm crime was governed by the 1991 amendments that provided for increased offense levels and new grouping rules that considered the aggregate amount of harm." The court also reasoned that defendant's offenses could be likened to a continuing offense or "same course of conduct," for which "the date the crimes are completed determines the version of the Sentencing Guidelines to be applied. . . . The offense conduct to which Cooper pled guilty involved a series of firearm offenses spanning from August 24, 1991, to January 23, 1992. As with the analogous cases referenced above, application of the Sentencing Guidelines in effect at the time Cooper completed the last offense does not violate the ex post facto clause."

Dissenting in part, Judge Wollman stated that the pre-amendment offense guidelines should be applied to the earlier counts, but agreed that the post-amendment grouping rules can be applied to all three counts.

U.S. v. Cooper, 35 F.3d 1248, 1250–52 (8th Cir. 1994).

See *Outline* at I.E.

Fifth Circuit affirms refusal to lower sentence following retroactive amendment. At her original sentencing for methamphetamine offenses defendant received a substantial § 5K1.1 downward departure. After the method of calculating the weight of a methamphetamine mixture was amended in 1993 and made retroactive, defendant filed a motion under 18 U.S.C. § 3582(c)(2). Using the amended guideline could have lowered defendant's guideline range, but not below the sentence she received after the original departure. The district court denied defendant's motion for a lower sentence, explaining that it had been "extremely lenient in its downward departure and would not resentence Movant below this."

The appellate court affirmed, while noting that "[i]t is not evident what the court is supposed to do, in a case such as this, when there has been a departure in the original sentencing decision." The court did not decide that issue, however, because the "application of § 3582(c)(2) is discretionary," and in determining "it would not depart further under the circumstances presented, the district court did not abuse its discretion."

U.S. v. Shaw, 30 F.3d 26, 28–29 (5th Cir. 1994) (per curiam).

See *Outline* at I.E.

Adjustments

Obstruction of Justice

Eleventh Circuit holds en banc that obstruction enhancement does not apply to persons who "simply disappear to avoid arrest, without more." During plea negotiations but before indictment, a couple being investigated for fraud disappeared. The government eventually located them after getting an indictment, and the husband gave a false name to police when arrested. Their sentences were enhanced for obstruction of justice. Based on § 3C1.1, comment. (n.4(d)) (no enhancement for "avoiding or fleeing from arrest"), the appellate court reversed: "We conclude that the § 3C1.1 enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more. Such persons do not face a two-level enhancement for failing to remain within the jurisdiction or for failing to keep the Government ap-

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prised of their whereabouts during its pre-indictment investigation."

The appellate court also held that there were insufficient findings to support a §3C1.1 enhancement for giving a false name. Under Application Note 4(a), "a district court applying the enhancement because a defendant gave a false name at arrest must explain how that conduct significantly hindered the prosecution or investigation of the offense." Here, the district court simply inferred that the false name "slowed down the criminal process."

U.S. v. Alpert, 28 F.3d 1104, 1106–08 (11th Cir. 1994) (en banc) (two judges dissented) (superseding opinion at 989 F.2d 454).

See *Outline* at III.C.1, 2.b and e, and 3.

Seventh Circuit reverses §3C1.1 enhancement for refusal to testify at coconspirator's trial. Defendant and a coconspirator were indicted for conspiracy and substantive offenses. After defendant pled guilty to a possession charge, the government obtained a court order immunizing defendant and directing him to testify at the coconspirator's trial. Defendant refused to testify and was held in civil contempt. The coconspirator was convicted anyway, but defendant was given a §3C1.1 enhancement for refusing to testify.

The appellate court reversed because defendant's conduct did not affect "the instant offense" as required by §3C1.1. "This court has defined 'the instant offense' to refer 'solely to the offense of conviction.' . . . 'Offense of conviction' does not refer to a separate crime by someone else. . . . Here, Partee's 'offense of conviction' was possession of cocaine with intent to distribute. Partee's refusal to testify at Dismuke's trial had no impact on *his* possession conviction and, therefore, Partee did not attempt 'to avoid responsibility for the offense for which *he* was being tried.'" Although some circuits have read "instant offense" to include relevant conduct, this circuit "has instead defined it narrowly as 'offense of conviction,' . . . and 'offense of conviction' refers only to the '"offense conduct charged in the count of the indictment or information of which the defendant was convicted."' . . . We are bound by this definition, and applying it here we conclude that a defendant cannot receive an enhancement for obstruction of justice for refusing to testify at a coconspirator's trial. . . . This does not mean that a defendant's disregard for a court order to testify under a grant of immunity will go unpunished; a district court could sentence a defendant to imprisonment for criminal contempt of court."

U.S. v. Partee, 31 F.3d 529, 531–33 (7th Cir. 1994).

See *Outline* at III.C.2.d and 4.

Abuse of Trust and Vulnerable Victim

Seventh Circuit reverses failure to give abuse of trust and vulnerable victim enhancements. Defendant fraudulently sold annuities through funeral home directors to elderly clients who wanted to pre-pay funeral expenses. He paid for some funerals initially, but kept most of the money. The parties stipulated that defendant was a licensed insurance broker and that this license was necessary to purchase these annuities. The district court refused the government's request for a §3B1.3 enhancement for abuse of trust, but the appellate court reversed. "Stewart's position as a licensed insurance broker enabled him to induce his elderly clients to entrust him with funds for the purchase of annuities. By paying the funeral directors ten percent for their services as his agents in inducing the elderly to part with their funds for the purchase of annuities, the funeral directors were led to believe that Stewart would purchase the annuities in his capacity as an insurance agent to reimburse them for the cost of the funerals. Stewart abused that position to embezzle over one million dollars." Defendant's position of trust also "made it significantly easier for him to commit and conceal his fraudulent scheme."

The district court denied the government's request for a §3A1.1 vulnerable victim enhancement on the ground that the funeral directors were the only victims of defendant's fraud—the elderly clients suffered no losses because the directors provided the funeral services despite defendant's failure to purchase sufficient annuities. The appellate court reversed for clear error. "The district court appears to have succumbed to Stewart's argument that section 3A1.1 requires that the vulnerable victim suffer a financial loss. There is no requirement in section 3A1.1 that a target of the defendant's criminal activities must suffer financial loss. . . . [Defendant] made his elderly clients the innocent instruments of his scheme to defraud the funeral directors . . . . The evidence supports an inference that Stewart targeted the elderly [and that] they were especially vulnerable" to his promises.

U.S. v. Stewart, 33 F.3d 764, 768–71 (7th Cir. 1994).

See *Outline* at III.A.1.b and III.B.8.a.

Supervised Release

Revocation of Supervised Release

Sixth Circuit holds that restitution obligation does not end if supervised release is revoked. Defendant argued that restitution is a condition of supervised release under 18 U.S.C. §3663(g), and that when his release was revoked the duty to pay resti-

tution did not survive. The appellate court concluded that "Congress intended restitution to be an independent term of the sentence of conviction, without regard to whether incarceration, probation, or supervised release were ordered." Reading § 3663(g) in the context of the whole statute shows that it is not meant to make restitution "merely a term of supervised release" but "is aimed at effectively using the court's jurisdiction over the defendant during supervised release and probation, not at modifying the obligation to make restitution. . . . Accordingly, we conclude that a district court's decision to revoke supervised release does not affect the obligation to pay restitution if such obligation was authorized under 18 U.S.C. §§ 3551, 3556."

U.S. v. Webb, 30 F.3d 687, 689–91 (6th Cir. 1994) (Jones, J., dissented).

See *Outline* generally at V.B.1.

Note: Reimposition of supervised release after revocation is now allowed under new 18 U.S.C. § 3583(h) (effective Sept. 13, 1994).

Criminal History

Career Offender Provision

First and Fourth Circuits hold that a drug conspiracy conviction is a "controlled substance offense" for career offender purposes. In the First Circuit, defendant was sentenced as a career offender after his conviction for a marijuana conspiracy. He appealed, arguing that conspiracy was not listed in the career offender guideline or the enabling statute and that its inclusion in Application Note 1 of § 4B1.2 is inconsistent with the guideline and exceeds the mandate in the enabling statute. The appellate court disagreed, holding that "the application note comports sufficiently with the letter, spirit, and aim of the guideline to bring it within the broad sphere of the Sentencing Commission's interpretive discretion."

U.S. v. Piper, 35 F.3d 611, 616–19 (1st Cir. 1994).

The Fourth Circuit defendant was convicted of conspiracy to distribute cocaine and was not sentenced as a career offender. In remanding, the appellate court concluded "that the career offender provision of the Sentencing Guidelines was promulgated pursuant to the Commission's general authority under [28 U.S.C.] § 994(a) as well as its more specific authority under § 994(h) . . . [and] it was reasonable for the Commission to interpret Congress' directive in § 994(h) as permitting inclusion of drug-related offenses other than the offenses specifically enumerated in § 994(h)."

The district court had also concluded that the career offender guideline did not apply because defendant was released from prison on one of his two predicate felonies just over fifteen years before the date charged in the indictment for the beginning of the instant conspiracy. However, the appellate court agreed with the government that the district court was not bound by the date in the indictment but should "consider all relevant conduct pertaining to the conspiracy in determining when that conspiracy began." *See also* § 4B1.2, comment. (n.8) ("the term 'commencement of the instant offense' includes any relevant conduct").

U.S. v. Kennedy, 32 F.3d 876, 888–91 (4th Cir. 1994).

See *Outline* at IV.B.

Departures

Mitigating Circumstances

Ninth Circuit reverses departures based on "combination of factors" and victim misconduct. Two Los Angeles police officers were convicted of civil rights offenses in the Rodney King beating case. (Note: This summary assumes familiarity with the basic facts of this widely publicized case.) In sentencing defendants to thirty months each, the district court departed downward three offense levels for a combination of factors that individually would not warrant departure: the additional punishment defendants could receive from administrative sanctions and their susceptibility as police officers to prison abuse; "the extreme absence of a need to protect the public from future wrongdoing" by defendants; and "the unfairness of successive state and federal prosecutions for the same conduct."

The appellate court reversed, stating that "although a district court may grant a departure based on a combination of factors that do not individually justify a departure, this policy does not permit the district court to consider in the mix factors that should not be part of the consideration. . . . [O]ur purpose is not to determine whether each factor taken alone justifies a departure, but rather whether consideration of the particular factor at all as part of the decision to depart is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes." As for the individual factors cited: "Personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." A departure based on the vulnerability of a police officer in prison "would be inconsistent with the structure and policies of the Guide-

lines. . . . While a departure based on U.S.S.G. § 5H1.4 involves the relatively objective question of whether an extraordinary physical impairment exists, the determination of whether an individual's membership in a group regarded with hostility leaves him vulnerable is both subjective and open-ended. Nothing would prevent this rationale from being applied to numerous groups . . . all of whom face an increased risk of abuse in prison."

The court also held that "the fact that appellants are neither dangerous nor likely to commit crimes in the future is not an appropriate basis for a departure in this case. Although it is true that some offenders who are classified in Criminal History Category I have a greater likelihood of recidivism than appellants, the Commission already took this factor into account when it drafted the Guidelines . . . . This is so even for defendants who may be unusually unlikely to commit crimes in the future." "Reliance on the 'spectre of unfairness' of dual prosecutions to support a departure is improper because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern. . . . We find nothing in the structure or policies of the Guidelines to support a departure on the grounds that successive prosecutions are burdensome."

The district court also departed five levels under § 5K2.10 for victim misconduct, despite concluding that this factor was no longer present at the time that defendant's conduct changed from legitimate use of force to a criminal violation of civil rights. The appellate court again reversed, concluding that the victim's conduct and the appropriateness of the police response to it are taken into account in the statute of conviction and the relevant guideline.

U.S. v. Koon, 34 F.3d 1416, 1452–60 (9th Cir. 1994).

See *Outline* at VI.C.3, 4.b, and 5.b.

Tenth Circuit reverses downward departure based on post-arrest drug rehabilitation and religious activity. The district court departed downward based on a combination of "a very significant change in the defendant's conduct and attitudes towards life," resulting from participation in religious activities, and defendant's concomitant drug rehabilitation after "a long history of drug abuse and drug usage." The appellate court reversed, first noting that it has previously prohibited departure for drug rehabilitation. In addition, "post-offense rehabilitative efforts, including counseling, are a factor to consider in § 3E1.1. *Id.,* Application Note 1(g). Chubbuck's religious guidance falls squarely into this category, and we therefore think that the guidelines have adequately considered Chubbuck's rehabilitation, both in kind and in degree."

U.S. v. Chubbuck, 32 F.3d 1458, 1461–62 (10th Cir. 1994).

See *Outline* at VI.C.2.a and c.

Aggravating Circumstances

Fifth Circuit affirms § 5K2.1 departure for unintended death that resulted indirectly from offense conduct. When defendant robbed a gas station, the "traumatic event of the robbery" caused an employee to suffer a brain aneurysm that resulted in her death two days later. The district court departed upward under § 5K2.1 because "death resulted" from the offense. The appellate court affirmed that this was proper under § 5K2.1. "The court's conclusion that although Davis did not consciously intend to kill Overby his conduct was such that he should have anticipated that a serious injury or death could result from his conduct shows that relevant factors under § 5K2.1 were thoroughly considered."

U.S. v. Davis, 30 F.3d 613, 615–16 (5th Cir. 1994).

See *Outline* at VI.B.1.e.

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Departures

Substantial Assistance

Ninth Circuit holds that government's improper behavior authorized district court to grant §5K1.1 departure without government motion. Before and during defendant's plea proceedings his counsel attempted to negotiate a plea agreement, whereby defendant would testify against other defendants in exchange for a §5K1.1 departure. The government refused the offer, but then, without notifying defendant's counsel, subpoenaed defendant to testify at a grand jury hearing. Defendant contacted his attorney, who tried to contact the prosecutor, who did not return the phone calls. Counsel could not contact defendant, either, because the government had moved defendant to another prison. Assuming that his attorney had reached the prosecutor and struck a deal for a departure, defendant testified before the grand jury. At defendant's sentencing the government refused to file a §5K1.1 motion, although it did file one for a codefendant who testified before the same grand jury.

The appellate court remanded, rejecting the government's argument that "its potentially unconstitutional *behavior* (interfering with defendant's Sixth Amendment rights) is not an 'unconstitutional motive' within the meaning of [*Wade v. U.S.,* 112 S. Ct. 1840 (1992)], and that a downward departure is not an appropriate remedy for such misconduct." The court held that defendant "has shown that he provided substantial assistance, and that the government's improper conduct deprived him of an opportunity to negotiate a favorable bargain before testifying. Allowing such potentially unconstitutional behavior to go unremedied creates troubling incentives. Although no cases have squarely addressed Hier's situation, the government's behavior in this case authorizes the district court to grant Hier's request for a downward departure."

U.S. v. Treleaven, 35 F.3d 458, 461–62 (9th Cir. 1994).

See *Outline* at VI.F.1.b.iii.

Fifth Circuit holds that district court must make independent determination of extent of §5K1.1 departure. Defendants received downward departures under §5K1.1, but argued on appeal that the district court's comments indicated that, as a matter of policy, the court would not depart more than the ten months the government recommended. The appellate court remanded. "Although the court referred to its power and discretion in determining whether and to what extent to depart, the record leaves open the question whether the court also adequately recognized its duty to evaluate independently each defendant's case . . . . The court is charged with conducting a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence. While giving appropriate weight to the government's assessment and recommendation, the court must consider all other factors relevant to this inquiry."

U.S. v. Johnson, 33 F.3d 8, 10 (5th Cir. 1994).

See *Outline* at VI.F.2.

Aggravating Circumstances

Second Circuit holds that likely fate of smuggled aliens after reaching U.S. may be considered in departure decision. Defendants were convicted of conspiring to bring 150 illegal aliens into the U.S. from China. The district court departed upward, partly based on the likelihood that, had the scheme succeeded, the illegal aliens would have been subject to "involuntary servitude" to pay off their debts to the smugglers. The appellate court affirmed. "Testimony at trial established that . . . each of the 150 aliens would be indebted to the smugglers in amounts ranging from $10,000 to nearly $30,000. A contract to pay smuggling fees, unenforceable at law or equity, necessarily contemplates other enforcement mechanisms, none of them savory. It requires no quantum leap in logic to infer from these established facts that these huge debts would be paid through years of labor under circumstances fairly characterized as involuntary servitude."

U.S. v. Fan, 36 F.3d 240, 245 (2d Cir. 1994).

See *Outline* generally at VI.B.1.j.

Offense Conduct

Mandatory Minimums

Eighth Circuit holds that quantity of LSD for mandatory minimums should be calculated under amended guideline method. Defendant pled guilty to conspiracy to distribute LSD and stipulated that the weight of the drug and carrier medium was over ten grams. This subjected him to a ten-year manda-

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tory minimum under 21 U.S.C. §841(b)(1)(A)(v), but with a substantial assistance departure he was sentenced to 72 months. Guideline Amendment 488 (Nov. 1, 1993) changed the method of calculating the weight of LSD and carrier media, *see* §2D1.1(c) at n.* and comment. (n.18 and backg'd), and made it retroactive under §1B1.10. Using the amendment would lower defendant's sentencing range to 33–41 months. The court declined to reduce the sentence, however, concluding that defendant was still subject to the mandatory minimum term and, although the sentence was below the minimum because of defendant's substantial assistance, it could not be reduced further based on the amended guideline.

The appellate court agreed that it would be improper to "piggyback" the amended calculation onto the substantial assistance reduction, but held that the calculation for the mandatory minimum quantity itself should be based on the amendment. "In *Chapman v. U.S.,* 500 U.S. 453, 468 . . . (1991), the Supreme Court construed 'mixture or substance' in [§841(b)(1)(A)(v)] as 'requir[ing] the weight of the carrier medium to be included.' . . . Amendment 488 merely provides a uniform methodology for calculating the weight of LSD and its carrier medium—the 'mixture' or 'substance' containing a detectable amount of LSD."

The court concluded that "Amendment 488 and Section 841 can and should be reconciled under *Chapman*. . . . To calculate mixture weights differently for mandatory minimum sentences on one hand and guideline sentences on the other would unnecessarily swallow up the guideline, which, itself, demands a very significant sentence. Applying two different measurements makes no sense. Accordingly, we find that Stoneking's sentence may be reduced under a retroactive application of Amendment 488." *Contra U.S. v. Boot,* 25 F.3d 52, 54–55 (1st Cir. 1994) [6 *GSU* #15]. Because retroactive application of an amendment is not mandatory, it remains for "the district court to determine, in its discretion, whether Amendment 488 should be applied retroactively to reduce Stoneking's sentence."

U.S. v. Stoneking, 34 F.3d 651, 652–55 (8th Cir. 1994).

See *Outline* at I.E, II.A.3, and II.B.1.

Loss

Third Circuit holds that loss from check kiting scheme is not reduced by amounts repaid after offense is discovered. Defendant pled guilty to bank fraud through check kiting. When the crime was detected the loss amounted to over $460,000. The district court reduced that sum to under $350,000, however, to reflect payments defendant made to some of the victim banks by the time he was sentenced. The appellate court remanded. "We believe that check kiting crimes, because of their particular nature, are crimes where the district court must calculate the victim's actual loss as it exists at the time the offense is detected rather than as it exists at the time of sentencing. . . . By its very nature, the crime of kiting checks ordinarily involves the borrowing of funds without authorization from the bank and without the offender providing any security to protect the bank against risk of loss. This distinction warrants treating perpetrators of check kiting loan frauds in most cases differently from perpetrators of secured loan frauds for sentencing purposes." Thus, "the gross amount of the kite at the time of detection, less any other collected funds the defendant has on deposit with the bank at that time and any other offsets that the bank can immediately apply against the overdraft (including immediate repayments), is the loss to the victim bank."

U.S. v. Shaffer, 35 F.3d 110, 113–14 (3d Cir. 1994). *See also U.S. v. Mummert,* 34 F.3d 201, 204 (3d Cir. 1994) (affirmed: where defendant arranged fraudulent unsecured loan to finance construction of house by third party, loss is not reduced by third party's offer to repay bank after sale of house or sign house over to bank—"A defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught"). Cf. *U.S. v. Bennett,* 37 F.3d 687, 695 (1st Cir. 1994) (remanded: error to reduce loss by amount repaid as part of civil settlement after fraudulent loan scheme was discovered).

See *Outline* at II.D.2.b and c.

Tenth Circuit holds that amount of loss is not reduced by fraud victims' tax benefits. Defendant defrauded dozens of investors of several million dollars. He argued that the amount of loss should be reduced by $2 million for tax benefits the victims obtained through their investments. The district court refused to do so and the appellate court affirmed: "Defendant cites no authority in support of his novel proposition, and we have found none. In previous cases where we have deducted the value of something the victim has received in computing actual loss, Defendant himself has been responsible for the victim's receipt of something of value. . . . Because the Sentencing Commission did not [allow for such a reduction], and because no Tenth Circuit or other precedent supports Defendant's argument to reduce the amount of loss by a victim's tax savings, we reject Defendant's argument."

U.S. v. McAlpine, 32 F.3d 484, 489 (10th Cir. 1994).

See *Outline* at II.D.2.d.

Adjustments

Acceptance of Responsibility

Seventh Circuit affirms denial of § 3E1.1 reduction for silence on "conduct comprising the offense of conviction." Defendant pled guilty to credit card offenses. The district court denied a reduction for acceptance of responsibility because defendant refused to answer questions concerning how she arrived in Wisconsin, where she obtained the counterfeit credit cards, and the source of money recovered at her arrest that exceeded the amounts she had obtained in the charged offenses. Defendant had invoked the Fifth Amendment on these issues and argued that § 3E1.1, comment. (n.1(a)), allowed her to do so without penalty ("A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection.").

The appellate court affirmed the denial, although it agreed with defendant that her silence regarding the money that exceeded the amount in the offenses of conviction was protected under Application Note 1(a). "There is, however, an important distinction between Hammick's silence concerning the source of the excess cash . . . and her silence concerning [her] means of travel to Wisconsin and the source of the counterfeit credit cards and other documents she used to commit the offenses to which she pleaded guilty." Note 1(a) also indicates that a defendant must "truthfully admit[] the conduct comprising the offenses of conviction." "The district judge's request that Hammick explain how she was able to carry out her crimes required no more than 'a candid and full unraveling' of the conduct comprising her offense of conviction, . . . and thus did not violate her right to remain silent concerning relevant conduct *beyond* the offense of conviction under the current version of the guideline."

U.S. v. Hammick, 36 F.3d 594, 600–01 (7th Cir. 1994) (Bauer, J., dissented).

See *Outline* at III.E.3.

Ninth Circuit indicates defendant should notify government of intent to plead guilty in order to secure §3E1.1(b) reduction for timely assistance. Defendant received the two-point reduction under §3E1.1(a), but was denied the extra point under §3E1.1(b) because he did not plead guilty until one week before trial and "after the government had begun seriously to prepare for trial." Defendant argued he had waited until the court ruled on his motion to dismiss on double jeopardy grounds, and should not be denied the extra reduction because the court did not decide the motion earlier or because he exercised his constitutional rights.

The appellate court affirmed. "While Narramore may well have intended to plead guilty in the event that his motion to dismiss was denied, he at no time approached the government with this information so the trial preparation could have been avoided. Nothing prevented him from doing so. Narramore's pretrial motion, if granted, would have completely obviated trial. Accordingly, if Narramore had earlier communicated his willingness to enter a plea, the government would have had no reason to prepare for trial. In such circumstances, his plea cannot be considered timely for purposes of §3E1.1(b)." As for defendant's constitutional argument, "[i]ncentives for plea bargaining are not unconstitutional merely because they are intended to encourage a defendant to forego constitutionally protected conduct. . . . [B]y advising the government of his intent to plead guilty if his trial motion were denied, Narramore could have enabled the government to avoid trial preparation" and qualified for §3E1.1(b).

U.S. v. Narramore, 36 F.3d 845, 846–47 (9th Cir. 1994).

See *Outline* at III.E.5.

Criminal History

Armed Career Criminal

Sixth Circuit holds that enhanced penalty in §4B1.4 for possessing firearm "in connection with a crime of violence" does not require conviction for that crime of violence. Defendant was convicted of being a felon in possession of a firearm and, because of prior convictions, was subject to sentencing as an armed career criminal under 18 U.S.C. §924(e) and §4B1.4. The district court found that defendant possessed the firearm "in connection with a crime of violence" (an assault) and increased the offense level and criminal history category under §4B1.4(b)(3)(A) & (c)(2). Defendant appealed, arguing that the increases did not apply because he was not *convicted* of the assault in connection with the unlawful possession.

The appellate court affirmed, concluding that "a conviction for a violent crime is not a prerequisite to application of this section. . . . Where the drafters of the guidelines intend that a defendant must have been convicted of a particular crime if a particular provision of the guidelines is to be applied, they generally say so explicitly. . . . No corresponding term appears in the definition of an 'armed career criminal,' the category at issue here."

U.S. v. Rutledge, 33 F.3d 671, 673–74 (6th Cir. 1994).

See *Outline* at IV.D.

Challenges to Prior Convictions

Ninth Circuit holds that *Custis* applies to challenges under Guidelines. The district court denied defendant's challenge to a prior conviction that increased his Guidelines sentence. Basing its decision on §4A1.2, comment. (n.6), and *Custis v. U.S.,* 114 S. Ct. 1732 (1994), the appellate court affirmed. "We conclude that Burrows had no right conferred by the Sentencing Guidelines to attack his prior convictions in his sentencing proceeding and no constitutional right to attack any prior convictions save those which were obtained in violation" of the right to counsel. Although *U.S. v. Vea-Gonzales,* 999 F.2d 1326 (9th Cir. 1993), held that defendants have a constitutional right to challenge prior sentences, "as far as its constitutional holding goes, *Vea-Gonzales* is no longer good law" in light of *Custis.*

U.S. v. Burrows, 36 F.3d 875, 885 (9th Cir. 1994).

See *Outline* at IV.A.3.

Determining the Sentence

Consecutive or Concurrent Sentences

Ninth Circuit holds that courts must consider, but are not strictly bound by, the methodology in §5G1.3(c), comment. (n.3). Defendant was serving a state sentence at the time he was to be sentenced for an unrelated federal offense. To determine the extent to which the federal sentence should be consecutive to the state sentence, the district court followed the procedure in §5G1.3(c), comment. (n.3), and approximated "the total punishment that would have been imposed under §5G1.2 . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time." The resulting guideline range was less than defendant was to serve on the state sentence. As an alternative, the court departed downward from defendant's criminal history category by discounting the state conviction and arrived at a sentencing range of 18–24 months. The court sentenced defendant to 18 months, to run consecutively to the state term, making defendant's "incremental punishment" for the federal offense 18 months.

Although the district court neither strictly followed Note 3 nor specifically explained why it did not use the recommended calculation, the appellate court affirmed. A "review of the history of §5G1.3 supports the inference that its current language is intended to give sentencing courts leeway in deciding what method to use to determine what a reasonable incremental penalty is in a given case. . . . Although the district court no longer has complete discretion to employ any method it chooses when it decides upon a reasonable incremental penalty, neither is it required to use the commentary methodology or else depart from the Guideline. . . . True, the court must attempt to calculate the reasonable incremental punishment that would be imposed under the commentary methodology. If that calculation is not possible or if the court finds that there is a reason not to impose the suggested penalty, it may use another method to determine what sentence it will impose. The court must, however, state its reasons for abandoning the commentary methodology in such a way as to allow us to see that it has considered the methodology. . . . Applying these principles to the case at hand, it becomes clear that the district court did everything it was required to do. . . . It did need to consider the methodology and it did need to give its reasons for using an alternative method." Cf. *U.S. v. Coleman,* 15 F.3d 612–13 (6th Cir. 1994) (remanded: courts must consider §5G1.3(c) and, "to the extent practicable," utilize methodology in Note 3).

U.S. v. Redman, 35 F.3d 437, 440–42 (9th Cir. 1994).

See *Outline* at V.A.3.

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Departures

Mitigating Circumstances

Ninth Circuit holds that departure is warranted for "sentencing entrapment." Defendant was the target of a sting operation in which a confidential informant and undercover agent induced him to sell 10,000 doses of LSD. The evidence indicated that defendant had never engaged in a drug deal anywhere near this size and that he was pressured into selling more than the 5,000 doses he was willing to sell, but the jury rejected defendant's entrapment defense. The district court expressed dissatisfaction with the guideline minimum of 151 months but concluded it had no ground for departure.

The appellate court reversed, holding that under these circumstances a departure for sentencing entrapment, or "sentence factor manipulation," would be proper. The Guidelines were amended after defendant's sentencing to allow the possibility of departure in a reverse sting, *see* §2D1.1, comment. (n.17) (Nov. 1993). Although this was not a reverse sting, the court concluded that the amendment "shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability. Our conclusion that a finding of sentencing entrapment is warranted in the instant case is motivated by the same concerns, and, as such, is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress."

"In this case, Judge Ideman found that Staufer was a user and sometime seller of LSD, but that he sold only to personal friends and had never engaged in a deal even approaching the magnitude of the transaction for which he was convicted. The court recognized that . . . he was not predisposed 'to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs.' We are persuaded that 'sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines,' . . . and, based on the district court's findings, we conclude that Staufer was so entrapped in this case."

U.S. v. Staufer, 38 F.3d 1103, 1107–08 (9th Cir. 1994) (Beezer, J., dissenting).

See *Outline* at VI.C.4.c.

Sixth Circuit rejects downward departure for white-collar defendant's community ties and charitable deeds. Defendant and others were indicted on 33 counts relating to the sale of adulterated orange juice. He pled guilty to one count and faced a sentence of 30–37 months. Based on "a substantial number of letters" praising defendant, the district court found that defendant's "community ties, civic and charitable deeds, and prior good works merited a substantial downward departure" and sentenced defendant to 12 months of home confinement and a $250,000 fine.

The appellate court remanded, holding that "it is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as Crouse, to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts. . . . [T]he Sentencing Guidelines already considered the nature of white-collar crime and criminals when setting the offense levels that govern this offense. Furthermore, the Guidelines reward defendants who have lived previously lawful lives by setting substantially lower sentencing ranges for them than those suggested for past offenders. . . . The record shows that Crouse has performed many fine deeds in his life and has won the devotion and admiration of people whom he has helped and who have honored him with positions of community leadership. However, he also has derived well over $1 million in income from . . . the adulteration scheme."

U.S. v. Kohlbach, 38 F.3d 832, 838–39 (6th Cir. 1994).

See *Outline* at VI.C.1.a.

First Circuit rejects departure based on comparison of defendant's charitable work and community service to that of "the typical bank robber." Defendant was convicted of several counts relating to a bank robbery. The district court departed under §5H1.11 because defendant's "charitable work and community service stood apart from what one would expect of 'the typical bank robber.'" The court noted that "[i]f this was a securities fraud case or bank fraud case, probably the downward departure would not be appropriate."

The appellate court remanded, noting at the outset that "a defendant's record of charitable work and community service falls into the discouraged-feature category of justifications for departure."

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Therefore "departure is warranted only if the 'nature and magnitude' of the feature's presence is unusual or special," and "a court must ask 'whether the case differs from the ordinary case in which those [discouraged] features are present.'" Here, the district court "did not compare Bonasia's history of charitable and community service to the histories of defendants from other cases who similarly had commendable community service records. . . . [T]he court erred by restricting the scope of its comparison to only bank robbery cases. A court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd."

U.S. v. DeMasi, – F.3d – (1st Cir. Oct. 26, 1994).

See *Outline* at VI.C.1.a.

Seventh Circuit holds departure for family responsibilities may be allowed in extraordinary cases. The district court was inclined to depart for defendant's family responsibilities but concluded that *U.S. v. Thomas,* 930 F.2d 526 (7th Cir. 1991) (*Thomas I*), prohibited it. The appellate court remanded. "Because our sister circuits have uniformly rejected *Thomas I*'s interpretation of section 5H1.6 both before and after the November 1, 1991 amendment, and because that amendment omits the language on which *Thomas I* specifically relied, we hold today that a district court may depart from an applicable guideline range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. Any other reading would be inconsistent with the plain language of section 5H1.6 in that it would render meaningless the Commission's use of the phrase 'not ordinarily relevant.'"

U.S. v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994).

See *Outline* at VI.C.1.a.

Tenth Circuit holds prison overcrowding cannot be basis for downward departure. Among other reasons, the district court justified a downward departure on the basis of prison overcrowding after finding that federal prisons are operating at 148% of capacity. The appellate court reversed. "In [28 U.S.C. §] 994(g), Congress directed the Sentencing Commission, not the courts, to consider prison capacities. While the Commission is directed to take into account prison overcrowding in devising its overall guideline scheme, prison capacity is not an appropriate consideration for courts in determining the sentences of individual defendants."

U.S. v. Ziegler, 39 F.3d 1058, 1063 (10th Cir. 1994).

See *Outline* generally at VI.C.5.b.

Substantial Assistance

Eleventh Circuit holds that where district court accepted plea agreement that obligated government to move for Rule 35(b) reduction, it may not reject the motion without hearing evidence. Defendant's plea agreement effectively obligated the government to file a Rule 35(b) motion if it determined that his post-sentence cooperation warranted an additional reduction in sentence. Eventually the government did file a motion, with a request for an evidentiary hearing, but the evidence of defendant's cooperation was not set forth in the motion for security reasons. The district court denied the motion and defendant appealed.

The appellate court allowed the appeal, finding that "if the motion is made pursuant to a plea agreement, the rights of the defendant are implicated by the district court's refusal to hear evidence of a defendant's substantial assistance. If the defendant were not permitted to appeal, he or she would be effectively without recourse to enforce a breached plea agreement." The court then remanded for an evidentiary hearing, holding that in these circumstances the refusal to grant a hearing had "effectively prevented the government from presenting its Rule 35 motion [and] forced a breach of the plea agreement." The court noted that the need for a hearing arose from the particular facts of this case and that "[i]n some instances a written motion outlining the defendant's cooperation may suffice to satisfy the plea agreement."

U.S. v. Hernandez, 34 F.3d 998, 1000–01 & n.6 (11th Cir. 1994).

See *Outline* at VI.F.4.

Aggravating Circumstances

Ninth Circuit reverses departure based on "the danger of violence associated with a fraudulent drug sale." Defendant pled guilty to distribution of cocaine, possession of cocaine with intent to distribute, and to carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. §924(c). Because he was attempting to cheat the buyers (who were really undercover agents), he sold much less than the negotiated amount—only about 25 grams of cocaine was contained in three kilogram-sized bricks. With only 25 grams of cocaine actually involved, defendant's guideline maximum was 16 months. However, the district court held that departure was warranted because of a greater likelihood of violence during an attempted drug fraud than in an "honest" drug sale. Defendant was sentenced to 25 months, plus the mandatory consecutive 60-month sentence on the firearm charge.

The appellate court reversed, concluding that the risk of violence was accounted for by the § 924(c) conviction. "Possession of a gun . . . is dangerous precisely—and only—because it may be used when one drug trafficker tries to cheat or rob another or when law enforcement officials try to apprehend a drug trafficker. . . . The fact that an attempted fraud occurs in any given transaction adds little, if anything, to the risk already reflected in section 924's mandatory sentencing provisions. . . . Because that danger is taken into account in the mandatory consecutive sentence under section 924(c)(1), it should not also be reflected in Zamora's sentence on the distribution charge." The court noted that it expressed no view whether departure would be warranted in a similar case where the defendant was not also subject to a sentence under §924(c)(1).

U.S. v. Zamora, 37 F.3d 531, 533–34 (9th Cir. 1994) (Rymer, J., dissenting).

See *Outline* generally at VI.B.2.a.

Criminal History

Third Circuit holds that downward departure for career offender may include departure by offense level as well as criminal history category. The district court held that career offender status overstated defendant's criminal history and departed under §4A1.3 by lowering defendant's criminal history category, but concluded that it could not also lower defendant's offense level. The appellate court remanded: "Because career offender status enhances both a defendant's criminal history category and offense level, . . . a sentencing court may depart in both under the proper circumstances."

U.S. v. Shoupe, 35 F.3d 835, 837–38 (3d Cir. 1994) (Alito, J., dissenting).

See *Outline* at VI.A.3.a.

Offense Conduct

Calculating Weight of Drugs

Third Circuit holds that government bears ultimate burden of proof on intent and capability regarding negotiated amounts. For the calculation of negotiated drug amounts under §2D1.1, comment. (n.12), the appellate court agreed with the circuits that have held that once the government meets its initial burden of proving the amount under negotiation, defendant then has the burden of showing lack of both intent and reasonable capability. However, the ultimate burden of persuasion "remains at all times with the government. Thus, if a defendant puts at issue his or her intent and reasonable capability to produce the negotiated amount of drugs by introducing new evidence or casting the government's evidence in a different light, the government then must prove either that the defendant intended to produce the negotiated amount of drugs or that he or she was reasonably capable of doing so." The court concluded that "it is more reasonable to read Note 12, in its entirety, as addressing how a defendant's base offense level may be determined in the first instance when a drug transaction remains unconsummated, for it is important to bear in mind that calculating the amount of drugs involved in criminal activity neither aggravates nor mitigates a defendant's sentence; rather, it provides the starting point." The court added that "a district court must make explicit findings as to intent and capability."

U.S. v. Raven, 39 F.3d 428, 434–37 (3d Cir. 1994).

See *Outline* at II.B.4.a.

Drug Quantity—Relevant Conduct

Fifth Circuit holds that amended guideline method for calculating weight of LSD does not apply retroactively to mandatory minimum calculation. Defendant sought resentencing after the method of calculating LSD quantities under the Guidelines was amended and made retroactive. The district court denied the motion, holding that the amendment could not be applied retroactively because defendant was subject to a 10-year statutory minimum sentence.

The appellate court affirmed. "We conclude that the district court's ruling is correct based on a logical reading of the policy statement to §2D1.1(c). This policy statement provides that the new approach to calculating the amount of LSD 'does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b)).' U.S.S.G. §2D1.1, comment. (backg'd). The *Chapman* citation refers to *Chapman v. U.S.*, 500 U.S. 453 . . . (1991), in which the Supreme Court held that the term 'mixture or substance' in 21 U.S.C. §841(b) required the weight of the carrier medium for LSD to be included for purposes of determining the mandatory minimum sentence. . . . A common sense interpretation of this policy statement leads to the inescapable conclusion that the mandatory minimum of §841, calculated according to *Chapman*, overrides the retroactive application of the new guideline."

U.S. v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994) (per curiam). *Accord U.S. v. Mueller,* 27 F.3d 494, 496–97 (10th Cir. 1994); *U.S. v. Boot,* 25 F.3d 52, 54–55 (1st Cir. 1994). *Contra U.S. v. Stoneking,* 34 F.3d 651, 652–55 (8th Cir. 1994) [7 *GSU* #3].

See *Outline* at I.E, II.A.3, and II.B.1.

Adjustments

Obstruction of Justice

Ninth Circuit affirms there was sufficient nexus between crime of conviction and reckless endangerment. Defendant committed an armed bank robbery. He abandoned his stolen getaway car on the same day, then four days later carjacked a taxicab. Local sheriffs were alerted after the carjacking and tried to capture defendant, who led them on a 30-minute chase, drove straight at a police car, and caused another police car to crash. The district court imposed a §3C1.2 enhancement for reckless endangerment during flight, finding that the car chase was part of the effort to avoid apprehension for the bank robbery as well as the carjacking. Defendant appealed, claiming there was no "nexus" between the bank robbery—the offense of conviction—and his reckless behavior. Because the government did not challenge the assertion that §3C1.2 requires such a nexus, the appellate court "assume[d] without so holding" that a nexus is required. The court affirmed.

"A sufficient nexus exists to warrant enhancement under U.S.S.G. §3C1.2 if a substantial cause for the defendant's reckless escape attempt was to avoid detection for the crime of conviction. In applying the nexus test, we look to the state of mind of the defendant when he recklessly attempted to avoid capture, not to why the police were pursuing him. The factors of geographic and temporal proximity give some indication of causation, but are not controlling determinates, particularly when the defendant's state of mind is established. On the day of his escape attempt and capture, Duran informed an agricultural worker that he had stolen a taxicab and robbed a bank. Thus, one of the reasons he initiated the dangerous car chase was the bank robbery. The district court found the car chase was 'in efforts to avoid apprehension due to his commission of the bank robbery, as well as stealing the motor vehicle.' The district court's findings are not clearly erroneous. There was sufficient nexus between the bank robbery and the car chase."

U.S. v. Duran, 37 F.3d 557, 559–60 (9th Cir. 1994).

See *Outline* at III.C.3.

Supervised Release

Revocation of Supervised Release

Fifth Circuit holds that need for rehabilitation may be considered in setting sentence after revocation. Defendant's three-year term of supervised release was revoked for drug possession under 18 U.S.C. §3583(g). He was thus subject to a minimum term of one year in prison, and the district court determined the maximum sentence allowed under §3583(e)(3) was two years. The court imposed the maximum, citing defendant's need for drug rehabilitation as a reason for the length of the sentence.

The appellate court affirmed. "We now hold that the language of 18 U.S.C. §3583(g), and the purposes and intent behind the statute, is best served by permitting a district judge to consider a defendant's need for rehabilitation in arriving at a specific sentence of imprisonment upon revocation of supervised release. While we do not decide whether rehabilitative needs can be used to determine whether to *impose* imprisonment as an initial matter, once imprisonment is mandated by 18 U.S.C. §3583(g) rehabilitative needs may be considered to determine the length of incarceration within the sentencing range."

U.S. v. Giddings, 37 F.3d 1091, 1096–97 (5th Cir. 1994).

See *Outline* at VII.B.1 and 2.

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Sentencing Procedure

Plea Bargaining—Dismissed Counts

En banc Fifth Circuit reconsiders, holds that conduct in dismissed counts may be considered in upward departure decision. Defendant pled guilty to two bank robberies; two other bank robberies were dismissed as part of the plea agreement. The district court departed upward after finding that defendant's criminal history was underrepresented, basing its decision in part on the dismissed robberies. In *U.S. v. Ashburn,* 20 F.3d 1336 (5th Cir. 1994) [6 *GSU* #13], the appellate court remanded, holding that "[c]ounts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure."

Upon reconsideration, however, the en banc court held that prior criminal conduct related to counts dismissed as part of a plea bargain may be used to justify an upward departure. The court reasoned that § 4A1.3 "expressly authorizes the court to consider 'prior similar adult criminal conduct not resulting in a criminal conviction.' . . . Neither this guideline nor its commentary suggests that an exception exists for prior similar criminal conduct that is the subject of dismissed counts of an indictment. . . . We have found no statute, guidelines section, or decision of this court that would preclude the district court's consideration of dismissed counts of an indictment in departing upward."

U.S. v. Ashburn, 38 F.3d 803, 807–08 (5th Cir. 1994) (en banc) (two judges dissenting).

See *Outline* at IX.A.1.

Offense Conduct

Mandatory Minimums

Fourth Circuit holds that mandatory minimum sentences are to be based only on conduct in the offense of conviction. Defendant was convicted on a charge of conspiracy to possess with intent to distribute and to distribute marijuana. The indictment and plea agreement specified that the conspiracy involved over 100 kilograms of marijuana, but the agreement also stated that 85 kilograms was attributable to defendant. Defendant stipulated that another 79 kilograms from a separate marijuana conspiracy in Arizona was includable as relevant conduct under the Guidelines. The total of 164 kilograms resulted in a guideline range of 46–57 months. However, the district court applied 21 U.S.C. § 841(b)(1)(B)(vii), which mandates a five-year minimum sentence for 100 kilograms of marijuana, concluding that defendant's admission in the plea agreement that the conspiracy involved over 100 kilograms indicated that defendant necessarily foresaw that amount.

The appellate court remanded, concluding first that the "indictment, plea agreement, and stipulation of facts merely describe . . . the quantity of marijuana for which the conspiracy as a whole was responsible. Aside from the 85 kilograms of marijuana for which Estrada admitted personal responsibility, they do not attribute an amount that was within the scope of his agreement and that was reasonably foreseeable to him." Defendant's statements could not be read as an admission of responsibility for 100 kilograms of marijuana in the offense of conviction.

The government argued in the alternative that the sentence was proper because the 79 kilograms from Arizona that defendant agreed were relevant conduct should also be included in the calculation of the mandatory minimum amount. The appellate court rejected that argument, agreeing with *U.S. v. Darmand,* 3 F.3d 1578, 1581 (2d Cir. 1993), that "[t]he mandatory minimum sentence is applied based only on conduct attributable to the offense of conviction. . . . Because the 79 kilograms of marijuana from the Arizona conspiracy are not a part of the offense charged in Count One, it could not be properly considered in determining the applicability of the mandatory minimum sentence under § 841(b)." The court remanded for the district court to make a specific factual determination of the amount of marijuana attributable to defendant in the offense of conviction, which it had not done before because it relied on the plea agreement.

U.S. v. Estrada, 42 F.3d 228, 231–33 (4th Cir. 1994) (Wilkins, C.J.). *But cf. U.S. v. Reyes,* 40 F.3d 1184, 1151 (10th Cir. 1994) (for defendant convicted on one count of possession of cocaine with intent to distribute, affirming inclusion of cocaine from prior related transactions to reach mandatory minimum despite lower amount specified in indictment—defendant received notice in plea agreement that minimum might apply).

See *Outline* at II.A.3.

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Sixth Circuit holds that drug quantities from different offenses may not be aggregated for mandatory minimum purposes. Defendant was convicted of a conspiracy to distribute cocaine base that involved 23 grams. He was also convicted on a separate possession charge that involved 37 grams of cocaine base. The district court concluded that it had "no discretion" and sentenced defendant under 21 U.S.C. § 841(b)(1)(A) for a violation of § 841(a) involving 50 grams or more of cocaine base.

The appellate court remanded. "It is obvious from the statute's face—from its use of the phrase '*a* violation'—that this section refers to a *single* violation. Thus, where a defendant violates subsection (a) more than once, possessing less than 50 grams of cocaine base on each separate occasion, subsection (b) does not apply, for there is no *single* violation involving '50 grams or more' of cocaine base. This is true even if the sum total of the cocaine base involved all together, over the multiple violations, amounts to more than 50 grams." The court noted that "§ 841(b)(1)(A) is quite unlike the sentencing guidelines," which require aggregation of amounts in multiple violations. Section 841(b)(1)(A) "requires a court to consider separate violations of § 841(a) without aggregating the amount of drugs involved."

U.S. v. Winston, 37 F.3d 235, 240–41 & n.10 (6th Cir. 1994).

See *Outline* at II.A.3.

Fourth Circuit holds that Guidelines method of aggregating different drugs should not be used to compute mandatory minimums. Defendant was convicted of conspiracy to distribute cocaine and cocaine base, and of possession with intent to distribute cocaine base. At sentencing, "the district court attributed to Boone 4.23 kilograms of powder cocaine and 9.24 grams of cocaine base, neither of which, individually, meet the minimum drug amounts of [21 U.S.C. §] 841(b)(1)(A). However, the district court, utilizing the drug conversion tables of U.S.S.G. § 2D1.1, comment (n.2), aggregated the 4.23 kilograms of cocaine and 9.24 grams of cocaine base under U.S.S.G. § 2D1.1, comment (n.6) and arrived at a total amount of 52 grams of cocaine base. On this basis the district court invoked the mandatory life provision of section 841(b)(1)(A). . . . [W]hile aggregation may be sometimes required under the Guidelines, '§ 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics.'" Defendant should have been sentenced under § 841(b)(1)(B) for the lower amounts.

U.S. v. Harris, 39 F.3d 1262, 1271–72 (4th Cir. 1994).

See *Outline* at II.A.3.

Adjustments

Obstruction of Justice

D.C. Circuit holds that clear and convincing evidence is required for application of § 3C1.1 to perjury in trial testimony. Defendant's trial testimony contradicted a police officer's testimony. The trial court found—by a preponderance of the evidence—that defendant had committed perjury and applied the § 3C1.1 enhancement for obstruction of justice. Defendant appealed and the appellate court remanded, concluding that a higher standard of proof was required.

Section 3C1.1, comment. (n.1) "direct[s] trial judges to evaluate the testimony 'in a light most favorable to the defendant.' In our view, the enunciated standard exceeds a 'preponderance of the evidence.' . . . [W]e think that it is something akin to 'clear-and-convincing' evidence. . . . We have never seen the preponderance-of-the-evidence standard defined along the lines indicated in Application Note 1 . . . . And we cannot imagine why the Sentencing Commission would have written the Application Note as it did had it intended nothing more than the usual standard of proof. . . . [W]e hold that when a district court judge makes a finding of perjury under section 3C1.1, he or she must make independent findings based on clear and convincing evidence. The nature of the findings necessarily depends on the nature of the case. Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more."

U.S. v. Montague, 40 F.3d 1251, 1253–56 (D.C. Cir. 1994). *See also U.S. v. Onumonu,* 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 1 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard").

See *Outline* at III.C.2.a and 5.

Eighth Circuit holds that obstruction at first trial may be used to enhance sentence at second sentencing after first conviction was reversed. Defendant's sentence was increased under § 3C1.1 for committing perjury during his trial testimony. However, his conviction was reversed and remanded for retrial. He then pled guilty to a lesser charge. The district court again imposed a § 3C1.1 enhancement based upon defendant's perjury during the first trial.

The appellate court affirmed. "A defendant's attempt to obstruct justice does not disappear merely because his conviction has been reversed on grounds having nothing to do with the obstruction.

The trial was part of the prosecution of the offense to which defendant pleaded guilty on remand. Section 1B1.4 of the Sentencing Guidelines allows courts to 'consider, without limitation, any information concerning the . . . conduct of the defendant, unless otherwise prohibited by law,' in determining whether to depart from the guideline range. Defendant does not deny that he lied under oath, nor does he point us to any reason, other than the reversal of his conviction, that would serve to limit the District Court's ability to consider his perjury in enhancing his sentence on remand. We hold that the reversal of a conviction on other grounds does not limit the ability of a sentencing judge to consider a defendant's conduct prior to the reversal in determining a sentence on remand."

U.S. v. Has No Horse, No. 94-2365 (8th Cir. Dec. 14, 1994) (Arnold, C.J.).

See *Outline* generally at III.C.4.

Vulnerable Victims

Ninth Circuit holds that vulnerable victim need not be victim of offense of conviction, also affirms departure for extreme psychological injury to victims. Defendant pled guilty to several counts of obstructing an FBI investigation, making false statements to the FBI, and obstructing justice by giving false testimony to a grand jury. All related to his false claims of knowing the whereabouts of a long-missing child and the identity of her killer. Based on the anguish suffered by the child's family in having their hopes raised and then dashed by defendant's "cruel hoax" (which included statements directed at the family), the district court enhanced his sentence under § 3A1.1 even though the family was not the direct victim of the offenses of conviction.

The appellate court affirmed. "We hold that courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a 'vulnerable victim' under section 3A1.1. By the words of the provision itself, no nexus is required between the identity of the victim and the elements of the crime charged. . . . Moreover, the Guidelines specifically instruct the district court to take into account in adjusting the defendant's base offense level 'all harm' the defendant causes. U.S.S.G. § 1B1.3(a)(3). We conclude that even though the harm Haggard caused Michaela's family members was not an element of any of the crimes of which he was convicted, the district court did not err in considering them 'vulnerable victims' for purposes of section 3A1.1." *See also U.S. v. Echevarria,* 33 F.3d 175, 180–81 (2d Cir. 1994) (affirmed: patients were vulnerable victims of defendant who posed as doctor to fraudulently obtain medical payments from government and insurers—defendant "directly targeted those seeking medical attention" and "exploit[ed] their impaired condition").

The court also affirmed an upward departure under § 5K2.3 for extreme psychological injury to victims. "In these circumstances, Michaela's family was a direct victim of Haggard's criminal conduct." The court rejected defendant's claim that applying § 5K2.3 and § 3A1.1 was double counting: "The two provisions in question account for different aspects of the defendant's criminal conduct. One section focuses on the psychological harm the defendant caused his victims. . . . The other section accounts for the defendant's choice of victims." The court similarly upheld a departure under § 5K2.8, finding that the family was a direct victim of the offense and that defendant's conduct "was in fact unusually cruel and degrading to Michaela's family."

U.S. v. Haggard, 41 F.3d 1320, 1325–27 (9th Cir. 1994).

See *Outline* at III.A.1.b, VI.B.1.d and e.

Acceptance of Responsibility

First Circuit holds that obstruction of justice cannot preclude the extra-point reduction under § 3E1.1(b) unless it affects timeliness requirement. Defendant received an obstruction enhancement under § 3C1.1. The district court determined that this was an "extraordinary case" where both § 3C1.1 and § 3E1.1(a) applied and granted a two-level reduction for acceptance of responsibility. However, without analyzing whether defendant met the requirements of § 3E1.1(b), the court refused to grant the extra-level reduction under that section.

The appellate court remanded, holding that once the district court found that defendant qualified for the two-point reduction under § 3E1.1(a), it had to consider whether he qualified for § 3E1.1(b). "The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied. . . . [I]f a defendant's obstruction of justice directly precludes a finding of timeliness under section 3E1.1(b), then a denial of the additional one-level decrease would be appropriate. If, however, the defendant's obstruction of justice has no bearing on the section 3E1.1(b) timeliness inquiry, . . . then the obstruction drops from the equation."

U.S. v. Talladino, 38 F.3d 1255, 1263–66 (1st Cir. 1994).

See *Outline* at III.E.5.

Eighth Circuit affirms denial of extra-point reduction for guilty plea after first conviction was reversed. Defendants were convicted on four counts after a trial, but their convictions were reversed on appeal. They then pled guilty to one count and argued that the district court should have awarded a point for timely acceptance of responsibility under § 3E1.1(b). The appellate court affirmed the denial. "Even though each defendant pleaded guilty within approximately three months of the reversal of his convictions on initial appeal, we do not agree that the government was saved much effort by those pleas, since the bulk of preparation by the government was for the initial trial and could relatively easily have been applied to the second trial as well."

U.S. v. Vue, 38 F.3d 973, 975 (8th Cir. 1994).

See *Outline* at III.E.5.

General Application

Sentencing Factors

Tenth Circuit holds that post-sentencing conduct may not be considered at resentencing after remand. Defendant's first sentence was remanded as an improper downward departure. At resentencing the district court again departed, partly on the basis of defendant's successful completion of six-month periods of community confinement and home confinement. Distinguishing between a limited remand and, as here, a complete remand for resentencing ("de novo resentencing"), the appellate court noted "that *de novo* resentencing permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *U.S. v. Ortiz,* 25 F.3d 934, 935 (10th Cir. 1994) (affirmed: district court properly considered new evidence regarding drug quantity in offense of conviction). *Accord U.S. v. Bell,* 5 F.3d 64, 67 (4th Cir. 1993); *U.S. v. Cornelius,* 968 F.2d 703, 705 (8th Cir. 1992).

Here, however, the appellate court held that the rule in *Ortiz* does not apply to new conduct that occurred after the first sentencing. "While [*Ortiz*] indicates resentencing is to be conducted as a fresh procedure, the latitude permitted is circumscribed by those factors the court could have considered 'at the first sentencing hearing.' Thus, events arising after that time are not within resentencing reach." Whether or not a defendant's post-sentencing rehabilitative conduct may provide a ground for downward departure, therefore, it was improper to consider it when resentencing this defendant.

U.S. v. Warner, No. 94-4113 (10th Cir. Dec. 19, 1994) (Moore, J.).

See *Outline* generally at I.C and IX.F.

Amended opinion: *U.S. v. Mun,* 41 F.3d 409, 413 (9th Cir. 1994). Amending the opinion originally decided July 18, 1994, and reported in 7 *GSU* #1, the court deleted the language relating to comity. The court still affirmed the sentence, but based its holding on the language of § 5G1.3 (1987): Section "5G1.3's provision mandating concurrent sentences applies only if 'the defendant is already serving one or more unexpired sentences.' At the time the federal court sentenced Mun he was not serving another sentence. The state sentence was imposed after the federal sentence. Therefore, § 5G1.3 did not require the district court to alter its sentence to make it run concurrently with the state sentence."

See *Outline* at V.A.2 and 3.

Vacated for rehearing en banc: *U.S. v. Stoneking,* 34 F.3d 651 (8th Cir. 1994), order granting rehearing en banc and vacating opinion, Sept. 16, 1994. *Stoneking* was summarized in 7 *GSU* #3 and cited in the summary of *Pardue* in 7 *GSU* #4.

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Sentencing Procedure

Procedural Requirements

Second Circuit holds that defendant was entitled to notice before sentencing hearing that district court planned to sentence her under harsher guideline than used in presentence report. Defendant pled guilty to assisting the filing of a false federal income tax return. The PSR based her sentence on §2T1.4(a), with an ultimate guideline range of 0–6 months. At the sentencing hearing, however, the district court took a different view of the facts and used §2T1.9, leading to a sentence of ten months. The appellate court remanded, concluding that because the factors that determined which guideline section to use were "reasonably in dispute," *see* §6A1.3(a), defendant "was entitled to advance notice of the district court's ruling and the guideline upon which it was based."

U.S. v. Zapatka, No. 93-1805 (2d Cir. Dec. 29, 1994) (Van Graafeiland, J.). *Cf. U.S. v. Jackson,* 32 F.3d 1101, 1106–09 (7th Cir. 1994) (remanding sua sponte abuse of trust adjustment at sentencing hearing because defendant had no notice it was contemplated—"When the trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing . . . fails to satisfy the dictates of Rule 32") (note: although concurring in the result, two judges on the panel did not join this part of the opinion).

See *Outline* at IX.E.

Determining the Sentence

Supervised Release

Sixth Circuit holds that Anti-Drug Abuse Act of 1986 did not limit district court discretion to end supervised release after one year. Defendant was sentenced under 21 U.S.C. §841(b)(1)(C), which requires a three-year term of supervised release. One year later, however, the district court terminated defendant's supervised release early pursuant to 18 U.S.C. §3583(e)(1). The government argued that the requirement for a three-year term in §841(b)(1)(C), enacted as part of the Anti-Drug Abuse Act of 1986, overrode §3583(e)(1) and therefore the district court had no authority to end defendant's supervised release early. The appellate court disagreed, concluding that when Congress enacted the ADAA "it only partially limited a court's discretionary authority to *impose* the sentence. Congress did not alter the court's separate authority to *terminate* a sentence of supervised release, under 18 U.S.C. §3583(e)(1), if the conduct of the person and the interest of justice warranted it. . . . [W]e hold that a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. §3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. §841(b)(1)(C) and 18 U.S.C. §3583(a)."

U.S. v. Spinelle, 41 F.3d 1056, 1059–61 (6th Cir. 1994).

See *Outline* generally at V.C.

Fines

Second Circuit holds that imposition of punitive fine is not required before cost of imprisonment fine may be imposed. The district court did not impose a punitive fine under §5E1.2(a) and (c), but did impose a fine under §5E1.2(i) to cover the costs of defendant's imprisonment and post-release supervision. The appellate court affirmed, holding "that §5E1.2 does not require the district court to impose a fine under §5E1.2(c) before it can impose a fine measured by the cost of imprisonment under §5E1.2(i). We read the word 'additional' in subsection (i) as an expression of the Sentencing Commission's intention that a defendant's total fine, including the cost of imprisonment, may exceed the relevant fine range listed in subsection (c). . . . [T]he total fine is the significant figure. . . . If the defendant is not able to pay the entire fine amount that the court would otherwise impose pursuant to subsections (c) and (i), the district court may exercise its sound discretion in determining which of the two subsections (or which combination of them) to rely upon in pursuing the goals of sentencing. . . . [T]he fine money goes into the Crime Victims Fund regardless of which subsection the district court selects."

Three circuits now hold that a punitive fine is not required before a cost of imprisonment fine; four hold that it is.

U.S. v. Sellers, 42 F.3d 116, 119–20 (2d Cir. 1994).

See *Outline* at V.E.2.

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Adjustments

Role in Offense

Seventh Circuit holds that if number of persons is sole basis for finding activity was "otherwise extensive," that number must be more than five. Defendant was convicted of extortion offenses and given a §3B1.1(a) enhancement for being the organizer of an "otherwise extensive" criminal activity. That finding was based solely on the fact that five persons were involved in the extortions—defendant, two other criminally responsible participants, and two "outsiders." The appellate court held that this was improper. "The involvement of five individuals, not all of whom are 'participants,' does not, without more, justify a finding that criminal activity was 'otherwise extensive.' . . . Although the meaning of 'otherwise extensive' is unclear, we must interpret that term in a manner that does no violence to the remainder of Section 3B1.1. Given the Section's five participant prong, it would be anomalous to conclude that the presence of five individuals—not all of whom are participants—warranted an increase. . . . If a district court intends to rely solely upon the involvement of a given number of individuals . . . , it must point to some combination of participants and outsiders equaling a number greater than five."

U.S. v. Tai, 41 F.3d 1170, 1174–75 (7th Cir. 1994).

See *Outline* at III.B.3.

Seventh Circuit holds that status as distributor, without more, did not warrant §3B1.1(a) enhancement. Defendant was convicted of conspiracy to distribute marijuana, possession of marijuana with intent to distribute, and money laundering. He purchased marijuana from coconspirators in Arizona and transported it back to Illinois for sale. He worked closely with several of the coconspirators, occasionally transported marijuana for one of them, and for a time subleased from one coconspirator a house used to process and store marijuana. The district court imposed a §3B1.1(a) enhancement, concluding that defendant was an organizer or leader of a criminal activity that involved five or more participants and was "otherwise extensive."

The appellate court remanded, concluding that defendant did not, in fact, organize or lead any other participants but operated within the conspiracy as an independent buyer and seller. The district court had reasoned that defendant "was at the top of a drug distribution network [and] exercised total decision making authority over his marijuana purchases." The appellate court held that "by itself, being a distributor, even a large distributor like Mustread, is not enough to support a §3B1.1 offense level increase. . . . If the record does not show that he [was an organizer or leader], if the defendant maintained no real guiding influence or authority over the purchasers, a §3B1.1 adjustment is inappropriate. . . . And the record does not show that Mustread had influence or authority over anybody to whom he distributed. Similarly, that Mustread 'exercised total decision making authority over his marijuana purchases' cannot, by itself, support the conclusion that Mustread played an aggravated role. One can make decisions for oneself without having authority or influence over others. The trial judge's reasoning does support the conclusion that Mustread committed the crimes of which he was convicted, but it is a significant extension from that to the conclusion that Mustread had an aggravated role relative to other participants." Defendant "exercised no decision making authority over other participants. He made decisions for himself, but the record does not show that he decided anybody else's course of action."

U.S. v. Mustread, 42 F.3d 1097, 1103–05 (7th Cir. 1994).

See *Outline* at III.B.4.

Offense Conduct

Loss

Ninth Circuit holds that cost of committing crime is not subtracted from value of goods in calculating loss. Defendant was convicted of theft of government property for harvesting and selling federal timber taken from U.S. Forest Service land. In calculating the loss under §2B1.1(b)(1), the district court used the value of the stolen timber. Defendant argued that "this amount erroneously includes the portion of the profit that was spent to cover logging expenses," which he would subtract from the gross value to measure the loss as defendant's "net gain." The appellate court disagreed and affirmed the district court. "We do not subtract the costs of pulling off the caper when we calculate the value of stolen property. Although being cut and carted away is surely a significant event from the perspective of a tree, it is not an economically significant event" for purposes of §2B1.1(b)(1).

U.S. v. Campbell, 42 F.3d 1199, 1205 (9th Cir. 1994).

See *Outline* generally at II.D.1.

Drug Quantity—Relevant Conduct

Eleventh Circuit holds that earlier drug sale was not part of relevant conduct. Defendant was convicted of conspiracy to distribute dilaudid plus one

count of cocaine distribution that was directly related to the dilaudid conspiracy. The district court included as relevant conduct another cocaine distribution that was not part of the dilaudid conspiracy. Adopting the test for "similarity, regularity, and temporal proximity" used by other circuits (and now in §1B1.3, comment. (n.9(B)) (Nov. 1994)), the appellate court remanded. "Maxwell's counts of conviction involve a dilaudid distribution scheme. The extrinsic offense, on the other hand, involved a cocaine distribution scheme. Other than Maxwell, the dilaudid distribution scheme and the cocaine distribution scheme did not involve *any* of the same parties." Also, the two cocaine transactions occurred more than a year apart, so "these acts are temporally remote." The court concluded that "we cannot say that there are any 'distinctive similarities' between the dilaudid distribution scheme and the cocaine distribution scheme that 'signal that they are part of a single course of conduct.' Rather, the two offenses appear to be 'isolated, unrelated events that happen only to be similar in kind.' We do not think that two offenses constitute a single course of conduct simply because they both involve drug distribution."

U.S. v. Maxwell, 34 F.3d 1006, 1010–11 (11th Cir. 1994).

See *Outline* at I.A.2 and II.A.1.

Departures

Aggravating Circumstances

Eighth Circuit affirms departure for dangerous nature of weapon involved in weapons offense. Defendant pled guilty to the possession of a firearm in a school zone. The district court held that an upward departure was warranted under §5K2.6 "due to the dangerousness of the weapon involved"—a semi-automatic pistol—in close proximity to a school. Defendant argued on appeal that §5K2.6 may only be used to enhance a non-weapons charge. The appellate court held that "this reading of section 5K2.6 is too narrow. . . . Even where the applicable offense guideline and adjustments take into consideration a factor listed in the policy statements, departure from the applicable guideline range is warranted if the factor is present to a degree substantially in excess of that which is ordinarily involved in the offense. . . . The base offense guideline for 18 U.S.C. §922(q) penalizes simply the possession of a firearm within a school zone. *See* U.S.S.G. §2K2.5. It does not take into account whether the firearm was loaded, semi-automatic, easily accessible, or had an obliterated serial number. *See id.* All of these aggravating facts appear here. For an especially serious weapon, the district court has leeway to enhance the sentence accordingly, even in a weapons charge."

U.S. v. Joshua, 40 F.3d 948, 951–52 (8th Cir. 1994). See also *U.S. v. Thomas,* 914 F.2d 139, 143–44 (8th Cir. 1990) (without reference to §5K2.6, affirmed departure based on dangerous nature of fully loaded weapons for defendant convicted of possession of firearms by a convicted felon).

See *Outline* generally at VI.B.1.a.

Criminal History

Tenth Circuit reverses upward departure because dissimilar remote criminal conduct was not sufficiently serious. Defendant had 14 prior convictions, 13 of which were not counted in his criminal history score because they were too remote under §4A1.2(e). The district court departed because of "the very extensive prior adult criminal conviction record of this defendant," increasing his criminal history category from I to III. The prior convictions were not similar to the current offense, but the court did not specify that the remote convictions comprised "serious dissimilar" criminal conduct so as to warrant departure pursuant to §4A1.2, comment. (n.8).

The appellate court remanded. In light of Note 8, "the upward departure can only be valid if the record showed 'serious dissimilar' conduct by the defendant." The record showed that the prior conduct should not be considered "serious." First, "defendant had never before been given a sentence of imprisonment exceeding one year and one month, a standard used in the Guidelines in setting the number of points assigned to prior convictions," *see* §4A1.1(a), and thus an indication of seriousness. Second, "little, if any, weight should have been given to the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest in the instant case." A 1970 conviction for "assault on a female" may or may not have been serious, but "no evidence was produced regarding Wyne's underlying prior criminal conduct other than the fact of conviction, the offense or offenses included, and the sentence imposed. This is significant because . . . 'assault on a female' in . . . the state of conviction, can consist of mere verbal accosting." The government did not meet its burden of providing evidence that "it was 'serious dissimilar' conduct, within the meaning of the Guidelines." Lastly, the court concluded that defendant's four remote DUI convictions (from 1974 to 1982) could not, when "distinguishing offenses to be regarded as

'serious' from within the realm of all criminal behavior, . . . qualify as serious criminal conduct justifying the decision to depart."

U.S. v. Wyne, 41 F.3d 1405, 1408–09 (10th Cir. 1994).

See *Outline* at VI.A.1.b.

General Application

Double Jeopardy

Seventh Circuit affirms consecutive sentences for RICO offense and pre-Guidelines predicate act offenses. Defendants were convicted of a RICO violation, to which the Guidelines applied, and of several other offenses that served as the predicate acts supporting the RICO conviction and were sentenced under pre-Guidelines law. The district court made the Guidelines and pre-Guidelines sentences consecutive. Defendants appealed, arguing that separate consecutive sentences for the predicate acts—which were used to increase their Guidelines sentences for the RICO offense—subjected them to multiple punishment for the same offense in violation of the Double Jeopardy Clause.

The appellate court affirmed. "Perhaps the simple answer to this problem is, given that RICO and the predicate acts are not the same offense, Defendants clearly were never punished twice for the same crime: Defendants were punished once for racketeering and once (but separately) for extortion, gambling, and interstate travel. It just so happens the Sentencing Guidelines consider the predicate racketeering acts (i.e. extortion, gambling, and interstate travel) relevant to computing the appropriate sentence for racketeering. *See* U.S.S.G. §2E1.1(a). Though the commission of these acts increased the racketeering sentence, the Defendants were punished for racketeering—the predicate acts were merely conduct relevant to the RICO sentence. . . . Provided Defendants could be convicted for both RICO and predicate act offenses (which they could) and provided the sentencing court could consider the predicate acts in assessing the RICO sentence insofar as they were conduct relevant to the RICO act (which it could) no double jeopardy problem portends."

U.S. v. Morgano, 39 F.3d 1358, 1367 (7th Cir. 1994).

See *Outline* at I.A.4.

Certiorari granted: *U.S. v. Wittie,* 25 F.3d 250 (5th Cir. 1994), *cert. granted, Witte v. U.S.,* 115 S. Ct. 715 (Jan. 6, 1995) (note: spelling of name corrected in Supreme Court). Question presented: Does government prosecution and punishment for offense violate Double Jeopardy Clause if it already was included in relevant conduct for sentencing under federal sentencing guidelines in different and final prosecution? *See* summary of *Wittie* in 6 *GSU* #16 and *Outline* at I.A.4.

A note to readers

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Violation of Probation and Supervised Release

Seventh Circuit overrules *Lewis,* holds that Chapter 7 policy statements are not binding. In *U.S. v. Lewis,* 998 F.2d 497 (7th Cir. 1993), the Seventh Circuit held that all policy statements—including those in Chapter 7—are binding on district courts unless they contradict a statute or guideline. However, after reevaluating Supreme Court precedent and noting that every other circuit to decide the issue has held that Chapter 7 is not binding, the court overruled *Lewis.* "The policy statements in Chapter 7 . . . are neither Guidelines nor interpretations of Guidelines. They tell the district judge how to exercise his discretion in the area left open by the Guidelines and the interpretive commentary on the Guidelines. Such policy statements are entitled to great weight because the Sentencing Commission is the expert body on federal sentencing, but they do not bind the sentencing judge. Although they are an element in his exercise of discretion and it would be an abuse of discretion for him to ignore them, they do not replace that discretion by a rule."

U.S. v. Hill, 48 F.3d 228, 230–32 (7th Cir. 1995).

See *Outline* at VII.

Offense Conduct

Mandatory Minimums

Third, Sixth, and Seventh Circuits hold that amended guideline method for calculating the weight of LSD does not apply retroactively to calculation for mandatory minimums; Ninth Circuit holds that it does. The Third, Sixth, and en banc Seventh Circuits all affirmed district court refusals to apply retroactively the guideline amendments for calculating LSD weight, *see* §2D1.1(c) at n.* and comment. (n.18 and backg'd), to the calculation of LSD amounts for mandatory minimum sentences. The courts concluded that *Chapman v. U.S.,* 500 U.S. 453 (1991), still applies and the weight of the LSD and its carrier medium should be used for mandatory minimum purposes.

U.S. v. Hanlin, 48 F.3d 121, 124–25 (3d Cir. 1995); *U.S. v. Andress,* 47 F.3d 839, 841 (6th Cir. 1995) (per curiam); *U.S. v. Neal,* 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc) (three judges dissenting). *See also* summary of *Pardue* in 7 *GSU* #4.

The Ninth Circuit, however, held that the amended guideline method should be used for mandatory minimum calculations. The court found persuasive the reasoning in *U.S. v. Stoneking,* 34 F.3d 651 (8th Cir. 1994) [7 *GSU* #3], although it acknowledged that *Stoneking* was vacated for rehearing en banc. "It is our belief that the assignment of a uniform and rational weight to LSD on a carrier medium does not conflict with *Chapman.* . . . Rather than 'overriding' *Chapman*'s interpretation of 'mixture or substance,' the formula set forth in Amendment 488 merely standardizes the amount of carrier medium that can be properly viewed as 'mixed' with the pure drug."

U.S. v. Muschik, No. 93-30461 (9th Cir. Feb. 28, 1995) (Wood, Sr. J.) (remanded).

See *Outline* at II.A.3 and II.B.1.

Calculating Weight of Drugs

Ninth Circuit holds that the one kilogram per plant conversion ratio for marijuana is not limited to seizures of live plants. Defendant pled guilty to manufacturing and possessing with intent to distribute "at least one hundred marijuana plants." She admitted growing and harvesting the marijuana, but argued that the sentence should be based on the 10–20 kilograms of dried marijuana that was actually harvested from the plants. The district court found that defendant had grown and harvested at least one hundred marijuana plants and based her offense level on the one plant equals one kilogram ratio in §2D1.1(c) at n.* ("In the case of an offense involving marijuana plants, if the offense involved (A) 50 or more marijuana plants, treat each plant as equivalent to 1 KG of marijuana . . . ").

The appellate court affirmed, holding that the kilogram conversion ratio may be applied to a grower when live plants were not actually seized but there is sufficient evidence to prove the number of plants involved. The court noted that its decision in *U.S. v. Corley,* 909 F.2d 359 (9th Cir. 1990), indicating that the ratio should be used only when live plants are seized, was based on earlier versions of the Guidelines and 21 U.S.C. §841(b). The Guidelines were changed in Nov. 1989 after §841(b) was amended to increase its ratio from 100 grams per plant to one kilogram per plant for more than fifty plants. The Ninth Circuit has "explained that Congress did not introduce the one kilogram conver-

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sion ratio because that quantity provided any evidentiary 'estimate' of the potential yield of a marijuana plant . . . . Congress imposed that conversion ratio because it provided a degree of punishment determined appropriate for producers of 50 or more marijuana plants." Following this "underlying purpose behind the one kilogram conversion ratio," the court held "that the one kilogram conversion ratio applies even when live plants are not seized. . . . When sufficient evidence establishes that defendant actually grew and was in possession of live plants, then conviction and sentencing can be based on evidence of live plants. The fact that those plants were eventually harvested, processed, sold, and consumed does not transform the nature of the evidence upon which sentencing is based into processed marijuana."

U.S. v. Wegner, 46 F.3d 924, 925–28 (9th Cir. 1995). *Accord U.S. v. Haynes,* 969 F.2d 569, 571–72 (7th Cir. 1992). Other circuits have held that the kilogram equivalence is limited to live plants. *See U.S. v. Stevens,* 25 F.3d 318, 321–23 (6th Cir. 1994); *U.S. v. Blume,* 967 F.2d 45, 49–50 (2d Cir. 1992); *U.S. v. Osburn,* 955 F.2d 1500, 1509 (11th Cir. 1992).

See *Outline* at II.B.2.

General Application

Sentencing Factors

Second Circuit holds that Guidelines are mandatory. Without notice to the government or findings based on the Guidelines, the district court departed downward from defendants' guideline ranges, concluding that "the Guidelines are one of several factors to be considered in imposing sentence, and are not necessarily controlling. . . . [T]he court determined that, in the case before it, the Sentencing Guidelines did not govern because the 24 to 30 month range was 'greater than necessary' to achieve general punishment purposes as that phrase is used in 18 U.S.C. §3553(a). The court therefore imposed lesser sentences, noting without findings or particulars that the 'sentences imposed would be appropriate' even if the Guidelines were, in fact, binding."

The appellate court remanded. "Notwithstanding that the Guidelines appear to be but one of several factors to be considered by a sentencing court, the statute goes on to say that the court 'shall impose a sentence of the kind, and within the [Guidelines] range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. . . .' 18 U.S.C. §3553(b). Thus, although subsection (a) fails to assign controlling weight to the Guidelines, subsection (b) does so. . . . We hold that section 3553 requires a court to sentence within the applicable Guidelines range unless a departure, as that term has come to be understood, is appropriate." The court remanded for consideration of whether "permissible bases for downward departure exist."

U.S. v. DeRiggi, 45 F.3d 713, 716–19 (2d Cir. 1995).

See *Outline* at I.C.

Departures

Substantial Assistance

Eighth Circuit holds that government may, within limits, apply substantial assistance motion to only some of defendants' multiple mandatory minimum sentences. Defendants were each subject to three mandatory minimum sentences for drug and weapons offenses. The government filed substantial assistance motions under §5K1.1 and 18 U.S.C. §3553(e), but limited the §3553(e) motions to only one of the mandatory minimums for each defendant. The district court accepted this limitation as valid and sentenced defendants accordingly.

The appellate court agreed that the government could so limit its §3553(e) motion. "The issue before us is whether the term 'a sentence' in §3553(e) refers to each offense of conviction when multiple mandatory minimums are involved, or to the total sentence imposed by reason of the conviction. Although the word 'sentence' is not defined in Chapter 227 of the Criminal Code (18 U.S.C. §§3551–3586) . . . numerous provisions in that Chapter make it clear that 'a sentence' is imposed for each offense of conviction. . . . Likewise, the Guidelines recognize that each offense in a multicount conviction receives a separate sentence, even though many counts may be grouped or sentenced concurrently in determining the total Guidelines prison sentence. . . . Thus, we conclude that the plain language of §3553(e) authorizes the government to make a separate substantial assistance motion decision for each mandatory minimum sentence to which a defendant is subject."

However, the government may not limit its motion for improper reasons, such as controlling the length of the sentence. "[T]he government's statements at the evidentiary hearing suggest that its motions were limited in scope at least in part . . . to reduce the district court's discretion to depart from the government's notion of the appropriate total sentences . . . . The prosecutor's role in this aspect of sentencing is limited to determining whether the defendant has provided substantial assistance with

respect to 'a sentence,' advising the sentencing court as to the extent of that assistance, and recommending a substantial assistance departure. . . . The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial assistance is not a permissible basis for exercising the government's power under §3553(e)." The court remanded "to permit the government either to file new §3553(e) motions or to provide satisfactory assurance to the district court that its prior motions were based solely upon its evaluation of the Stockdalls' respective substantial assistance."

U.S. v. Stockdall, 45 F.3d 1257, 1260–61 (8th Cir. 1995).

See *Outline* generally at VI.F.3 and 4.

Second Circuit holds that Rule 35(b) motion cannot be denied without affording defendant an opportunity to be heard. Defendant received a §5K1.1 downward departure for substantial assistance. He continued to cooperate after sentencing and the government later made a motion under Fed. R. Crim. P. 35(b) for a further reduction. Before defendant even knew the motion had been filed the district court denied it, stating that defendant's criminal conduct was too serious to permit an even lower sentence. Defendant argued that summary dismissal of the motion without giving him an opportunity to be heard violated Rule 35(b), denied him due process, and was an abuse of discretion.

The appellate court agreed and remanded. The court reasoned that the same process for §5K1.1 motions should be applied to Rule 35(b) because the "only practical difference between" the two motions "is a matter of timing"—one is for substantial assistance before, the other after, sentencing. In §5K1.1 motions "the exercise of discretion requires that the court give the real party in interest an opportunity to be heard. A defendant must have an opportunity to respond to the government's characterization of his cooperation." In light of this, and a defendant's right to challenge the government's refusal to file a §5K1.1 motion in some instances, the court concluded "that just as a defendant may comment on the government's refusal to move under §5K1.1, a defendant should be able to comment on the inadequacy of the government's motion under that section or under Rule 35(b)."

The government argued that defendant's opportunity to be heard at the original sentencing was adequate, but the court disagreed: "The Rule 35(b) motion here concerned events that had not yet occurred at the time of the sentencing hearing in February 1993. Obviously, Gangi did not have an opportunity to be heard at that time as to those events. . . . [F]airness requires that a defendant at least be allowed to comment on the government's motion. . . . We therefore hold that a defendant must have an opportunity to respond to the government's characterization of his post-sentencing cooperation and to persuade the court of the merits of a reduction in sentence. While we rest our decision on the requirements of Rule 35, we recognize that failure to afford an opportunity to be heard would raise grave due process issues. Our holding does not mean that the defendant is entitled to a full evidentiary hearing, as distinguished from a written submission. Whether such a hearing is necessary is left to the discretion of the district court."

U.S. v. Gangi, 45 F.3d 28, 30–32 (2d Cir. 1995).

See *Outline* generally at VI.F.4.

Criminal History

Second Circuit holds that Guidelines do not authorize use of unrelated, uncharged foreign criminal conduct for criminal history departure. Defendant pled guilty to possessing fraudulent alien registration cards. The district court imposed an upward departure—from criminal history category I to IV—on the basis of the government's claims that defendant previously engaged in homicide, terrorism, and drug trafficking while working for the Medellin drug cartel in Colombia, conduct for which he was never charged or convicted.

The appellate court remanded, holding that the Guidelines authorize some consideration of foreign convictions or sentences, but not other alleged criminal conduct. Under §§4A1.1–1.3, the court reasoned, "not even foreign sentences may be used initially in determining the criminal history category, but they may be used, like a [domestic] pending charge, as the basis for an upward departure. In light of these precise provisions as to how charges and foreign sentences may be used, it is significant that nowhere do the Guidelines specifically authorize the use of unrelated, uncharged foreign criminal conduct, or even foreign arrests, for a departure in the criminal history category." The court also concluded that even if §4A1.3(e)'s consideration of "prior similar adult criminal conduct not resulting in a criminal conviction . . . might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is 'similar' to the crime of conviction. Chunza's alleged prior acts of homicide, terrorism, and drug trafficking in Colombia are not 'similar' to his possession of false immigration documents in the United States."

U.S. v. Chunza-Plazas, 45 F.3d 51, 56–57 (2d Cir. 1995).

See *Outline* generally at VI.A.1.c.

Mitigating Circumstances

Ninth Circuit holds that whether offense level "overrepresents the defendant's culpability" under Note 16 of §2D1.1 is independent of qualification for §3B1.2 adjustment. Defendants were part of a large cocaine conspiracy and personally delivered 738 and 200 kilograms, respectively, from a stash house to various locations. They pled guilty and argued that they should receive departures under §2D1.1, comment. (n.16), because they had base offense levels above 36 and received §3B1.2 mitigating role adjustments. The district court refused to depart because defendants' offense levels did not overrepresent their culpability in the criminal activity. Defendants argued on appeal that "whether the base offense level referred to in [Note 16's] clause (A) 'overrepresents the defendant's culpability' is determined solely by whether or not the defendant qualifies for a mitigating role adjustment under §3B1.2. In their view, if the defendant qualifies for a minor role adjustment, he also qualifies for a downward departure."

The appellate court disagreed, concluding that "the defendants' reading of Note 16 would make clause (B) irrelevant. For if 'overrepresentation' were satisfied whenever a minor role adjustment was found, there would be no need for a distinct determination of 'overrepresentation.' . . . The issue is whether the original base offense level, set by the amount of the controlled substance the defendant is 'accountable' for under §1B1.3, is commensurate with the defendant's involvement in the crime. . . . In this case the defendants were only charged at a level reflecting drugs that they actually transported or handled. If that established a base level higher than their culpability, the district court could depart downward. We conclude that the district court properly considered various equities and degrees of involvement before it declined to depart downward. Because the district court did not err in its interpretation of Note 16, its discretionary denial of a downward departure is not reviewable."

U.S. v. Pinto, 48 F.3d 384, 387–88 (9th Cir. 1995).

See *Outline* generally at III.B.7 and VI.C.5.a.

Criminal History

Criminal Livelihood Provision

Seventh Circuit holds that proof showing defendant derived requisite amount of income from criminal activity may be indirect. Defendant pled guilty to possession of stolen mail and his criminal record showed a lengthy history of mail theft. He admitted to having a $100 to $150 per day heroin habit and that he stole mail to support his addiction. The government did not present direct evidence that defendant had stolen the equivalent of 2,000 times the hourly minimum wage (approximately $8,500 at the time), the threshold amount for application of §4B1.3, and defendant only admitted to possessing $2,741 worth of stolen mail for the year. However, the appellate court held that the district court properly applied §4B1.3 based on all of the evidence in context. Defendant's own estimates indicated that his "heroin habit required over $8,500 a year. The evidence also showed that Taylor had no legitimate income for the twelve months prior to his arrest, that he held a job for only three months in the prior eleven years, and that he had an extensive history in the mail theft business. This evidence is certainly relevant to the application of this enhancement and, after considering it all in context, the court had no difficulty concluding that Taylor stole the required amount from the mails that year in order to live and feed his drug habit."

U.S. v. Taylor, 45 F.3d 1104, 1106–07 (7th Cir. 1995).

See *Outline* generally at IV.B.3.

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Determining the Sentence

Restitution

Fourth Circuit holds that final decisions about amount of restitution and schedule and amounts of payments cannot be delegated to probation officer. The district court ordered that "defendant shall make restitution of not less than $6,000.00 but not more than $35,069.10, in such amounts and at such times as may be directed by the Bureau of Prisons and/or the probation officer. Restitution payments of not less than $100.00 per month shall be made during the period of supervised release and payments shall be greater if the probation officer determines the defendant is capable of paying more. . . . Restitution in this case, just like in any other case, can be adjusted appropriately by the probation officer or the Court, depending on the defendant's ability to pay, should that change either upwardly or downwardly."

The appellate court remanded. "The question presented in this case is whether the court may . . . delegate to a probation officer the authority to determine, within a range, the amount of restitution or the amount of installment payments of a restitution order. We hold that this delegation from a court to a probation officer would contravene Article III of the U.S. Constitution and is therefore impermissible. . . . Sections 3663 and 3664 of Title 18 clearly impose on the court the duty to fix terms of restitution. This statutory grant of authority to the court must be read as exclusive because the imposition of a sentence, including any terms for probation or supervised release, is a core judicial function. . . . In this case, the district court appears to have delegated to the probation officer the final authority to determine the amount of restitution and the amount of installment payments (albeit within a range), without retaining ultimate authority over such decisions (such as by requiring the probation officer to recommend restitutionary decisions for approval by the court). The order was understandably fashioned to address a situation where the defendant did not have assets to pay restitution immediately but had the capacity to earn money for payment in the future. . . . The problem is a difficult one, and we recognize that district courts, to remain efficient, must be able to rely as extensively as possible on the support services of probation officers. But making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable."

U.S. v. Johnson, 48 F.3d 806, 807–09 (4th Cir. 1995). *Accord U.S. v. Porter,* 41 F.3d 68, 71 (2d Cir. 1994); *U.S. v. Albro,* 32 F.3d 173, 174 (5th Cir. 1994) (timing and amount of payments); *U.S. v. Gio,* 7 F.3d 1279, 1292–93 (7th Cir. 1994) (same). *But cf. U.S. v. Clack,* 957 F.2d 659, 661 (9th Cir. 1992) (indicating court may set upper limit of total restitution and delegate to probation officer timing and amount of payments).

See *Outline* at V.D.1.

Departures

Mitigating Circumstances

Second Circuit affirms downward departure based on small quantities of drugs distributed by defendants at any one time during conspiracy. Two defendants were low-level employees in a drug conspiracy. Although they handled only small amounts of drugs at any one time, they worked for several months and, under the Guidelines, were held responsible for 7 and 2–3 kilograms of crack cocaine, yielding minimum sentences of 235 and 188 months. However, the sentencing judge thought this result overstated defendants' culpability and looked at their conduct in terms of the "'quantity/time factor'—what the Judge explained as 'the relationship between the amount of narcotics distributed by a defendant and the length of time it took the defendant to accomplish the distribution.'" Reasoning that Congress authorized severe sentences mainly for "stereotypical drug dealers" who move large amounts of drugs and make lots of money, and that "those who deal in kilogram quantities of narcotics are more culpable than the street peddler who sells $10 bags," the court determined that "the 'quantity/time factor' was a factor that had not been 'adequately taken into consideration by the Sentencing Commission in formulating the Guidelines'" for those who deal in small quantities over a long period. In setting the extent of a departure for such defendants, the court concluded that "the appropriate time period that would correlate culpability (and hence punishment) with drug quantity should vary depending on the defendant's role, [and] the appropriate period for a sporadic street-level dealer might be one day, for a more regular distributor, one week, and for those involved at higher levels of a narcotics

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operation, one month." The court used the weekly figure for these defendants and based the departure sentences on the amount of drugs that the conspiracy distributed during the time they were actually working in an average week.

The appellate court affirmed. "[W]e are persuaded that, at least as to defendants whose attributable aggregate quantities place them at the high end of the drug-quantity table, where sentencing ranges *exceed* the significant mandatory minimum sentences established by Congress, Judge Martin properly concluded that the normal guideline sentence may, in some circumstances, overrepresent the culpability of a defendant and that the 'quantity/time factor,' which was not adequately considered by the Commission, was available as a basis for departure. . . . The quantities attributable to [defendants] subjected them to guideline sentences of more than nineteen and fifteen years, respectively, they worked for modest wages, and they were not shown to have any proprietary interest in the drug operation of their employers. Judge Martin reasonably concluded that guideline sentences of more than fifteen years, based on aggregate drug quantities reflecting sales of approximately 50 grams per day, overstated the culpability of these two defendants. And his selection of a one-week interval for application of the 'quantity/time factor' did not render the extent of his departure 'unreasonable,' *see* 18 U.S.C. §3742(e)(3) (1988), where it resulted in a ten-year sentence, not subject to parole." The court noted that it "need not decide whether the 'quantity/time factor' can be a basis for departure as to defendants whose base offense level is not at the high end of the drug-quantity table." Nor did it decide whether such a departure would be precluded by recently added Note 16 in §2D1.1, which authorizes departures in limited circumstances for certain low-level offenders with high offense levels: "The limitations of Note 16 can have no restrictive effect upon the appellants, since their offenses were committed prior to the November 1, 1993, effective date of Note 16."

The court did, however, remand a departure for a third defendant who had sold small amounts of heroin and was not subject to a long sentence. "It simply cannot be said that a guideline sentencing range of 51 to 63 months, indicated by his aggregate quantity of four ounces of heroin bought and resold during a four-month period, overstated his culpability. Application of the 'quantity/time factor' to a person in Abad's circumstances would precisely realize the Government's apprehension that the entire structure of the Commission's drug-quantity table was being abandoned."

U.S. v. Lara, 47 F.3d 60, 63–67 (2d Cir. 1995).

See *Outline* generally at VI.C.5.a.

Substantial Assistance

Seventh Circuit holds that denial of Rule 35(b) motion was improperly based on factors unrelated to defendant's cooperation. Defendant testified for the government in several trials and post-trial hearings in the three years after he was sentenced. The government filed a Fed. R. Crim. P. 35(b) motion to reduce defendant's sentence for his substantial assistance, but the district court denied it. The appellate court reversed, concluding that "the district court intermixed Lee's claims with its criticisms of procedures and conduct by the former U.S. attorneys [in related] cases thereby confusing the proceedings and depriving Lee a fair opportunity for consideration."

The court found that "[t]he prosecution, Lee's former counsel and Lee all testified to Lee's helpfulness and continuing cooperation which extended beyond one year, including some information not known by the defendant until one year or more after imposition of his sentence. The proof was not in dispute. The district court, however, focused its ire on perceived coverup motives from the prosecution." The decision to deny relief "did not relate to the proof offered during the hearing on Lee's cooperation," but rather to "the judge's dissatisfaction with the performance and conduct of the [government attorneys]. . . . Lee's rights were not adequately considered by the district judge who conducted a wide-ranging criticism and dialogue on the misconduct of government counsel in the [related] cases and seemed to charge Lee with complicity because he, as a witness in those cases, accepted favors from the government." While the district court's concerns may be legitimate, "such blame should [not] extend to Lee. . . . We think Lee has shown entitlement to relief of a reduced sentence, [and] conclude that the trial court abused its discretion in the manner in which it conducted the hearing which resulted in denial of relief to Lee on improper grounds."

U.S. v. Lee, 46 F.3d 674, 677–81 (7th Cir. 1995).

See *Outline* generally at VI.F.4.

Offense Conduct

Calculating Weight of Drugs

Eighth Circuit holds that kilogram conversion ratio for marijuana does not require seizure of live plants. Defendant was convicted on several charges related to a marijuana growing and distribution operation that ended in 1991 when the marijuana farms were seized. Using evidence of the number of plants that defendant was responsible for during the course of the operation, the district court followed §2D1.1(c) at n.* and converted each plant into one kilogram of marijuana to set the offense level. Defendant ap-

pealed, arguing that this conversion ratio should be applied only to live plants and that the marijuana attributed to him had already been harvested.

The appellate court affirmed, reasoning that a "legitimate goal of §2D1.1(c) is to punish those guilty of offenses involving marijuana plants more severely in order to get at the root of the drug problem. In the present case . . . there was considerable evidence of Wilson's participation in the planting and cultivation of marijuana plants. Thus, following the plain language of the guidelines, this must be an offense 'involving marijuana plants.' *See* U.S.S.G. §2D1.1(c). Accordingly, we hold that where, as here, the evidence demonstrates that an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

U.S. v. Wilson, 49 F.3d 406, 409–10 (8th Cir. 1995). See the summary of *Wegner* in 7 *GSU* #7 for other cases on this issue.

See *Outline* at II.B.2.

General Application

Relevant Conduct

D.C. Circuit holds that conduct must be related to offense of conviction, not merely to other relevant conduct, to be used under §1B1.3. Defendant pled guilty to one fraud count (count four) and had three other fraud counts dismissed. All three dismissed counts were used as relevant conduct in setting the offense level. The appellate court affirmed the use of counts one and two, holding that although they were "separately identifiable" from the offense of conviction they were "similar in nature"—all involved presenting a counterfeit check to obtain money or goods—and, at three months apart, close enough in time to reasonably conclude they were part of the "same course of conduct" under §1B1.3(a)(2). The third dismissed count, however, a credit card fraud, "is both separately identifiable from count four and of a different nature. That counts three and four both involved fraud to obtain money is not enough. While substantial similarities exist between count three and counts one and two—they all involved the same alias and occurred within two months—the government must demonstrate a connection between count three and the *offense of conviction*, not between count three and the other offenses offered as relevant conduct. The credit card fraud in count three is thus not part of the same course of conduct as the offense of conviction. The district court committed clear error in treating it as relevant conduct."

U.S. v. Pinnick, 47 F.3d 434, 438–39 (D.C. Cir. 1995).

See *Outline* at I.A.2.

Second Circuit holds that the Guidelines require a particularized finding of the scope of the criminal activity that defendant jointly undertook with others. Defendant was one of many sales representatives in a fraudulent loan telemarketing scheme. Although it was uncontested that defendant knew the scheme was fraudulent, no evidence was presented that his involvement extended beyond his own sales efforts or that he had any other role or participation in the scheme. However, the district court held defendant responsible for the entire loss caused by the fraud, finding that this was a jointly undertaken activity and the conduct of the other participants was reasonably foreseeable to him.

The appellate court remanded because there was no finding that the acts of other participants were within the scope of defendant's agreement. For relevant conduct involving others, the Guidelines "require the district court to make a particularized finding of the scope of the criminal activity agreed upon by the defendant. . . . [T]hat the defendant is aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation. The relevant inquiry is what role the defendant agreed to play in the operation, either by an explicit agreement or implicitly by his conduct." Here, the evidence shows that defendant's agreement "was limited to his own fraudulent activity and did not encompass the fraudulent activity of the other representatives. His objective was to make as much money in commissions as he could. He had no interest in the success of the operation as a whole, and took no steps to further the operation beyond executing his sales." The court noted that, because the government may not have had notice that it needed to show evidence of defendant's agreement as outlined in this opinion, it may try to do so on remand.

U.S. v. Studley, 47 F.3d 569, 574–76 (2d Cir. 1995).

See *Outline* at I.A.1.

Adjustments

Multiple Counts—Grouping

Sixth Circuit holds that multiple counts from different indictments may be grouped. Defendant was charged with multiple offenses in two different indictments and pled guilty to one count from each indictment. The district court determined the offense level for each count and then applied the multiple count adjustment under §3D1.4 to reach a combined adjusted offense level. Defendant argued that it was improper to apply §3D1.4 to counts from different indictments.

The appellate court affirmed. "Even though Part D of Chapter Three contains no explicit language ap-

plying §3D1.4 to multiple counts in separate indictments, the absence of such a statement is of no moment. First, there is no language in Part D of Chapter Three prohibiting the application of §3D1.4 to counts in separate indictments. Second, U.S.S.G. §3D1.5 states '[u]se the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.' In order to apply a sentence to multiple counts in separate indictments pursuant to §5G1.2, a combined offense level must first have been determined which incorporates the counts from the separate indictments. Thus, in order to make sense, §3D1.4 must be read to apply to counts existing in separate indictments in which sentences are to be imposed at the same time or in a consolidated proceeding. . . . The only logical reading of U.S.S.G. §§3D1.1–5 and 5G1.2 requires that §3D1.4 apply to multiple counts in separate indictments."

U.S. v. Griggs, 47 F.3d 827, 831–32 (6th Cir. 1995). *See also U.S. v. Coplin,* 24 F.3d 312, 318 & n.6 (1st Cir. 1994) ("§5G1.2 would not make much sense unless we also assumed that the grouping rules under chapter 3, part D had previously been applied to counts 'contained in different indictments . . . for which sentences are to be imposed at the same time.' Accordingly, we read this concept into chapter 3, part D.").

See *Outline* generally at III.D.1.

Sentencing Procedure

Procedural Requirements—Notice

Seventh Circuit holds that testimony from codefendants' sentencing hearings may not be used to increase defendant's offense level unless defendant has adequate notice. Defendant received an aggravating role adjustment under §3B1.1(c), despite the fact that a similarly situated codefendant did not and the government stated at the sentencing hearing that it would be inappropriate and did not present any evidence to support it. The court based the enhancement on testimony about defendant at the sentencing hearings of other defendants. Neither defendant nor the government had notice before the hearing that the court intended to use that testimony.

The appellate court remanded after applying "a two-prong inquiry: first, was the specific evidence considered by the court from the prior sentencing hearings previously undisclosed to [defendant], and second, if he had no prior knowledge, was he given a reasonable opportunity to respond to the information." The court first concluded that although most of the information used to justify the enhancement was in the presentence report, "certain significant evidence taken into account by the district court was not disclosed to [defendant] before the hearing."

On the second issue, the court found that defendant "was on notice of a dispute between himself and others and was given some opportunity to respond to the new evidence before he was sentenced. . . . On balance, however, we do not believe [he] was given sufficient notice to allow him meaningfully to rebut the prior testimony. Because the government backed away from a role increase, [defendant] knew that no new evidence would be introduced at the hearing to support such an increase. Additionally, . . . he knew that the same judge had found the evidence insufficient to support such an increase for [the codefendant]. . . . Thus, when they arrived for the sentencing, [defendant] and his attorney reasonably would not have anticipated the need for evidence to rebut new, damaging information . . . . We therefore conclude that [defendant] did not receive sufficient notice, as required by Rule 32, so that he could comment meaningfully on the court's decision to impose a role increase."

U.S. v. Blackwell, 49 F.3d 1232, 1237–40 (7th Cir. 1995).

See *Outline* at IX.D.2 and E.

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General Application

Double Jeopardy

Supreme Court holds that use of relevant conduct to increase guideline sentence for one offense does not preclude later prosecution for that conduct. When defendant was sentenced on a marijuana charge his offense level was increased under § 1B1.3 for related conduct involving cocaine. This increased his guideline range (from approximately 78–97 months to 292–365 months), although he then received a § 5K1.1 departure to 144 months. Defendant was later indicted for conspiring and attempting to import cocaine, but the district court dismissed the charges on the ground that punishing defendant for conduct that was used to increase his sentence for the marijuana offense would violate the Double Jeopardy Clause's prohibition against multiple punishments. However, the Fifth Circuit reversed, holding that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct," and therefore prosecution for the cocaine offenses was not prohibited by the Double Jeopardy Clause. *U.S. v. Wittie,** 25 F.3d 250, 258 (5th Cir. 1994) [6 *GSU* #16].

The Supreme Court agreed with the appellate court that there is no double jeopardy bar to the second prosecution. "We find this case to be governed by *Williams [v. Oklahoma,]*" 358 U.S. 576 (1959), in which the Court "made clear that use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause. . . . We are not persuaded by petitioner's suggestion that the Sentencing Guidelines somehow change the constitutional analysis. A defendant has not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account. . . . As the Government argues, '[t]he fact that the sentencing process has become more transparent under the Guidelines ... does not mean that the defendant is now being "punished" for uncharged relevant conduct as though it were a distinct criminal "offense."' . . . The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional. . . . Regardless of whether particular conduct is taken into account by rule or as an act of discretion, the defendant is still being punished only for the offense of conviction."

The Court also addressed petitioner's "contention that he should not receive a second sentence under the Guidelines for the cocaine activities that were considered as relevant conduct for the marijuana sentence. As an examination of the pertinent sections should make clear, however, the Guidelines take into account the potential unfairness with which petitioner is concerned. . . . There are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and § 5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding). *See* USSG § 5G1.3, comment., n. 3." Along with the protections in § 5G1.3, the Court noted that a district court retains discretion to depart "to protect against petitioner's second major practical concern: that a second sentence for the same relevant conduct may deprive him of the effect of the downward departure under § 5K1.1 of the Guidelines for substantial assistance to the Government, which reduced his first sentence significantly. Should petitioner be convicted of the cocaine charges, he will be free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure."

Witte v. U.S., 115 S. Ct. 2199, 2206–09 (1995) (Stevens, J., dissenting in part).

*Note: Spelling of defendant's name was incorrect in the appellate court case title.

See *Outline* at I.A.4.

Determining the Sentence

Consecutive or Concurrent Sentences

Seventh Circuit concludes departure may be warranted when § 5G1.3(b) does not apply because a prison term for related conduct has already been served. Defendant was convicted of conspiracy to commit bank fraud. At sentencing the government and defendant requested a downward departure of

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fourteen months to account for a sentence defendant served in prison for related conduct that was considered in setting the offense level for the instant offense. Had defendant still been serving the prior sentence, § 5G1.3(b) would have effected the same result by requiring concurrent sentences. The district court refused to depart, based on a belief that defendant's prior sentence was mistakenly too lenient.

The appellate court concluded that the district court acted within its discretion in refusing to depart and that its decision was, "like any other refusal to depart, unreviewable." However, the sentence was remanded on another matter and the court "encouraged" the district court to reconsider. "Section 5G1.3 on its face does not apply to [defendant] because, by the time of his sentencing in Milwaukee, he had completed his term for the related conduct in Kansas and therefore had no relevant 'undischarged term of imprisonment.' The probation office in this case apparently recognized that the rationale underlying § 5G1.3—to avoid double punishment—nevertheless was applicable to a defendant . . . who had fully discharged his prior term. It sought guidance from the Sentencing Commission, which suggested that a downward departure would be the appropriate way to recognize such a defendant's prior time in prison. . . . We recognize that distinguishing between two defendants merely by virtue of their sentencing dates appears contrary to the Guidelines 'goal of eliminating unwarranted sentence disparities.' . . . Although we may not directly review the district court's rejection of a departure, we do encourage the court upon remand to reconsider its decision. . . . Assuming [defendant] would have been eligible for the 14-month credit if he still were serving the prior terms at issue, we think it would be fair and appropriate to deduct that amount from the new sentence imposed on the instant offense."

U.S. v. Blackwell, 49 F.3d 1232, 1241–42 (7th Cir. 1995).

See *Outline* generally at V.A.3.

Ninth Circuit holds that sentence under 18 U.S.C. § 924(e)(1) may be reduced below mandatory minimum to give credit for time served on related charge. Defendant was serving a state sentence for armed robbery when he pled guilty to being a felon in possession of the same weapon used in the robbery. Because he had three prior violent felony convictions, 18 U.S.C. § 924(e)(1) required that he be "imprisoned not less than fifteen years," and the government and defendant agreed to a guideline sentence of 188 months. The district court agreed with defendant that, under § 5G1.3(b) and comment. (n.2), the state sentence had been "fully taken into account" in determining the federal sentence and the two sentences should be made concurrent with credit for the twelve months defendant had served on the state charge, i.e., the federal sentence should be 176 months. However, the district court concluded it could not go below the mandatory 180 months and imposed the agreed-on guideline sentence of 188 months.

The appellate court remanded, following the holding in *U.S. v. Kiefer,* 20 F.3d 874 (8th Cir. 1994) [6 *GSU* #12], that "in appropriate circumstances time served in custody prior to the commencement of the mandatory minimum sentence is time 'imprisoned' for purposes of § 924(e)(1)." The court concluded that time served in state prison on a related charge is "an appropriate circumstance," and that in order to harmonize § 924(e) with the guideline sentencing scheme and the rest of the Sentencing Reform Act of 1984, "we construe 18 U.S.C. § 924(e)(1) to require the court to credit Drake with time served in state prison. To hold otherwise would 'frustrate the concurrent sentencing principles mandated by other statutes.' . . . [T]he district court indeed was required to reduce Drake's mandatory minimum sentence for the time Drake served in Oregon prison."

U.S. v. Drake, 49 F.3d 1438, 1440–41 (9th Cir. 1995).

See *Outline* at V.A.3.

Adjustments

Obstruction of Justice

Tenth Circuit holds that obstruction enhancement does not apply if defendant did not know that an investigation of the offense of conviction had begun. Defendant was part of a conspiracy to manufacture explosives without a license. One of the conspirators was arrested on an unrelated weapons charge, and while he was being questioned at the police station the police received a tip about the explosives. In the meantime, without knowing that the police had begun to investigate the explosives manufacture, defendant and others attempted to hide the explosive materials. The police ultimately recovered the explosives and defendant pled guilty to conspiracy. She received a § 3C1.1 enhancement for obstructing the investigation by hiding the explosives, but argued on appeal that she should not have received the enhancement for obstructing an investigation of which she was unaware.

The appellate court agreed and remanded. "A plain reading of U.S.S.G. § 3C1.1 compels the conclusion that this provision should be read only to cover willful conduct that obstructs or attempts to obstruct '*the* investigation . . . of *the* instant offense.' (emphasis added) . . . To our mind, the clear language of

§ 3C1.1 enunciates a nexus requirement that must be met to warrant an adjustment. This requirement is that the obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution, or sentencing; prior to any indication of an impending investigation, prosecution, or sentencing; or as regards a completely unrelated offense, does not fulfill this nexus requirement. . . . There is simply no evidence that Ms. Gacnik undertook to hide the explosive materials with any knowledge of an impending investigation or during any investigation of the conspiracy for which she was ultimately convicted. We disagree with the district court that the very act of concealment, standing alone, is sufficient evidence of Ms. Gacnik's awareness of an investigation pointed at her offense of conviction. The record reveals only that Ms. Gacnik was aware that the police had taken Mr. Gade into custody for having discharged a gun, but this knowledge of police interest in a completely unrelated offense, not involving her, simply does not meet the requirements of § 3C1.1."

U.S. v. Gacnik, 50 F.3d 848, 852–53 (10th Cir. 1995).

See *Outline* at III.C.4.

Seventh Circuit holds that obstruction of related state prosecution does not warrant enhancement unless it actually obstructed federal prosecution of the "instant offense." Defendant was arrested in April 1992 on a state drug charge. After release on bond in June he fled the country but returned in November. He was rearrested by the state in December, at which time a federal investigation into defendant's drug activities began. After defendant was convicted and began serving his sentence on the state charge, he was indicted on federal charges and pled guilty to conspiracy to distribute cocaine. Concluding that the criminal conduct underlying the state prosecution from which defendant fled constituted part of the criminal conduct underlying the instant federal offense, and that defendant's flight impeded the state prosecution and investigation, the district court applied the § 3C1.1 obstruction enhancement. "In short, the district court considered the state and federal offenses to be one and the same and, for purposes of section 3C1.1, the 'instant offense' included the state prosecution."

The appellate court remanded because there was no evidence that defendant's flight obstructed the federal investigation or prosecution. The court acknowledged that "because the state offense was an overt act of the federal conspiracy charge, arguably the state offense is part of the 'instant offense' for purposes of section 3C1.1. Consequently, there is a basis for the district judge to say as she did that 'it's the same offense you look at and not the particular entity that was prosecuting it at the time the obstruction occurred.' Although we agree that the factual basis for the state charges are encompassed within the federal offense, the inclusiveness of the federal offense does not necessarily dictate the conclusion that any obstruction of the prior state prosecution automatically compels a finding that the federal prosecution was also obstructed. This is too long a stretch and ignores the temporal requirement of [§] 3C1.1 that the obstructive conduct occur 'during' the investigation, prosecution, or sentencing of the instant offense. In other words, section 3C1.1 intends that the obstructive conduct have some discernible impact on the investigation, prosecution, or sentencing of the federal offense which may or may not encompass the state offense. . . . Obstructive conduct having no impact on the investigation or prosecution of the federal offense falls outside the ambit of section 3C1.1 no matter when the obstruction occurs; i.e., whether it occurs during a state or federal investigation or prosecution. Even if the state and federal offenses are the same, under section 3C1.1 it is the federal investigation, prosecution, or sentencing which must be obstructed by the defendant's conduct no matter the timing of the obstruction."

U.S. v. Perez, 50 F.3d 396, 398–400 (7th Cir. 1995).

See *Outline* at III.C.4.

Sixth Circuit holds that § 3C1.2 enhancement for reckless endangerment does not apply if defendant did not know a law enforcement officer was in pursuit. Defendant was driving away from a drug delivery site when detectives in an unmarked police van attempted to block the car and arrest the occupants. Defendant swerved around the van, striking the leg of a detective who had jumped out of the van, and was eventually arrested. Without making a finding that defendant knew that police officers were in pursuit at the time he swerved around the van, the district court imposed a § 3C1.2 enhancement. The appellate court remanded "for the district court to make a specific finding regarding defendant's knowledge," holding that "a § 3C1.2 enhancement is inapplicable if the defendant did not know it was a law enforcement officer from whom he was fleeing."

The appellate court also held that the sentence was appealable even though defendant had received a downward departure under § 5K1.1 to a sentence below the ranges suggested by both the government and defendant. "A defendant may appeal his sentence even when the sentence imposed fell within the range advocated by him so long as he can iden-

tify a specific legal error," which defendant did with his claim of a misapplication of § 3C1.2. Thus, this decision is consistent with cases that have held that the guideline range is the point of reference for a departure and must be correctly calculated. See cases in *Outline* at VI.D.

U.S. v. Hayes, 49 F.3d 178, 182–84 (6th Cir. 1995).

See *Outline* at III.C.3.

Offense Conduct

Marijuana

Eleventh Circuit holds that "dead, harvested root systems are not 'plants' within the meaning of" the statute or Guidelines. When defendant was arrested police found 27 live marijuana plants and, in a trash can, "26 dead, crumbling roots, each attached to a small portion of the stalk ('root systems'), remaining from previously-harvested plants." The district court counted all 53 plants and sentenced defendant under § 2D1.1(c), n.*, which treats each plant as one kilogram of marijuana for offenses involving 50 or more plants.

The appellate court remanded, concluding "that *clearly dead* vegetable matter is not a plant." The court reasoned that its decision in *U.S. v. Foree,* 43 F.3d 1572 (11th Cir. 1995), holding that marijuana cuttings and seedlings are not "plants" until they develop root systems, "treats evidence of life as a necessary (but alone insufficient) prerequisite of 'planthood,' and its reasoning counsels rejection of the government's converse contention here that dead marijuana remains are plants simply because they have roots."

The court also noted that it has held that once plants are harvested the actual weight must be used, not the kilogram-per-plant equivalency, and specifically disagreed with circuits that have held that the number of plants may be used even after harvesting. See cases summarized in 7 *GSU* nos. 7 & 8. "Our decisions . . . contemplate the use of actual post-harvest weight of consumable marijuana, rather than presumed weight derived from the number of harvested plants, for sentencing in manufacturing and conspiracy to manufacture, as well as possession, cases. . . . The fact that [21 U.S.C.] § 841(b) creates *alternative* plant number and marijuana weight sentencing regimes implies that growers should not continue to be punished for plants when those plants cease to exist. . . . We therefore reaffirm that dead, harvested root systems are not marijuana plants for sentencing purposes irrespective of whether the defendant is convicted of possession, manufacturing, or conspiracy to manufacture marijuana plants. We leave it to the district court to decide, in the first instance, how the 26 dead root systems should be accounted for in sentencing in this case (as they cannot be counted as plants)."

U.S. v. Shields, 49 F.3d 707, 710–13 (11th Cir. 1995).

See *Outline* at II.B.2.

Certiorari Granted:

U.S. v. Neal, 46 F.3d 1405 (7th Cir. 1995) (en banc), *cert. granted,* No. 94-9088 (June 19, 1995). Question presented: Does amendment to Sentencing Guidelines establishing presumptive weight of LSD for purposes of establishing base offense level for violations involving LSD change manner of computing weight of LSD for purposes of statute imposing mandatory minimum sentence for possession or distribution?

See *Outline* at II.B.1 and summary of *Neal* in 7 *GSU* #7.

Judgment Vacated:

U.S. v. Porat, 17 F.3d 660 (3d Cir. 1994), *vacated on other grounds,* No. 94-140 (U.S. June 26, 1995), and remanded for reconsideration in light of *U.S. v. Gaudin,* No. 94-514 (U.S. June 19, 1995).

See *Outline* at V.C and summary of *Porat* in 6 *GSU* #11.

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Determining the Sentence

"Safety Valve" Provision

Fifth Circuit holds that statements to a probation officer do not satisfy requirement to provide information "to the Government." Defendant faced a ten-year mandatory minimum sentence after pleading guilty to a drug conspiracy charge. He requested application of 18 U.S.C. §3553(f), which allows sentencing under the Guidelines without regard to the mandatory minimum. USSG §5C1.2 incorporates §3553(f) into a guideline, and subsection (5) requires the defendant to have "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The probation officer interviewed defendant in preparation of the presentence report, but neither defendant nor the probation officer spoke to the government's case agent. The court gave defendant an opportunity to do so, but defendant refused. The court declined to apply §5C1.2 and sentenced defendant to the mandatory minimum.

Defendant argued on appeal that his discussion with the probation officer satisfied the requirement to disclose to the Government all information he knew about the criminal offense because the probation officer is, for purposes of §5C1.2, "the Government." The appellate court disagreed and affirmed the sentence. "In the context of the sentencing hearing, [Fed. R. Crim. P.] 32(c) uses 'Government' in conjunction with 'attorney' or 'counsel.' By the use of *in pari materia,* the Government argues that we should construe 'Government' in §5C1.2 the same way. The Government's position is supported by §5C1.2's explicit cross reference to Rule 32. *See* §5C1.2 commentary n.8. We agree with the Government and the district court that the probation officer is, for purposes of §5C1.2, not the Government. The purpose of the safety valve provision was to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences. . . . A defendant's statements to a probation officer do not assist the Government."

U.S. v. Rodriguez, 60 F.3d 193, 195–96 (5th Cir. 1995).

First Circuit holds that defendant must make "affirmative act of cooperation" in providing "information and evidence" to government under §3553(f)(5). The "safety valve" provision in 18 U.S.C. §3553(f) requires, inter alia, that "(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Although defendant did not directly speak with the government, he argued that he effectively provided the required information because his discussion of the crime with his coconspirators had been recorded by an undercover agent and, when pleading guilty, he admitted to the facts presented by the government at the plea hearing. The district court refused to apply §3553(f).

The appellate court affirmed. "Whatever the scope of the 'information and evidence' that a defendant must provide to take advantage of section 3553(f)(5), we hold that a defendant has not 'provided' to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversations conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. . . . Nor does it suffice for the defendant to accede to the government's allegations during colloquy with the court at the plea hearing. Section 3553(f)(5) contemplates an affirmative act of cooperation with the government no later than the time of the sentencing hearing. Here, Wrenn did not cooperate . . . . And when the court offered to postpone sentencing so Wrenn could make a proffer to the government for purposes of section 3553(f)(5), he refused."

U.S. v. Wrenn, No. 94-2089 (1st Cir. Sept. 25, 1995) (Lynch, J.).

See *Outline* generally at V.F.

Violation of Supervised Release

Sixth Circuit holds that amended statutory language does not require courts to follow revocation policy statements. The Violent Crime Control and Law Enforcement Act of 1994, effective Sept. 13, 1994, amended 18 U.S.C. §3553(a)(4) to state that courts "shall consider . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission." Defendant argues that this amendment indicates that Congress intended that courts must now impose sentence following revocation of probation or supervised release in accordance with the Chapter 7 policy statements in the Guidelines. After his supervised release was revoked he was subject to a 3–

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9-month term under §7B1.4(a), but the court thought that was too lenient and sentenced defendant to the two-year statutory maximum.

The appellate court affirmed, finding that the amendment did not change the current holding of all circuits that Chapter 7 policy statements must be considered but are not mandatory. Courts are required by 18 U.S.C. §3553(b) to follow *guidelines*, but "[a]bsent any applicable guidelines, the mandatory language of §3553(b) does not apply." Chapter 7 consists of policy statements only, without accompanying guidelines, that are intended to provide "greater flexibility to . . . the courts." *See* USSG Ch.7, Pt.A.3(a), intro. comment. "Therefore, because there are not any guidelines for the policy statements to interpret or explain, the mandatory language of §3553(b) does not apply. On a plain reading of amended §3553(a), a court is required to 'consider' the policy statements in Chapter 7 in imposing a sentence for supervised release violation. Defendant argues that in amending §3553 Congress only could have intended to make the policy statements mandatory. [There are] two other possible purposes: To make explicit that when the Commission does issue guidelines pertaining to the revocation of supervised release, those guidelines will be as binding as other sentencing guidelines; and to affirm the principle recognized by the Sixth Circuit that a court must consider the Chapter 7 policy statements when sentencing a defendant for violation of the conditions of supervised release. Defendant's conclusion about Congressional purpose does not follow from the wording of the amendment or reasoning of the cases. . . . Until the Sentencing Commission changes the policy statements in Chapter 7 to guidelines or Congress unequivocally legislates that the policy statements in Chapter 7 are binding, this Court will not reduce the flexibility of the district courts in sentencing supervised release violators."

U.S. v. West, 59 F.3d 32, 35–36 (6th Cir. 1995).

See *Outline* at VII.

Departures

Substantial Assistance

Ninth Circuit holds that government may not refuse §5K1.1 motion because defendant exercised right to trial. Defendant pled guilty to drug charges pursuant to a plea agreement in which he agreed to cooperate with the government. He faced a sentencing range of 235–293 months, but the government made a §5K1.1 motion and the district court sentenced him to 144 months. However, before sentencing, defendant had moved to withdraw his guilty plea and the court had denied the motion. After sentencing, the government agreed to allow defendant to withdraw his plea. The government tried to persuade defendant to forego a trial by offering to recommend a one-year sentence reduction if he pled guilty and, conversely, stating that if defendant went to trial it would "present additional charges to the Grand Jury and would not recommend [a §5K1.1] reduction." Defendant insisted on going to trial and was found guilty. He received a 188-month sentence after the government refused to make a §5K1.1 motion and the district court refused to depart. Defendant argued on appeal that the government's refusal to file was "in retaliation for his choice to exercise his constitutional right to a jury trial."

The appellate court agreed that "[t]he record supports this contention. . . . While it is undoubtedly true both that the government does not have to make a substantial assistance motion every time a defendant is cooperative and that the government may use the motion as a carrot to induce a defendant to make a plea, that is not what transpired in this case. Here, the government initially took the position at sentencing that the defendant had offered substantial assistance and made the appropriate motion, and then threatened to change its position to discourage the defendant from going to trial. . . . Mr. Khoury has presumptively established that the government has withdrawn its §5K1.1 motion because he forced them to go to the trouble of proving their case before a jury, as was his constitutional right. The government has pointed to no intervening circumstances that diminished the usefulness of what they previously considered to be substantial assistance. We therefore conclude that Mr. Khoury has made the 'substantial threshold showing' [of an unconstitutional motive] required by *Wade* [*v. U.S.,* 504 U.S. 181 (1992)]." On remand the district court should "exercise its discretion and consider the appropriate Guideline factors relating to a §5K1.1 motion."

U.S. v. Khoury, 62 F.3d 1138, 1140–42 (9th Cir. 1995) (Fernandez, J., dissenting). *Accord U.S. v. Paramo,* 998 F.2d 1212, 1219–21 (3d Cir. 1993) (may not deny §5K1.1 motion to penalize defendant for exercising right to trial).

See *Outline* at VI.F.1.b.iii.

Offense Conduct

Calculating Weight of Drugs

Fourth Circuit holds that amended LSD calculation applies to "liquid LSD." Defendant was convicted of LSD offenses that involved LSD dissolved on blotter paper and in a liquid solvent, and his sentence was based on the total weight of the mixtures. After the 1993 amendment to the LSD calculation (Amendment 488), he moved for resentencing. The district court applied the new method to the LSD on blotter paper but not to the liquid, reasoning that "in calculating the Guidelines involving liquid LSD, the 0.4 mg conversion factor should not be used because there is no carrier medium involved." The change in the weight of the blotter paper LSD was too small to lower the offense level, so defendant's sentence was not changed and he appealed, arguing that his offense level should be deter-

mined by calculating the number of doses in the liquid and then using the 0.4 mg per dose conversion factor of the amendment.

The appellate court remanded. Although Amendment 488 focuses on doses of LSD "on a blotter paper carrier medium" and did not provide a specific calculation for liquid LSD, there is a reference to it in §2D1.1, comment. (n.18): "In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted." The court determined "that the Commission intended 'liquid LSD' to refer to pure LSD dissolved or suspended in a liquid solvent, the form of LSD at issue in this case," and "did not intend 'liquid LSD' to refer to pure LSD because the Guidelines readily distinguish between drugs contained in an impure mixture or substance and drugs in 'pure' or 'actual' form." However, "[b]y defining pure LSD dissolved or suspended in a liquid solvent as 'LSD not placed onto a carrier medium,' Amendment 488 interprets the liquid solvent as not to be an LSD carrier medium for Guidelines purposes," leading the court to conclude that the 0.4 mg per dose calculation for paper carrier media is "inapplicable to liquid LSD." Instead, "Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level . . . . [T]he plain language of the amendment supports this interpretation because Application Note 18 expressly authorizes the use of 'LSD alone' in cases involving liquid LSD," and the reference to upward departure "would be unnecessary had the Commission not intended courts to use the weight of the LSD alone in calculating a defendant's base offense level."

The court thus held that the offense level must be based on either the weight of pure LSD in the liquid or the number of doses contained in the liquid multiplied by 0.05 mg (the Drug Enforcement Administration's standard dosage unit for LSD referenced in §2D1.1's Background Commentary)—"we conclude that using the 0.05 mg factor is consistent with our conclusion above that the liquid solvent in liquid LSD is not a carrier medium for Guidelines purposes and with Amendment 488's primary approach that courts should use the weight of the LSD alone, and not the weight of the LSD and its liquid solvent or any potential carrier medium." "As in using the weight of the pure LSD, the court remains free to depart upward if it determines that using the 0.05 mg conversion factor does not reflect the seriousness of Turner's offense." Because the issue was not addressed below, the court added that it "need not decide whether [to] use the entire weight of the liquid LSD or some other weight in applying any statutory minimum sentence."

U.S. v. Turner, 59 F.3d 481, 484–91 (4th Cir. 1995).

See *Outline* at II.B.1.

Seventh Circuit holds that drugs purchased for personal use are included for sentencing on drug distribution conspiracy. Defendant pled guilty to conspiracy to possess with intent to distribute and to distribute cocaine. An admitted cocaine addict, he argued that approximately half of the cocaine he purchased from his supplier should not be included in calculating his offense level because it was for his personal use rather than for distribution. *See U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993) [6 *GSU* #9]. The district court disagreed and sentenced defendant on the full quantity of cocaine that he had purchased.

The appellate court affirmed, finding that its decision was controlled by *Precin v. U.S.,* 23 F.3d 1215, 1219 (7th Cir. 1994) (affirming inclusion of cocaine that defendant received for personal use as "commission" from sales for another conspirator—"Any cocaine which Precin received for his personal use was necessarily intertwined with the success of the distribution"). *Accord U.S. v. Brown,* 19 F.3d 1246, 1248 (8th Cir. 1994); *U.S. v. Innamorati,* 996 F.2d 456, 492 (2d Cir. 1993). The court concluded that all of the drugs were part of the "same common scheme or plan"—all the cocaine came from the same supplier, "was not divided into packages for distribution and packages for personal use, . . . [and] the amount that Snook personally consumed directly affected the conspiracy—the more Snook used, the more he had to sell to bankroll his habit." The court distinguished *Kipp* because that case did not involve a conspiracy—the offense of conviction there was possession with intent to distribute, and "the court decided that only the amount of drugs that the defendants intended to distribute was 'part of the same course of conduct or common scheme or plan.'"

U.S. v. Snook, 60 F.3d 394, 395–96 (7th Cir. 1995).

See *Outline* at II.A.1.

Loss

Seventh Circuit holds that interest due on a loan may be included in loss calculation. Defendant was convicted of offenses involving a series of fraudulent loans. In determining the amount of loss involved, the district court included the interest that defendant had agreed to pay on the loans. Defendant appealed, arguing that §2F1.1, comment. (n.7), states that loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred."

The appellate court affirmed, agreeing with the circuits that have held that the exclusion of interest in Note 7 "refers to speculative 'opportunity cost' interest—the time value of money stolen from the victims. . . . It does not refer to a guaranteed, specific rate of return that a defendant contracts or promises to pay." The court added that "Note 7 states that loss is the value of the thing stolen—money, property, or services. In the context of a

loan agreement, the thing itself, or property, includes both the principal and the agreed-upon interest. But for the promise to pay interest, the bank would not have made the loan. The interest Allender challenges here could therefore properly be considered part of the property itself for purposes of Note 7. But even if it is properly deemed 'interest' under this Note, the language allows for a distinction to be made between the types of interest based on the level of certainty with which the interest was due. The Note uses the phrase 'interest the victim *could have* earned on such funds.' Inherent in this phrasing is a degree of speculation that is usually associated with mere investment opportunities—the time value of money. But where there is an enforceable agreement to pay a calculable sum, all speculation disappears. If this was the kind of interest contemplated by Note 7, the commentary drafters would likely have used different language, perhaps the phrase 'interest the victim *would have* earned.' They did not, and therefore we think that the only 'interest' properly excluded from the loss calculations here is the opportunity cost value of the item stolen."

The court noted that this decision conflicted with a recent decision by another panel in *U.S. v. Clemmons,* 48 F.3d 1020, 1025 (7th Cir. 1995), which held that under Note 7 interest promised to defrauded investors should not be included as loss. The current opinion was circulated among all active judges in the circuit and "[a] majority of the court has . . . agreed that *Clemmons* should be overruled to the extent that it conflicts with the holding in this opinion."

U.S. v. Allender, 62 F.3d 909, 917 (7th Cir. 1995).

See *Outline* at II.D.2.d.

Certiorari granted:

U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994), *cert. granted,* 64 U.S.L.W. 3199 (U.S. Sept. 27, 1995) (No. 94-1664). "Question presented: Is district court's downward departure from prescribed range of Sentencing Guidelines on basis of factors not expressly prohibited as grounds for departure to be reviewed under de novo standard applied by court below or under deferential standard set forth in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993), and other cases?" Certiorari was also granted in a companion case, *Powell v. U.S.,* No. 94-8842 (U.S. Sept. 27, 1995), "to resolve sharp conflict among federal courts of appeals in essential approach to reviewing departures under federal Sentencing Guidelines, and in correct analysis of particular categories of downward departure involved in this case." *See also* 7 *GSU* #2; *Outline* at VI.C.3 and VI.C.4.b.

Opinion withdrawn:

U.S. v. Garza, 57 F.3d 950 (10th Cir. 1995), was withdrawn from publication Sept. 6, 1995, after a joint motion to dismiss the appeal was granted and the judgment vacated. Parts of the opinion were included in the upcoming September 1995 *Outline* (currently being printed with distribution expected after Oct. 23). The references to *Garza* in sections VI.C.5.c and VI.F.1.b.i should be deleted.

Correction:

The pending amendment to §2D1.1, which requires the use of number of pills rather than gross weight for certain controlled substances, will *not* be retroactive as is stated in the September 1995 *Outline*. Please delete that statement at the top of page 31 in section II.B.1.

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Departures

Mitigating Circumstances

Second Circuit affirms small downward departure for antitrust defendant because his imprisonment would have imposed "extraordinary hardship on the defendant's employees." Defendant was convicted of one count of price fixing and faced a guideline range of 8–14 months, which requires imprisonment for at least half the minimum term. *See* §5C1.1(d). The district court granted defendant's request for a departure of one offense level, which would allow defendant to avoid prison. The court concluded that imprisoning defendant "would extraordinarily impact on persons who are employed by him" and placed defendant on two years' probation, with the first six months in home confinement.

The appellate court affirmed, finding that the departure was legally appropriate and supported by the facts of the case. The court acknowledged that under §2R1.1, the guideline that applied to defendant, "antitrust offenders should generally be sentenced to prison" and that "the business effects of a white collar offender's incarceration generally provide no ground for departure." However, "a district court not only can, but must, consider the possibility of downward or upward departure 'when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest.' . . . Among the permissible justifications for downward departure, we have held, is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties," such as family members under §5H1.6. "The issue before us, then, is whether the facts considered by the district court comprise such 'extraordinary circumstances,' falling outside the heartland envisioned by the Antitrust Guideline. Our *de novo* review . . . makes clear that extraordinary effects on an antitrust offender's employees, 'to a degree[ ] not adequately taken into consideration by the Sentencing Commission,' warrant a downward departure."

The court then held that the district court properly found that defendant's "situation [was] extraordinary when it distinguished his case from other 'high level business people' it had sentenced." The record showed that defendant's remaining "companies' continuing livelihood depends entirely on [his daily] personal involvement, and that, in his absence, [their main creditor] might well withdraw its credit, leading to both companies' immediate bankruptcy and the loss of employment for [at least] 150 to 200 employees." It was not error to find that imprisoning defendant "would have extraordinary effects on his employees to a degree not adequately taken into consideration by the Sentencing Commission. While we agree with our sister circuits that business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate, . . . departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees. As we have noted in similar circumstances, the Sentencing Guidelines 'do not require a judge to leave compassion and common sense at the door to the courtroom.'"

U.S. v. Milikowsky, 65 F.3d 4, 6–9 (2d Cir. 1995).

See *Outline* at VI.C.1.e.

Extent of Departure

Seventh Circuit holds that defendant may appeal calculation of sentencing range even if new range would be above sentence defendant had received after downward departure. The district court determined that defendant's guideline range was 121–151 months. After the government recommended a 25% downward departure for substantial assistance, the court sentenced defendant to 91 months. Defendant appealed, arguing that he should have received a reduction in his offense level for being a minor participant, reducing his guideline range to 100–125 months, and that the 25% departure should have been made from the lower range.

As an initial matter, the appellate court faced "a jurisdictional question: whether a defendant may appeal the computation of his sentencing range, when he already has a sentence below the lower bound of the range he thinks is right." The court said yes, even though the extent of a discretionary departure is normally unreviewable: "Correction of a legal error often leads to a revision in the judgment, and the possibility that the district judge will impose the same sentence does not preclude review. . . . Unless the judge expressly states that he would impose the same sentence whichever range is correct, . . . the defendant has the *potential* for gain on a remand, because the district judge may have meant to grant a substantial discount from the properly calculated range. . . . The treatment of overlapping guideline ranges . . . offers a close parallel—with the difference that instead of two overlapping guideline ranges we have one range plus a zone of reasonable departures. If the district judge had said that he would impose a 91-month sentence whether

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or not he thought Burnett a 'minor' participant, then there would be no point to this appeal. As things stand, however, the actual sentence may be a 'result' of the decision about minor-participant status. . . . It is in the interest of the legal system and defendants alike to ensure that even 'discounted' sentences rest on a legally correct foundation. We therefore conclude that [18 U.S.C.] §3742(a)(2) provides jurisdiction to entertain a claim that an error in the calculation of the guideline range influenced the sentence, whether or not that sentence ultimately falls below the properly calculated range."

However, the court ultimately affirmed the sentence after concluding that defendant's claim to minor participant status was not supported by the facts. Note that two other circuits have addressed this jurisdictional question and reached different conclusions. *Compare U.S. v. Hayes,* 49 F.3d 178, 182 (6th Cir. 1995) (because defendant alleged a "specific legal error," court would review 113-month sentence imposed after §5K1.1 departure even though it was below guideline range that would result if defendant's appeal of §3C1.2 enhancement succeeded; sentence remanded for further findings on whether §3C1.2 should be applied) *with U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (affirmed: although defendant claimed that §3B1.1(a) enhancement was improper and his guideline range should have been 108–135 months rather than 168–210 months, court would not review 84-month sentence imposed after §5K1.1 departure—even if defendant's claim was correct, "his eighty-four month sentence would still represent a downward departure from the applicable guideline range [and] would still be non-reviewable").

U.S. v. Burnett, 66 F.3d 137, 138–40 (7th Cir. 1995).

See *Outline* at VI.D.

General Application

Amendments

Eighth and Ninth Circuits hold that 1991 amendment clarifying that career offender provision does not apply to felon-in-possession offense should be applied retroactively, but amendment to §2K2.1 that increased offense level for that offense cannot. Both defendants committed the offense of being a felon in possession of a firearm, and were sentenced as career offenders, before the Nov. 1991 amendment to §4B1.2's commentary (Amendment 433) "clarified" that the career offender guideline did not apply to that offense. After the amendment was made retroactive (Amendment 469) in Nov. 1992, both defendants sought resentencing. Application of Amendment 433 to the pre-1991 guidelines they were originally sentenced under would significantly lower their sentences, mainly by eliminating application of the career offender provision. Both district courts did apply Amendment 433, but instead of using the offense guideline in effect at the time of defendants' offenses or original sentencing they used a post-Nov. 1991 version of §2K2.1, which had been amended to increase the base offense level for the felon-in-possession offense but was not made retroactive. The courts reasoned that amended §2K2.1 could be used because it did not result in a harsher sentence than what defendants were originally subject to under the pre-Nov. 1991 guideline and then-existing circuit law. Defendants appealed and, following different reasoning, both appellate courts remanded.

The Ninth Circuit held that using the later version of §2K2.1 was an ex post facto violation because it "imposes a base offense level 15 levels higher than that imposed under the 1988 version—resulting in a harsher punishment under the later Guidelines. . . . The government has erroneously assumed that the proper comparison is between the 84-month sentence initially imposed on Hamilton under the 1988 Guidelines and the 77-month sentence imposed upon him at resentencing. This comparison is inappropriate, however, because it is based on the sentencing court's initial sentencing 'error.' . . . [W]hen the sentencing court initially sentenced Hamilton, it erred in calculating his sentence; instead of being sentenced to 84 months, Hamilton should have been sentenced only to 12 to 18 months. Therefore, we must compare the sentence that Hamilton received upon resentencing, 77 months, to the sentence that he should have received originally, 12 to 18 months." To properly resentence defendant, the court held, "the sentencing court is to apply the Guidelines in effect at the time of the offense, but must also consider the clarification provided by Amendment 433. As we conclude that application of the 1993 Guidelines indeed violates the Ex Post Facto prohibition, . . . the sentencing court [must] apply the Guidelines in effect at the time of the offense—the 1988 Guidelines—in light of Amendment 433."

The Eighth Circuit, rejecting the government's argument that Amendment 433 "is plainly inconsistent with both pre- and post-November 1991 law" and should not be applied retroactively, concluded that "the Commission's decision that the change is clarifying and suitable for retroactive use is not at odds with the Guidelines. . . . [T]he amendment raising the base offense level for felon-in-possession is best understood as a decision by the Commission that this crime was too leniently punished under the correct interpretation of its pre-November 1991 Guidelines. . . . Douglas seeks resentencing wholly under the Guidelines version employed by the original district court, but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version. We conclude that Douglas is entitled to the relief that he seeks." Using the later version of §2K2.1, which was not designated for retroactive applica-

tion, would also be inconsistent with §1B1.10, comment. (n.2) (when applying a retroactive amendment, "the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.").

Hamilton v. U.S., 67 F.3d 761, 764–65 (9th Cir. 1995); *U.S. v. Douglas,* 64 F.3d 450, 451–53 (8th Cir. 1995). *But cf. U.S. v. Lykes,* 999 F.2d 1144, 1148–50 (7th Cir. 1993) (not an ex post facto violation to apply amended §2K2.1 and Amendment 433 to defendant sentenced in 1992 for 1990 offense; alternatively, if applying later guideline would violate ex post facto, Amendment 433 would not be applied to 1989 Guidelines because it was a substantive change that conflicted with circuit precedent).

See *Outline* at I.E and IV.B.1.b.

Sentencing Procedure

Waiver of Rights in Plea Agreement

Ninth Circuit upholds unconditional waiver of right to appeal sentence despite change in law between time of plea and sentencing. As part of the plea agreement defendant "waived 'the right to appeal any sentence imposed by the district judge.' The waiver was not conditioned on the imposition of any particular sentence or range." With a downward departure under §4A1.3 because his criminal history score overstated the seriousness of his prior offenses, defendant was sentenced to the 10-year mandatory minimum. After the plea agreement but before defendant was sentenced, Congress enacted 18 U.S.C. §3553(f), which allows drug offenders to be sentenced below applicable mandatory minimum terms if they meet certain requirements. The district court itself raised the issue of whether defendant might qualify, but ultimately ruled that he could not because he had three criminal history points and §3553(f) applies only if defendant "does not have more than 1 criminal history point, as determined under the sentencing guidelines." Defendant appealed, arguing (1) that the district court erred in ruling that he could not qualify for §3553(f) (presumably by departure to a lower criminal history score), and (2) that he should not be held to his waiver because he could not knowingly and intelligently waive the right to appeal the application of a law that did not exist at the time of his plea agreement.

The appellate court held that the waiver was valid and dismissed the appeal. "The temporal scope of an appeal waiver appears to be an issue of first impression in the federal courts. . . . We hold that Johnson's appeal waiver encompasses appeals arising out of the law applicable to his sentencing. On its face, Johnson's waiver does not appear to be limited to issues arising from the law as it stood at the time of his plea: the waiver refers to 'any sentence imposed by the district judge,' not 'any sentence imposed under the laws currently in effect.' Although the sentencing law changed in an unexpected way, the possibility of a change was not unforeseeable at the time of the agreement. Johnson was presumably aware that the law in effect at the time of sentencing, not the time of the plea, would control his sentence if the change in law did not increase his sentencing exposure. . . . Therefore, a waiver of an appeal of 'any sentence' is most reasonably interpreted as intending to waive appeals arising out of the district court's construction of the laws that actually determine Johnson's sentence, regardless of when they were enacted." The court also held that "the waiver could be knowing and voluntary as to laws enacted after the plea was entered into. . . . The fact that Johnson did not foresee the specific issue that he now seeks to appeal does not place that issue outside the scope of his waiver."

U.S. v. Johnson, 67 F.3d 200, 202–03 (9th Cir. 1995).

See *Outline* at IX.A.5.

Fed. R. Crim. P. 35(c)

Second Circuit holds that "imposition of sentence" for purposes of Rule 35(c)'s seven-day limit refers to the oral pronouncement of sentence. Four days after defendant was sentenced, and before written judgment of sentence was entered, the district court entered an order stating that there may be other factors relevant to the sentence that were not accounted for and that it was considering correcting the sentence under Fed. R. Crim. P. 35(c). However, because this could not be accomplished within the seven-day limit of the rule, the court reserved the right to correct the sentence if error was found. Almost six months later, at another sentencing hearing, the district court reconsidered the sentence and departed downward.

The appellate court reversed, holding first that the "correction" in this case—a downward departure—"is clearly outside the scope of the rule. By its terms Rule 35(c) permits corrections of 'arithmetical, technical, or other clear error[s].' . . . Since Abreu-Cabrera's resentencing represented nothing more than a district court's change of heart as to the appropriateness of the sentence, it was accordingly not a correction authorized by Rule 35(c)."

The court also had to answer "the question of whether 'imposition of sentence' refers to the oral pronouncement of a defendant's sentence or the docket entry of a written sentence (which was not done with respect to the oral pronouncement of Abreu-Cabrera's original sentence)," to determine whether Rule 35(c) actually applied here. Reasoning that the purpose of the rule is finality in sentencing, the court held that "a sentence is imposed for purposes of Rule 35(c) on the date of oral pronounce-

ment, rather than the date [the written] judgment is entered. . . . A contrary rule, interpreting the phrase to refer to the written judgment, would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence—a sequence of events we believe to be beyond what the rule was meant to allow." *Accord U.S. v. Townsend,* 33 F.3d 1230, 1231 (10th Cir. 1994) ("sentence is imposed upon a criminal defendant, for purposes of Rule 35(c), when the court orally pronounces sentence from the bench"). *See also U.S. v. Fahm,* 13 F.3d 447, 453 (1st Cir. 1994) ("judgment and docket entry plainly reflect that the twenty-month prison sentence was 'imposed'" for purposes of Rule 35(c)). *But see U.S. v. Clay,* 37 F.3d 338, 340 (7th Cir. 1994) (stating that "date of 'imposition of the sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced"; when district court, after reconsidering original sentence and deciding not to change it, entered final judgment twelve days after oral pronouncement of sentence, "it acted within the time constraints of" Rule 35(c)).

U.S. v. Abreu-Cabrera, 64 F.3d 67, 72–74 (2d Cir. 1995).

See *Outline* at IX.F.

Certiorari granted:

U.S. v. Melendez, 55 F.3d 130 (3d Cir. 1995), *cert. granted,* 64 U.S.L.W. 3340 (U.S. Nov. 6, 1995) (No. 95-5661). "Question presented: Does district court have discretion to depart below applicable statutory minimum sentence when government has filed motion pursuant to Section 5K1.1 for downward departure from applicable range under federal Sentencing Guidelines but government has not filed motion under 18 U.S.C. §3553(e) for departure below statutory minimum?" See also the summary of *Melendez* in 7 *GSU* #10 and the *Outline* at section VI.F.3 (p.196).

Amended opinion:

U.S. v. Camp, 58 F.3d 491 (9th Cir. 1995) [7 *GSU* #11], has been superseded by an amended opinion issued Oct. 3, 1995. The holding remains largely the same but has been narrowed, with the court stressing that the grant of immunity must have been initiated by the state, thereby making the self-incriminating evidence state-induced. This distinguishes the holding from *U.S. v. Eliason,* 3 F.3d 1149, 1153–54 (7th Cir. 1993) and *U.S. v. Roberson,* 872 F.2d 597, 611–12 (5th Cir. 1989), which allowed such evidence to be used where the defendants had actively bargained with the state for the immunity. Please adjust the entries in the *Outline* for *Camp* at sections I.C (p.9) and VI.A.1.c (p.148) as necessary, and change the cite to 66 F.3d 185, 186–87.

Vacated opinion:

U.S. v. Shields, 49 F.3d 707 (11th Cir. 1995), *vacated upon granting of reh'g en banc,* 65 F.3d 900 (11th Cir. 1995). *Shields* was summarized in 7 *GSU* #9 and the *Outline* at section II.B.2 (p.33).

Guideline amendments:

Please delete the note in the *Outline* at section II.B.3 (p.35) regarding the proposed amendment to lower crack sentences. Congress has disapproved the amendments relating to the equalization of crack and powder cocaine sentences and to sentences for money laundering and transactions in property derived from unlawful activity. *See* P.L. 104-38 (Oct. 30, 1995). All other amendments noted in the *Outline* are effective as of Nov. 1, 1995.

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Departures

Mitigating Circumstances

Eleventh Circuit holds that departure may be warranted when use of the statutory maximum under §5G1.1(a) effectively negates the reduction for acceptance of responsibility. Defendant was convicted on two counts that each carried a statutory maximum sentence of four years. Because his guideline range was 135–168 months, he was sentenced to eight years pursuant to §§5G1.1(a) and 5G1.2(d). Defendant argued that the effect of using the statutory maximum as the final sentence was to deprive him of the benefit of the three-level reduction he had received for acceptance of responsibility, that his sentence would have been the same whether he accepted responsibility or not. The district court agreed, but held that it had no authority to depart and had to impose the eight-year sentence.

The appellate court remanded, concluding first that "a district court has the same discretion to depart downward when §5G1.1(a) renders the statutory maximum the guideline sentence as it has when the guideline sentence is calculated without reference to §5G1.1(a). Section 5G1.1(a) is simply the guidelines' recognition that a court lacks authority to impose a sentence exceeding the statutory maximum. Section 5G1.1(a) was not intended to transform the statutory maximum into a minimum sentence from which a court may not depart in appropriate circumstances." *Accord U.S. v. Cook,* 938 F.2d 149, 152–53 (9th Cir. 1991); *U.S. v. Sayers,* 919 F.2d 1321, 1324 (8th Cir. 1990); *U.S. v. Martin,* 893 F.2d 73, 76 (5th Cir. 1990).

The court then held that departure may be considered here. "We find no evidence in the sentencing guidelines, policy statements, or commentary of the Commission that it considered, or recognized the implications of, the interaction of §5G1.1(a) and §3E1.1 in cases such as this. . . . We think that the Commission failed to consider that §5G1.1(a) might operate to negate the §3E1.1 adjustment and undermine the 'legitimate societal interests' served by the adjustment." The court reasoned that "one of the 'legitimate societal interests' served by rewarding a defendant's acceptance of responsibility is providing an incentive to engage in plea bargaining. . . . If a defendant knows that, under §5G1.1(a), he will receive the same sentence regardless of whether he accepts responsibility, he will be more likely to shun plea bargaining and go to trial. . . . Allowing a departure based on acceptance of responsibility in such circumstances preserves the possibility of some sentencing leniency and thus serves society's legitimate interest in guilty pleas and plea bargaining. We hold, therefore, that a district court has the discretion to reward a defendant's acceptance of responsibility by departing downward when §5G1.1(a) renders §3E1.1 ineffectual in reducing the defendant's actual sentence."

U.S. v. Rodriguez, 64 F.3d 638, 642–43 (11th Cir. 1995) (per curiam).

See *Outline* generally at VI.C.5.a.

Second Circuit affirms, with modification, downward departure to allow defendant to enter special in-prison drug treatment program. Defendant pled guilty to two drug counts and faced a sentence of 130–162 months. At sentencing, however, the district court departed downward to the five-year mandatory minimum, partly because it felt defendant had committed the offenses largely to feed his drug addiction and because defendant had participated in a drug education program before sentencing, wanted to continue treatment in prison, and "had a genuine desire for rehabilitation." This sentence was overturned on appeal in *U.S. v. Williams,* 37 F.3d 82, 86 (2d Cir. 1994), with the court holding that defendant's efforts did not satisfy the test set forth in *U.S. v. Maier,* 975 F.2d 944, 946–49 (2d Cir. 1992) (rehabilitative efforts may be considered but must be "extraordinary" and admission to treatment program is not "an automatic ground for" departure).

By the time defendant was resentenced he had completed the drug education program and been accepted into an intensive, pilot treatment program at the federal prison in Butner, N.C. One requirement for admission to the program was that the inmate be 18–36 months away from a confirmed release date. The district court concluded that defendant's "admission to the selective drug treatment program based on objective factors and his subjective willingness to commit to the program regimen was a significant changed circumstance" that would allow departure. The court also "noted that 18 U.S.C. §3553(a)(2)(D) mandates a sentencing court to take account of the defendant's need for 'medical care[] or other correctional treatment in the most effective manner,'" and that without a departure the pilot program would not be available to defendant for several years, if at all. The court imposed the same five-year sentence, which included a 10-year term of supervised release so that "if even once he goes back to the drug life he led before . . . [defendant] will go back to prison for a period of time comparable to that required by the guidelines."

This time the appellate court affirmed the departure, although it remanded for stricter conditions of super-

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vised release. "To say that admission to a drug treatment program is not 'an automatic ground for obtaining a downward departure' . . . is not to say that it can never be the basis for such a departure, provided that there exist other compelling circumstances not adequately considered by the Commission. . . . On remand, the district court did not depart from the guidelines sentencing range of 130 to 162 months simply because Williams had entered a drug treatment program. It departed because, on the facts of this case, there was effectively no other sentence that would accord with the requirements of 18 U.S.C. §3553(a)(2)(D). The district court determined that Williams was an excellent candidate for rehabilitation given his prior history, demeanor, post-arrest resolve, and acceptance into a 'special and selective' treatment program based on criteria devised by experts in the field."

"We believe that the district court had the authority to depart downward in order to facilitate Williams's rehabilitation given the atypical facts of this case, which place it outside the 'heartland' of usual cases involving defendants who may benefit from drug treatment. . . . We clarified in *Williams I* that 'demonstrated willingness' to rehabilitate one's self must be manifested by objective indicia of extraordinary efforts to that end. 37 F.3d at 86. But when a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he has been admitted to a selective and intensive inmate drug treatment program, and when a sentence within the guideline range would effectively deprive him of his only opportunity to rehabilitate himself while incarcerated, we think a departure is within the district court's discretion. If the Sentencing Commission did not give adequate consideration to the mitigating circumstance of drug rehabilitation generally, *Maier*, 975 F.2d at 948, it certainly did not consider the unique constellation of mitigating circumstances in this case."

However, the court concluded that the supervised release term was unreasonable because defendant "could simply withdraw from the Butner program at any time [and] go free at the end of five years while similar defendants who committed similar crimes would serve another six to nine years." The district court should add two special conditions: (1) when defendant's prison term is over, he must "present to his probation officer certification from a drug treatment program at his place of incarceration that he has entered an available program at the first opportunity and remained in this program until the earlier of his release from confinement or the completion of the program, and that he is currently drug-free," and (2) he must submit to drug testing during his supervised release and, if so directed, must continue to participate in an approved drug treatment program.

U.S. v. Williams, 65 F.3d 301, 303–09 (2d Cir. 1995).

See *Outline* at VI.C.4.a.

Offense Conduct

Calculating Weight of Drugs

Tenth Circuit holds that waste by-products should not be included in weight of methamphetamine mixture for mandatory minimum calculation. Defendant pled guilty in 1989 to possession with intent to manufacture methamphetamine. He possessed 28 grams of pure methamphetamine that was combined with waste water in a mixture weighing 32 kilograms, and his 188-month sentence was based on the entire weight of the mixture. In Nov. 1993, §2D1.1, comment. (n.1), was amended to exclude materials, such as waste water, that must be separated from a drug "mixture or substance" before use. The amendment was made retroactive, and defendant filed a motion under 18 U.S.C. §3582(c) for resentencing. The district court granted the motion and sentenced defendant to the 60-month mandatory minimum term required for offenses involving 10 or more grams of methamphetamine. The government argued that the amended guideline definition does not control for purposes of 21 U.S.C. §841(b), and that defendant should receive a 10-year mandatory minimum for possessing "1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine."

The appellate court affirmed. Although in *U.S. v. Killion,* 7 F.3d 927 (10th Cir. 1993), decided before the 1993 amendment, the court had held that the weight of waste by-products may be used to calculate base offense levels under §2D1.1, "we have never specifically interpreted [§841(b)] apart from the guideline to require the inclusion of waste water in its definition of 'mixture or substance.'" The court looked to *Chapman v. U.S.,* 500 U.S. 453 (1991), and its finding "that Congress 'adopted a "market-oriented" approach to punishing drug trafficking,' which punished according to the quantity distributed 'rather than the amount of pure drug involved.' . . . *Chapman*'s recognition of Congress' 'market-oriented' approach dictates that we not treat unusable drug mixtures as if they were usable. . . . This usable/unusable distinction . . . [in defining] 'mixture or substances' for statutory purposes also permits us to refer to the guideline definition and 'adopt a congruent interpretation of the statutory term as an original matter.'" Concluding that there are persuasive reasons to "construe 'mixture or substance' in section 841 to be consistent with the guideline commentary as revised," such as avoiding "unnecessary conflict and confusion," the court held "that section 841 does not include the weight of waste by-products in the measurement of a 'mixture or substance.'"

U.S. v. Richards, 67 F.3d 1531, 1534–38 (10th Cir. 1995) (Baldock, J., dissenting).

See *Outline* at II.B.1.

Sixth Circuit holds that weight of "liquid LSD" should be calculated under amended guideline method, but that *Chapman* still applies to calculation for mandatory minimum. Defendant was originally sentenced on the basis of the total weight of 6.2 grams of a "liquid LSD" mixture, which consisted of 5.1 milligrams of pure LSD dissolved in a liquid. After the Nov. 1, 1993, amendment to §2D1.1 changed the way LSD weight was calculated under the Guidelines (Amendment 488) and was made retroactive, defendant filed a motion for reduction of sentence. The district court denied the motion, holding that Amendment 488 did not apply because the new method involved LSD on a carrier medium and defendant's offense involved liquid LSD without a carrier medium.

The appellate court remanded. Although Amendment 488 does not refer to liquid LSD, "Application Note 18 provides that, in the case of liquid LSD, 'using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.' Guidelines, §2D1.1. By allowing an upward departure in cases where a carrier medium is not used, the Sentencing Commission remains consistent with the market-oriented approach to sentencing for drug crimes. Using the 0.4 milligram standard, rather than the actual weight of the liquid, to measure dosage seems to be the logical means to determine the level of departure. Therefore, Defendant's sentence under the Guidelines must be recalculated accordingly."

Using only the 5.1 milligrams of pure LSD results in a guideline range for defendant of 10–16 months. "If the district court finds that this sentence does not reflect the seriousness of Defendant's offense, it may depart upward by applying the 0.4 milligram standard of Amendment 488. According to the Drug Enforcement Agency, the quantity of pure LSD per dose is 0.05 milligrams. When divided by 0.05 milligrams, the 5.1 milligrams of LSD involved in Defendant's case results in 102 doses of the drug. When the 102 doses are multiplied by Amendment 488's 0.4 milligram standard weight for each dose, the resulting weight is 40.8 milligrams. In this case, no increase in the sentencing level results. The base offense level for less than 50 milligrams of LSD is level 12, requiring a sentence of 10–16 months." *See also U.S. v. Turner,* 59 F.3d 481, 484–91 (4th Cir. 1995) (in light of Amendment 488 and Note 18, use weight of pure LSD in liquid LSD and depart if appropriate; however, if weight of pure LSD cannot be adequately proved, calculate weight by determining number of doses in liquid LSD and multiplying by DEA standardized figure of 0.05 mg of pure LSD per dose) [8 *GSU* #1].

However, because the Sixth Circuit has held "that Amendment 488 does not overrule" *Chapman v. U.S.,* 500 U.S. 453 (1991), "courts should continue to use the entire weight of LSD and its carrier medium to determine the mandatory minimum sentence required by statute, while using the standardized weight to determine the sentencing range provided in the guidelines. . . . When *Chapman* is applied to this case, the weight of the liquid LSD, 6.2 grams, triggers the five year mandatory minimum sentence for Defendant."

U.S. v. Ingram, 67 F.3d 126, 128–29 (6th Cir. 1995).

See *Outline* at II.B.1.

Determining the Sentence

Consecutive or Concurrent Sentences

Seventh Circuit holds that home detention is not a "term of imprisonment" under §5G1.3. When defendant was sentenced in federal court she had served a 14-month state prison term and had been in home detention for over a year on the same offense. The federal court credited the 14-month prison term against her federal sentence because the state offense had been fully accounted for in determining the sentence for the related federal charge; however, the court refused to credit the time spent in home detention. Defendant appealed, arguing that §5G1.3(b) required the court to credit her home detention as an "undischarged term of imprisonment" attributable to offenses "fully taken into account in the determination of the offense level for the instant offense."

The appellate court affirmed the sentence, concluding that "term of imprisonment" must be defined under federal law and that the Guidelines do not treat home detention as imprisonment. Using state definitions "would lead to divergent aggregate sanctions depending on which state the crime occurred in, undermining the most basic purpose of the Sentencing Reform Act of 1984 and the Guidelines themselves. The meaning of 'imprisonment' therefore is a question of federal law, one depending on what states *do* rather than on the labels they attach to their sanctions. . . . 'Imprisonment' is a word used throughout the Guidelines to denote time in a penal institution. . . . Section 7B1.3(d) permits a judge to require a recidivist to serve a period of 'home detention' in addition to a period of 'imprisonment,' showing that the Guidelines distinguish the two. . . . 'Home detention' differs from 'imprisonment' throughout the Guidelines' schema. It is not 'imprisonment' but is a 'substitute for imprisonment.' *See* §5B1.4(b)(20). . . . Unless something in §5G1.3 overrides this understanding, Phipps's sentence is just right." *But cf. U.S. v. French,* 46 F.3d 710, 717 (8th Cir. 1995) (using state law to hold that parole term was an "undischarged term of imprisonment" for §5G1.3(b)).

U.S. v. Phipps, 68 F.3d 159, 161–62 (7th Cir. 1995).

See *Outline* generally at V.A.3.

Supervised Release and Probation

Ninth Circuit holds that courts may not order repayment of court-appointed attorney's fees as condition of supervised release, later holds same for probation. In the first case, the district court ordered as a condition of defendant's supervised release that he repay the Criminal Justice Act attorney's fees expended on his behalf within one year of his release from prison; failure to comply would result in reincarceration. The appellate court reversed. Supervised release is governed by 18 U.S.C. §3583(d), which sets mandatory conditions and "then states that a court may impose additional supervised release conditions that meet the following criteria. First, they must be reasonably related to the factors set forth in §§3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). These factors are: consideration of 'the nature and circumstance of the offense and the history and characteristics of the defendant;' 'to afford adequate deterrence to criminal conduct;' 'to protect the public from further crimes of the defendant;' and 'to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner.' . . . The recoupment order simply bears no relationship to any of these goals. It is not related to Eyler's underlying criminal conduct—unlawful possession of firearms—and has no rehabilitative effects. Nor does it further any deterrence goals, protect the public from future crimes, or provide Eyler with any training or treatment. . . . The discretion of a district court to impose conditions of supervised release that it considers appropriate is limited by the express provisions of §3853(d). A condition that a defendant repay CJA attorneys fees violates these provisions and, accordingly, exceeds the district court's authority."

U.S. v. Eyler, 67 F.3d 1386, 1393–94 (9th Cir. 1995).

See *Outline* at V.C.

In the later case, defendant was sentenced to probation with the condition that he repay his CJA attorney's fees within one year. The appellate court reversed. "The statute governing probation, 18 U.S.C. §3563, . . . allows for the imposition of discretionary conditions as long as they are reasonably related to the purposes of sentencing in 18 U.S.C. §3553(a)(1) & (2)." Reimbursement of attorney's fees is not a mandatory condition of probation, and in the case above the court held that it is not reasonably related to the goals of §§3553(a)(1) and (a)(2)(B)–(D). "Therefore, the question before us is whether the repayment of attorney's fees is reasonably related to [the purposes of] 18 U.S.C. §3553(a)(2)(A), and whether it involves only such deprivation of liberty or property as is reasonably necessary to accomplish the purposes of sentencing. We conclude that repayment of attorney's fees is not a valid condition of probation because it is not reasonably related 'to the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,' 18 U.S.C. §3553(a)(2)(A). We also conclude that because the government has a number of other less drastic means by which it can enforce a court order to repay attorney's fees, conditioning probation on repayment of fees is not reasonably necessary to any legitimate sentencing objective."

U.S. v. Lorenzini, No. 94-30409 (9th Cir. Dec. 13, 1995) (Reinhardt, J.) (Fernandez, J., dissenting). Cases before the Sentencing Reform Act of 1984 took effect split on whether former 18 U.S.C. §3561 authorized repayment of attorney's fees as a condition of probation. *Compare U.S. v. Gurtunca,* 836 F.2d 283, 287–88 (7th Cir. 1987) (authorized, but lack of funds would be defense against revocation for nonpayment) *and U.S. v. Santarpio,* 560 F.2d 448, 455–56 (1st Cir. 1977) (same—"the condition cannot be enforced so as to conflict with Hamperian's sixth amendment rights; if Hamperian is unable to pay the fees, revocation of probation for nonpayment would be patently unconstitutional") *with U.S. v. Jimenez,* 600 F.2d 1172, 1174–75 (5th Cir. 1979) (§3561 does not allow for reimbursement as condition of probation).

See *Outline* generally at V.B.

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Offense Conduct

Calculating Weight of Drugs

Supreme Court reaffirms *Chapman*, holds that LSD carrier medium is included in weight calculation for mandatory minimum. In *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), the Supreme Court held that the weight of the carrier medium is included when determining the weight of LSD for mandatory minimum sentences under 21 U.S.C. §841(b)(1). After *Chapman*, the Guidelines were amended to provide a new method of establishing the weight of LSD based on the number of doses and an assigned weight per dose, rather than using the actual weight of whatever carrier medium was used. *See* §2D1.1(c)(H) & comment. (n.16) (formerly n.18, effective Nov. 1, 1993). Petitioner in this case was originally sentenced to 192 months before the Guidelines were amended and was subject to a mandatory 10-year minimum term because the combined weight of the LSD and blotter paper exceeded 10 grams. After the amendment was made retroactive, he petitioned for resentencing under the new guideline method and argued that this method should also be used for the §841(b)(1) calculation. His guideline range was reduced to 70–87 months (based on 4.58 grams of LSD under the new method), but the district court held that *Chapman* still applied for the mandatory minimum and sentenced petitioner to 10 years. The Seventh Circuit affirmed. *See U.S. v. Neal,* 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc).

The Supreme Court unanimously affirmed. "While acknowledging that the [Sentencing] Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman.* In any event, principles of stare decisis require that we adhere to our earlier decision. . . . Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities . . . . We, however, do not have the same latitude to forsake prior interpretations of a statute. True, there may be little in logic to defend the statute's treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers. . . . Even so, Congress, not this Court, has the responsibility for revising its statutes. . . . We hold that §841(b)(1) directs a sentencing court to take into account the actual weight of the blotter paper with its absorbed LSD, even though the Sentencing Guidelines require a different method of calculating the weight of an LSD mixture or substance."

Neal v. U.S., No. 94-9088 (U.S. Jan. 22, 1996) (Kennedy, J.).

See *Outline* at II.B.1.

Possession of Weapon by Drug Defendant

Ninth Circuit holds that §2D1.1(b)(1) enhancement cannot be given to defendant acquitted on §924(c) charge. Defendant was convicted of a drug offense but acquitted on a charge of using or carrying a firearm in relation to that offense, 18 U.S.C. §924(c). At sentencing, he received the §2D1.1(b)(1) enhancement for possessing a weapon during a drug offense. He appealed, arguing that acquittal on a §924(c) charge precludes application of §2D1.1(b)(1), a claim rejected by all circuits that have considered the issue. See cases in *Outline* at section II.C.4.

However, the appellate court agreed with defendant and reversed, reasoning that in *U.S. v. Brady,* 928 F.3d 844, 851 (9th Cir. 1991), it had held that "a district court sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." The court rejected the government's argument that "the district court's determination that Watts possessed a firearm is not a reconsideration of facts rejected by the jury, because the jury could have acquitted Watts on the section 924(c) charge because it believed that Watts possessed a firearm during the offense but that the firearm was not connected to the offense. . . . The connection of a firearm to the offense of conviction, although not an *element* of the weapon enhancement under the Guidelines, is nonetheless relevant. The commentary to U.S.S.G. §2D1.1(b)(1) provides an exception to the enhancement if the defendant can show that 'it is clearly improbable that the weapon was connected with the offense.' . . . Thus, the connection between the firearm and the predicate offense is relevant under both the sentencing enhancement and section 924(c); the only difference between U.S.S.G. §2D1.1(b)(1) and section 924(c) is the assignment and standard of the burden of proof regarding this connection. We held in *Brady* that a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted."

U.S. v. Watts, 67 F.3d 790, 796–98 (9th Cir. 1995). *Cf. Bailey v. U.S.,* 116 S. Ct. 501, 506 (1995) ("conviction for 'use' of a firearm under §924(c)(1) requires more than a showing of mere possession").

See *Outline* at I.A.3 and II.C.4.

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Departures

Mitigating Circumstances

Second Circuit affirms downward departure in "close case," deferring to district court's "better feel" for the circumstances. Defendant was convicted of 22 counts involving fraudulent conduct against the government. A vice president of Grumman Data Systems Corp., he negotiated a contract with NASA. However, he violated federal contracting law by not truthfully disclosing certain pricing data that led to a significant—and illegal—financial benefit to Grumman. The sentencing judge departed downward by seven levels, partly because the calculated loss "significantly . . . overstate[d] the seriousness of the defendant's conduct." *See* §2F1.1, comment. (n.7(b)). The judge also concluded that there were mitigating circumstances that warranted departure under §5K2.0, namely that "(i) Broderson had sought only to benefit his employer, Grumman, and had received no personal benefit from the fraud; (ii) under existing market conditions, the contract was favorable to the government; and (iii) the government received restitution from Grumman."

Although the appellate court remanded on another sentencing issue, it rejected the government's challenge to the downward departure and concluded that the circumstances here fell "outside the 'heartland' of fraud cases. In addressing that issue, we adopt then-Chief Judge Breyer's analysis in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993). . . . The departure in the present case can be justified, if at all, only as a 'discouraged departure.' Ordinarily, payment of restitution is not an appropriate basis for downward departure under Section 5K2.0 because it is adequately taken into account by Guidelines Section 3E1.1, dealing with acceptance of responsibility. . . . Nor is lack of personal profit ordinarily a ground for departure, because the Commission generally took that factor into account in drafting the Guidelines. . . . Finally, the fact that the contract was favorable to NASA given existing market conditions arguably does not mitigate Broderson's failure to observe [federal contract] obligations."

"Nevertheless, we also recognize the district court's 'better "feel" for the unique circumstances of the particular case before it,' *Rivera,* 994 F.2d at 951, and 'special competence' in determining whether that case falls within the 'heartland.' *Id.* . . . Judge Mishler concluded that this confluence of circumstances was not taken into account by the Guidelines . . . and that the loss calculation . . . overstated the seriousness of Broderson's offense . . . . Although we regard the case as a close one, we believe that Judge Mishler was within his discretion in downwardly departing and that the departure was reasonable. We agree with *Rivera* that courts of appeals should recognize that they hear relatively few Guidelines cases compared to district courts and that district courts thus have a 'special competence' in determining whether a case is outside the 'heartland.' 994 F.2d at 951. Although we might have reached a contrary decision . . . , we acknowledge that there are grounds on which his violation of [these laws] are distinguishable from classic instances of fraud. We thus defer to Judge Mishler's view of the case."

U.S. v. Broderson, 67 F.3d 452, 458–59 (2d Cir. 1995).

See *Outline* at VI.C.3, 5.a, and X.A.1.

Criminal History

Career Offender Provision

First Circuit upholds amendment to definition of "Offense Statutory Maximum." The career offender guideline, §4B1.1, uses a defendant's "Offense Statutory Maximum" sentence for the offense of conviction in determining the applicable offense level. The phrase was first defined in a Nov. 1989 amendment to §4B1.1's commentary as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." Some circuits held that the maximum included applicable statutory enhancements that increased the statutory maximum sentence, like those in 21 U.S.C. §841(b)(1). Amendment 506, effective Nov. 1, 1994, changed the definition to specify that the maximum does "not includ[e] any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* §4B1.1, comment. (n.2). This amendment was made retroactive under §1B1.10(c).

Ruling in four cases that were consolidated for this appeal, the appellate court upheld the changed definition, concluding that it is a reasonable interpretation of the statute that authorized the career offender guideline, 28 U.S.C. §994(h). That section instructs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for [career offenders]." Looking at the language of the statute and the legislative history, the court found "no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in section 994(h)." In such a case, "an interpretation by the agency that administers it will prevail as long as the interpretation is reasonable under the statute. . . . We believe that the Commission's act in defining 'maximum' to refer to the unenhanced maximum term of imprisonment . . . furnishes a reasonable interpretation of section 994(h). The statute explicitly refers to 'categories of defendants,' namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests."

In one of the cases on appeal, the district court agreed that the new definition was valid but declined to apply it retroactively to reduce defendant's sentence. The appellate court held that the district court properly acted

within the discretion granted under §1B1.10(a) and 18 U.S.C. §3582(c)(2) in choosing not to reduce the sentence. Another sentence that had been reduced was affirmed, and the two where the district court held that Amendment 506 was invalid were remanded.

U.S. v. LaBonte, 70 F.3d 1396, 1403–12 (1st Cir. 1995) (Stahl, J., dissenting).

See *Outline* at IV.B.3.

Sentencing Procedure

Plea Bargaining

Eighth Circuit holds that district court may not defeat purposes of plea agreement by departing upward based on dismissed charge. Under a plea agreement, defendant pled guilty to both conspiracy to transfer and aiding and abetting the transfer of stolen property in interstate commerce. The parties anticipated the guideline range would be 24–30 months, with a total offense level of 13, and the government agreed to file a §5K1.1 motion. However, they discovered that defendant's guilty plea to conspiracy would lead to a significantly longer sentence because the plea included a stipulation that defendant participated in an armed robbery related to the offense—that would require use of the guideline for armed robbery (level 26) and a guideline range of 70–87 months. Defendant and the government reached a new agreement whereby defendant would withdraw his plea to the conspiracy and the government would dismiss that count at sentencing. The district court followed the parties' calculations in reaching a 24–30 month range, but departed upward under §5K2.0 on the ground that defendant's participation in the armed robbery was relevant conduct that was not adequately reflected in the guideline sentence. The court also departed downward on the government's §5K1.1 motion and, without explaining how it apportioned the two departures, sentenced defendant to 30 months.

The appellate court remanded. "The sentencing court erred in considering conduct from the dismissed count as the basis for an upward departure under section 5K2.0 in clear opposition to the intentions of the parties as embodied in their plea agreement. A contrary rule would allow the sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration. . . . Permitting sentencing courts to accept a defendant's guilty plea and yet disavow the terms of and intent behind the bargain . . . would bring an unacceptable level of instability to the process. Unquestionably, the district courts may consider conduct from uncharged or dismissed counts for certain purposes under the guidelines," such as adjustments and other specific offense characteristics, and for criminal history departures under §4A1.3(e). "The circuit courts are divided, however, on the question of whether conduct from dismissed counts may be used as a basis for an upward departure under section 5K2.0. Although we note that each case implicates a different constellation of variables under the guidelines, our holding is generally consistent with the Third and Ninth Circuits." *See U.S. v. Thomas,* 961 F.2d 1110, 1120–22 (3d Cir. 1992); *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1082 (9th Cir. 1990). "The court was not entitled to defeat the parties' expectations by imposing a more severe sentence using Harris's role in the armed robbery that preceded the offense of conviction to depart upward pursuant to §5K2.0. For that reason, we remand the case to the district court with instructions either to resentence Harris in a manner consistent with this opinion or to reject the plea agreement and allow Harris the opportunity to withdraw his plea as directed by [Fed. R. Crim. P.] 11(e)(4)."

U.S. v. Harris, 70 F.3d 1001, 1003–04 (8th Cir. 1995).

See *Outline* at IX.A.1.

Violation of Supervised Release

Sixth Circuit holds that court may consider need for drug rehabilitation in setting length of revocation sentence, but may not order defendant to participate in intensive in-prison drug treatment program. Defendant was originally sentenced to three years' probation. His probation was revoked for drug use and he was sentenced to six months' imprisonment, followed by three years of supervised release. His supervised release was revoked under 18 U.S.C. §3583(g) because he possessed cocaine; he had also failed to complete a required drug treatment program. By the time he was sentenced for the revocation, defendant had been jailed for six months, and his recommended sentence under USSG §7B1.4 was only 3–9 months. "The District Court expressed concern that if defendant were sentenced to a term of nine months he would only be incarcerated an additional three months, a period not long enough to insure his completion of a prison drug treatment program." Therefore, because of defendant's extensive history of drug use and drug-related problems, the court "imposed a sentence of sixteen months with the requirement that defendant participate in an intensive drug treatment program while in custody." Defendant appealed the length of sentence and the required treatment.

The appellate court upheld the length of sentence but not the order for treatment. "Unlike the statutory provisions governing initial sentencing and sentencing upon permissive revocation of supervised release, the statutory provisions governing mandatory revocation of supervised release neither instruct nor prohibit the sentencing court from considering rehabilitative goals in determining the length of a sentence upon mandatory revocation of supervised release. [*See* 18 U.S.C. §§3553(a), 3583(e), and 3583(g).] However, we can identify no reason that a court sentencing a defendant upon mandatory revocation of supervised release should not be able to consider rehabilitative goals in arriving at the length of a sentence

while a court imposing either an initial sentence [within the guideline range] or a sentence upon permissive revocation of supervised release may properly consider that need." Therefore, "a district court may properly consider a defendant's rehabilitative needs in setting the length of imprisonment within the range prescribed by statute."

However, the drug treatment requirement was not authorized. "Although statute and federal regulations do not squarely address whether it is within the sentencing court's authority to order a defendant's participation in a drug rehabilitation program, they do indicate that it is solely within the authority of the Federal Bureau of Prisons ('Bureau') to select those prisoners who will be best served by participation in such programs. . . . Therefore, we conclude that it was beyond the District Court's authority to order defendant's participation in a drug treatment program while incarcerated." However, the district court "may recommend that a prisoner receive drug rehabilitation treatment while incarcerated," and on remand it may "amend its order to recommend rather than mandate defendant's participation."

U.S. v. Jackson, 70 F.3d 874, 877–81 (6th Cir. 1995).

See *Outline* at VII.B.1 and 2.

General Application

Sentencing Factors

Ninth Circuit supersedes prior decisions in *Camp,* holds that state-immunized testimony that was not compelled may be used for departure. In a state proceeding unrelated to the instant federal offense, defendants were granted transactional immunity for all offenses relating to a 1979 shooting death. When defendants were later sentenced in federal court, the district court found that defendants' roles in the 1979 death warranted upward departure under §4A1.3. The appellate court originally remanded, holding that defendants' state transactional immunity required there be "an independent, legitimate source" regarding defendants' role in the death before that evidence could be used for federal sentencing. *See U.S. v. Camp,* 58 F.3d 491, 492–93 (9th Cir. 1995). That opinion was later amended, with the court stressing that the grant of immunity must have been initiated by the state so that the self-incriminating information was state-induced. *U.S. v. Camp,* 66 F.3d 185 (9th Cir. 1995), *withdrawn,* 66 F.3d 187 (9th Cir. 1995).

The court has now amended the original opinion to affirm the sentence, holding that "a federal court may consider information revealed by a defendant in exchange for state transactional immunity." The court concluded that the rule of *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 79 (1964), limiting the use of incriminating information given by a state witness, "applies only if the witness [was] compelled to testify. Otherwise, there are no Fifth Amendment implications. . . . It does not appear that the Camps were constrained in any way to accept the state's offer of immunity." They "had the option to remain silent," and "the record does not suggest that any negative consequences would have followed if [they] had invoked the privilege. . . . Absent any Fifth Amendment implications, the Camps' immunity agreement had the same effect as a cooperation agreement. A sentencing judge has discretion to depart upward when the defendant's criminal history category is inadequate because 'for appropriate reasons, such as cooperation . . . [he] had previously received an extremely lenient sentence for a serious offense.' USSG §4A1.3, p.s. An upward departure is similarly appropriate here. Because they were never charged in connection with [the] death, the Camps' criminal history categories do not reflect gravely serious criminal conduct. The court did not err in taking that conduct into account at sentencing."

U.S. v. Camp, No. 94-30292 (9th Cir. Dec. 22, 1995) (Wright, J.).

See *Outline* at I.C and VI.A.1.c.

Note: Readers should delete the entries for *Camp* in the *Outline* at sections I.C (p. 9) and VI.A.1.c (p.148), 7 *GSU* #11 (p.3), and 8 *GSU* #2 (p.4).

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Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that §3553(f)(5) requires a defendant to divulge all known information about the offense and related conduct, not just defendant's own conduct. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. The district court departed downward from the 10-year mandatory minimum after concluding that, because defendant wrote a letter detailing his own involvement in the conspiracy, he qualified for the "safety valve" departure under 18 U.S.C. §3553(f), USSG §5C1.2. The government appealed, arguing that defendant's refusal to talk about others involved in the conspiracy violated the requirement in §3553(f)(5) to "truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The government claimed that a defendant must "tell the government all he knows about the offense of conviction and the relevant conduct, including the identities and participation of others," but defendant argued that he need only detail his own personal involvement in the crime.

The appellate court agreed with the government and remanded. "The phrase 'all information and evidence' is obviously broad. The Application Notes to §5C1.2 define 'offense or offenses that were part of the same course of conduct or of a common scheme or plan' to mean 'the offense of conviction and all relevant conduct.' USSG §5C1.2, comment. (n.3). 'Relevant conduct' has in turn been defined to include 'in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' USSG §1B1.3(a)(1)(B). Thus, the guidelines appear to require disclosure of 'all information' concerning the offense of conviction and the acts of others if the offense of conviction is a conspiracy or other joint activity. As applied to Mr. Acosta-Olivas, the guideline would therefore require disclosure of everything he knows about his own actions and those of his co-conspirators." The court rejected defendant's argument that this interpretation essentially duplicates USSG §5K1.1, noting that under §3553(f) the decision is made by the court and does not require a government motion, and the information does not have to be "relevant or useful" to the government.

"We therefore hold that the district court erred in interpreting §3553(f)(5) to require a defendant to reveal only information regarding his own involvement in the crime, not information he has relating to other participants. . . . If, at resentencing, the court makes a factual finding that, in deciding what information to disclose to the government, Mr. Acosta-Olivas relied upon the district court's interpretation of §3553(f)(5), the court shall allow him the opportunity to comply with the statute as this court has interpreted it in this opinion."

U.S. v. Acosta-Olivas, 71 F.3d 375, 377–80 (10th Cir. 1995).

Seventh Circuit holds that §3553(f) requires affirmative offer of information by defendant, does not duplicate USSG §3E1.1, and does not violate Fifth Amendment rights. Defendant pled guilty to conspiracy to distribute crack cocaine and was sentenced to a 10-year mandatory minimum term. He argued that he qualified for a lower term under 18 U.S.C. §3553(f) because he stipulated to the facts of the offense in his plea agreement and the government never requested additional information. The district court denied his §3553(f) motion, however, because defendant made no further attempts to cooperate with the government and reveal additional details of the offense.

The appellate court affirmed, concluding that "§3553(f) was intended to benefit only those defendants who truly cooperate. Thus, to qualify for relief under §3553(f), a defendant must demonstrate to the court that he has made a good faith attempt to cooperate with the authorities. . . . Although he stipulated to the basic details of his offense conduct, he made no further efforts to cooperate. He failed to respond to a proffer letter sent by the government outlining the terms that would apply (*e.g.,* limited immunity) if he provided additional information. Furthermore, he did not initiate any contact with government officials offering to provide details of his involvement in drug dealing. Specifically, the government notes that [defendant] could have at least provided the name of the 'source' who sold him the crack cocaine. Before granting relief under §3553(f), the court may reasonably require a defendant to reveal information regarding his chain of distribution. . . . [I]t is [defendant's] duty to satisfy the court that he has 'truthfully provided to the Government all [of the] information and evidence . . . [that he] has concerning the offense.' . . . Although [defendant] is not required to provide information that the government expressly states that it does not want, he at least must offer what he has." *See also U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "con-

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templates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court also rejected defendant's claim that it was inconsistent to deny his §3553(f) motion after granting him the three-level reduction for acceptance of responsibility under §3E1.1, which required him to "truthfully admit[] the conduct comprising the offense(s) of conviction." "Although §3E1.1(a) forbids a defendant from falsely denying relevant conduct, . . . it imposes no duty on a defendant to volunteer any information aside from the conduct comprising the elements of the offense. . . . In contrast, §3553(f) states that a defendant must disclose 'all information' concerning the course of conduct—not simply the facts that form the basis for the criminal charge. Accordingly, the district court correctly held that §3553(f)(5) requires more than §3E1.1(a)."

Defendant's final argument, that requiring him to volunteer information of his criminal conduct beyond the offense of conviction violates his Fifth Amendment right against self-incrimination, also failed. "[R]equiring defendants to admit past criminal conduct in order to gain relief from statutory minimum sentences does not implicate the right against self-incrimination. In a similar line of cases, we have held that requiring a defendant to admit criminal conduct related to but distinct from the offense of conviction in order to gain a reduction for acceptance of responsibility does not implicate the Fifth Amendment" because it does not penalize defendants but denies a benefit. "The same is true of §3553(f), which requires a defendant to provide complete and truthful details concerning his offense in order to qualify for a sentence below the statutory minimum."

U.S. v. Arrington, 73 F.3d 144, 148–50 (7th Cir. 1996).

Second and Ninth Circuits hold that downward criminal history departure for defendant with more than one criminal history point cannot qualify defendant for §3553(f). In the Second Circuit, defendant faced a five-year mandatory minimum on a cocaine charge. He had four criminal history points, but the district court concluded that overrepresented his criminal history and departed under §4A1.3 to criminal history category I, which resulted in a guideline range of 57–71 months. The court imposed a 60-month sentence after rejecting defendant's argument that he qualified for a departure under 18 U.S.C. §3553(f) because the departure effectively left him with only one criminal history point.

The appellate court affirmed. "Section 3553(f) states that the safety-valve provision is to apply only where 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.'" The relevant guideline, §5C1.2, has commentary that "interprets this passage to mean 'more than one criminal history point as determined under §4A1.1 (Criminal History Category).' U.S.S.G. §5C1.2 comment. (n.1). Section 4A1.1 is the schedule that specifies how a sentencing court should calculate a defendant's criminal history points. It is not disputed that Resto has four criminal history points, as determined under §4A1.1. Notwithstanding that the sentencing judge elected to depart by treating Resto as falling in Criminal History Category I, rather than Category III where his four points originally placed him, he nonetheless has four criminal history points. He is thus ineligible for the safety valve provision of §3553(f)."

U.S. v. Resto, 74 F.3d 22, 27–28 (2d Cir. 1996).

The Ninth Circuit defendant was convicted of a methamphetamine offense and faced a 10-year mandatory minimum. He had two criminal history points under §4A1.2(c)(1) for two offenses of driving with a suspended license, and was thus ineligible for departure under §3553(f). The district court held that criminal history category II overrepresented defendant's criminal history and departed under §4A1.3 to category I and a guideline range of 108–135 months, but concluded that this did not make defendant eligible for a §3553(f) departure and sentenced him to 120 months.

The appellate court agreed and affirmed. Under §3553(f)(1) the district court "must find *inter alia* that 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.' . . . Section 3553(f) is not ambiguous. It explicitly precludes departure from the mandatory minimum provisions of 21 U.S.C. §841 if the record shows that a defendant has more than one criminal history point. . . . Assuming arguendo that there is merit to [defendant's] argument that a mandatory minimum sentence should not be imposed where the criminal history category overrepresents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

U.S. v. Valencia-Andrade, 72 F.3d 770, 773–74 (9th Cir. 1995).

See *Outline* generally at V.F for all cases above.

Departures

Mitigating Circumstances

First Circuit holds departure may be considered when enhancement based on acquitted conduct mandates life sentence. Defendant was tried in state court for murder and was acquitted. Later he was indicted in federal court on firearms and other charges arising out of the murders. Convicted on two counts, defendant was sentenced under §2K2.1 (Nov. 1990) for the firearms offense. Section 2K2.1(c)(2) directed that if defendant "used or possessed the firearm in connection with the commission or attempted commission of another offense, apply §2X1.1 . . . in respect to that other offense, if the resulting offense level is greater than that determined above." The court

found that the murders were "another offense," that defendant had committed the murders, and that the "object offense" for purposes of §2X1.1 was first degree murder. That gave defendant an offense level of 43, which, because he qualified for no reductions, mandated a sentence of life imprisonment. (Later versions of the Guidelines give the same result.) Defendant's sentence on the firearms count without applying §2K2.1(c)(2) would have been 30–37 months, but his total sentence would have been 262–327 months because he qualified as an armed career criminal on the other count.

The appellate court rejected defendant's claim that the method by which the sentence was reached violated due process, but held that the district court erred in thinking it did not have discretion to consider downward departure in this situation. Noting that the Supreme Court "has cautioned against permitting a sentence enhancement to be the 'tail which wags the dog of the substantive offense,'" the court concluded that this was such a case. "The effect here has been to permit the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections such as the requirement of proof beyond a reasonable doubt. . . . When put to that proof in state court, the government failed. The punishment imposed in view of this other conduct far outstripped in degree and kind the punishment Lombard would otherwise have received for the offense of conviction." Under §2K2.1 "the cross-reference to the first-degree murder guideline essentially *displaced* the lower Guidelines range that otherwise would have applied. As a result, the sentence to be imposed for Lombard's firearms conviction was the same as the sentence that would have been imposed for a federal murder conviction: a mandatory term of life. Despite the nominal characterization of the murders as conduct that was considered in 'enhancing' or 'adjusting' Lombard's firearms conviction, the reality is that the murders were treated as the gravamen of the offense." The court also noted that "in *no circumstances* under Maine law would Lombard have been subject to a *mandatory* life sentence. . . . We would be hard put to think of a better example of a case in which a sentence 'enhancement' might be described as a 'tail which wags the dog' of the defendant's offense of conviction."

Following the principles governing departure set forth in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993), the court held that "the district court had authority to avoid any unfairness in Lombard's sentence through the mechanism of downward departure. . . . The facts and circumstances of this case present a whole greater than the sum of its parts and distinguish it, from a constitutional perspective, from other cases that have involved facially similar issues. The specific question from the perspective of the Guidelines and under U.S.S.G. §5K2.0 is whether these features of the case—*e.g.,* the state court acquittal and the fact that the federal sentence may exceed any state sentence that would have attached to a murder conviction; the paramount seriousness of the 'enhancing conduct'; the magnitude of the 'enhancement'; the disproportionality between the sentence and the offense of conviction as well as between the enhancement and the base sentence; and the absence of a statutory maximum for the offense of conviction—taken in combination, make this case 'unusual' and remove it from the 'heartland' of the guideline (§2K2.1) that yielded the mandatory life sentence. This case is outside the 'heartland.'"

U.S. v. Lombard, 72 F.3d 170, 174–87 (1st Cir. 1995).

See *Outline* generally at VI.C.5.a.

Sixth Circuit remands to consider downward departure based on coercion or duress. Defendant and her husband committed bank fraud in several states. She pled guilty to bank fraud, conspiracy, and firearms violations, and was sentenced to 46 months. The record indicated that defendant "has significant emotional problems and a history of drug and alcohol abuse associated with her experience of sexual and emotional abuse as a child. She also appears to have suffered serious physical and emotional abuse at the hands of Mr. Hall (her husband). Her reports of violence and gun-threats by Mr. Hall were corroborated by him in letters he wrote to her from prison." The appellate court noted that "[i]t would not be unreasonable to conclude that her husband beat and cajoled her into submission to his will," and a psychological evaluation of defendant described her as suffering from "post traumatic stress disorder" and "Battered Person Syndrome." On appeal, defendant argued that the district court failed to recognize its discretion to consider these circumstances as a basis for downward departure.

The appellate court agreed and remanded, holding that "there is overwhelming evidence that the Defendant's criminal actions resulted, at least in part, from the coercion and control exercised by her husband. On the record before us, she had not been involved in any bank fraud schemes before she met Mr. Hall, and, according to the forensics evaluation of the Bureau of Prisons, she continued her criminal activity only after he threatened to kill himself, to kill her, to hurt their friends and pets, and to commit bank robbery using violent means. . . . His own letters to Ms. Hall from prison describe scenes from the past in which he threatened her with a gun. . . . These circumstances indicate that a departure may be appropriate under U.S.S.G. §5K2.12, which permits departure because of serious coercion not amounting to a complete defense . . . . The failure of the probation report and the district court to take note of these circumstances or to discuss this issue indicates that it was not aware of the applicability of §5K2.12 and of its discretion to depart downward. It must consider coercion as a basis for depar-

ture. We therefore remand to the district court to make findings of fact and conclusions of law as to whether downward departure is appropriate for this Defendant, noting in particular the coercive effect of her husband's abuse in light of her related emotional problems."

U.S. v. Hall, 71 F.3d 569, 570–73 (6th Cir. 1995).

See *Outline* at VI.C.4.a.

D.C. Circuit rejects sentencing entrapment claim. Defendants were convicted on charges relating to four crack cocaine sales to undercover agents and, because of the amount involved and prior convictions, received mandatory life sentences under 21 U.S.C. §841(b). They argued that they should have been sentenced as if they sold powder cocaine rather than crack because the agents had insisted that the cocaine be in the form of crack and, at the first sale, refused to buy the powder cocaine defendants tried to sell until defendants found someone to "cook" it into crack. At trial, when one of the agents was asked why they insisted on crack rather than powder, he stated: "Well, crack cocaine is less expensive than [powder] cocaine, and we felt like through our investigation, that it takes fifty grams of crack cocaine to get any target over the mandatory ten years." Defendants claimed this demonstrated sentencing entrapment by the government.

The appellate court rejected defendants' claims and indicated that it did not view sentencing entrapment as a viable defense. "The theory appears to be that if the government induces a defendant to commit a more serious crime when he was predisposed to commit a less serious offense, the defendant should be sentenced only for the lesser offense. . . . But the Supreme Court has warned against using an entrapment defense to control law enforcement practices of which a court might disapprove. . . . The main element in any entrapment defense is rather the defendant's 'predisposition'—'whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime.' . . . Persons ready, willing and able to deal in drugs—persons like [defendants]—could hardly be described as innocents. These defendants showed no hesitation in committing the crimes for which they were convicted. Alone, this is enough to destroy their entrapment argument."

The court also rejected the possibility of an "outrageous-conduct defense" to reduce a statutorily-mandated sentence. If the government's conduct were so outrageous as to violate due process it would preclude prosecution. If the conduct was not that outrageous—"if, in other words, there was no violation of the Due Process Clause—it follows that those actions cannot serve as a basis for a court's disregarding the sentencing provisions."

U.S. v. Walls, 70 F.3d 1323, 1328–30 (D.C. Cir. 1995). *See also U.S. v. Miller,* 71 F.3d 813, 817–18 (11th Cir. 1996) (remanded: reiterating earlier holding "that sentencing entrapment is a defunct doctrine" and rejecting theory of "partial entrapment," holding district court could not sentence defendant as if he had sold powder instead of crack cocaine—defendant was clearly disposed to sell cocaine and arranged sale of crack after initial deal for powder fell through). *But see U.S. v. McClelland,* 72 F.3d 717, 725–26 (9th Cir. 1995) (affirming "imperfect entrapment" departure for defendant convicted in murder-for-hire attempt—although defendant initiated plan to kill his wife, he repeatedly expressed reluctance to carry it out and only went forward after the undercover informant defendant had asked to do the killing "repeatedly pushed McClelland to go forward").

See *Outline* at VI.C.4.c.

Note to Readers:

Beginning this year the Center will publish *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* once per year, instead of twice as we have in the past. We anticipate that the next issue will be distributed in July or August.

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Determining the Sentence

"Safety Valve" Provision

Fourth, Fifth, Sixth, and Eighth Circuits hold that defendant has burden of providing information to government to qualify for §3553(f) departure. The Fourth Circuit defendant was denied a downward departure under 18 U.S.C. §3553(f) and USSG §5C1.2 because he never "truthfully provided to the Government all information and evidence" he had about the marijuana conspiracy he pled guilty to. He argued on appeal that he was entitled to the departure because he was ready to provide information, but the government never asked for it.

The appellate court disagreed and affirmed. "Section 3553(f)(5) requires more than accepting responsibility for one's own acts; rather, satisfaction of §3553(f)(5) requires a defendant to disclose all he knows concerning both his involvement and that of any co-conspirators." Even if the information would be of no use to the government, "§3553(f)(5) requires a defendant to 'truthfully *provide to the Government* all information . . . concerning the offense.' 18 U.S.C. §3553(f)(5) (emphasis added). We believe this plain and unambiguous language obligates defendants to demonstrate, through affirmative conduct, that they have supplied truthful information to the Government." *Accord U.S. v. Arrington,* 73 F.3d 144, 148–50 (7th Cir. 1996) [8 *GSU* #5]. *See also U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "contemplates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court rejected defendant's contention that the burden should be on the government, finding that "such a construction is not supported by §3553(f)(5)'s plain language, and it would lead to an absurd result. Under Ivester's proffered construction, those defendants facing statutorily-mandated minimum sentences for drug convictions who were not approached and debriefed by the Government could qualify for the reduction even though they *never* provided the Government with any information. Ivester's construction of §3553(f)(5) would essentially obviate the requirement that defendants 'provide' information."

The court also rejected the claim "that our construction of §3553(f)(5) is illogical because it requires defendants to become government informants and, as such, renders redundant substantial assistance departures under §3553(e) or its companion sentencing guidelines provision, U.S.S.G. §5K1.1," agreeing with the Tenth Circuit that the substantial assistance provisions have different requirements and procedures. *See U.S. v. Acosta-Olivas,* 71 F.3d 375, 379 (10th Cir. 1995) [8 *GSU* #5]. *Accord U.S. v. Thompson,* No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: two provisions differ).

U.S. v. Ivester, 75 F.3d 182, 184–85 (4th Cir. 1996) (Hall, J., dissenting). *Cf. U.S. v. Thompson,* 76 F.3d 166, 168–71 (7th Cir. 1996) (rejecting government claim that defendant did not truthfully provide all information: defendant "suffered from a diminished capacity to understand complex situations" and had "a low level of cognitive functioning," but she "provided the government all information and evidence she had concerning the offense" and "was forthright within the range of her ability," thus satisfying §5C1.2(5)'s requirements).

The Eighth Circuit rejected a defendant's claim that he had provided enough information to warrant departure, agreeing with the cases cited above that the burden is on defendant to truthfully provide all information about the offense. "To satisfy §3553(f)(5), Romo was required to disclose all the information he possessed about his involvement in the crime and his chain of distribution, including the identities and participation of others. . . . Romo had the burden to show, through affirmative conduct, that he gave the Government truthful information and evidence about the relevant crimes before sentencing. . . . Although Romo gave the Government some limited information about his crime, the presentence report indicated Romo did not tell the Government the whole story about his role in the distribution chain and his gang's involvement."

U.S. v. Romo, 81 F.3d 84, – (8th Cir. 1996). *See also U.S. v. Thompson,* No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: "we hold that a defendant must give the Government all the information he has concerning the offense, including the source of his drugs, to avail himself of the benefit of §5C1.2").

The Sixth Circuit, citing *Ivester* and *Wrenn,* held that "defendant did not carry his burden of proving that he was eligible for sentencing below the prescribed mandatory minimum. . . . The defendant's statement that he gave the government 'all they asked,' if true, does not satisfy his burden of proof under §3553(f)(5) and §5C1.2(5). These provisions clearly require an affirmative act by the defendant truthfully disclosing all the information he possesses that concerns his offense or related offenses."

U.S. v. Adu, No. 95-1488 (6th Cir. Apr. 15,1996) (Lively, J.).

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The Fifth Circuit also followed *Ivester* in holding that it was error to give defendant a §5C1.2 departure when he had made no effort to provide any information to the government. "Likewise, we conclude 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. There is no indication that the Government must solicit the information. Further, the provision explains that if the information is not useful to the Government or if the Government is already aware of the information, the court is not precluded from finding that the defendant has sufficiently complied with subsection five, thus illustrating that the focus of subsection five is on the defendant's providing information, rather than on the Government's need for information."

U.S. v. Flanagan, 80 F.3d 143, 146–47 (5th Cir. 1996).

Eighth Circuit holds that defendant may not lie to government in interview and then satisfy §3553(f)(5) by admitting truth under cross-examination at sentencing hearing. Defendant, convicted on a cocaine conspiracy charge, had been arrested at an airport with a coconspirator who was posing as her husband. In an interview with the government after she pled guilty, defendant said that the man had posed as her husband (who was an airline employee) because he wanted her to obtain airline tickets available to airline employees and their families, but she denied that she had done so. At the sentencing hearing, however, the government produced several such tickets purchased by defendant and she admitted on cross-examination that she had obtained tickets on four occasions for the coconspirator, and that she lied to the government because she feared retribution from her employer. Although she otherwise qualified for a "safety valve" departure under 18 U.S.C. §3553(f), the district court sentenced her to the mandatory minimum after concluding she did not satisfy the requirement to truthfully provide all information to the government.

The appellate court affirmed, rejecting defendant's claim that "she provided all truthful information 'not later than the time of the sentencing hearing' under §3553(f)(5) because she admitted she provided [the coconspirator] with [employee] tickets at the sentencing hearing. Under Long's reading, defendants could deliberately mislead the government about material facts, yet retain eligibility for relief under §3553(f) by 'curing' their misstatement at the sentencing hearing. Although this would serve a sentencing court's interest in full disclosure for purposes of sentencing, we think Long overlooks the government's interest in full truthful disclosure when it interviews defendants. This interest is reflected in the text of §3553(f)(5) in the clause requiring the defendant's information be 'truthfully provided to the Government.' Only if Long had provided truthful information could the government have avoided the further investigation required to discover the airline ticket receipts."

U.S. v. Long, 77 F.3d 1060, 1062 (8th Cir. 1996) (per curiam).

Third Circuit holds that the safety valve provision cannot be applied to 21 U.S.C. §860, the "schoolyard" statute. Defendant was convicted on several drug charges, including four counts of distribution within 1,000 feet of a school, 21 U.S.C. §860. Defendant qualified for a safety valve departure on some of the drug counts, but the district court ruled that 18 U.S.C. §3553(f) could not be applied to §860 and sentenced defendant to a five-year mandatory minimum sentence. Defendant appealed, arguing that §860 is not a substantive offense but merely an enhancement of the penalty for §841, to which the safety valve provision may be applied.

The appellate court rejected defendant's argument and affirmed the sentence. "By its terms, 18 U.S.C. §3553(f) applies only to convictions under 21 U.S.C. §§841, 844, 846, 961 and 963. Section 860 is not one of the enumerated sections. It is a canon of statutory construction that the inclusion of certain provisions implies the exclusion of others. . . . In clear and unambiguous language, . . . 18 U.S.C. §3553(f) does not apply to convictions under 21 U.S.C. §860, the 'schoolyard' statute." The court also held that "§860 is a separate substantive offense, not a sentence enhancement provision. . . . [T]he language of the statute specifies §860 is a separate offense. Although §860 refers to §841, . . . it requires a separate and distinct element—distribution within 1,000 feet of a school. Distribution within 1,000 feet of a school must be charged and proven beyond a reasonable doubt in order to obtain a conviction under §860."

U.S. v. McQuilkin, 78 F.3d 105, 108–09 (3d Cir. 1996).

See *Outline* generally at V.F for all cases above.

Criminal History

Career Offender Provision

Seventh and Tenth Circuits hold that amendment to definition of "Offense Statutory Maximum" conflicts with statute; Ninth Circuit upholds amendment. The Tenth Circuit defendant was sentenced in 1989 as a career offender to 262 months. The maximum sentence he could have received under 21 U.S.C. §841(b)(1)(C) was 30 years because he had a prior felony drug conviction; without that enhancement the maximum was 20 years. For defendant's Offense Statutory Maximum under §4B1.1, the court used the 30-year maximum sentence. Effective Nov. 1, 1994, Amendment 506 redefined Offense Statutory Maximum as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record," such as the one defendant received under

§841(b)(1)(C). *See* §4B1.1, comment. (n.2). Under the amendment, which was made retroactive, defendant's Offense Statutory Maximum would have been 20 years and his offense level reduced from 34 to 32. He filed a motion to be resentenced under the amendment, but the district court held that Amendment 506 "clearly conflicts" with 28 U.S.C. §994(h) and denied the motion.

The appellate court upheld the district court's conclusion. "We are compelled by the clear directive of §994(h) to hold that Amendment 506 is inconsistent with that statute, and is therefore invalid as beyond the scope of the Commission's authority delegated to it by Congress. . . . The statute directs the Commission to assure that the guidelines specify a sentence 'at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a crime of violence or enumerated drug offense and has two such prior convictions].' . . . Because the 'maximum term authorized' for categories of defendants in which the defendant has two prior qualifying felony convictions is necessarily the enhanced statutory maximum, we find no ambiguity in the statute. It would make no sense for the statute to require the 'maximum term authorized' to be considered in the context of defendants with two or more prior qualifying felony convictions unless it was intended that that phrase mean the enhanced sentence resulting from such a pattern of recidivism. . . . Under the reading urged by Novey, §994(h) would provide that qualifying recidivist violent felons or drug offenders would only receive sentences at or near the maximum term authorized for defendants without such prior criminal history—that is, the unenhanced maximum. This would negate those provisions in 21 U.S.C. §841(b)(1)(A)–(D) which clearly provide that qualifying recidivist criminals may receive penalties substantially above the maximum penalties authorized for first-time offenders of the same offense. We cannot agree that by expressing an intent to punish repeat drug offenders 'at or near the maximum term authorized,' Congress in fact intended that express statutory sentence enhancements for qualifying recidivist offenders be disregarded."

"In holding that Amendment 506 is invalid, we recognize that we stand in disagreement not only with the Commission, but with the only other appellate court to address the issue. *See U.S. v. LaBonte,* 70 F.3d 1396, 1400 (1st Cir. 1995) ("Although the call is close, we hold that Amendment 506 is a reasonable implementation of the statutory mandate.")" [8 *GSU* #4].

U.S. v. Novey, 78 F.3d 1483, 1487–91 (10th Cir. 1996).

A few days after *Novey* was decided, the Seventh Circuit also invalidated Amendment 506 and held that "Offense Statutory Maximum" includes enhancements. "A pragmatic reading of section 994(h) thus leads us to this conclusion: When Congress directed the Sentencing Commission to provide for sentences 'at or near the maximum term authorized' for persons who qualify as career offenders, it meant the highest penalty for which a given defendant is eligible. For a person who is subject to the enhanced statutory penalties due to her prior convictions and the filing of a section 851(a) notice, that is the enhanced maximum. . . . To treat the unenhanced statutory maximum as the maximum term authorized for purposes of section 994(h), even when the defendant is eligible for a higher penalty, ignores the common meaning of the word 'maximum,' abrogates the enhanced maximums Congress has provided for in statutes like section 841(b), and, we are convinced, underestimates the severity of the penalties Congress had in mind for these defendants."

U.S. v. Hernandez, 79 F.3d 584, 595–601 (7th Cir. 1996).

The defendant in the Ninth Circuit was sentenced under Amendment 506 and the government appealed. The appellate court affirmed and, agreeing with the conclusion of the First Circuit in *LaBonte,* held that Amendment 506 was valid. "Plainly the words 'at or near' create a range in which the Commission is free to act. If Congress intended all sentences to be at the maximum it could have said so. Congress specified that it was for the Commission to determine by the Guidelines whether the term of imprisonment should be at the maximum or near it and to do so in terms of categories of defendants, not in terms of enhancements for particular defendants. . . . The legislative history of [§994(h)] suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. . . . Application Note 2, added to §4B1.1 of the Guidelines, accurately carries out the intention of Congress. It is not for the Department of Justice nor for this court to deny the Commission's carrying out of its statutory function in this way."

U.S. v. Dunn, 80 F.3d 402, 404–05 (9th Cir. 1996) (Rymer, J., dissenting).

See *Outline* at IV.B.3.

Departures

Aggravating Circumstances

First Circuit holds that attempt to hide assets to avoid restitution may warrant departure. Defendant was convicted of interstate theft offenses and received a §3C1.1 enhancement for perjury. The district court also departed upward two levels because "after conviction but before sentence [defendant] created an irrevocable trust for his six year old daughter and transferred to it, without consideration, his real estate and business assets. The trial judge found after a hearing at which [defendant] testified that the purpose of the transfer was to frustrate collection of a likely fine or restitution and that [defendant] himself regarded the trust as 'a sham.'"

The appellate court affirmed. Although defendant argued that the purpose of the trust was simply to provide for his daughter, the evidence showed that he "created the trust shortly after his wife had been ordered to pay over $400,000 in restitution; that [he] had been warned by his lawyer that the trust might be viewed as an attempt to avoid payment of restitution or fines; and that [he] intended to return to operate his business after release and expected to be able to use the real estate as well. . . . [T]he attempt to frustrate a fine or restitution order is a permissible basis for a departure."

The court also concluded that, although an "attempt to frustrate the actual or anticipated judgment by secreting assets is closely akin to obstruction of justice," the fact that defendant had already received an obstruction enhancement did not make departure for additional obstructive conduct double counting. "Here, [defendant]'s attempt to frustrate restitution was not just additional perjury but a new and different act of misbehavior with a different victim; and the sum of the two is greater than either standing alone. Even if both are treated as forms of obstruction and are within section 3C1.1—a matter we need not decide—section 5K2.0 permits departure for an aggravating circumstance 'of a kind, *or to a degree*, not adequately' considered by the guidelines."

U.S. v. Black, 78 F.3d 1, 5–6 (1st Cir. 1996).

See *Outline* at VI.B.1.h.

Mitigating Circumstances

First Circuit holds that "lesser harms" provision, §5K2.11, may allow departure despite §5H1.4's prohibition on considering drug dependence or abuse. Defendant, a 50-year-old farmer, was sentenced to 70 months for manufacturing marijuana. The evidence showed that defendant had suffered from severe depression for 30 years, that the depression made him suicidal, that medication was either ineffective or made him ill, and that, on a doctor's advice, he tried marijuana and found that it helped his depression and kept him from feeling suicidal. When defendant was released from custody pending sentencing on the condition that he not use marijuana, he became depressed and suicidal. He was admitted to a medical center for treatment and therapy and was given medication that worked. He testified at sentencing that "the only reason I used marijuana was to keep from being suicidal, and that now that I have found a proper medication that really works . . . I don't believe that I would ever be tempted . . . in breaking the law to treat my depression." The district court found that defendant's story was credible and wanted to depart under §5K2.11, but concluded it could not because of §5H1.4's prohibition of departures for "[d]rug or alcohol dependence or abuse."

The appellate court disagreed and remanded. "We hold that a district court has authority to consider a downward departure under section 5K2.11, *provided there is an appropriate factual predicate*, even if that predicate subsumes particular facts that would be precluded by section 5H1.4 from forming a basis for departure. . . . Section 5K2.11 provides that '[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.' U.S.S.G. §5K2.11, p.s. Here, where the record clearly demonstrates that the alternative to Carvell's marijuana use might well have been the taking of his own life, the interest in punishment or deterrence of drug 'manufacturing' could reasonably be thought to be reduced. In contrast, in the ordinary drug dependence case, it is difficult to see how that limitation in section 5K2.11 could be avoided. . . . This is not a case where the defendant's drug dependence is the very element driving the applicability of the 'lesser harms' provision. The risk of suicide for Carvell was not a byproduct of his drug dependence: the district court credited Carvell's testimony that fear he would take his own life led him to use drugs, not vice versa. The avoidance of suicide, not drug use, drives the 'lesser harms' analysis here."

U.S. v. Carvell, 74 F.3d 8, 9–12 (1st Cir. 1996).

See *Outline* at VI.C.2.a and 5.d.

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Appellate Review

Departures

Supreme Court holds that decision to depart should be reviewed for abuse of discretion, not de novo; Court also states that courts cannot categorically reject a factor as basis for departure. In sentencing two police officers for civil rights violations in the Rodney King beating case, the district court departed downward eight offense levels. The court departed five levels under §5K2.10, concluding that "the victim's wrongful conduct contributed significantly to provoking the offense behavior." It also departed three levels for a combination of circumstances that, individually, would not warrant departure: Defendants were "particularly likely to be targets of abuse" in prison; defendants would suffer administrative sanctions and loss of employment; defendants had been "significantly burden[ed]" by successive state and federal prosecutions; and defendants were not "violent, dangerous, or likely to engage in future criminal conduct," so there was "no reason to impose a sentence that reflects a need to protect the public."

Reviewing the departure de novo, the Ninth Circuit reversed. The court held that the victim misconduct departure was invalid because misbehavior by a suspect in an excessive use of force case is taken into account in the statutes and Guidelines. The court rejected the other four factors as being accounted for in the Guidelines or inappropriate to consider at all. *See U.S. v. Koon,* 34 F.3d 1416, 1452–60 (9th Cir. 1994) [7 *GSU* #2].

The Supreme Court "granted certiorari to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines. The appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion." The Court concluded that the Sentencing Reform Act and the Guidelines reduced but "did not eliminate all of the district court's discretion," and it adopted then-Chief Judge Breyer's opinion that "a sentencing court considering a departure should ask the following questions: '1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?' *U.S. v. Rivera,* 994 F.2d 942, 949 (C.A.1 1993)."

"We agree with this summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"

As for the standard of review on appeal, the Court agreed that the creation of sentencing guidelines showed "that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."

"A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. . . . Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. . . . [A] district court's departure decision involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization,"' . . . and as a consequence, de novo review is 'unlikely to establish clear guidelines for lower courts.'"

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To the government's argument that whether a particular factor is within the "heartland" is a question of law, the Court answered that the relevant inquiry is "whether the particular factor is within the heartland given all the facts of the case. For example, it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct which occurred in the particular instance suffices to make the case atypical. The answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters."

"This does not mean that district courts do not confront questions of law in deciding whether to depart. In the present case, for example, the Government argues that the District Court relied on factors that may not be considered in any case. The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction."

As to the specific grounds for departure in this case, the Supreme Court held that the victim's conduct and two of the four "combination" factors were valid reasons for departure. On the first, "[t]he Court of Appeals misinterpreted the heartland of §2H1.4 by concentrating on whether King's misconduct made this an unusual case of excessive force. . . . [T]he same Guideline range applies both to a Government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive. The District Court did not abuse its discretion in differentiating between the classes of cases, nor did it do so in concluding that unprovoked assaults constitute the relevant heartland. Victim misconduct is an encouraged ground for departure. A district court, without question, would have had discretion to conclude that victim misconduct could take an aggravated assault case outside the heartland."

On the other factors, the government argued that "each of the factors relied upon by the District Court [are] impermissible departure factors under all circumstances." The Court responded that "[t]hose arguments, however persuasive as a matter of sentencing policy, should be directed to the Commission. Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. Rather, 18 U.S.C. §3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider 'only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.' The Guidelines, however, 'place essentially no limit on the number of potential factors that may warrant departure.' . . . The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it 'does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.' . . . Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission. . . . We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline."

The Court then concluded that two of the factors could not be used for departure in this case. "[T]he District Court abused its discretion by considering petitioners' career loss because the factor, as it exists in these circumstances, cannot take the case out of the heartland of 1992 USSG §2H1.4. . . . Although cognizant of the deference owed to the district court, we must conclude it is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field." (Note: Justice Stevens dissented on this point.) The Court also found that "the low likelihood of petitioners' recidivism was not an appropriate basis for departure. Petitioners were first-time offenders and so were classified in Criminal History Category I, . . . [which] 'is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.'"

"The two remaining factors are susceptibility to abuse in prison and successive prosecutions. The District Court did not abuse its discretion in considering these factors. The Court of Appeals did not dispute, and neither do we, the District Court's finding that '[t]he extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse' . . . . The District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts."

"As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal

system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. . . . Nonetheless, the District Court did not abuse its discretion in determining that a 'federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants.' . . . The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court." (Justices Souter, Ginsburg, and Breyer dissented on these last two points.)

The Court remanded for the district court to reconsider the extent of departure in light of this opinion. The Court then added: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the U.S. District Judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt."

Koon v. U.S., No. 94-1664 (U.S. June 13, 1996) (Kennedy, J.).

See *Outline* at VI.C.3 and 4.b, X.A.1

Departures

Substantial Assistance

Supreme Court holds that separate motion under 18 U.S.C. §3553(e) is required for substantial assistance departure below mandatory minimum. Defendant was charged with cocaine offenses and faced a ten-year mandatory minimum sentence. He pled guilty under a plea agreement that stated the government would move under §5K1.1 for a departure from the applicable guideline range if he cooperated, but there was no agreement to move under 18 U.S.C. §3553(e) for departure below the mandatory minimum. The government did make a motion "pursuant to §5K1.1" for departure from the guideline sentence, which was 135–168 months, but did not mention §3553(e) or the mandatory minimum. The district court granted the motion and imposed a ten-year term after ruling that, in the absence of a §3553(e) motion, it could not depart below the mandatory minimum.

Defendant appealed, but the Third Circuit affirmed, holding that "a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. §3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." *U.S. v. Melendez,* 55 F.3d 130, 135–36 (3d Cir. 1995) [7 *GSU* #10]. The Eighth Circuit agrees, but four circuits have held that a separate §3553(e) motion is not required. See cases in *Outline* at VI.F.3.

The Supreme Court granted certiorari to resolve the circuit split and concluded that a §5K1.1 motion "does not authorize a departure below a lower statutory minimum." The Court rejected petitioner's argument that §5K1.1 creates "a 'unitary' motion system," agreeing with the government that "nothing in §3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in §3553(e) or [28 U.S.C.] §994(n) suggest that the Commission itself may dispense with §3553(e)'s motion requirement, or alternatively, 'deem' a motion requesting or authorizing different action—such as a departure below the Guidelines minimum—to be a motion authorizing the district court to depart below the statutory minimum."

"Moreover, we do not read §5K1.1 as attempting to exercise this nonexistent authority. Section 5K1.1 says: 'Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the Guidelines,' while its Application Note 1 says: 'Under circumstances set forth in 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) . . . substantial assistance . . . may justify a sentence below a statutorily required minimum sentence,' §5K1.1, comment., n.1. One of the circumstances set forth in §3553(e) is, as we have explained previously, that the Government has authorized the court to impose a sentence below the statutory minimum."

The Court also found unpersuasive petitioner's arguments "that §3553(e) requires a sentence below the statutory minimum to be imposed in 'accordance' with the Guidelines," that §994(n) required the Commission to draft a provision covering reduction below a mandatory minimum for substantial assistance, and that the language of the policy statement and various application notes indicate that §5K1.1 authorizes departure from the mandatory minimum. "We agree with the Government that the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum. Congress did not charge the Commission with 'implementing' §3553(e)'s Government motion requirement, beyond adopting provisions constraining the district court's discretion regarding the particular sentence selected.

"Although the various relevant Guidelines provisions invoked by the parties could certainly be clearer, we also believe that the Government's interpretation of the current provisions is the better one. Section 5K1.1(a) may guide the district court when it selects a sentence below the statutory minimum, as well when it selects a sentence below the Guidelines range. The Commission has not, however, improperly attempted to dispense with or modify the requirement for a departure below the statutory minimum spelled out in §3553(e)—that of a Government motion requesting or authorizing a departure below the statutory minimum."

The Court left one issue unresolved. "Although the Government contends correctly that the Commission does not have authority to 'deem' a Government motion that does not authorize a departure below the statutory minimum to be one that does authorize such a departure, the Government apparently reads §994(n) to permit the Commission to construct a unitary motion system by adjusting the requirements for a departure below the Guidelines minimum—that is, by providing that the district court may depart below the Guidelines range only when the Government is willing to authorize the court to depart below the statutory minimum, if the court finds that to be appropriate. . . . We need not decide whether the Commission could create this second type of unitary motion system, for two reasons. First, even if the Commission had done so, that would not help petitioner, since the Government has not authorized a departure below the statutory minimum here. Second, we agree with the Government that the Commission has not adopted this type of unitary motion system." (Note: Justices Breyer and O'Connor dissented on this issue.)

Melendez v. U.S., No. 95-5661 (U.S. June 17, 1996) (Thomas, J.).

See *Outline* at VI.F.3.

Determining the Sentence

Fines

Fourth Circuit holds that district courts may not delegate final decisions concerning amount of fine and schedule of payments. Defendant was ordered to pay a $3,000 fine and $50 in restitution. Payments toward those amounts were to be made at such times and in such amounts as the Bureau of Prisons and/or the Probation Office may direct. In another case after this sentencing, the Fourth Circuit held that district courts could not delegate to probation officers final decisions about the amount and schedule of restitution payments. *See U.S. v. Johnson,* 48 F.3d 806, 808–09 (4th Cir. 1995) [7 *GSU* #8].

The appellate court in this case concluded that the reasoning of *Johnson* "equally applies when the delegation involves a fine. Title 18 U.S.C.A. §3572(d) (West Supp.1995) provides that a 'person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments.' This section as well as §3663(f)(1), setting forth the district court's statutory duty to fix the terms of restitution, both impose upon the 'court' the responsibility for determining installment payments. Like restitution, the statutory duty imposed upon district courts to fix the terms of a fine must be read as exclusive because the imposition of a sentence, including the terms of probation or supervised release, is a core judicial function. Accordingly, we hold a district court may not delegate its authority to set the amount and timing of fine payments to the Bureau of Prisons or the probation officer. *See U.S. v. Kassar,* 47 F.3d 562, 568 (2d Cir. 1995) (holding that a district court may not delegate its responsibility under 18 U.S.C.A. §3572 for determining installment payments with regard to a fine)."

U.S. v. Miller, 77 F.3d 71, 77–78 (4th Cir. 1996). Note: 18 U.S.C. §3572(d) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (effective Apr. 24, 1996), and new subsection (2) states: "If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made."

See *Outline* at V.D.1, generally at V.E.1.

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Departures

Substantial Assistance

Fourth Circuit holds that departure may be warranted where district court prohibited defendant from actively cooperating with the government in order to obtain substantial assistance departure. Defendant was arrested for possession of child pornography materials. He soon entered a plea agreement that, among other things, called for him to cooperate with an investigation of criminal activity by others in exchange for a downward departure for substantial assistance under USSG §5K1.1. However, after defendant entered his plea, as a condition of release "the district court ordered Goossens to cease his active cooperation in investigative operations. The result of this prohibition was that Goossens was unable to assist the Government personally or to participate in an operation planned by the United States Customs Service. The parties subsequently requested that the district court allow Goossens to resume his active cooperation with law enforcement officials." The district court refused to lift the ban, and the government subsequently did not file a §5K1.1 motion. Defendant requested a downward departure on the ground that the Sentencing Commission did not consider a situation where a district court order prevented a defendant from assisting the government to qualify for a §5K1.1 departure. The district court denied that request, but sua sponte departed downward under §5K2.13 for diminished capacity. The government appealed that departure.

The appellate court remanded. First, it held that the facts did not support a finding that defendant suffered from diminished mental capacity such as would justify departure under §5K2.13. Because the sentence would have to be reconsidered on remand, the court "address[ed] the prohibition on Goossens' active cooperation with law enforcement authorities and the appropriateness of departing downward from the properly calculated guideline range on the basis of this prohibition."

"The district court committed a clear abuse of discretion by imposing the prohibition on cooperation with law enforcement officials as a condition of Goossens' release. Although we have difficulty imagining factual circumstances in which the imposition of such a condition might be appropriate, we do not foreclose the possibility that such a condition might in some extraordinary circumstances properly be imposed by a district court when truly necessary to assure a defendant's appearance or to protect the public safety. There is no genuine argument, however, that the condition was necessary in this instance. Indeed, the district court did not even attempt to justify its imposition on this basis. Instead, the court based its decision on its view of what would best benefit the rehabilitation of the defendant, a factor that is conspicuously absent among those specified in [18 U.S.C.] §3142(c)(1)(B)," the provision that prescribes conditions of release that may be imposed on a convicted defendant.

"Furthermore, in so doing, the district court improperly frustrated Goossens' desire to cooperate in order to qualify for more favorable sentencing treatment and the Government's legitimate hope that he would aid in law enforcement authorities' investigative efforts. *See U.S. v. Vargas,* 925 F.2d 1260, 1265 (10th Cir. 1991) (holding that 'inflexible practice' by district court of refusing to permit criminal defendants to cooperate was error); *U.S. v. French,* 900 F.2d 1300, 1302 (8th Cir. 1990) (same)."

The court concluded that "the Sentencing Commission did not consider the possibility that a district court might affirmatively prohibit a defendant from cooperating with law enforcement authorities in an effort to qualify for a departure based upon substantial assistance. And, it is undisputed that Goossens was so prohibited by the district court in this instance. Accordingly, we conclude that on remand the district court should determine whether, under the circumstances of this case, this factor is sufficiently important such that a sentence outside the guideline range should result. In weighing whether the facts presented by situations such as this warrant a sentence outside the guideline range, a court should consider whether a defendant's cooperation likely would have been such that the Government would have moved for a departure based upon substantial assistance had the defendant's cooperation not been foreclosed improperly."

U.S. v. Goossens, 84 F.3d 697, 699–704 (4th Cir. 1996).

See *Outline* generally at VI.F.1.a.

Mitigating Circumstances

First Circuit holds that "aberrant behavior" is determined by viewing the totality of the circumstances. Defendant pled guilty to one count of mail fraud. He requested departure based on "aberrant behavior," and the government agreed. The district court, however, ruled that it could not depart on this basis because defendant's conduct did not fall within the court's definition of aberrant behavior, which included "spontaneity or thoughtlessness in committing the crime of conviction."

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The appellate court remanded. Rejecting the approach of some circuits that require "a spontaneous and seemingly thoughtless act," the court opted for the broader view of aberrant behavior taken by the Ninth and Tenth Circuits. It held that "determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances. District court judges may consider, inter alia, factors such as pecuniary gain to the defendant, charitable activities, prior good deeds, and efforts to mitigate the effects of the crime in deciding whether a defendant's conduct is aberrant in terms of other crimes. . . . Spontaneity and thoughtlessness may also be among the factors considered, though they are not prerequisites for departure."

"That aberrant behavior departures are available to first offenders whose course of criminal conduct involves more than one criminal act is implicit in our holding. . . . We think the Commission intended the word 'single' to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to 'single acts of aberrant behavior' to include multiple acts leading up to the commission of a crime. . . . Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts."

The court added that, "[w]ithout more, first-offender status is not enough to warrant downward departure. District courts are not, however, precluded from considering first-offender status as a factor in the departure calculus. Departure-phase consideration of a defendant's criminal record does not, we think, wrongly duplicate the calculations involved in establishing a defendant's criminal history category under the Guidelines. . . . The Guidelines explain that 'the court may depart . . . even though the reason for departure is taken into consideration . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.' U.S.S.G. §5K2.0."

U.S. v. Grandmaison, 77 F.3d 555, 562–64 (1st Cir. 1996). *But see U.S. v. Withrow,* 85 F.3d 527, 531 (11th Cir. 1996) (aberrant behavior "is not established unless the defendant is a first-time offender and the crime was a spontaneous and thoughtless act rather than one which was the result of substantial planning"); *U.S. v. Dyce,* 78 F.3d 610, 619 (D.C. Cir. 1996) (following circuits that require "a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning"), *as amended on denial of rehearing,* 91 F.3d 1462, 1470 (D.C. Cir. 1996).

See *Outline* at VI.C.5.c.

Seventh Circuit holds that "sentencing manipulation" is not a valid defense. Over a three-week period defendant made four separate sales of heroin to an undercover agent, the last one being the largest at one kilogram. Defendant claimed on appeal that the government manipulated his sentence by waiting to arrest him so that the additional heroin sold would increase his sentence.

The appellate court rejected this claim. "Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. . . . This claim is distinct from a claim of sentencing entrapment which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense" (a claim defendant did not make). "We now hold that there is no defense of sentencing manipulation in this circuit. A suspect has no constitutional right to be arrested when the police have probable cause. . . . It is within the discretion of the police to decide whether delaying the arrest of the suspect will help ensnare co-conspirators, as exemplified by this case, will give the police greater understanding of the nature of the criminal enterprise, or merely will allow the suspect enough 'rope to hang himself.' Because the Constitution requires the government to prove a suspect is guilty of a crime beyond a reasonable doubt, the government 'must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.'"

U.S. v. Garcia, 79 F.3d 74, 75–76 (7th Cir. 1996).

See *Outline* at VI.C.4.c.

Tenth Circuit holds that claim of sentencing entrapment or manipulation will be reviewed under outrageous conduct standard. Defendant was suspected of cocaine distribution. After the government made three half-kilogram purchases from a coconspirator by an undercover operative, they arranged a larger purchase that resulted in the seizure of five kilograms of cocaine that defendant and another were transporting, plus five more kilograms from a farm where government agents had suspected defendant stored drugs. Defendant was sentenced on the basis of all 11.5 kilograms of cocaine but argued that the last ten kilograms should have been excluded because the government engaged in "sentence factor manipulation" by continuing its investigation and negotiating the multikilogram purchase after it had sufficient evidence against defendant and his coconspirators.

The appellate court disagreed and affirmed the sentence. "This Circuit never has addressed squarely a defense claim of 'sentencing factor manipulation' under that rubric. However, we have addressed the same concept under the appellation of 'outrageous governmental conduct' . . . [and] suggested that sufficiently egregious government conduct may affect the sentencing determination. . . . [W]e believe that arguments such as Lacey's,

whether presented as 'sentencing factor manipulation' or otherwise, should be analyzed under our established outrageous conduct standard. . . . [T]he relevant inquiry is whether, considering the totality of the circumstances in any given case, the government's conduct is so shocking, outrageous and intolerable that it offends 'the universal sense of justice.'" Looking at the circumstances of the case, the court concluded that the multikilogram transaction "was in furtherance of legitimate law enforcement objectives and not, as a matter of law, outrageous."

U.S. v. Lacey, 86 F.3d 956, 963–66 (10th Cir. 1996).

See *Outline* at VI.C.4.c.

Determining the Sentence

"Safety Valve" Provision

First Circuit holds that submitting to debriefing by government is advisable, but not required, under safety valve provision. Defendant requested application of 18 U.S.C. §3553(f) on the basis of "an eight-page letter setting forth what purported to be Montanez' 'information' concerning the crimes charged in the case" that his attorney sent to the government. However, the letter "was drawn almost verbatim from an affidavit filed by one of the federal agents early in the case." In finding that defendant had not satisfied §3553(f)(5)'s requirement to "truthfully provide to the Government all information" about the offense, the district court indicated that defendants must submit to debriefing by the government to qualify for the safety valve provision. On appeal, defendant argued that there is no debriefing requirement and that the letter complied with the statute. The government argued that debriefing is required but, alternatively, that defendant had not made the required disclosures anyway.

"[T]he issue before us is whether the statute requires the defendant to offer himself for debriefing as an automatic pre-condition in every case, and it is hard to locate such a requirement in the statute. All that Congress said is that the defendant be found by the time of the sentencing to have 'truthfully provided to the Government' all the information and evidence that he has. Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure." Although debriefing is not required, "[a]s a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course. It is up to the defendant to persuade the district court that he has 'truthfully provided' the required information and evidence to the government. . . . And a defendant who contents himself with a letter runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment, just as the district judge did in this case. . . . The possibility remains, however rare, that a defendant could make a disclosure without a debriefing (*e.g.,* by letter to the prosecutor) so truthful and so complete that no prosecutor could fairly suggest any gap or omission." This was not such a case, however, and the court concluded that "[t]he failure to disclose is so patent in this case that no reason exists for extended discussion."

U.S. v. Montanez, 82 F.3d 520, 522–23 (1st Cir. 1996). *See also U.S. v. Jimenez Martinez,* 83 F.3d 488, 495–96 (1st Cir. 1996) (agreeing with *U.S. v. Rodriguez,* 60 F.3d 193 (5th Cir. 1995) [8 *GSU* #1], that statements to probation officer do not satisfy requirement of §3553(f)(5) to provide information "to the Government").

See *Outline* at V.F and cases in 8 *GSU* #'s 1,5, and 6.

Criminal History

Career Offender Provision

Eighth Circuit holds that amended definition of "Offense Statutory Maximum" conflicts with statute. Effective Nov. 1, 1994, Amendment 506 states that "Offense Statutory Maximum," used to determine a career offender's offense level, "refers to the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* USSG §4B1.1, comment. (n.2). Defendant was subject to such an enhancement, but the district court followed the amendment and used the unenhanced statutory maximum. The government appealed, claiming that the Sentencing Commission exceeded its authority in enacting the amendment.

The appellate court agreed and remanded. "Based upon the plain language of [28 U.S.C. §]994(h), we conclude that the amendment conflicts with the statute and is therefore invalid. . . . Section 994(h) requires that '[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older' and has been convicted of a crime of violence or enumerated drug offense and has at least two prior such convictions. . . . The controverted language is the phrase 'at or near the maximum term authorized.' The question becomes the maximum term of what—the enhanced sentence or the unenhanced sentence? . . . In our view, the statute is a recidivist statute clearly aimed at the category of adult repeat violent felons and adult repeat drug felons. . . . Because the 'maximum term authorized' for categories of recidivist defendants is necessarily the enhanced statutory maximum, there is no ambiguity in the statute."

U.S. v. Fountain, 83 F.3d 946, 950–53 (8th Cir. 1996). *Accord U.S. v. Hernandez,* 79 F.3d 584, 595–601 (7th Cir. 1996) [8 *GSU*#6]; *U.S. v. Novey,* 78 F.3d 1483, 1487–91 (10th Cir. 1996) [8 *GSU*#6]. *Contra U.S. v. Dunn,* 80 F.3d 402, 404–

05 (9th Cir. 1996) [8 *GSU* #6]; *U.S. v. LaBonte,* 70 F.3d 1396, 1403–12 (1st Cir. 1995) [8 *GSU* #4], *cert. granted,* 116 S. Ct. 2545 (U.S. June 24, 1996).

See *Outline* at IV.B.3.

Sentencing Procedure

Fed. R. Crim. P. 35(a) and (c)

Second Circuit holds that complete failure to consider supervised release revocation policy statement was "clear error" allowing correction of sentence under Rule 35(c). Before defendant's supervised release was revoked, he was held for eight months in pretrial detention on a related state charge. The district court sentenced him to six months in prison without considering USSG §7B1.3(e), which states that a revocation sentence should be increased "by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. §3585(b)." Within seven days after sentencing, the court was informed that the Bureau of Prisons intended to credit defendant for the eight months in state custody, which would lead to his immediate release, and that the court had overlooked §7B1.3(e). On the seventh day the court held another sentencing hearing and resentenced defendant to fourteen months. The court reasoned that its failure to consider §7B1.3(e) was error and that it had the authority under Fed. R. Crim. P. 35(c) to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."

The appellate court affirmed the resentencing. "A district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to 'cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a),' . . . which authorizes the correction of a sentence on remand when the original sentence results from 'an incorrect application of the sentencing guidelines.'" Although the policy statements on revocation of release are advisory rather than mandatory, "district courts are required to consider them when sentencing a defendant for a violation of probation or supervised release. . . . Because courts are required to consider the policy statements in Chapter 7 of the Guidelines, we find that the district court's failure to do so here constituted an 'incorrect application of the sentencing guidelines' within the meaning of Rule 35(a). Accordingly, it properly exercised its authority to correct its error within seven days after the imposition of the original sentence, pursuant to Rule 35(c)."

The court distinguished *U.S. v. Abreu-Cabrera,* 64 F.3d 67 (2d Cir. 1995) [8 *GSU* #2], where it reversed a district court attempt to use Rule 35(c) to give defendant a downward departure on resentencing. In that case, "the court's resentencing 'represented nothing more than a district court's change of heart as to the appropriateness of the sentence,'" which is not authorized by the rule.

U.S. v. Waters, 84 F.3d 86, 89–90 (2d Cir. 1996).

See *Outline* at IX.F.

Certiorari Granted:

U.S. v. LaBonte, 70 F.3d 1396 (1st Cir. 1995) [8 *GSU* #4], *cert. granted,* 116 S. Ct. 2545 (U.S. June 24, 1996). Question presented: "Does Sentencing Commission's implementation of Career Offender Guideline [Offense Statutory Maximum] conflict with commission's obligation under Section 994(h) to 'assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of' career offenders?"

See *Outline* at IV.B.3 and summary of *Fountain* above.

Note to readers

The next revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* will be completed in November for distribution in December.

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Violation of Supervised Release

Revocation

Third and Seventh Circuits disagree on whether supervised release may be reimposed after revocation when original offense occurred before law changed. Before enactment of the 1994 Crime Bill on Sept. 13, 1994, 18 U.S.C. § 3583 did not specifically allow reimposition of a term of supervised release after revocation and imprisonment. Most circuits, including the Third and Seventh, held that release could not be reimposed. The 1994 Crime Bill added new § 3583(h), which authorized reimposition of supervised release to follow imprisonment after revocation. Defendants here committed their offenses and were sentenced before Sept. 13, 1994. In 1995 both violated the terms of their supervised release, had release revoked, were sent to prison, and were given a new term of supervised release to follow incarceration.

The Seventh Circuit held that application of § 3583(h) to defendant violated the Ex Post Facto Clause of the Constitution because it could result in greater punishment than the old law. "Assume that Defendant A is convicted of a Class C felony and sentenced to a term of imprisonment followed by three years of supervised release. . . . He serves his prison time and is released under supervision. One year into his supervised release period, he violates the terms of the release. Prior to Subsection (h), because an additional term of supervised release was not permitted, the maximum penalty the court could impose was two years' imprisonment. 18 U.S.C. § 3583(b)(3). At the end of two years the government's supervision of A is extinguished. After Subsection (h), the district court, perhaps believing itself more lenient, may order A to serve two years on a combination of imprisonment and supervised release, say one year in prison and one year on supervised release. If A then violates the terms of that second supervised release six months into it, the court has the power to send him back to prison again, this time for up to one year (the two-year maximum minus the one-year term of imprisonment he has already served). Under this scenario, A's punishment totals two and a half years from the time of his initial revocation (one year in prison, six months on supervised release, and then another year in prison)—six months longer than that allowed prior to Subsection (h). And the potential exists for even greater discrepancies."

The court also had to determine if application of § 3583(h) to defendant would be retroactive, a question the court framed as "whether the punishment imposed upon Beals' revocation 'should be considered the continuing "legal consequence" of [Beals'] original crimes, or viewed instead as the independent "legal consequence" of [Beals' later] misconduct.'" Following cases that held that changes treating parole violations more severely may not be applied retroactively, the court concluded that punishment under § 3583(h) would arise from defendant's original offense. "Conduct that violates the terms of supervised release, like that of parole violations, is often not criminal. . . . Therefore, the government punishes that conduct only because of the defendant's original offense. For that reason, we must link the punishment imposed for the subsequent conduct to the original offense for ex post facto purposes. . . . Any law enacted after the original offense that increases the total amount of time he can spend in [imprisonment and post-imprisonment release] violates the Ex Post Facto Clause." The court "remanded [the case] to the district court for it to amend its revocation order by eliminating the requirement that Beals serve a second term of supervised release following his term of imprisonment."

U.S. v. Beals, 87 F.3d 854, 858–60 (7th Cir. 1996).

In the Third Circuit, the appellate court affirmed, holding that applying the new law was not an ex post facto violation because it did not impose greater punishment than the old law. "Before the enactment of subsection (h), a defendant who violated supervised release could be sentenced to imprisonment under 18 U.S.C. § 3583(e)(3) for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release." Defendant had committed a Class A felony and faced a maximum of five years in prison if he violated his supervised release. "Under the new subsection (h), . . . the new term of supervised release may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed upon revocation of the original term of supervised release. Thus, under the new law, Brady could have been sentenced to a combination of imprisonment and supervised release that was no greater than five years. Accordingly, the maximum period of time that a defendant's freedom can be restrained is the same."

"The only difference is that now Brady's liberty can be restrained with a mix of imprisonment and supervised release. In either event, the legal consequences of his criminal conduct are identical, i.e., he faces the possibility

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of a 5-year term of loss of freedom both before the enactment of subsection (h) and after the enactment of subsection (h). Therefore, the availability of supervised release in no way increased the amount of time that Brady was exposed to incarceration. Thus, we fail to see how subsection (h) increased the penalty for his original offense, and we find no ex post facto violation."

U.S. v. Brady, 88 F.3d 225, 228–29 (3d Cir. 1996).

See *Outline* at VII.B.1

Offense Conduct

Calculating Weight of Drugs

En banc Eleventh Circuit holds that previously harvested marijuana plants may be used when sentencing by number of plants with weight-per-plant ratio. Defendant grew marijuana in the basement of a house. When he was arrested there were 27 live plants. Law enforcement officers also found what they later determined to be the remains of 26 previously harvested marijuana plants. The district court concluded that the remains could be counted as "plants" under the "equivalency provision" of USSG §2D1.1, n.* (1993), which considered each plant to equal one kilogram of marijuana (changed in 1995 to 100 grams) for sentencing purposes when the offense involved 50 or more plants.

"The primary issue in this appeal is whether, under 21 U.S.C. § 841 and U.S.S.G. § 2D1.1, 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 or according to the weight of the marijuana. A panel of this court held that, under our precedents, a grower who is apprehended after harvest may not be sentenced according to the number of plants involved. *U.S. v. Shields,* 49 F.3d 707, 712–13 (11th Cir. 1995). We vacated the panel opinion and granted rehearing en banc. *U.S. v. Shields,* 65 F.3d 900 (11th Cir. 1995). We hold that a defendant who has grown and harvested marijuana plants should be sentenced according to the number of plants involved, and affirm the district court."

"By its own terms, the equivalency provision applies to 'offense[s] involving marijuana plants.' Similarly, the statute sets mandatory minimum sentences for violations of §841(a) 'involving' a specified number of 'marijuana plants.' Nothing in the text of §2D1.1 or §841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower."

"An interpretation of §2D1.1 that is not supported by the text of the guideline and depends on a state of affairs discovered by law enforcement authorities is contrary to the principle that guideline ranges are based on relevant conduct. *See* U.S.S.G. § 1B1.3. The guidelines broadly define 'relevant conduct,' which includes, among other things, '*all* acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction.' *Id.* (emphasis added). We hold that, where there is sufficient evidence that the relevant conduct for a defendant involves growing marijuana plants, the equivalency provision of §2D1.1 applies, and the offense level is calculated using the number of plants."

U.S. v. Shields, 87 F.3d 1194, 1195–97 (11th Cir. 1996) (en banc).

See *Outline* at II.B.2

En banc Tenth Circuit holds that full weight of methamphetamine "mixture" is used to calculate statutory minimum sentence. Defendant was originally sentenced to 188 months on the basis of the 32-kilogram weight of the methamphetamine mixture he produced. After §2D1.1, comment. (n.1), was amended in 1993 to exclude unusable materials from a drug "mixture or substance" for sentencing purposes, he was resentenced to 60 months based on the weight of the pure methamphetamine, 28 grams, that remained after excluding waste water. The government appealed, arguing that the amended guideline does not control drug weight for the purpose of calculating the mandatory minimum sentence under 21 U.S.C. § 841(b), and that defendant was subject to a ten-year minimum for possessing more than one kilogram of a "mixture or substance containing a detectable amount of methamphetamine." The appellate panel did not agree and affirmed the sentence. *U.S. v. Richards,* 67 F.3d 1531 (10th Cir. 1995) [8 *GSU* #3].

The en banc court reversed, holding that "the plain language of § 841(b)" and *Chapman v. U.S.,* 500 U.S. 453 (1991), requires using the weight of the mixture. In *Neal v. U.S.,* 116 S. Ct. 763 (1996) [8 *GSU* #4], "the Court reaffirmed that *Chapman* sets forth the governing definition of 'mixture or substance' for purposes of § 841. In *Neal*, the Sentencing Commission amended the guidelines post-*Chapman* to revise the method of calculating the weight of LSD for purposes of sentencing under the guidelines. . . . The Court held that *Chapman*'s plain meaning interpretation of 'mixture or substance' governs the determination of a defendant's statutory mandatory minimum sentence under § 841, even where the Sentencing Commission adopts a conflicting definition in the sentencing guidelines."

"Although the Court in *Chapman* specifically interpreted 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v), its interpretation is not limited to that subsection. Under settled canons of statutory construction, we presume that identical terms in the same statute have the same meaning. . . . Accordingly, the plain meaning of 'mixture or substance' governs Defendant's mandatory minimum sentence calculation under § 841(b)."

"Applying the plain meaning of 'mixture,' the methamphetamine and liquid by-products Defendant possessed constitute 'two substances blended together so

that the particles of one are diffused among the particles of the other.' . . . Liquid by-products containing methamphetamine therefore constitute a 'mixture or substance containing a detectable amount of methamphetamine' for purposes of §841(b)." The court rejected defendant's "invitation to define the statute in accord with the Sentencing Commission's amendment under a 'congruent' approach" or to follow cases which held that only "marketable" portions of a drug mixture should be used.

U.S. v. Richards, 87 F.3d 1152, 1156–57 (10th Cir. 1996) (en banc) (three judges dissented).

See *Outline* at II.B.1

Ninth Circuit holds that amended Note 12 of §2D1.1 should be applied retroactively to set offense level by weight of drugs actually delivered, not larger amount negotiated. Defendants negotiated to sell five kilograms of cocaine to undercover FBI agents but actually delivered somewhat less. They were sentenced for the five kilograms they negotiated. On appeal, defendants argued they should have been sentenced for the amount actually delivered, which would reduce their offense levels by two. While the appeals were pending, Note 12 of §2D1.1 was amended to specify that the offense level should be determined by the amount of drugs negotiated "unless the sale is completed and the actual amount delivered more accurately reflects the scale of the offense." The appellate court concluded that, under amended Note 12, the amount actually delivered here would be used: "[A]s the amount of cocaine actually present and under negotiation is determinable by the court and as no further delivery was contemplated . . . , the amount of cocaine actually seized (4,643 grams) more accurately reflects the scale of the offense than the promised five kilograms."

The court then held that the amendment should apply retroactively and remanded. "Amendments to Guidelines that occur between sentencing and appeal that clarify the Guidelines, rather than substantively change them, are given retroactive application. . . . The prior version of Application Note 12 was silent as to the amount of cocaine to be considered in a completed transaction. . . . In short, until Application Note 12 was amended, the appropriate weight of drugs to consider in a completed transaction was ambiguous; a court might sentence on the amount under negotiation or the amount delivered. Although this court twice addressed the proper interpretation of old version of Application Note 12, we never squarely answered the question of the appropriate weight to consider when sentencing a defendant for a completed transaction. . . . We therefore hold that by specifying the weight to consider in a completed transaction, the current version of Application Note 12 clarifies the Guidelines, and should be given retroactive effect."

U.S. v. Felix, 87 F.3d 1057, 1059–60 (9th Cir. 1996).

See *Outline* at II.B.4.a

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit affirms safety valve reduction for defendant who, at trial and sentencing, denied earlier admissions. Defendant was arrested for importing heroin. In an interview after his arrest, defendant told federal agents what he knew of the importation scheme, including the identity of his supplier, and admitted that he knew he was carrying drugs. At his trial, however, defendant claimed that he had no knowledge of the drugs before their discovery by customs agents and thought he was merely returning a suitcase to a friend of the man he had earlier identified as the supplier. He stuck to that story in a presentence interview and at the sentencing hearing. The district court denied defendant a §3E1.1 reduction for acceptance of responsibility but concluded that, despite his later denials, the information he provided to the government agents in the post-arrest interview qualified him for a safety valve reduction from the mandatory minimum, *see* 18 U.S.C. §3553(f); USSG §5C1.2.

The appellate court affirmed, rejecting the government's urging to analogize to §3E1.1. "[W]e see no reason to require a defendant to meet the requirements for acceptance of responsibility in order to qualify for relief under the safety valve provision. . . . The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is §3E1.1, or . . . with providing the government a means to reward a defendant for supplying useful information, as is §5K1.1. Rather, the safety valve was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who played a minor role in the offense and who 'have made a good-faith effort to cooperate with the government.' . . . We hold that the district court did not clearly err in finding that Shrestha met the safety valve requirements. The fact that Shrestha denied his guilty knowledge at trial and at sentencing after his confession to the customs agents does not render him ineligible for the safety valve reduction as a matter of law. The safety valve provision authorizes district courts to grant relief to defendants who provide the Government with complete information by the time of the sentencing hearing. Shrestha's recantation does not diminish the information he earlier provided." *But cf. U.S. v. Long,* 77 F.3d 1060, 1062–63 (8th Cir. 1996) (affirming denial of §3553(f) reduction to defendant who lied to government about material fact in presentence interview and admitted it only on cross-examination during sentencing hearing) [8 *GSU* #6].

The court added that the initial burden of proof "is incontestably on the defendant to demonstrate by a preponderance of the evidence that he is eligible for the reduction. . . . Once he has made this showing, however, it falls to the Government to show that the information he

has supplied is untrue or incomplete. Apart from contending that Shrestha's denial of guilty knowledge at trial rendered him untruthful, which we have deemed irrelevant, the Government did not do so."

U.S. v. Shrestha, 86 F.3d 935, 939–40 (9th Cir. 1996). *See also U.S. v. Ramirez,* 94 F.3d 1095, 1100–01 (7th Cir. 1996) (affirmed: agreeing with other circuits that defendant "had the burden of proving, by a preponderance of the evidence, his entitlement to the reduction under §5C1.2").

See *Outline* generally at V.F and cases in 8 *GSU* #6

Departures

Mitigating Circumstances

Seventh Circuit holds that discovery of offense must objectively be unlikely to warrant §5K2.16 departure for voluntary disclosure. Section 5K2.16 states that if a defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted." Defendant here, vice president of a bank, voluntarily revealed that he had misapplied bank funds. Because defendant confessed out of remorse, not because he feared discovery, the district court departed from the guideline range of 18–24 months to impose a sentence of nine months. The government appealed, claiming the district court failed to make a necessary finding that discovery of the offense would have been unlikely absent defendant's disclosure.

The appellate court agreed and remanded, rejecting defendant's argument that the district court should make a subjective inquiry into *defendant's* belief as to the likelihood of discovery, rather than an objective inquiry into the actual likelihood of discovery. "[T]he guideline sets forth two requirements for a downward departure: (1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to discovery of the offense; and (2) the offense was unlikely to have been discovered otherwise. . . . [A] downward departure is only awarded where the defendant is motivated by guilt and the Government receives information it likely would not have acquired absent the disclosure. The plain language yields this result, and we thus need not inquire further into the drafters' intent." Remand is required because the district court "did not make particularized findings regarding the likelihood of discovery."

U.S. v. Besler, 86 F.3d 745, 747–48 (7th Cir. 1996). *Cf. U.S. v. Brownstein,* 79 F.3d 121, 122–23 (9th Cir. 1996) (affirmed: "plain language" of §5K2.16 shows that it does not apply to bank robber who voluntarily notified police and confessed—offenses were already known to authorities even if identity of robber was not).

See *Outline* generally at VI.C.5

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General Application Principles

Sentencing Factors

Supreme Court holds that conduct from acquitted counts may be used in guideline calculation. "In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. . . . Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence. . . . Because the panels' holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States,* . . . 115 S. Ct. 2199 . . . (1995), we grant the petition and reverse in both cases."

"We begin our analysis with 18 U.S.C. § 3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. . . . We reiterated this principle in *Williams v. New York,* 337 U.S. 241 . . . (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. . . . Neither the broad language of § 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.'"

"The Guidelines did not alter this aspect of the sentencing court's discretion." Section 1B1.4 allows sentencing courts to "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," and for "certain offenses . . . USSG § 1B1.3(a)(2) requires the sentencing court to consider 'all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.' Application Note 3 explains that '[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts.' . . . In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."

"The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. . . . In *Witte,* we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that 'consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.' . . . 115 S. Ct. at 2207. Rather, the defendant is 'punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment.'"

"The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury 'rejects' some facts when it returns a general verdict of not guilty. . . . We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.' . . . [T]he jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."

"We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."

U.S. v. Watts, 117 S. Ct. 633, 635–38 (1997) (per curiam) (Stevens and Kennedy, JJ., dissenting).

See *Outline* at I.A.3

Violation of Supervised Release

Revocation

In Eighth Circuit, after revocation court may reimpose supervised release under § 3583(h) for defendant originally sentenced before statute's effective date. Defendant was first sentenced in 1990. He began serving his term of supervised release in May 1995, had it revoked

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in October, and was sentenced to 14 months in prison with an additional supervised release term of 22 months. The district court did not specify whether it sentenced defendant under 18 U.S.C. § 3583(h), which authorized the reimposition of supervised release after revocation, effective Sept. 13, 1994, or under prior Eighth Circuit case law that interpreted 18 U.S.C. § 3583(e) to allow for reimposition after revocation, *see U.S. v. Schrader,* 973 F.2d 623 (8th Cir. 1992). Defendant challenged the new term of supervised release on ex post facto grounds.

The appellate court upheld the sentence. "In this circuit, under the prior law, the district court could impose, in addition to the term of imprisonment . . . , a new term of supervised release, so long as the aggregate of the two terms is less than or equal to the original term of supervised release. . . . We conclude that a defendant is not potentially subject to an increased penalty under § 3583(h) because, given our [earlier] interpretation of § 3583(e)(3) . . . , the maximum period of time that a defendant's freedom can be restrained upon revocation of supervised release under the new law is either the same as, or possibly less than, under the prior law. Because application of the new law does not result in an increased penalty, there is no ex post facto violation." The court distinguished *U.S. v. Beals,* 87 F.3d 854 (7th Cir. 1996), reasoning that the contrary holding was correct for the Seventh Circuit because it had previously held that reimposition after revocation was not authorized under § 3583. Thus, in the Seventh Circuit, reimposition under § 3583(h) was an ex post facto violation because it retroactively increased a defendant's potential penalty.

U.S. v. St. John, 92 F.3d 761, 765–67 (8th Cir. 1996).

See *Outline* at VII.B.1

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit holds that information "provided to the Government" includes information provided to a different prosecutor in another case. Defendant pled guilty to a marijuana offense that occurred in 1994. He claimed that he qualified under 18 U.S.C. § 3553(f), USSG § 5C1.2, for sentencing below the mandatory minimum. However, there was evidence that defendant committed a similar offense in 1993, which he had not disclosed, and the government claimed that he therefore did not meet subsection (5)'s requirement to truthfully provide to the Government all information concerning the offense and related offenses. Defendant's sentencing was postponed twice, and before he was sentenced he pled guilty to and admitted his involvement in the 1993 offense, and the prosecutor in that case recommended a reduction under § 5C1.2. At the sentencing for the 1994 offense, defendant argued that, by providing information to the prosecutor in the 1993 case he satisfied subsection (5). The district court denied the reduction and defendant appealed.

The appellate court remanded, first finding that the district court erred by not providing reasons for the denial at the final sentencing hearing. "[S]ection 3553(f) states that the court shall depart from the mandatory minimum sentence if it finds '*at sentencing*' that the defendant meets all five criteria. 18 U.S.C. § 3553(f) (emphasis added); *see also* U.S.S.G. § 5C1.2. The district court thus must provide reasons for agreeing or refusing to apply section 5C1.2 at the time of sentencing."

The court then concluded that defendant satisfied subsection (5) when he was debriefed by the assistant U.S. attorney (AUSA) in the 1993 case. "A defendant need not disclose information to any particular government agent to be eligible for relief under section 5C1.2. 'The prosecutor's office is an entity,' and knowledge attributed to one prosecutor is attributable to others as well. . . . Thus, the fact that AUSA Torres-Reyes, the prosecutor in this case, was not present when AUSA Coughlin debriefed Real-Hernandez in the 1993 incident is not relevant to the question whether Real-Hernandez provided information to the 'government.'" The court also rejected the government's argument that the 1993 case debriefing should not trigger the safety valve because it "was a totally separate case and was only relevant to show [defendant] had not been truthful" when he told government agents in the 1994 case that he did not know anything. "The plain language of section 5C1.2(5) allows any provision of information in any context to suffice, so long as the defendant is truthful and complete."

U.S. v. Real-Hernandez, 90 F.3d 356, 361 (9th Cir. 1996).

See *Outline* at V.F.2

Fourth Circuit holds that government violated plea agreement by arguing against safety valve reduction after it failed to debrief defendant as promised. In its plea agreement with defendant, the government agreed that he would be debriefed by government agents. The debriefing never occurred, however, and defendant eventually submitted a proffer letter to the government attempting to explain his involvement in and knowledge of the offense. Defendant argued at sentencing that, in the absence of the promised debriefing, the letter entitled him to the safety valve reduction under § 3553(f); § 5C1.2. The government argued against the reduction, saying it could not verify the information defendant had provided. The district court, without finding whether defendant was telling the truth, determined that there was not enough information to conclude that he was and sentenced him to the statutory minimum.

The appellate court remanded. "[W]e have recognized that the burden rests on the defendant to prove that the prerequisites for application of the safety valve provision, including truthful disclosure, have been met. . . . Debriefing by the Government plays an important role in permitting a defendant to comply with the disclosure requirement of the safety valve provision and in convinc-

ing the Government of the fullness and completeness of a defendant's disclosure, thereby encouraging a favorable recommendation. . . . [W]hen the Government promises in a plea agreement to debrief a defendant, it may not thereafter simply refuse to do so and then, having deprived the defendant of his best opportunity for attempting to obtain this favorable treatment, argue that the defendant is not entitled to sentencing under the safety valve provision. . . . On remand, the Government shall comply with the plea agreement by debriefing Beltran-Ortiz prior to resentencing. The district court shall then determine whether Beltran-Ortiz has met the requirements of 18 U.S.C.A. § 3553(f)."

U.S. v. Beltran-Ortiz, 91 F.3d 665, 669 & n.4 (4th Cir. 1996).

See *Outline* at V.F.2

Supervised Release

Ninth Circuit holds that when retroactive application of guideline amendment reduces prison term to less than time already served, term of supervised release begins on date defendant should have been released. "Appellants in these consolidated cases were each convicted for growing marijuana in violation of 21 U.S.C. § 841(a) and sentenced to a term of imprisonment plus a statutory three years of supervised release. In November, 1995, each received a reduction in his custodial sentence by reason of a retroactive amendment to the sentencing guidelines which affected the manner of calculating the quantity of marijuana for sentencing purposes. Each had already spent more time in prison than required by the modified sentence."

"The government nonetheless used each prisoner's actual release date as the starting date for measuring the duration of the three years of supervised release. Appellants . . . ask[ed] the court to set the starting times for their terms of supervised release on the dates their imprisonments should have ended under the new sentences. The district court, after reviewing the stated purposes of both custody and supervised release, agreed with the government that supervised release must be measured from the actual release dates."

The appellate court reversed, concluding that, "while the statutory scheme is not crystal clear, the supervised release portion of the sentence begins on the date a prisoner's term of imprisonment expires, whether or not he is released on that date. The appellants' terms of supervised release began on the dates appellants should have been released, rather than on the dates of their actual release." The applicable statutes state that a supervised release term "commences on the day the person is released from imprisonment," 18 U.S.C. § 3624(e), and that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's term of imprisonment," § 3624(a). "Neither direct nor circumstantial evidence of legislative intent concerning the narrow question presented by this appeal is present. We know only that the revised sentencing guideline was intended to apply retroactively, and was intended to have the remedial effect of reducing sentences imposed under an earlier, more punitive sentencing formula. In a somewhat similar situation, this court contemplated a problem of clarifying when a period of supervised release was to begin. *See U.S. v. Montenegro-Rojo,* 908 F.2d 425, 431 fn. 8 (9th Cir. 1990) (stating that, in fairness, the extra time in prison should be counted towards the year of supervised release)."

"We hold that in view of the language of 18 U.S.C. § 3624(a), and because of the obvious purpose of leniency in applying the revised sentencing guidelines retroactively, we must follow the lead of this court in *Montenegro-Rojo*. We limit our holding to the unusual facts of this case, where there has been a retroactive amendment to the guidelines."

U.S. v. Blake, 88 F.3d 824, 825–26 (9th Cir. 1996). *But cf. U.S. v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996) (per curiam) (although clarifying guideline amendment reduced defendant's sentence to less than time served, rejecting claim that excess time defendant spent in prison should be credited against his term of supervised release).

See *Outline* generally at V.C

Adjustments

Vulnerable Victim

Eighth Circuit declines to apply 1995 amendment that removed "target" language. Application Note 1 of § 3A1.1 formerly stated that the adjustment applied "where an unusually vulnerable victim is made a target" of the offense. Some circuits, including the Eighth, read that language to require that a defendant intentionally targeted the victim because of a particular vulnerability. However, the commentary was revised in 1995 by the removal of the target language "to clarify application with respect to this issue." USSG App. C, Amend. 521, at 430 (Nov. 1995). The revised note now states that the enhancement applies "to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." USSG § 3A1.1(b), comment. n.2 (Nov. 1995). The court had to determine whether it could apply the amended commentary to defendants who were sentenced before Nov. 1995.

"[N]otwithstanding the Sentencing Commission's description of Amendment 521 as a 'clarification,' we hold that applying the new language set forth in U.S.S.G. § 3A1.1 comment. (n.2) (Nov. 1995), as opposed to the language set forth in U.S.S.G. § 3A1.1 comment. (n.1) (Nov. 1994), would in this case violate the Constitution's prohibition against ex post facto laws because: the application would be retrospective; it would, if anything, increase defendants' sentences; it would not merely involve a procedural change; and it would not be offset by other ameliorative provisions. "

The court then concluded that there was no evidence to support a finding that defendants, who had defrauded couples seeking to adopt children, targeted any of the couples because of their desire to adopt or because of the infertility problems of some of the victims. In any event, the court also held that the defrauded couples' "strong desire to adopt" is not "the type of particular susceptibility contemplated by § 3A1.1," and defendants should not have received the enhancement.

U.S. v. Stover, 93 F.3d 1379, 1384–88 (8th Cir. 1996).

See *Outline* at III.A.1.a and d

Departures

Mitigating Circumstances

Ninth Circuit holds that sentencing entrapment may warrant reducing amount of drugs used to determine whether mandatory minimum applies. Defendant was convicted of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. "At the sentencing hearing, the court found that sentencing entrapment had occurred, and the government did not oppose a downward departure from the applicable sentencing guideline range based upon sentencing entrapment. The district court attributed one kilogram of cocaine to Castaneda and imposed the five year statutory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(B)(ii). The court said that it lacked discretion to sentence Castaneda to a term below the statutory minimum. Castaneda timely appealed."

The appellate court remanded, reasoning that district courts determine the quantity of drugs attributable to a defendant, including amounts for purposes of establishing whether a mandatory minimum sentence applies. "If a defendant proves that sentencing entrapment has occurred, there is no sound reason that the government's wrongful conduct should be protected by a statutory minimum based upon an amount of drugs higher than a defendant was predisposed to buy or sell. . . . The district court here did not think that it had the discretion to reduce the amount of cocaine attributable to Castaneda by the amount tainted by sentencing entrapment. Otherwise, the court might have found, for example, that Castaneda lacked the predisposition to sell 500 grams or more of cocaine. Had the district court made such a finding, it could have excluded more than 500 grams from its finding of cocaine attributable to Castaneda. A finding that less than 500 grams of cocaine were attributable to Castaneda would result in no obligation to impose a statutory minimum sentence."

U.S. v. Castaneda, 94 F.3d 592, 594–96 (9th Cir. 1996). *See also U.S. v. Montoya,* 62 F.3d 1, 3 (1st Cir. 1995) (courts' authority to exclude drug amounts tainted by sentencing entrapment "applies to statutory minimums as well as to the guidelines").

See *Outline* at VI.C.4.c

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Determining the Sentence

Consecutive or Concurrent Sentences

Supreme Court holds that § 924(c) sentence cannot be imposed to run concurrently with a state sentence. Under 18 U.S.C. § 924(c), the five-year mandatory sentence for using a firearm during a drug trafficking offense may not be imposed to "run concurrently with any other term of imprisonment." In *U.S. v. Gonzalez,* 65 F.3d 814, 819–22 (10th Cir. 1995), the Tenth Circuit held that a § 924(c) sentence "may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve*" (emphasis in original). After reviewing the legislative history and the purpose of § 924(c), the court ultimately concluded that "the phrase 'any other offense' encompasses only federal offenses" and that this interpretation was consistent with USSG § 5G1.3(b). *Cf. U.S. v. Kiefer,* 20 F.3d 874, 876–77 (8th Cir. 1994) (if called for under § 5G1.3(b), mandatory sentence under § 924(e) may be imposed to run concurrently with related state sentence; distinguishing § 924(c) because § 924(e) does not contain specific prohibition against concurrent sentencing); *U.S. v. Drake,* 49 F.3d 1438, 1440–41 (9th Cir. 1995) (following *Kiefer*).

The Supreme Court reversed, concluding that the text of the statute was clear and the Tenth Circuit should not have resorted to the legislative history. "The question we face is whether the phrase 'any other term of imprisonment' 'means what it says, or whether it should be limited to some subset' of prison sentences . . . —namely, only federal sentences. Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' . . . Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all 'term[s] of imprisonment,' including those imposed by state courts. . . . There is no basis in the text for limiting § 924(c) to federal sentences."

"Given the straightforward statutory command, there is no reason to resort to legislative history. . . . In sum, we hold that the plain language of 18 U.S.C. § 924(c) forbids a federal district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. The statute does not, however, limit the court's authority to order that other federal sentences run concurrently with or consecutively to other prison terms—state or federal—under § 3584."

U.S. v. Gonzalez, 117 S. Ct. 1032, 1035–38 (1997) (Stevens and Breyer, JJ., dissenting).

See *Outline* at V.A.3

"Safety Valve" Provision

Ninth Circuit holds that court's findings for safety valve are not controlled by jury verdict. Defendant was convicted on heroin possession and importation charges. He consistently denied that he knew the suitcase he had been paid to carry contained heroin. The district court believed him and, because defendant otherwise qualified for the safety valve provision, 18 U.S.C. § 3553(f); USSG § 5C1.2, sentenced him below the mandatory minimum. The government appealed, "arguing that the jury's guilty verdict precludes any notion that Sherpa truthfully provided 'all information' he had concerning the offense . . . [and] legally forecloses any possibility that Sherpa's consistent profession of ignorance (regarding the presence of drugs in the suitcase) was based in truth."

The appellate court affirmed. "Section 3553(f) requires a determination by the judge, *not the jury,* as to the satisfaction of the five underlying criteria. This is no accident. The judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and determine whether the defendant complies with § 3553(f)." Although a judge "cannot set aside a verdict just because he or she personally disagrees with a jury's finding," the judge "could logically find that reasonable minds might differ on a given point so as to preclude a judgment of acquittal, but conclude that *he or she* would have voted differently had he or she been a juror. While the judge's personal disagreement has no impact on the jury's finding of guilt, we hold that such disagreement is properly considered in the judge's sentencing decision."

The court also determined that *U.S. v. Brady,* 928 F.2d 844 (9th Cir. 1991), which held that a sentencing judge may not reconsider facts that were necessarily rejected by a jury's not guilty verdict, was effectively overturned by *Koon v. U.S.,* 116 S. Ct. 2035 (1996). *Koon* emphasized "the deference due the sentencing judge" and that sentencing factors should only be excluded from consideration by the Sentencing Commission, not by the courts. "We therefore acted beyond our authority . . . in *Brady* . . . . Consistent with the language of § 3553(f) and the different roles involved when determining guilt and imposing sentence, we hold that the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings."

U.S. v. Sherpa, 97 F.3d 1239, 1243–45 (9th Cir. 1996), *as amended on denial of rehearing and rehearing en banc,* — F.3d — (9th Cir. Mar. 5, 1997).

See *Outline* at V.F.2

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Tenth Circuit holds that in resentencing after §3582(c)(2) motion for reduction of sentence, safety valve provision may not be applied if original sentence was imposed before effective date of §3553(f). After defendant was sentenced in 1993 to a 60-month mandatory minimum sentence for marijuana offenses, Amendment 516 (effective Nov. 1, 1995) changed the method for determining the weight of marijuana plants for purposes of sentencing under §2D1.1(c). The amendment was made retroactive, *see* §1B1.10(c), and defendant filed a motion for reduction of sentence under 18 U.S.C. §3582(c)(2). He was still subject to the mandatory minimum term, but argued that he qualified for the safety valve exception to the mandatory minimum, 18 U.S.C. §3553(f); USSG §5C1.2, and should be sentenced within the amended guideline range of 18–24 months. The district court held that §3553(f), which did not take effect until Sept. 23, 1994, could not be applied retroactively to defendant's 1993 sentence and thus the 60-month sentence would stand.

The appellate court agreed that "the safety valve exception applies to all sentences imposed on or after September 23, 1994, . . . and it is not retroactive. . . . We agree with Mr. Torres that when we remand a case to the district court with instructions to vacate the sentence and resentence the defendant, 'the district court [is] governed by the guidelines in effect at the time of resentence' . . . . But that is not the situation Mr. Torres is in. There has been no vacation of his sentence nor any order for resentencing. . . . Rather, he seeks relief pursuant to §3582(c)(2), which is a different animal."

Under that section, a defendant's "eligibility for a reduction in sentence is 'inexorably tied'" to USSG §1B1.10, which states in Application Note 2: "In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. *All other guideline application decisions remain unaffected.*" (Emphasis added by court.) "The safety valve exception is specifically excluded from retroactive application by §1B1.10, and Mr. Torres cannot evade the plain language and effect of this section by characterizing his §3582(c)(2) motion as requiring de novo resentencing."

U.S. v. Torres, 99 F.3d 360, 362–63 (10th Cir. 1996). *Cf. U.S. v. Polanco,* 53 F.3d 893, 898–99 (8th Cir. 1995) (after vacating sentence for improperly departing from mandatory minimum absent §3553(e) motion from government, directing district court to consider §3553(f) when resentencing on remand).

See *Outline* at V.F.1

Sentencing Procedure

Second Circuit uses supervisory authority to require that defendants be given opportunity to have counsel present at debriefing related to substantial assistance reduction. Defendant pled guilty to one racketeering count. He signed an agreement to cooperate with the government which, in return, agreed to file a §5K1.1 motion for downward departure if it determined that defendant provided substantial assistance. After debriefing defendant, the government did file the motion, but disparaged defendant's assistance as reluctant and less than candid. Relying on the government's characterization, the district court declined to depart more than three months from the guideline minimum of 63 months.

At the sentencing hearing, defense counsel objected to the prosecutor's comments and the sentence, complaining that the prosecutor did not notify her when the debriefing sessions were to occur and that she could have helped her client cooperate more fully. "[T]he prosecutor stated that her failure to give notice to defendant's lawyer was routine, adding that every witness or potential witness in the case was debriefed without counsel being present because that was 'standard practice' in the Eastern District prosecutor's office. The sentencing court found the practice unremarkable" and rejected defense counsel's argument. On appeal defendant contended that the Sixth Amendment entitled him to the assistance of counsel during his debriefing.

The appellate court "d[id] not reach or decide appellant's constitutional argument," instead concluding that "the government's standard practice in this district of conducting debriefing interviews outside the presence of counsel is inconsistent, in our view, with the fair administration of criminal justice. Consequently, we exercise our supervisory authority to bring it to an end, and vacate the judgment in the instant case and remand for resentencing." The court reasoned that "[t]he special nature of a §5K1.1 motion demonstrates that the government debriefing interview is crucial to a cooperating witness. To send a defendant into this perilous setting without his attorney is, we think, inconsistent with the fair administration of justice."

The court explained that "[d]efendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of counsel's failure to attend could be explained to defendant. . . . Alternatively, waiver can be set forth expressly in the cooperation agreement."

U.S. v. Ming He, 94 F.3d 782, 785–94 (2d Cir. 1996).

See *Outline* generally at IX.C

Departures

Mitigating Circumstances

Fourth Circuit rejects downward departure, sets forth five-step analysis for departure decision. Defendant was convicted on conspiracy and perjury charges. The district court departed downward five offense levels based "on the confluence of six factors": (1) defendant was "a highly decorated Vietnam War veteran [with] an unblemished record of 20 years of service . . . in the military and in the Secret Service; (2) he had a nine-year-old son with neurological problems who was in need of special supervision, and his wife's mental health was fragile; (3) he is recovering from an alcohol abuse problem and requires counseling; (4) his offense was not relatively serious because his scheme to defraud did not involve 'real fraud'; (5) his imprisonment would be 'more onerous' because law enforcement officers 'suffer disproportionate problems when they are incarcerated'; and (6) his status as a convicted felon—which prohibits him, an experienced firearms handler and instructor, from ever touching a firearm again and from voting for the rest of his life—constitutes sufficient punishment when coupled with his sentence of probation."

The appellate court, guided by *Koon v. U.S.,* 116 S. Ct. 2035 (1996), first "prescribe[d] the following analysis for sentencing courts to follow when deciding whether to depart, and we clarify the standards for review of departure decisions:

"1. The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed only for clear error.

"2. The district court must then decide whether any of the circumstances or consequences of the offense of conviction appear 'atypical,' such that they potentially take the case out of the applicable guideline's heartland. . . . Unlike the other steps in this analysis, a district court's identification of factors for potential consideration is purely analytical and, therefore, is never subject to appellate review.

"3. . . . [T]he district court must identify each [atypical factor] according to the Guidelines' classifications as a 'forbidden,' 'encouraged,' 'discouraged,' or 'unmentioned' basis for departure. Because a court's classification of potential bases for departure is a matter of guideline interpretation, we review such rulings *de novo* in the context of our ultimate review for abuse of discretion. . . . And '[a] district court by definition abuses its discretion when it makes an error of law.' . . . A factor classified as 'forbidden' . . . can never provide a basis for departure and its consideration ends at this step. . . .

"4. . . . 'Encouraged' factors . . . are usually appropriate bases for departure. But such factors may not be relied upon if already adequately taken into account by the applicable guideline, and that legal analysis involves interpreting the applicable guideline, which we review *de novo* to determine whether the district court abused its discretion. . . . Conversely, 'discouraged' factors . . . are '"not ordinarily relevant,"' but may be relied upon as bases for departure '"in exceptional cases"'. . . . When the determination of whether a factor is present to an exceptional degree amounts merely to an evaluation of a showing's adequacy, it becomes a legal question, and our review is *de novo* to determine whether the district court abused its discretion. Finally, . . . 'unmentioned' factors . . . may justify a departure where the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' indicate that they take a case out of the applicable guideline's heartland. . . . The interpretation of whether the Guidelines' structure and theory allow for a departure is, again, a legal question subject to *de novo* review to determine whether the district court abused its discretion.

"5. As the last step, the district court must consider whether circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure . . . is therefore warranted. Because this step requires the sentencing court to 'make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing' and its comparison of the case with other Guidelines cases, this part of the departure analysis 'embodies the traditional exercise of discretion by [the] sentencing court.'. . . While we review this ultimate departure decision for abuse of discretion, . . . if the district court bases its departure decision on a factual determination, our review of that underlying determination is for clear error. And if the court's departure is based on a misinterpretation of the Guidelines, our review of that underlying ruling is *de novo*."

The court then reversed, finding that none of the factors justified a departure under the foregoing analysis. Defendant's service record and his family responsibilities are "discouraged" factors under the Guidelines, *see* §§ 5H1.6 and 5H1.11, and "the record does not indicate that these factors are present to an 'exceptional' degree." Defendant's alcohol problem is a "forbidden" basis for departure, so it was "legal error and per se an abuse of discretion for the district court to have relied on this factor." The last three factors "are all 'unmentioned' factors. We conclude, however, that none of these factors warranted the district court's downward departure in this case because a departure based on the first two reasons is inconsistent with the structure and theory of the relevant guidelines . . . and the third factor is not present to an exceptional degree."

U.S. v. Rybicki, 96 F.3d 754, 757–59 (4th Cir. 1996).

See *Outline* at VI.C.1.a, h, 2.c, 3, and 5.b

Second Circuit affirms downward departure based on combination of physical impairment and "good works." Based on defendant's health problems and "good acts," the district court departed from offense level 20 to level 10 and imposed a sentence of three years' probation, six months of home confinement, and 500 hours of community service. The government appealed the departure.

Following the *Koon* standard of abuse of discretion for review of departures, the appellate court affirmed. The court recognized that physical problems, § 5H1.4, and "good works," § 5H1.11, are "not ordinarily relevant" to departure decisions. "In extraordinary cases, however, the district court may downwardly depart when a number of factors that, when considered individually, would not permit a downward departure, combine to create a situation that 'differs significantly from the "heartland" cases covered by the guidelines.' U.S.S.G. § 5K2.0 cmt."

The court agreed that defendant's case "differed significantly from the heartland of guideline cases. Rioux had a kidney transplant over 20 years ago, and his new kidney is diseased. Although his kidney function remains stable, he must receive regular blood tests and prescription medicines. As a complication of the kidney medications, Rioux contracted a bone disease requiring a double hip replacement. Although the replacement was successful, it does require monitoring. While many of Rioux's public acts of charity are not worthy of commendation, he unquestionably has participated to a large degree in legitimate fund raising efforts. . . . It was not an abuse of discretion for the district court to conclude that, in combination, Rioux's medical condition and charitable and civic good deeds warranted a downward departure."

U.S. v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996).

See *Outline* at VI.C.1.a and d

To all readers of *Guideline Sentencing Update* and *Guideline Sentencing: An Outline:*

There is an error in the February 1997 edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues,* which was distributed throughout the courts in March. Please delete the note on p. 47 at the beginning of section II.C that refers to a 1995 amendment to § 2D1.1(b)(1). That proposed change did *not* go into effect.

Also note:

Have you received a copy of the Center's report *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*? In March, copies were sent to all appeals court and district court judges, all chief probation officers, and all Sentencing Commission commissioners. If you have not received a copy, please fax a request to the Center's Information Services Office at 202-273-4025.

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Criminal History

Career Offender Provision

Supreme Court resolves circuit split, holds that "maximum term authorized" for career offender guideline calculation includes statutory enhancements. In 28 U.S.C. §994(h), the Sentencing Commission was directed to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for a career offender. Amendment 506 (Nov. 1,1994) redefined USSG §4B1.1's "Offense Statutory Maximum" as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." The appellate courts split on whether Amendment 506 conflicted with the mandate of §994(h) or was a reasonable interpretation of the statute. *See Outline* at IV.B.3.

The Supreme Court has now resolved the split by "conclud[ing] that the Commission's interpretation is inconsistent with §994(h)'s plain language, and . . . that 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements." Rejecting arguments that §994(h) was ambiguous, the Court found "that the word 'maximum' most naturally connotes the 'greatest quantity or value attainable in a given case.'" Furthermore, "the phrase 'term authorized' refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes. Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute. . . . Where Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term."

U.S. v. LaBonte, 117 S. Ct. 1673, 1675–78 (1997) (Breyer, Stevens, and Ginsburg, JJ., dissenting).

See *Outline* at IV.B.3

Departures

Extent of Departure

Seventh and Ninth Circuits differ on whether they may require use of analogies to Guidelines in setting extent of departure after *Koon.* In the Seventh Circuit case, the appellate court held that the district court chose an inappropriate analogy for an upward departure, and that therefore the extent of the departure was unreasonable. In so doing, the court also ruled that *Koon v. U.S.,* 116 S. Ct. 2035 (1996), did not remove the circuit's requirement to explain the extent of a departure by analogy to the Guidelines. "[I]n computing the degree of an upward departure, the district court is 'required to articulate the specific factors justifying the extent of [the] departure and to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the . . . sentence.'"

"We do not read *Koon* to require that we abdicate our reviewing authority over the magnitude of a departure chosen by the district court. As noted at the outset, our authority to review the district judge's departure decision in Horton's case stems from section 3742(e)–(f), which provides for appellate review of the reasonableness of the extent of any departure assigned by the district court, an issue quite separate from the court's decision whether to depart at all. Although *Koon* changed the standard of review with respect to the latter issue, . . . and adopted a unitary abuse of discretion standard for the review of departure decisions, . . . we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. . . . Because this requirement does not deprive the district judge of the deference to which he is due, we do not believe it to be inconsistent with *Koon.*"

U.S. v. Horton, 98 F.3d 313, 319 (7th Cir. 1996) (Evans, J., dissenting). *See also U.S. v. Barajas-Nunez,* 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure and the extent thereof still remains.").

The Ninth Circuit, on the other hand, decided en banc that *Koon* effectively overruled its earlier holding that the extent of departure must be determined by reference to "the structure, standards and policies" of the Guidelines and "be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines," and that courts "should include a reasoned explanation of the extent of the departure" with reference to these principles. *See U.S. v. Lira-Barraza,* 941 F.2d 745, 747–51 (9th Cir. 1991) (en banc).

"In *Lira-Barraza,* we relied heavily on the Seventh Circuit's decision in *U.S. v. Ferra,* 900 F.2d 1057 (7th Cir. 1990), . . . as support for the proposition that the extent of an upward departure *requires* a comparison to analogous Guideline provisions. . . . In light of *Koon,* we now reject such a mechanistic approach to determining whether the

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extent of a district court's departure was unreasonable, and hold that where, as here, a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. . . . As the Supreme Court has repeatedly noted, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.' . . . Because the extent of the district court's departure was not unreasonable, we find no abuse of discretion in the sentence imposed." The court did note that "[a]n analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential."

U.S. v. Sablan, 114 F.3d 913, 916–19 & n.10 (9th Cir. 1997) (en banc) (five judges dissenting), *rev'g* 90 F.3d 362. *See also U.S. v. Hardy,* 99 F.3d 1242, 1253 (1st Cir. 1996) (affirming upward departure: "A sentencing court is not required to 'dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic choice made.' . . . Similarly, the reasonableness *vel non* of the degree of departure need 'not [] be determined by rigid adherence to a particular mechanistic formula, but by an evaluation of "the overall aggregate of known circumstances."'").

See *Outline* at VI.D and X.A.1

Mitigating Circumstances

First Circuit holds that third-party job loss cannot be categorically excluded as potential basis for departure. Defendants, owners of a small business, were convicted of tax evasion. The district court denied their request for a downward departure on the claim that "twelve innocent employees will lose their jobs and suffer severe hardship" if defendants are imprisoned. The court agreed that the business would fail and the employees would lose their jobs, but concluded that, as a matter of law, the Sentencing Commission had considered the possible failure of a small business and its effect on employees. On defendants' appeal, the government argued that departure is precluded by §5H1.2, which states that "vocational skills are not ordinarily relevant" in a departure decision.

The appellate court, following *Koon v. U.S.,* 116 S. Ct. 2035 (1996), reversed. "It is clear that the Guidelines do not explicitly list the factor at issue here among the forbidden or the discouraged factors. The question is whether the Commission's 'vocational skills' comment implicitly discourages consideration of job loss to innocent employees. We note first that 'vocational skills' themselves are not a forbidden factor, but a discouraged factor. . . . Therefore, even if the present case merely concerned vocational skills, a per se approach would be inappropriate and the district court would still have to consider whether the case was in some way 'different from the ordinary case where the factor is present.' *Koon,* . . . 116 S. Ct. at 2045."

"We do not agree with the Government's contention that the loss of employment to innocent employees necessarily falls within the term 'vocational skills.' That a defendant may have vocational skills of great value or rarity does not necessarily tell one whether incarceration of that defendant will entail job loss to others totally uninvolved in the defendant's crimes. Vocational skills may or may not be related to job loss to others."

The court found support in *Koon* for its "belief that courts should be careful not to construe the categories covered by the Guidelines' factors too broadly." In *Koon,* "the Supreme Court recognized that while 'socio-economic status' of the defendant is an impermissible ground for departure and 'a defendant's career may relate to his or her socio-economic status, . . . the link is not so close as to justify categorical exclusion of the effect of conviction on a career. Although an impermissible factor need not be invoked by name to be rejected, socio-economic status and job loss are not the semantic or practical equivalents of each other.' . . . 116 S. Ct. at 2051."

"As *Koon* holds that job loss by the defendant resulting from his incarceration cannot be categorically excluded from consideration, we think it follows that job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration. . . . To add a judicial gloss equating job loss by innocent third parties with 'vocational skills' is to run headlong into the problem of judicial trespass on legislative prerogative against which the Supreme Court warned in *Koon.* We do not travel this path."

The court stressed that "[t]he mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland. These issues are matters of degree, involving qualitative and quantitative judgments" that must be made by the district court. "[W]e decide only that there is no categorical barrier to the district court's consideration of a departure—not that a departure would be proper on these facts."

U.S. v. Olbres, 99 F.3d 28, 32–36 & n.12 (1st Cir. 1996).

See *Outline* at VI.C.1.e and X.A.1

Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that burden is on defendants to show weapon was not possessed "in connection with the offense," §5C1.2(2); Tenth and D.C. Circuits differ on whether a defendant can be held responsible for a codefendant's possession. In the Tenth Circuit, three defendants were arrested while carrying marijuana in duffel bags from a marijuana patch to their vehicles parked 200

to 300 yards away. A rifle was found in the vehicle belonging to one defendant, who claimed the rifle was only for protection against snakes. All defendants argued that the firearm was not possessed "in connection with the offense" within the meaning of USSG §5C1.2(2), 18 U.S.C. §3553(f)(2). Section 5C1.2 does not define "possess" or "in connection with," so the district court looked to §2D1.1(b)(1) and found it was not "clearly improbable that the weapon was possessed in connection with the offense conduct of conviction." The court thus held that defendants were ineligible for sentencing below the five-year statutory minimum.

The appellate court affirmed the sentences. The district court's findings and the one defendant's admission that he had the gun for protection "establish[ed] proximity of the firearm to the offense," and the court held that "a firearm's proximity and potential to facilitate the offense is enough to prevent application of USSG §5C1.2(2)." The court also rejected the other two defendants' claim that they should not be held accountable for their codefendant's possession of the weapon. "'Offense' for purposes of §5C1.2(2) includes 'the offense of conviction and all relevant conduct.' USSG §5C1.2 comment. (n.3). The commentary in application note 4, read together with §1B1.3, simply acknowledges that individual defendants are accountable for their own conduct and that participants in joint criminal enterprises can be accountable for the foreseeable acts of others that further the joint activity. . . . Blackburn and Hilton knew of the presence of the weapon Hallum brought to the marijuana patch; that it might further their joint activity was reasonably foreseeable."

U.S. v. Hallum, 103 F.3d 87, 89–90 (10th Cir. 1996).

The defendant in the D.C. Circuit pled guilty to a drug conspiracy charge. His brother pled guilty to that charge and two other charges related to his possession of a firearm during the last of the four drug sales in the conspiracy. That sale occurred outside a restaurant and was handled by defendant's brother while he sat in his car, in which he had a gun. Defendant remained inside the restaurant during the entire transaction. Although he otherwise qualified for the safety valve, the district court ruled that, based on either coconspirator liability or constructive possession, he had possessed a firearm in connection with the offense in violation of §5C1.2(2).

The appellate court remanded, holding first that "co-conspirator liability cannot establish possession under the safety valve." The court reasoned that "application note four provides that, '[c]onsistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language parallels the wording of one of the two principal provisions defining the scope of relevant conduct . . . . Notably absent from application note four, however, is any mention of the other principal provision defining the scope of relevant conduct, which holds defendants liable for 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' *Id.* §1B1.3(a)(1)(B). Omission of this co-conspirator liability language, we think, can hardly have been inadvertent. Its omission, moreover, is consistent with the safety valve's basic purpose: to spare certain minor participants in drug trafficking enterprises from mandatory minimum sentences when imposition of the mandatory sentences would be disproportionate to the defendants' culpability. . . . Given the great likelihood that at least one member of a drug distribution conspiracy will possess a firearm, . . . incorporating co-conspirator liability into the safety valve's weapon possession element would render the safety valve virtually useless."

The court recognized "the tension" between Note 4 and "application note three's broad definition of 'offense,' which includes 'all relevant conduct.' . . . Applying the principle that the specific trumps the general, however, we read application note four, which addresses only the weapon possession element, as restricting the meaning of application note three, which applies to several elements of the safety valve. Indeed, application note four describes the weapon possession element's use of the term 'defendant' as 'limiting' defendants' liability, . . . a limitation that would have no function if application note three incorporated co-conspirator liability into the weapon possession element. We also think it significant that, by comparison to the provision enhancing drug sentences for gun possession, which uses the passive voice—requiring enhancement if a firearm 'was possessed,' *id.* §2D1.1(b)(1)—and omits any reference to the defendant, the safety valve speaks in the active voice, requiring that 'the defendant' must do the possessing . . . . And most fundamentally, we think our interpretation of the safety valve is faithful to its purpose."

The court also held that the alternative ground of constructive possession, while a possibly valid ground to deny the safety valve, did not apply under the facts of this case. "[F]inding a participant in a drug operation constructively possessed someone else's weapon requires some additional evidence linking the participant to the weapon—a link nowhere evident in the record before us."

In re Sealed Case, 105 F.3d 1460, 1461–65 (D.C. Cir. 1997).

See *Outline* generally at V.F

Sentencing of Organizations

Determining the Fine

Ninth Circuit holds that court could impose fine that might jeopardize continued viability of organization. Defendant (ELI) pled guilty to eight fraud counts. In addition to restitution of $322,442, the district court imposed a fine of $1.5 million. The fine was a departure from the sentencing guideline range of $6,425,013 to $9,178,590, and was reached after an independent auditor analyzed ELI's finances. ELI appealed, claiming that the fine would jeopardize its continued viability and, pursuant to USSG §8C3.3, a lower fine should have been imposed.

The appellate court held that the fine was properly imposed. In relevant part, §8C3.3(a) states that a court "shall reduce the fine below that otherwise required . . . , to the extent that imposition of such fine would impair its ability to make restitution to victims." Subsection (b) states that a court "may impose a fine below that otherwise required . . . if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required." An unnumbered paragraph adds that "the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."

The court held that §8C3.3 "does not prohibit a court from imposing a fine that jeopardizes an organization's continued viability. It permits, but does not require, a court in such circumstances and in its discretion, to reduce the fine. The only time a reduction is mandated under section 8C3.3 is if the fine imposed, without reduction, would impair the defendant's ability to make restitution to victims. . . . Thus, even if the district court's fine would completely bankrupt ELI, neither section 8C3.3(a) nor section 8C3.3(b) precluded the court from imposing such a fine so long as the fine did not impair ELI's ability to make restitution. It did not. . . . [Thus], the plain language of Guideline Section 8C3.3 did not require the district court to further reduce ELI's fine."

The court also looked at the guideline covering fines for individuals. "Under Guideline Section 5E1.2(a), a court must first determine if an individual defendant is financially able to pay any fine at all. If the defendant successfully demonstrates that he is unable to pay any fine, then a fine may be inappropriate. . . . Unlike Guideline Section 5E1.2, Guideline Sections 8C3.3 and 8C2.2, which apply to organizational defendants such as ELI, do not require a sentencing court to consider whether the defendant can pay a fine, so long as the ability to pay restitution is not impaired." The court added that the district court properly considered the factors listed in 18 U.S.C. §3572 in setting the fine, and that nothing in that statute precluded a fine that could jeopardize the company's viability.

U.S. v. Eureka Lab., Inc., 103 F.3d 908, 912–14 (9th Cir. 1996).

To be included in *Outline* at section VIII

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Adjustments

Multiple Counts—Grouping

Ninth Circuit holds that drug conspiracy and money laundering counts should be grouped. Defendant was convicted of conspiracy to distribute drugs and money laundering, and the evidence showed that the laundered money came from the drug business. She appealed the district court's refusal to group the conspiracy and money laundering counts for sentencing purposes. The appellate court reversed and remanded for resentencing.

"Section 3D1.2 permits grouping of closely related counts. Subsection (b) permits grouping '[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.'" The court found that defendant's "crimes satisfy the first requirement of subsection (b) of §3D1.2. Victimless crimes, such as those involved here, are treated as involving the same victim 'when the societal interests that are harmed are closely related.' U.S.S.G. §3D1.2, Application Note 2."

"The money laundering prohibition was adopted as part of the Anti-Drug Abuse Act of 1986. . . . The societal interests harmed by money laundering and drug trafficking are closely related: Narcotics trafficking enables traffickers to reap illicit financial gains and inflict the detrimental effects of narcotics use upon our society; money laundering enables criminals to obtain the benefits of income gained from illicit activities, particularly drug trafficking and organized crime. *See also Most Frequently Asked Questions About the Sentencing Guidelines* 20 (7th ed. 1994) ('[B]ecause money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as "closely intertwined" and groupable with the underlying offense.'). . . . Grouping the crimes of conspirators who engage in both trafficking and laundering merely implements the Sentencing Commission's direction to group closely related counts." The court disagreed with the Fifth and Eleventh Circuits, which "have held that the societal interests implicated by drug trafficking and money laundering are not closely related because narcotics distribution 'increas[es] lawlessness and violence' while 'money laundering disperses capital from lawfully operating economic institutions.' *U.S. v. Gallo,* 927 F.2d 815, 824 (5th Cir. 1991); *see also U.S. v. Harper,* 972 F.2d 321, 322 (11th Cir. 1992)."

The court also concluded that defendant's offenses "satisfy the second requirement of subsection (b) of §3D1.2. Lopez's acts of drug trafficking and money laundering were connected by a common criminal objective. Lopez laundered money to conceal the conspiracy's drug trafficking and thus facilitated the accomplishment of the conspiracy's ultimate objective of obtaining the financial benefits of drug trafficking."

U.S. v. Lopez, 104 F.3d 1149, 1150–51 (9th Cir. 1997) (per curiam) (Fernandez, J., dissenting).

See *Outline* at III.D.1

Departures

Mitigating Circumstances

Fourth Circuit rejects departing when §5G1.3 does not give credit for previously discharged related sentence. Defendant was convicted on a drug conspiracy charge in 1988. That conviction served as a predicate offense for a CCE charge, to which he pled guilty in July 1992 after two years of preindictment and pretrial negotiations and delays. Defendant was still serving the related 1988 sentence when he was convicted in 1992, but had finished it by the time he was sentenced on the CCE conviction in 1994. Had the 1988 term still been undischarged, credit for time served could have been given under §5G1.3(b) & comment. (n.2). Finding that the Guidelines did not adequately account for a related sentence's being already discharged, the district court departed downward to give defendant credit for the time he had served.

The appellate court vacated the departure. "The Sentencing Guidelines expressly permit district courts to give sentencing credit only for terms of imprisonment 'result[ing] from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense' if the previous term of imprisonment is 'undischarged.' U.S.S.G. §5G1.3. The Application Notes and Background Statement to §5G1.3 similarly limit its application to *undischarged* terms of imprisonment. And, despite several amendments to the Sentencing Guidelines, the Sentencing Commission has not altered §5G1.3 to include credit for discharged sentences. . . . [W]e conclude that the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority."

The court also rejected defendant's claim that departure was warranted because the 22-month delay between conviction and sentencing rendered §5G1.3 inap-

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plicable. "The Sentencing Guidelines . . . direct district courts to determine credit for prior sentences at the time of sentencing and provide no exceptions for cases in which the defendant's sentencing has been delayed. Moreover, it was McHan who is principally responsible for bringing about delays in his trial and sentencing by engaging in proactive negotiation and sometimes dilatory litigation. At least where there is no indication that the government intentionally delayed the defendant's processing for the purpose of rendering §5G1.3(c) inapplicable, we decline to undermine the Sentencing Guidelines' general preference for repose and specific preference for denying sentencing credit for previously discharged sentences."

U.S. v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996) (Hall, J., dissenting). *Contra U.S. v. Blackwell,* 49 F.3d 1232, 1241–42 (7th Cir. 1995) (on remand, district court may consider departure because §5G1.3 does not cover situation where related sentence was already discharged).

See *Outline* at V.A.3

Eighth Circuit holds that §3553(e) motion has no time limit and may be made by government in conjunction with defendant's §3582(c)(2) motion. Defendant received a §5K1.1 substantial assistance reduction at his sentencing and, after another year of assistance, a further reduction under Fed. R. Civ. P. 35(b) to a sentence of 131 months, a 55% reduction from the original guideline minimum. Later, defendant moved for a sentence reduction under 18 U.S.C. §3582(c)(2), based on a retroactive guideline amendment. The government urged the court to grant the motion and reduce defendant's sentence to 106 months, which would equal a 55% reduction from the amended guideline minimum. Because this would fall below the 120-month statutory minimum, the government also made a motion under §3553(e). The court granted defendant's motion, but concluded that the government could not invoke §3553(e) in the context of a §3582(c)(2) motion and reduced the sentence to the 120-month minimum.

The appellate court remanded for reconsideration. "Section 3582(c)(2) does not itself authorize a reduction below the statutory minimum, . . . but the benefit accruing from a lowered sentencing range is independent of any substantial-assistance considerations. In order that a defendant may receive the full benefit of both a change in sentencing range and the assistance the defendant has previously rendered, we conclude that the government may seek a section 3553(e) reduction below the statutory minimum in conjunction with a section 3582(c)(2) reduction. Section 3553(e) contains no time limitation foreclosing such a conclusion."

U.S. v. Williams, 103 F.3d 57, 58 (8th Cir. 1996) (per curiam).

See *Outline* at I.E and VI.F.3

Violation of Supervised Release

Sentencing

Ninth Circuit holds that revocation sentence may be reduced under §3582(c)(2) when already-served sentence for underlying conviction could have been reduced by a later amendment. Defendant pled guilty to a marijuana offense in 1991. After completing his 51-month sentence in March 1995, he began serving his term of supervised release. Three months later, defendant violated the conditions of his release and was sentenced to seven months in prison. In November 1995, an amendment to §2D1.1 changed the method of calculating quantity for offenses involving marijuana plants. The amendment was made retroactive and, if it could have been applied to defendant, would have reduced his original guideline range from 51–63 months to 27–33 months. Defendant filed a motion pursuant to 18 U.S.C. §3582(c), requesting that his sentence on the violation of release be reduced to time served. The district court did so.

"The question presented is whether the district court had discretion under section 3582(c)(2) to reduce Etherton's sentence pursuant to the revocation of supervised release." Section 3582(c)(2) allows a court to "modify a term of imprisonment . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The appellate court determined that this section could be applied to reduce the sentence for the release violation. "The seven months imprisonment is not punishment for a new substantive offense, rather 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of . . . supervised release.' . . . [W]e interpret the statute's directive that 'the court may reduce the term of imprisonment' as extending to the entirety of the original sentence, including terms of imprisonment imposed upon revocation of supervised release."

U.S. v. Etherton, 101 F.3d 80, 81 (9th Cir. 1996) (Nelson, J., dissenting). *Cf. U.S. v. Trujeque,* 100 F.3d 869, 871 (10th Cir. 1996) (remanded: because defendant's sentence under Fed. R. Crim. P. 11(e)(1)(C) was based on a valid plea agreement and not "on a sentencing range that has subsequently been lowered by the Sentencing Commission," §3582(c)(2) cannot be applied and his motion to lower his sentence should have been dismissed).

See *Outline* at I.E and VII.B.1

Offense Conduct

Relevant Conduct

Eighth Circuit holds defendants responsible for cocaine shipment they were directly involved with despite their claim that they expected to receive marijuana. Defendants agreed to accept deliveries of pack-

ages containing marijuana for another person. After two successful deliveries, a third package was intercepted and, after a controlled delivery, defendants were arrested. The third package contained cocaine rather than marijuana. Defendants pled guilty to conspiring to distribute and possess with intent to distribute controlled substances. At sentencing, the district court held defendants accountable for the cocaine shipment despite their claims that they were expecting another marijuana shipment and could not reasonably foresee that cocaine would be in the package.

The appellate court affirmed, although it concluded "that it would have been more fitting to assess the conspirators' responsibility for the cocaine under Guideline §1B1.3(a)(1)(A). Unlike paragraph (a)(1)(B), which the district court utilized to hold [defendants] liable for the 'acts and omissions of others,' paragraph (a)(1)(A) appertains to conduct personally undertaken by the defendant being sentenced." Application Note 2 states that "the defendant is accountable for all quantities of contraband with which he was directly involved. . . . The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes . . . ; such conduct is addressed under subsection (a)(1)(A)."

"Mindful of these precepts, we have no difficulty in determining that the district court correctly attributed the 239.5 grams of cocaine to [defendants]. Through their own actions, the two men aided, abetted, and wilfully caused the conveyance . . . of at least three packages. . . . Their convictions verify that they embarked upon this behavior with the requisite criminal intent and with every expectation of receiving some type of illegal drug to distribute. Accordingly, . . . they are accountable at sentencing for the full quantity of all illegal drugs located within the parcels."

U.S. v. Strange, 102 F.3d 356, 359–61 (8th Cir. 1996).

See *Outline* at II.A.2

Second Circuit requires "specific evidence" of defendant's involvement before counting drug amounts from uncharged relevant conduct. Defendant was convicted of drug charges after being caught attempting to import heroin on a plane flight from Nigeria. His sentence was first based on the 427.4 grams of heroin contained in balloons he had swallowed. The district court then found that defendant had made seven other trips to Nigeria for the purpose of importing heroin, concluded that it was reasonable to assume that the same amount of heroin was involved in all eight trips, and used the total of 3,419.2 grams as relevant conduct to set the offense level. The appellate court remanded for resentencing, holding that there must be "specific evidence—*e.g.,* drug records, admissions or live testimony—to calculate drug quantities for sentencing purposes," and that no such evidence had been shown to support the extra amounts of heroin.

On remand, the district court conducted a sentencing hearing that produced extensive statistical evidence and other information relating to quantities carried by heroin swallowers from Nigeria who were arrested at JFK Airport during the time defendant made his trips; plus, other district judges were surveyed on their experiences with heroin swallowers. The district court also relied on defendant's statements at the time of arrest and his demeanor at trial and sentencing, concluding that the evidence supported a finding that he was responsible for carrying between 1,000 and 3,000 grams of heroin.

The appellate court vacated the sentence. Although the preponderance of evidence standard is generally used for resolving disputed facts at sentencing, "we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence. *See U.S. v. Gigante,* 94 F.3d 53, 56–57 (2d Cir. 1996). . . . The 'specific evidence' we required [in the previous opinion] to prove a relevant-conduct quantity of drugs for purposes of enhancing a sentence must be evidence that points specifically to a drug quantity for which the defendant is responsible." The court reasoned that "under the Sentencing Guidelines, evidence tending to prove 'relevant conduct' is not merely taken into consideration at sentencing, it *determines* sentencing (subject only to departure authority), and it does so at the same level of severity as if the defendant had been convicted of the relevant conduct. That circumstance prompted us to require 'specific evidence' of a 'relevant conduct' drug quantity, and we adhere to that requirement."

The "items of evidence [used by the district court] are not 'specific evidence' of drug quantities carried by Shonubi on his prior seven trips. . . . The DEA records informed [the court] of what 117 other balloon swallowers from Nigeria had done during the same time period as Shonubi's eight trips. Those records of other defendants' crimes arguably provided some basis for an estimate of the quantities that were carried by Shonubi on his seven prior trips, but they are not 'specific evidence' of the quantities he carried." Similarly, the other evidence "relates to Shonubi specifically," but does "not provide 'specific evidence' of the quantities carried on his prior seven trips." The court then ruled that, "[s]ince the Government has now had two opportunities to present the required 'specific evidence' to the sentencing court, no further opportunity is warranted, and the case must be remanded for imposition of a sentence based on the quantity of drugs Shonubi carried on the night of his arrest."

U.S. v. Shonubi, 103 F.3d 1085, 1087–92 (2d Cir. 1997).

See *Outline* at I.A.3, II.A.1 and B.4.d, and IX.B

General Application Principles

Amendments

Eighth Circuit holds that sentencing court was bound by original drug quantity finding when considering whether to apply retroactive amendment. Defendant and his son were arrested after federal agents discovered 110 marijuana plants on his property. In accordance with a plea agreement, defendant was reindicted and charged with manufacturing 73 marijuana plants; his son was charged with manufacturing 37 plants. The government and defendant stipulated that 73 plants were attributable to defendant, the presentence report stated that defendant was accountable for 73 plants, and the district court sentenced him to 30 months on that basis. After Amendment 516 to §2D1.1(c) retroactively changed the weight equivalence of marijuana plants for sentencing purposes from 1 kilogram to 100 grams, defendant filed motions to have his sentence reconsidered pursuant to 18 U.S.C. §3582(c)(2). The court denied the motions, stating in part that defendant could have been held accountable for 110 plants, which would have resulted in a statutory mandatory minimum sentence of 60 months.

The appellate court remanded, concluding that "the district court was bound by its previous determination with respect to the number of marijuana plants that was relevant to Mr. Adams's sentence. In the first place, although the finding is perhaps not technically *res judicata*, it is unusual, for efficiency reasons if no other, for trial courts to revisit factual findings. In the second place, the district court had already made a finding that the seventy-three plants for which Mr. Adams was going to be held responsible 'adequately reflect[ed] the seriousness of the actual offense behavior,' else the court could not have approved the reduction in the charges against Mr. Adams at all. *See* U.S.S.G. §6B1.2(a). In the third place, the sentencing guidelines direct a district court in situations like the present one to 'consider the sentence that it would have imposed had the amendment[] . . . been in effect' at the time of the original sentencing. *See* U.S.S.G. §1B1.10(b). We think it implicit in this directive that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively."

U.S. v. Adams, 104 F.3d 1028, 1030–31 (8th Cir. 1997). *See also U.S. v. Cothran,* 106 F.3d 1560, 1562–63 (11th Cir. 1997) (citing *Adams*, affirming district court's refusal during §3582(c)(2) hearing to reconsider number of marijuana plants that defendant had not contested at original sentencing—"§3582(c)(2) and related sentencing guidelines do not contemplate a full *de novo* resentencing").

See *Outline* at I.E

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Determining the Sentence

"Safety Valve" Provision

Third Circuit holds that defendant possessed firearm during relevant conduct and thus cannot qualify for safety valve. Defendant pled guilty to one count of possession with intent to distribute over 50 grams of cocaine base. He was arrested while selling crack on the street in September 1994. The evidence indicated that he regularly sold drugs during the preceding year and, at least in May and June of that year, purchased several guns in connection with his drug dealing. To qualify for the safety valve reduction, a defendant cannot "possess a firearm . . . in connection with the offense." 18 U.S.C. §3553(f)(2); USSG §5C1.2(2). Application Note 3 of §5C1.2 states that "offense" in subdivision (2) means "the offense of conviction and all relevant conduct." The district court held that defendant possessed a firearm in connection with the offense as defined in Note 3 and declined to apply the safety valve provision.

The appellate court affirmed. "The record shows that Wilson's drug dealing activities in the year preceding his arrest fit within the definition of 'same course of conduct.' By his own admission, he was regularly engaged in drug sales for the year prior to his September arrest, satisfying both the 'regularity' and 'temporal proximity' tests for determining 'same course of conduct.' . . . [Also], the record has demonstrated that Wilson has dealt drugs, and cocaine in particular, both when he was in possession of firearms and in connection with the offense of conviction. Wilson's admission of prior drug dealing, the reputation evidence and the circumstances surrounding his September arrest are sufficient to satisfy the similarity prong."

"We conclude from this course of conduct that Wilson's prior drug dealing was relevant conduct to the offense of conviction . . . for the purposes of the Relevant Conduct and Safety Valve Provisions." The court then found that defendant's "involvement with firearms is integrally connected to his prior drug dealing," and therefore he "failed to meet one of the requirements of the Safety Valve Provision."

U.S. v. Wilson, 106 F.3d 1140, 1144–45 (3d Cir. 1997). *See also U.S. v. Plunkett,* 125 F.3d 873, 874–75 (D.C. Cir. 1997) (affirmed: safety valve did not apply to defendant who, although he had no weapon during single drug transaction that was basis of offense of conviction, admittedly possessed firearm during relevant conduct).

See *Outline* generally at V.F

Eighth Circuit holds that defendant, not a coconspirator, must possess weapon to preclude safety valve. Defendant pled guilty to drug conspiracy charges, plus a charge of using and carrying a firearm in relation to a drug-trafficking crime. The basis for the firearm charge was that defendant knew his coconspirator carried a weapon during the conspiracy. At sentencing, the district court ruled that defendant was ineligible for the safety valve reduction because of the coconspirator's possession. The safety valve provision requires that a defendant did not "possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." 18 U.S.C. §3553(f)(2); USSG §5C1.2(2).

The appellate court remanded. Note 4 to §5C1.2(2) "provides that '[c]onsistent with [U.S.S.G.] §1B1.3 (Relevant Conduct),' the use of the term 'defendant' in §5C1.2(2) 'limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language mirrors §1B1.3(a)(1)(A). Of import is the fact that this language omits the text of §1B1.3(a)(1)(B) which provides that 'relevant conduct' encompasses acts and omissions undertaken in a 'jointly undertaken criminal activity,' *e.g.* a conspiracy." Therefore, "we conclude that in determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. As it was Wilson's co-conspirator, and not Wilson himself, who possessed the gun in the conspiracy, the district court erred in concluding that Wilson was ineligible to receive the benefit of §5C1.2."

U.S. v. Wilson, 105 F.3d 219, 222 (5th Cir. 1997) (per curiam). *Accord In re Sealed Case,* 105 F.3d 1460, 1461–65 (D.C. Cir. 1997) [9 *GSU* #3]. *But see U.S. v. Hallum,* 103 F.3d 87, 89–90 (10th Cir. 1996) (proper to deny safety valve for codefendant's possession of weapon) [9 *GSU* #3].

See *Outline* generally at V.F

Ninth Circuit holds that safety valve provision does not allow departure to probation when statute of conviction prohibits probation sentence. Defendant faced a ten-year statutory minimum sentence, but qualified for the safety valve provision. In addition to sentencing below the mandatory minimum, the district court sua sponte departed below the guideline range to impose a sentence of probation. The government appealed, and the appellate court remanded for resentencing. Apart from finding that the departure itself—for aberrant be-

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havior—was not justified, the court held that the government was entitled to notice that the district court planned to depart on a ground that was not raised by either party or the presentence report. See other cases in *Outline* at VI.G and *U.S. v. Pankhurst,* 118 F.3d 345, 357 (5th Cir. 1997) (remanded: "notice must be given to the Government before a district court may depart downward").

The court also held that a sentence of probation was illegal in this case. Defendant was convicted of violating 21 U.S.C. § 841(a)(1). Section 841(b), which required the ten-year minimum sentence for defendant, states that "notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph." Defendant argued that the safety valve, 18 U.S.C. § 3553(f), which also contains "notwithstanding any other provision of law" language, "trumps" § 841(b)'s prohibition, but the court disagreed. "To suggest that a court can disregard both the minimum sentence and the probation ban would render the ban on probation in § 841 entirely meaningless, since every time a court avoided the 10-year minimum, it could also disregard the probation ban. Construing § 841(b) to give effect to every provision, it appears that § 841 establishes the probation ban as the ultimate floor in case the mandatory minimum sentence is somehow avoided. We therefore hold that the 'notwithstanding any other provision of law' language in §3553(f) is tied only to the ability to disregard statutory minimum terms of imprisonment; any other reading would eviscerate this ultimate floor in § 841."

The court also noted that "the Guidelines *themselves* clarify that a sentence of probation is impermissible for the crime committed by Green. First, probation is prohibited under the Guidelines for any 'Class A' felony, which is defined [as carrying] a maximum term of life imprisonment. . . . U.S.S.G. § 5B1.1(b)(1)." Defendant was convicted of such a felony. "Second, the Sentencing Guidelines also expressly incorporate the probation ban in statutes such as § 841(b), by prohibiting probation in the event that the offense of conviction expressly precludes probation as a sentence. . . . U.S.S.G. § 5B1.1(b)(2)."

U.S. v. Green, 105 F.3d 1321, 1323–24 (9th Cir. 1997).

See *Outline* at VI.G, generally at V.F

Departures

Mitigating Circumstances

Ninth Circuit affirms departure based on prejudice to defendant from government conduct during plea negotiations. Defendant was indicted on cocaine and heroin distribution charges. "The district court originally dismissed the five-count indictment, finding that the government had engaged in misconduct by entering into plea negotiations with Lopez in the absence of his attorney. This court reversed the dismissal, determining it to be an inappropriate remedy." Defendant was then convicted at a jury trial, and "the district court sentenced Lopez to 135 months in custody. In imposing this sentence, the district court departed downward three levels because of the prejudice to Lopez which resulted from the government's conduct."

The appellate court affirmed. "The government appeals what it characterizes as the district court's three-level downward departure for governmental misconduct. A reading of the sentencing transcript makes clear, however, that the district court assumed it could not depart downward for governmental misconduct. . . . Rather, it instituted a downward departure due to prejudice Lopez suffered as a result of the government's conduct. . . . Lopez's opportunity for full and fair plea negotiations was seriously affected. The district court noted that 'although it cannot be determined what the result of those negotiations might have been, it is clear that he reasonably believed he had no choice but to go to trial.' . . . The prejudice Lopez encountered as a direct result of the government's conduct was, in our view, significant enough to take this case out of the heartland of the Guidelines. . . . Therefore, the district court's three-level departure was not an abuse of discretion."

U.S. v. Lopez, 106 F.3d 309, 311 (9th Cir. 1997).

See *Outline* at VI.C.4.c

Eighth Circuit establishes analysis for aberrant behavior departure after *Koon.* Defendant pled guilty to participating in a drug manufacturing conspiracy. The district court granted a downward sentencing departure under § 5K2.0 for aberrant behavior. The government appealed, arguing that defendant's conduct was not a "single act" of aberrant behavior. The appellate court, concluding that "this is no longer the most relevant inquiry," remanded and discussed departures in light of *Koon v. U.S.,* 116 S. Ct. 2035 (1996), and how it affects the analysis of whether to depart for aberrant behavior.

Under *Koon*, "a court of appeals need not defer to the district court's determination of an issue of law, such as 'whether a factor is a permissible basis for departure under any circumstances.' But the district court is entitled to deference on most departure issues, including the critical issues of '[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way.'"

"On this appeal, the parties primarily debate whether Kalb's offense was a 'single act of aberrant behavior' as that term has been defined in prior Eighth Circuit departure cases. . . . However, . . . our prior cases, and the district court in this case, have not accurately anticipated the *Koon*-mandated mode of analysis in a number of significant respects."

"First, the Sentencing Commission only mentioned 'single acts of aberrant behavior' in discussing probation and split sentences. Thus, it is an *encouraged* factor only when considering crimes in which the offender might be eligible, with a departure, for those modest forms of punishment. . . . Under *Koon*, for a serious crime like Kalb's that cannot warrant probation, a 'single act of aberrant behavior' is an unmentioned, not an encouraged departure factor."

"Second, our prior cases suggest that the only 'aberrant behavior' which may be *considered* for departure purposes is the 'single act of aberrant behavior' mentioned in the introductory comment about probation and split sentences. . . . The Commission's introductory comment about single acts of aberrant behavior does not appear in its general discussion of departures. . . . Thus, under *Koon*, 'aberrant behavior' in general is an unmentioned factor, and the task for the sentencing court is to analyze how and why specific conduct is allegedly aberrant, and whether the Guidelines adequately take into account aspects of defendant's conduct that are in fact aberrant."

"Third, when dealing with an unmentioned potential departure factor such as alleged aberrant behavior, *Koon* instructs the sentencing court to consider the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.' . . . In this case, we cannot tell from the sentencing record what aspects of Kalb's behavior the district court considered 'aberrant,' and why that particular kind of aberrant behavior falls outside the heartland *of the guidelines applicable in determining Kalb's sentencing range*. For example, the court stated that Kalb's shipping of six gallons of a precursor chemical was a single aberrant act, but it did not compare this single act to those of other peripheral drug conspirators, such as cocaine and heroin couriers."

U.S. v. Kalb, 105 F.3d 426, 428–30 (8th Cir. 1997) (Bright, J., dissenting).

See *Outline* at VI.C.1.c

Aggravating Circumstances

Sixth Circuit holds that potential dangerousness of defendant with mental disease did not warrant upward departure. Defendant was convicted of four federal firearms offenses in 1991. Before sentencing, the government moved for a hearing under 18 U.S.C. §4244 to determine his mental condition. Following §4244(d), the court found that defendant "is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment."

During defendant's treatment, doctors found a new medication that improved his condition enough to warrant a "Certificate of Recovery and Request for Court to Proceed with Final Sentencing" in 1995. The certificate also recommended that, after sentencing, defendant be returned to the institution for proceedings under §4246, "Hospitalization of a person due for release but suffering from mental disease or defect." This recommendation was made because the time defendant had spent at the institution was longer than his sentence would be and so, after sentencing, he would be released; there was no assurance that he would continue his medication without further supervision; and, without the medication, he could pose a danger to others.

Defendant's guideline range was 12–18 months, but the court "ruled that the danger Moses posed to the community warranted an upward departure to a sentence of 120 months 'primarily on the basis of Section 5K2.14, but alternatively on the ground of Section 5K 2.0 . . . .'"

The appellate court held that the departure was invalid. Under §5K2.14 ("national security, public health, or safety was significantly endangered"), the sentencing court is required "to look at the offense committed and the dangerousness of the defendant *at the time of the crime*, not the future dangerousness of the defendant." However, "it is evident . . . that the district court, legitimately concerned about the prospects that Moses would discontinue Clozaril, was focusing on Moses' future dangerousness when it applied §5K2.14. That was legal error." The court also found that §5H1.3 ("[m]ental and emotional conditions are not ordinarily relevant" in departure decisions) applied here and precluded departure. "Section 5H1.3 by its terms must encompass a variety of mental illnesses, including many that might make a defendant dangerous to himself and others. Moses' paranoid schizophrenia made him dangerous at the time of his crime, but not in an uncommon way, or in a way so out of the ordinary (in the context of mentally ill criminals) as to override application of the rule."

The court also rejected §5K2.0 as a basis for departure. A defendant's need for treatment does not warrant departure, the court held. And, as noted above, "we do not believe that Moses' dangerousness makes this is an 'extraordinary case.'" The court then disagreed with *U.S. v. Hines*, 26 F.3d 1469, 1477 (9th Cir. 1994) (defendant's "extremely dangerous mental state" and the "significant likelihood he will commit additional serious crimes" warranted upward departure under §5K2.0 and §4A1.3). Danger resulting from mental illness cannot justify departure "when there exists a statute, 18 U.S.C. §4246, directly designed to forestall such danger through continued commitment . . . . Otherwise, virtually every criminal defendant who, at the time of sentencing, met the dangerousness criteria of §4246 would also be subject to an upward departure. . . . [W]e hold that under the relevant statutes and guidelines, the appropriate mechanism of public protection is a commitment proceeding under §4246, rather than an extended criminal sentence."

U.S. v. Moses, 106 F.3d 1273, 1277–81 (6th Cir. 1997).

See *Outline* at VI.B.2.c

Offense Conduct

Calculating Weight of Drugs

Second Circuit holds that "not reasonably capable of providing" exception to using agreed-upon amount is not applicable to buyer in reverse sting. Defendant agreed to pay $11,000 for 125 grams of heroin from undercover agents. When arrested at the time the buy was to occur, defendant had only $2,039. The district court based the sentence on the agreed-upon 125 grams of heroin. On appeal, defendant conceded he had agreed to buy 125 grams but argued that, following Application Note 12 of § 2D1.1, his sentence should be based on the amount that $2,039 would buy because he was financially incapable of purchasing 125 grams.

Note 12 states, in relevant part: "In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. . . . In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing."

The appellate court concluded that "[t]he plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance, that is, where the defendant '*provid[es]* the agreed-upon quantity of the controlled substance.' (emphasis added) It is hard to believe that the narrowness of this language is inadvertent, coming immediately after a discussion of what happens in a reverse sting, where the government agent 'provides' the controlled substance and the defendant provides only the money to purchase it. Moreover, in a reverse sting, as the government points out, drug traffickers making an illegal purchase frequently hold purchase money in reserve nearby for ready access while they test the quality of the drugs being purchased. We note also that drugs have been delivered on consignment, . . . or on credit with a down payment . . . . These possibilities lend support to the logic of the Sentencing Commission's distinction." Because the "not reasonably capable" exception does not apply to buyers, "[t]he district court correctly calculated Santos' sentence on the basis of 125 grams of heroin, which was the agreed-upon amount in this transaction."

U.S. v. Gomez, 103 F.3d 249, 253–54 (2d Cir. 1997).

See *Outline* at II.B.4.d

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General Application Principles

Amendments

Ninth Circuit holds that applying § 1B1.11(b)(3) to increase offense level under guideline amended after some of defendant's offenses occurred violates ex post facto clause. Defendant was convicted of five counts of mail fraud, four of which occurred before a 1989 amendment to USSG § 2F1.1. For the amount of loss involved in defendant's five counts, the amended guideline would increase his offense level by eleven, instead of by eight under the 1988 guideline. The district court used the 1994 guidelines (which included the amendment), ruling that there was no ex post facto problem because the conduct charged in the fifth count occurred after the amendment.

The appellate court remanded. "The district court implicitly followed a Guidelines policy statement when it sentenced all five counts under the 1994 Guidelines. Effective as of the November 1, 1993 Guidelines, USSG § 1B1.11(b)(3) p.s. explains that, 'If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual should be applied to both offenses.' . . . We have not previously applied policy statement § 1B1.11(b)(3). Generally speaking, Commission policy statements *are* binding on us. . . . However, we need not apply the Guidelines where they *would* violate the Constitution, regardless of the intent of the Commission. . . . Under the facts of this case, we find that the policy statement § 1B1.11(b)(3) violates the ex post facto clause of the Constitution."

"We *have* required all single-count conduct to be sentenced under a single Guidelines manual. . . . We have also required that all continuing offenses be sentenced under one Guidelines manual: the later one. . . . However, we have applied more than one Guidelines manual to multiple counts involving offenses completed at different times, and we must do so in this case."

"Application of the policy statement in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline. . . . The harm caused by the earlier offenses *can* be counted in sentencing the later one. . . . That does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be. In fact, were the later count to fall at some time after sentencing, all that would remain would be the earlier sentences, which would be too long." The court vacated and remanded for resentencing "under the 1988 Guidelines on counts one through four and under the 1994 Guidelines on count five."

U.S. v. Ortland, 109 F.3d 539, 546–47 (9th Cir. 1997).

See *Outline* at I.E

Offense Conduct

Mandatory Minimums and Other Issues

Second Circuit holds that § 2D1.1(b)(6) reduction can apply to defendant who is not subject to mandatory minimum. "This case presents the question of whether U.S.S.G. § 2D1.1(b)(4) (now § 2D1.1(b)(6)) can be applied in cases in which the defendant is not subject to a statutory mandatory minimum sentence. The district court concluded, over the objection of both the defendant and the government, that Section 2D1.1(b)(4) is not applicable in such a case. Applying the plain language of the Sentencing Guidelines, we disagree." The section states: "If the defendant meets the criteria set forth in subdivisions (1)–(5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels."

"Had the Sentencing Commission intended to limit the application of § 2D1.1 to those defendants who are subject to a mandatory minimum sentence, it could easily have done so . . . . Instead, Congress and the Commission chose to draft [§ 2D1.1(b)(6)] in such a way that, by its plain terms, it applies whenever the offense level is 26 or greater and the defendant meets all of the criteria set forth in § 5C1.2(1)–(5), regardless of whether § 5C1.2 applies independently to the case."

"Moreover, if the Commission had intended the two-level reduction to be given only to defendants who are subject to mandatory minimum sentences, it would logically have located the reduction directly within § 5C1.2, which applies only to those defendants who are subject to such mandatory sentences. Instead, it placed the reduction in § 2D1.1, which applies to *all* defendants who have been convicted of drug crimes, regardless of whether or not they are subject to mandatory minimum sentences." The court vacated and remanded, with instructions to determine whether defendant "has met the criteria listed in § 5C1.2(1)–(5). If he has, he should be given a two-point reduction pursuant to § 2D1.1(b)[(6)]."

U.S. v. Osei, 107 F.3d 101, 102–05 (2d Cir. 1997) (per curiam).

To be included in *Outline* at II.A.3; see also V.F.1

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Possession of Weapon by Drug Defendant

Fifth Circuit holds that carrying weapon as part of job does not preclude §2D1.1(b)(1) enhancement. Defendant was an INS agent who was part of a drug conspiracy that transported cocaine and marijuana from Mexico to Houston in INS vehicles. He was present during at least one transport where, as part of his job, he carried a gun. However, the district court declined to enhance his sentence for possessing a firearm during a drug offense under §2D1.1(b)(1), and the government appealed.

The appellate court reversed and remanded. "Possession of a firearm will enhance a defendant's sentence under U.S.S.G. §2D1.1(b)(1) where a temporal and spatial relationship exists between the weapon, the drug-trafficking activity, and the defendant. . . . This enhancement provision will not apply where the defendant is able to show that it is 'clearly improbable' that the weapon was connected with an offense. U.S.S.G. §2D1.1 n.3. . . . Under the facts of this case, we cannot say that Marmolejo has borne his burden of proving that it is 'clearly improbable' that his gun was connected to his offense. . . . That carrying a gun was an incidence of his position does not undo the benefit that drug traffickers received from having an armed guard protect their goods. Marmolejo used his position to transport drugs and therefore any incidence of that position which further facilitated the transport should properly be taken into account at sentencing."

U.S. v. Marmolejo, 106 F.3d 1213, 1216 (5th Cir. 1997). *See also U.S. v. Sivils,* 960 F.2d 587, 596 (6th Cir. 1992) (§2D1.1(b)(1) properly applied to county sheriff who carried weapon as part of job); *U.S. v. Ruiz,* 905 F.2d 499, 508 (1st Cir. 1990) (same, for police officer).

See *Outline* at II.C.4

Sentencing Procedure

Plea Bargaining

Tenth Circuit holds that Rule 11(e)(1)(C) plea agreement that specifies sentencing range is binding and district court cannot depart downward. Defendant and the government entered into a plea agreement that stated, in part: "The United States has made an AGREEMENT pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P., that a specific offense level is the appropriate disposition of this case. The United States and defendant have agreed that the offense level is 16." The district court determined that the guideline range was 21–27 months and, after ruling that it lacked authority to consider defendant's motion for downward departure, sentenced him to 27 months. Defendant appealed, arguing that because the agreement specified a sentencing range rather than an exact term of months it was not a Rule 11(e)(1)(C) agreement that bound the court, and that, even if the agreement fell under Rule 11(e)(1)(C), the district court had jurisdiction to depart downward.

The appellate court affirmed, concluding first that "a plea agreement specifying a sentence at a particular guideline range is specific enough to fall within the language of [Rule] 11(e)(1)(C)." *See also U.S. v. Nutter,* 61 F.3d 10, 11–12 (2d Cir. 1995) (range of 155–181 months specific enough to satisfy 18 U.S.C. § 3742(c)(1) and Rule 11(e)(1)(C)); *U.S. v. Mukai,* 26 F.3d 953, 954–55 (9th Cir. 1994) (plea agreement providing for five to seven years' imprisonment was Rule 11(e)(1)(C) agreement); *U.S. v. Lambey,* 974 F.2d 1389, 1396 (4th Cir. 1992) (indicating that specifying a sentencing range would satisfy Rule 11(e)(1)(C)); *U.S. v. Kemper,* 908 F.2d 33, 36 (6th Cir. 1990) (agreement that assumed sentence within range of 27–33 months was binding under Rule 11(e)(1)(C)).

Defendant's second argument "contradicts the plain language of Rule 11," which states that if a Rule 11(e)(1)(C) agreement is accepted "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." Fed. R. Crim. P. 11(e)(3). "Based on the clear language of Rule 11(e)(1)(C) and the applicable case law, Veri had no reason to believe the district court would entertain a motion for downward departure when the plea agreement specified a disposition at offense level sixteen and included no provision for downward departure." *See also Mukai,* 26 F.3d at 956–57 (where agreement allowed for downward departure only within sentencing range specified in Rule 11(e)(1)(C) agreement, district court could not depart below that range); *U.S. v. Cunavelis,* 969 F.2d 1419, 1422 (2d Cir. 1992) (district court had no authority to go beyond four-level reduction specified in Rule 11(e)(1)(C) agreement in making departure under §5K1.1). *Cf. U.S. v. Swigert,* 18 F.3d 443, 445–46 (7th Cir. 1994) (where Rule 11(e)(1)(C) agreement called for specific "term of imprisonment," district court could not impose split sentence of imprisonment and community confinement or home detention under §5C1(d)(2)).

U.S. v. Veri, 108 F.3d 1311, 1313–15 (10th Cir. 1997).

See *Outline* at VI.F.2 and IX.A.4

Departures

Mitigating Circumstances

Fourth Circuit acknowledges that, after *Koon,* post-offense rehabilitation may provide basis for departure. Defendant sought a downward departure based upon his post-offense rehabilitation efforts. Although the district court was inclined to depart, it held that it could not under *U.S. v. Van Dyke,* 895 F.3d 984, 986–87 (4th Cir. 1990) (holding that post-offense rehabilitation may be considered for acceptance of responsibility reduction but not for departure). During the pendency of defendant's appeal, the Supreme Court decided *Koon v. U.S.,* 116 S. Ct. 2035 (1996), which addressed the analysis courts should follow for departures.

The appellate court remanded, recognizing that "*Koon* rejected the reasoning that we employed in *Van Dyke* and made clear that . . . only those factors on which the Commission has forbidden reliance . . . *never* may provide an appropriate basis for departure. . . . All others potentially may provide a basis for departure under appropriate circumstances." Therefore, "it is clear that our holding in *Van Dyke* that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure. Because the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

U.S. v. Brock, 108 F.3d 31, 33–35 (4th Cir. 1997). *Accord U.S. v. Sally,* 116 F.3d 76, 79–82 (3d Cir. 1997).

See *Outline* at VI.C.2.a and X.A.1

Adjustments

Acceptance of Responsibility

Seventh Circuit outlines when attorney's statements may be attributed to defendant for § 3E1.1 purposes. On the issue of whether a particular drug deal should have been considered relevant conduct, defendant remained silent. However, his attorney made both legal and factual arguments against using that deal in setting defendant's offense level. The district court held that it was relevant conduct, and also concluded that the attorney's factual arguments, which attempted to deny or minimize defendant's involvement in that deal, were false denials of relevant conduct that, under § 3E1.1, comment. (n.1(a)), warranted denial of the acceptance of responsibility reduction. Defendant appealed, arguing that his attorney's challenges were not to the facts but to the legal conclusions drawn from facts he had admitted.

The appellate court first agreed that a defendant should be able to challenge the legal conclusion of whether admitted facts constitute relevant conduct and remain eligible for the § 3E1.1 reduction. "We think this situation is closely analogous to challenging the constitutionality of a statute while admitting the conduct which would violate the statute, or challenging the applicability of a statute to the facts. In both cases, the application notes to the Guidelines suggest that such challenges do not deprive an otherwise eligible defendant of the reduction for acceptance of responsibility."

Here, however, defendant's attorney challenged facts as well as legal conclusions, and the court recognized the district court's frustration with the way it was done. "The defendant and his attorney appear to have been attempting to manipulate the Guidelines. The attorney directed his client to remain silent about relevant conduct, apparently in order to keep his client within Application Note 1(a) . . . . The attorney then challenged facts comprising relevant conduct in the course of argument and in the written objections to the PSR. . . . Because the Guidelines provide that an otherwise eligible defendant may remain silent as to relevant conduct without losing the acceptance of responsibility reduction, the attorney presumably believed his client had everything to gain and nothing to lose from this strategy. But in this case, the district court called the attorney's bluff, and attributed the attorney's factual challenges to [defendant]."

The appellate court found such an attribution "troubling for a number of reasons," and instructed district courts on how to handle future cases. "In a case such as this one, where the defendant remains otherwise silent as to relevant conduct but his lawyer challenges certain facts alleged in the PSR, we think the court should attempt to ensure that the defendant understands and approves the argument before attributing the factual challenges in the argument to the defendant for purposes of assessing acceptance of responsibility. . . . If the defendant does understand and agree with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction."

In addition, "[w]hen an attorney challenges the facts set out in the PSR during argument, we think the court should put counsel to his or her proof. The court should ask whether the attorney intends to present evidence in support of these fact challenges. If so, the argument can go forward. If not, the argument is really baseless, and the court need not allow an attorney to waste the court's time with a baseless argument when there is no evidence supporting the factual challenges. . . . If the attorney proffers evidence, we can safely assume the defendant himself is challenging the facts, and the court can then decide whether the challenge is frivolous."

Here, it was not clear whether defendant understood and agreed with his attorney's arguments; thus, the acceptance of responsibility reduction could not be denied on this ground. However, the district court gave another, independent reason for denying the reduction—that defendant "was insincere in his apology to the court, and that he did not actually accept responsibility for his offense." Because that finding was not clearly erroneous, the appellate court affirmed.

U.S. v. Purchess, 107 F.3d 1261, 1267–69 (7th Cir, 1997).

See *Outline* at III.E.2 and 3

Determining the Sentence

Consecutive or Concurrent Sentences

Eleventh Circuit holds that government cannot omit relevant conduct to avoid concurrent sentences under § 5G1.3(b). Defendant stole cars and ran "chop shops" for several years. In 1992 he was sentenced in state court to 12 years for three car thefts. Two years later he pled guilty in federal court to conspiracy to run a chop shop operation. The presentence report, based on information supplied by the government, calculated the offense level by using all the cars involved in the chop shop conspiracy except for the three involved in the state conviction. Because the state thefts were thus not "fully taken into account in the determination of the offense level for the instant offense," § 5G1.3(b), the sentencing court exercised its discretion under § 5G1.3(c) to make the federal sentence consecutive to the undischarged state sentence. Defendant appealed, arguing that the state thefts were relevant conduct requiring application of §5G1.3(b), and that the government omitted them because their inclusion would not have increased his sentence (his guideline range was 100–125 months, but the statutory maximum for his offense of conviction was only 60 months).

The appellate court agreed, concluding that "the Government deliberately refrained from portraying [the state thefts] as relevant conduct for one reason—to manipulate the application of the guidelines so that his federal sentence would run consecutively to the state sentences." Such manipulation is "contrary to both the letter and spirit of the guidelines. First, section 1B1.3 states that a defendant's offense level '*shall* be determined on the basis of' all relevant conduct. U.S.S.G. § 1B1.3(a) (emphasis added).... Second, the guidelines were written to prevent the Government from manipulating indictments and prosecutions to increase artificially a defendant's sentence or sentences for the same criminal conduct." Moreover, deliberately omitting relevant conduct would violate the guidelines' "real offense" sentencing approach. "We therefore conclude that when a defendant is serving an undischarged sentence resulting from conduct that is required to be considered in a subsequent sentencing proceeding as relevant conduct pursuant to section 1B1.3, section 5G1.3(b) provides that the subsequent sentence should run concurrently to the undischarged sentence."

Because defendant's state thefts were, in fact, conduct relevant to the federal offense of conviction, they should have been "fully taken into account" in setting the offense level. "[T]he district court consequently erred in concluding that section 5G1.3(b) does not require the instant sentence to run concurrently to the state sentences." However, the court noted that, even though § 5G1.3(b) requires concurrent sentences, the district court retains discretion to consider an upward departure on remand.

U.S. v. Fuentes, 107 F.3d 1515, 1521–27 (11th Cir. 1997).

See *Outline* generally at V.A.3

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Offense Conduct

Mandatory Minimums and Other Issues

Seventh Circuit holds that defendant may receive § 2D1.1(b)(6) reduction even if § 3E1.1 reduction is denied. Under USSG § 2D1.1(b)(6) (formerly § 2D1.1(b)(4)), drug defendants whose offense level is 26 or above can qualify for a two-level reduction if they satisfy the requirements of subdivisions (1)–(5) of the "safety valve" provision, § 5C1.2. In this case, the district court denied defendant an acceptance of responsibility reduction because he had failed to appear for his plea hearing, finally turning himself in seven months later, and did not fully admit his criminal conduct until the sentencing hearing. However, because defendant did finally admit his conduct, the court concluded that he met the requirements of § 5C1.2 and thereby qualified for the two-level reduction under § 2D1.1(b)(6). Defendant appealed, claiming it was inconsistent to deny the § 3E1.1 reduction while granting the § 2D1.1(b)(6) reduction.

The appellate court affirmed. Subdivision (5) of § 5C1.2 requires that, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense." "Section 5C1.2(5) in one respect demands more of an effort from the defendant than § 3E1.1(a), . . . but in other respects may demand less. Under § 5C1.2(5), the defendant is required to provide the necessary information 'not later than the time of the sentencing hearing.' U.S.S.G. § 5C1.2(5). In contrast, the commentary to § 3E1.1 advises the district court that it may consider whether the defendant provided information in a timely manner. . . . Likewise, the commentary to § 3E1.1 points to prompt and voluntary surrender and voluntary termination of criminal conduct as factors for consideration, while neither the text nor commentary for § 5C1.2 highlights such factors. Assuming that the district court in Webb's case appropriately awarded a § 5C1.2 reduction, it was nevertheless permitted to refuse a § 3E1.1(a) reduction."

U.S. v. Webb, 110 F.3d 444, 447–48 (7th Cir. 1997). *Cf. U.S. v. Mertilus,* 111 F.3d 870, 874 (11th Cir. 1997) (per curiam) (remanded: although § 2D1.1(b)(6) uses the factors listed in § 5C1.2, the two sections operate independently and it was error not to consider § 2D1.1(b)(6) reduction because offense of conviction is not listed in § 5C1.2 as eligible for safety valve). *See also U.S. v. Osei,* 107 F.3d 101, 102–05 (2d Cir. 1997) [9 *GSU* #6].

To be included in *Outline* at II.A.3; see also V.F.2

Determining the Sentence

Safety Valve Provision

Sixth Circuit holds that safety valve may be applied to defendant whose appeal was pending on provision's date of enactment. Defendant was originally sentenced in 1991 to 121 months on an LSD charge. On appeal, the appellate court remanded for clarification of a plea withdrawal issue, and the district court imposed the same sentence on remand. After a Nov. 1993 amendment changed the guideline for calculation of LSD amounts, defendant filed a motion for sentence modification under 18 U.S.C. § 3582(c). Although the district court granted her motion, it held that she was still subject to a 10-year mandatory minimum sentence and imposed a modified sentence of 120 months. One month after this sentence, on Sept. 23, 1994, the safety valve statute took effect, 18 U.S.C. § 3553(f); USSG § 5C1.2. Defendant appealed her sentence, claiming she should be resentenced under the safety valve provision.

"The question before us is whether § 3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted. This subsection applies 'to all sentences imposed on or after' [10 days after] the date of enactment . . . . The statute's language does not address the question of its application to cases pending on appeal. The statute's purpose statement, however, suggests that it should receive broad application and should apply to cases pending on appeal when the statute was enacted."

"A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error. When a sentence is modified under 18 U.S.C. § 3582(c)(2), the courts are required to consider the factors that are set out in 18 U.S.C. § 3553(a). . . . The consideration of these factors is consistent with the application of the safety valve statute. Therefore, § 3553(a) authorizes consideration of the safety valve statute when a defendant is otherwise properly resentenced under § 3582(c)(2)."

The court also concluded that its holding is consistent with §§ 3553(a) and 3582(b)(2)–(3), "which indicate that a sentence is not final if it can be appealed and modified pursuant to 18 U.S.C. § 3742. Similarly, § 3582(b)(1) indicates that a sentence is not final if it can be modified pursuant to 18 U.S.C. § 3582(c). In each of these situations resentencing is possible because of an exception to the

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general rule that the initial sentence was final. Each situation raises the possibility that resentencing will lower the defendant's unrestricted guideline range below the statutory minimum, thus making consideration of the safety valve relevant. Therefore, we hold that appellate courts may take the safety valve statute into account in pending sentencing cases and that district courts may consider the safety valve statute when a case is remanded under § 3742 or § 3582(c), the Sentencing Guidelines or other relevant standards providing for the revision of sentences."

U.S. v. Clark, 110 F.3d 15, 17–18 (6th Cir. 1997). *See also U.S. v. Mihm,* 134 F.3d 1353, 1355 (8th Cir. 1998) ("[T]he § 3553(f) safety valve is a general sentencing consideration that the district court must take into account in exercising its present discretion to resentence under § 3582(c)(2). . . . [T]he grant of § 3582(c)(2) relief to Mihm is a distinct sentencing exercise, one that results in a sentence 'imposed on or after' September 23, 1994. Thus, there is no retroactivity bar to applying § 3553(f) in these circumstances."). *Contra U.S. v. Stockdale,* 129 F.3d 1066, 1068 (9th Cir. 1997) ("A person whose sentence is reduced pursuant to the change in the weight equivalencies is not entitled to retroactive application of the safety valve statute, whether his original sentence was pursuant to a guideline range or the statutory minimum. Both the language of the applicable provisions and their purposes require this result.") (note: order was amended on denial of rehearing and rehearing en banc, April 20, 1998); *U.S. v. Torres,* 99 F.3d 360, 362–63 (10th Cir. 1996) (do not apply to defendant originally sentenced in 1993 who was resentenced under § 3582(c) after retroactive amendment changed guideline calculation of marijuana plants).

See *Outline* at V.F.1

Ninth Circuit holds that adverse jury finding does not preclude safety valve reduction. Defendant claimed to have no knowledge that a suitcase he had been asked to transport contained heroin. However, the jury found him guilty of possession of heroin with intent to distribute and of importation of heroin. At sentencing, the district court found that defendant had told the government everything he knew about the offenses and reduced his sentence under the safety valve provision, § 3553(f); § 5C1.2. The government argued that, because knowledge of the drugs is an element of the convicted offenses, the jury's guilty verdict precludes a finding that defendant "truthfully provided" information as required under § 3553(f)(5); § 5C1.2(5).

The appellate court affirmed the sentence, holding that recent Supreme Court cases make it clear that sentencing findings do not have to agree with a jury verdict. In *Koon v. U.S.,* 116 S. Ct. 2035 (1996), "the Supreme Court made it clear that courts may not define facts relevant to sentencing beyond those identified in the guidelines," and "reflect[ed] the long-standing tradition that sentencing is the province of the judge, not the jury. . . . In light of the Court's decision in *Koon,* we have no difficulty holding that a district court may reconsider facts necessary to the jury verdict in determining whether to apply the safety valve provision of the guidelines."

The court found further support in *U.S. v. Watts,* 117 S. Ct. 633 (1997), which held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge." In reversing Ninth Circuit precedent, the Court also stated that "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." The appellate court thus held that, "[c]onsistent with the language of § 3553(f) and the different roles involved when determining guilt and imposing sentence, . . . the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." Because the district court's conclusion here was not clearly erroneous, the sentence was affirmed.

U.S. v. Sherpa, 110 F.3d 656, 661–62 (9th Cir. 1996) (amending 97 F.3d 1239).

See *Outline* generally at V.F.2

Supervised Release

Sixth Circuit holds that period of supervised release may be tolled while defendant is out of country after deportation. In 1992 defendant pled guilty to immigration fraud. He was sentenced to three months of imprisonment to be followed by two years of supervised release. As special conditions of supervised release, defendant was to agree to voluntary deportation, was not to reenter the United States without written permission of the Attorney General, and, if allowed to reenter, would report to the nearest probation office so that his period of supervised release "shall be resumed." Defendant served his sentence and was deported. Within a year he returned to the United States illegally and was eventually arrested in 1996. The original district court revoked defendant's supervised release and sentenced him to 24 months in prison, rejecting defendant's arguments that the court had no authority to toll his period of release and therefore that period had expired in 1995.

The appellate court affirmed the revocation and sentence, concluding that tolling a period of supervised release is allowed under the "broad discretion to fashion appropriate conditions of supervised release" granted to district courts under USSG § 5D1.3 and 18 U.S.C. § 3583(d). "We think that the tolling order met the specified criteria [in § 5D1.3]. Mr. Isong had repeatedly violated immigration laws, and he had flagrantly violated his original sentence within months of its entry. Given his demonstrated disrespect for the law, it seems to us that the tolling order was an appropriate penological measure, designed to ensure that the defendant would be subject to supervi-

sion if and when he returned to the United States. The tolling order was also appropriate from a deterrence standpoint. It is unlikely that Mr. Isong could have been supervised after his deportation to Nigeria. Supervised release without supervision is not much of a deterrent to further criminal conduct."

The court also rejected defendant's argument that, because 18 U.S.C. § 3624(e) specifically provides for tolling a period of supervised release if a defendant is imprisoned for another crime for 30 days or more, the lack of any comparable tolling provision for a deported defendant impliedly forbids such an order. The argument "is blunted here by the rest of the statutory scheme. When deportation is part of a defendant's sentence, the deportation normally occurs upon the end of any term of imprisonment. An unserved period of supervised release does not defer deportation. 8 U.S.C. § 1252(h). In most instances, supervised release of a defendant who is outside the United States would be essentially meaningless. It seems to us that a tolling order is an appropriate way to make supervised release meaningful for defendants who are going to be deported. This circumstance, coupled with the district court's discretion to set appropriate conditions of supervised release . . . , is sufficient to counter any negative implication that might otherwise stem from 18 U.S.C. § 3624(e)."

U.S. v. Isong, 111 F.3d 428, 429–31 (7th Cir. 1997) (Moore, J., dissented). *See also U.S. v. (Mary) Isong,* 111 F.3d 41, 42 (6th Cir. 1997) (affirming condition of supervised release that defendant remain under supervision for three years, not including any time she is not in the country if she is deported).

See *Outline* generally at V.C

First Circuit holds that supervised release begins on date of actual release from prison, not date prisoner would have been released had he not been convicted of charge that was later dismissed. Defendant was sentenced in 1991 to two concurrent terms of 21 months each plus a consecutive term of 60 months for a third count of using a firearm during a drug offense, 18 U.S.C. § 924(c). He also received concurrent supervised release terms of three and five years on the first two counts. In early 1996, defendant filed a motion under 28 U.S.C. § 2255 seeking to have his § 924(c) conviction vacated on the basis of *Bailey v. U.S.,* 116 S. Ct. 501 (1995). His motion was granted and the conviction and sentence were vacated and the count was dismissed. Because the remaining valid sentences had long been completed, the court ordered defendant's immediate release and commencement of the terms of supervised release. Defendant appealed, arguing that his supervised release terms should be reduced by the time he was imprisoned (approximately 39 months) beyond the date the two valid sentences would have ended. Alternatively, he requested that the supervised release terms be eliminated altogether to compensate him for the deprivation of freedom that resulted from the vacated conviction and sentence.

The court rejected defendant's arguments, and specifically disagreed with the rationale of *U.S. v. Blake,* 88 F.3d 824, 825–26 (9th Cir. 1996) (when retroactive guideline amendment reduces prison term to less than time served, term of supervised release begins on date defendant should have been released) [9 *GSU* #1]. Defendant's arguments are "contrary to the language of 18 U.S.C. § 3624[(e)]," which states that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." Defendant can reasonably argue that, because he should have been released from prison in late 1992 and his term of release begun at that time, he should be given credit for his excess prison time by reducing his time on release. However, "[t]he fact remains that § 3624(e) ties the beginning of a term of supervised release to release from imprisonment. It forbids the running of the term of supervised release during any period in which the person is imprisoned. Joseph was in prison at the time he now seeks to identify as the beginning of his terms of supervised release and was, under the plain language of § 3624(e), ineligible for supervised release then. . . . [L]ike the Eighth Circuit in [*U.S. v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996)], we believe that the language in § 3624(e) must be given its plain and literal meaning."

The court also found defendant's arguments undermined by 18 U.S.C. § 3583(e), under which "a defendant can ask the district court to grant early termination of his supervised release terms 'in the interests of justice' after completing one full year of supervised release. . . . The availability of this mechanism, which will enable Joseph to argue whatever points of equity and fairness he thinks persuasive to the district court, further persuades us not to invent some form of automatic credit or reduction here to compensate for Joseph's increased incarceration."

U.S. v. Joseph, 109 F.3d 34, 36–39 (1st Cir. 1997).

See *Outline* generally at V.C

Adjustments

Obstruction of Justice

Second Circuit examines when § 3C1.1 enhancement may be given for perjury during a related state investigation. Defendant was convicted of environmental crimes. The district court found that, during a state investigation into the illegal waste dumping later prosecuted in federal court, defendant committed perjury. Concluding that defendant was aware of the federal investigation at that time and that it was the motivation for his perjury, the court imposed a § 3C1.1 enhancement for obstruction of

justice. Because "the connection between the two cases is quite close," the appellate court agreed that "here, perjury in the [state] action could constitute obstruction of justice in the instant federal offense."

However, the court concluded that the district court did not make adequate findings to show that defendant's perjury actually warranted enhancement. "[I]n order to base a § 3C1.1 enhancement upon the giving of perjured testimony, a sentencing court must find that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter." The appellate court concluded that the district court did not sufficiently address the materiality elements. "We understand the materiality element to mean ordinarily that the intentional giving of false testimony must be material *to the proceeding in which it is given.* In other words, Herzog can be found to have committed perjury in the state proceeding only if the sentencing court finds that he intentionally gave false testimony which was material *to the state civil action.*"

"This case presents an additional twist. Where, as here, the enhancement is applied based upon perjury made not in the instant judicial proceeding, but, rather, in a related but separate state action, we must assume that the element of materiality which is required by the Guidelines (as opposed to that required for a finding of perjury) must refer to a finding that the false testimony is material *to the instant action.* Just because perjured testimony is given in a related action, and simply because that testimony is found to have been material to the related proceeding, does not mean that the statements are material to the instant proceeding. We believe that, even if the court finds that Herzog's statements constituted perjury because they were material to the state proceeding, it must also find that the perjury was material to the instant federal offense before applying that state perjury as the basis for a § 3C1.1 enhancement of his federal sentence. We thus hold that, when false testimony in a related but separate judicial proceeding is raised as the basis for a § 3C1.1 obstruction of justice enhancement, a sentencing court may only apply the enhancement upon making specific findings that the defendant intentionally gave false testimony which was material to the proceeding in which it was given, that the testimony was made willfully, i.e., with the specific purpose of obstructing justice, and that the testimony was material to the instant offense."

"The sentencing court did not make findings with respect to either aspect of materiality. Although [it] found that the false state deposition was *motivated by* the instant federal offense, motivation alone does not equate to materiality. We therefore vacate Herzog's sentence and remand for additional findings."

U.S. v. Zagari, 111 F.3d 307, 328–29 (2d Cir. 1997).

See *Outline* at III.C.4 (State offenses)

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Offense Conduct

Drug Quantity

Supreme Court affirms that, under the Guidelines, the sentencing court determines whether offense involved cocaine or crack when jury verdict allows for either. Defendants were charged with conspiring to possess with intent to distribute mixtures containing cocaine and cocaine base (crack), 21 U.S.C. §§ 841, 846. The jury was instructed that the government must prove that the conspiracy involved cocaine *or* cocaine base, and it returned a general verdict of guilty. The district court imposed sentences based on both cocaine and cocaine base.

On appeal, defendants argued that, because the jury returned a verdict based on cocaine *or* cocaine base, their sentences could only be based on cocaine, which would result in shorter sentences. The appellate court rejected that argument, finding that the Sentencing Guidelines require the sentencing judge, not the jury, to determine the kind and amount of drugs involved in a conspiracy. *U.S. v. Edwards,* 105 F.3d 1179, 1180–81 (7th Cir. 1997).

The Supreme Court affirmed, agreeing "that in the circumstances of this case the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the offense-related activities. The Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon amount and kind. . . . Consequently, regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the 'controlled substances' at issue—and how much of those substances—consisted of cocaine, crack, or both."

Nonetheless, "petitioners argue that the drug statutes, as well as the Constitution, required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Petitioners misapprehend the significance of this contention, however, for even if they are correct, it would make no difference to their case. That is because the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's 'relevant conduct.' USSG § 1B1.3. And 'relevant conduct,' in a case like this, includes *both* conduct that constitutes the 'offense of conviction,' *id.,* § 1B1.3(a)(1), *and* conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction,' *id.,* § 1B1.3(a)(2). Thus, the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each—regardless of whether the judge believed that petitioners' crack-related conduct was part of the 'offense of conviction,' or the judge believed that it was 'part of the same course of conduct, or common scheme or plan.' The Guidelines sentencing range—on either belief—is identical." The Court added that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," but that was not the case here.

Edwards v. U.S., 118 S. Ct. 1475, 1477 (1998). *See also U.S. v. Lewis,* 113 F.3d 487, 490 (3d Cir. 1997) (instruction that jury had to find that defendant distributed cocaine or cocaine base to convict him of § 841(a)(1) distribution offense was not improper—district court determines weight and identity of controlled substance for sentencing under § 841(b)).

To be included in *Outline* at II.A.3

Possession of Weapon by Drug Defendant

Ninth Circuit holds that § 2D1.1(b)(1) should not be applied if defendant was entrapped into possessing weapon. Defendant pled guilty to cocaine distribution. An informant made several purchases from defendant, and one time traded a handgun for cocaine. When defendant was arrested and his home searched, officers found the gun along with cocaine and drug paraphernalia. Although a charge of using or carrying a gun during a drug-trafficking offense was dropped, the sentencing court applied the two-level enhancement under § 2D1.1(b)(1) for possessing a weapon during a drug-trafficking crime. The court rejected defendant's argument that he had been entrapped into possessing the gun and that the court should not apply § 2D1.1(b)(1) or, if it did, should offset it by a two-level reduction for sentencing entrapment.

The appellate court remanded, concluding that its precedents hold that sentencing entrapment, if proved, may warrant a downward departure or a refusal to apply an enhancement. "We hold that if Parrilla was entrapped into trading cocaine for a gun, then the doctrine of sentencing entrapment precludes application of the two-level gun enhancement under § 2D1.1(b)(1). Our holding rests upon the basic principle that a defendant's sentence should reflect 'his predisposition, his capacity to commit

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the crime on his own, and the extent of his culpability.'" Defendant bears the burden of proving sentencing entrapment by a preponderance of the evidence, and the sentencing court must make "express factual findings" as to whether defendant has met that burden. Here, the court remanded because "nothing in the record shows that the district court considered all the relevant evidence or made the required findings to reject Parrilla's sentencing entrapment claim, [and] the record is not sufficiently developed to show whether the district court properly applied the gun enhancement."

U.S. v. Parrilla, 114 F.3d 124, 127–28 (9th Cir. 1997).

To be included in *Outline* at II.C.1.

D.C. Circuit examines sentencing liability for defendant whose participation in conspiracy straddled his eighteenth birthday. Defendant was 11 years old when he first joined a large drug conspiracy. He turned 18 during the course of the conspiracy, and was 19 when he was indicted. In addition to his own conduct, the sentencing court held defendant liable for the foreseeable conduct in furtherance of the conspiracy by his fellow conspirators that occurred before he turned 18. Defendant argued, first, that as a juvenile he did not have the requisite capacity to "join" a conspiracy, and second, that because "a defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant *joining* the conspiracy," USSG § 1B1.3, comment. (n.2) (emphasis added), he should not be held liable for the conduct of others before he turned 18.

The court acknowledged that, in some instances, federal juvenile delinquency law may limit a young defendant's liability for the conduct of others. "[I]n the case of a defendant younger than twenty-one at the time of the indictment who joined a conspiracy prior to reaching eighteen, the government must either obtain a transfer of the defendant to adult status or prove that the defendant personally engaged in some affirmative act in furtherance of the conspiracy after turning eighteen before the court may attribute to him as relevant conduct drugs sold by coconspirators before he reached age eighteen."

The court affirmed the sentence because "there was overwhelming evidence of post-eighteen action in furtherance of the conspiracy. . . . The adult conduct ratifies the juvenile agreement to join the conspiracy and the juvenile participation in the conspiracy. . . . Since [defendant] was properly convicted in adult court of a conspiracy he joined as a juvenile but continued in after eighteen, the Guidelines unambiguously permit the court to consider his and his co-conspirator's foreseeable conduct 'that occurred during the commission of the [entire conspiracy] offense,' . . . starting when he joined the conspiracy at age eleven."

U.S. v. Thomas, 114 F.3d 228, 262–67 (D.C. Cir. 1997).

To be included in *Outline* at I.I and II.A.2

Criminal History

Career Offender

Fourth Circuit holds that post-offense reclassification of prior violent felony to misdemeanor level does not change its status under career offender provision. Defendant was sentenced in 1996 as a career offender, partly on the basis of a 1986 state conviction for "assault on a woman," which at the time carried a two-year maximum sentence. In 1994 the state reclassified that offense as an A1 misdemeanor with a maximum sentence of 150 days. As such, it would not have qualified as a crime of violence as defined in § 4B1.2 at the time defendant was sentenced, and he argued that he should not have been sentenced as a career offender.

The appellate court disagreed and affirmed the sentence. "The issue presented in the instant appeal appears to be one of first impression for the federal courts. Guided by the language of the guideline and the accompanying notes a rejection of Johnson's position is dictated." For the "two prior felony conviction" required for career offender status, § 4B1.2(c)(2) provides that: "The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established." The court found that defendant "sustained his conviction for assault on a female in 1986. In 1986, assault on a female was punishable by a statutory maximum of 2 years. Thus, Johnson's assault conviction is properly considered a prior felony conviction for guideline purposes."

U.S. v. Johnson, 114 F.3d 435, 445 (4th Cir. 1997).

To be included in *Outline* at IV.B.3

General Application Principles

Amendments

Eighth Circuit outlines procedure for district courts when considering whether to apply retroactive amendments following § 3582(c)(2) motion. Defendant was sentenced in 1993 for a marijuana offense. After a § 5K1.1 departure, the district court departed well below the guideline range but not below the 60-month statutory minimum, despite a motion by the government under 18 U.S.C. § 3553(e). After a Nov. 1995 amendment to the Guidelines retroactively reduced the penalty for offenses involving marijuana plants, defendant filed a motion to reduce his sentence, 18 U.S.C. § 3582(c)(2). He argued that his new sentencing range would be 57–71 months, and that the substantial assistance departure should be recalculated from this level.

The government argued against a reduction, claiming that defendant had already benefited from a substantial reduction, that it would not have moved for a reduction below the statutory minimum if the amendment had been in effect, and that defendant's later escape from prison undermined his value as a witness. The govern-

ment also claimed that, because of the longer original guideline range, it did not charge defendant with a § 924(c) firearms violation or file notice of his status as a repeat drug offender, which would have added to the statutory minimum sentence. The district court, in a one-line, handwritten ruling, denied defendant's motion "for the reasons set out in the [government's] response.

The appellate court remanded for reconsideration. Reading § 3582(c)(2) and USSG § 1B1.10(b) together, "a district court [must] make two distinct determinations. First, by substituting only the amended sentencing range for the originally determined sentencing range, and leaving all other previous factual decisions concerning particularized sentencing factors (e.g., role in the offense, obstruction of justice, victim adjustments, more than minimal planning, acceptance of responsibility, number of plants, etc.) intact, the district court must determine what sentence it would have imposed had the new sentencing range been the range at the time of the original sentencing. Second, having made the first determination, the district court must consider that determination together with the general sentencing considerations contained in section 3553(a) and, in the exercise of its thus informed discretion, decide whether or not to modify the original sentence previously imposed. . . . The denial of Wyatt's motion for a sentence reduction, absent any indication that the district court considered what would have been an appropriate sentence under the retroactive amendment, constitutes an abuse of discretion."

The court went on to consider which of the factors raised by the government could properly be considered on remand, such as "other charges the government might have been able to file had it not entered the plea agreement. While we agree that the district court should not speculate about what charges the government chose not to pursue, the district court is free to consider the complete nature of the defendant's crime pursuant to section 3553(a)." As for defendant's escape, that may not be consider in setting the amended guideline range, but "it is appropriate for the district court to consider his escape as relevant to the defendant's nature and characteristics when determining whether ultimately to grant the motion to modify his sentence."

The court rejected defendant's claim that the district court was bound to honor it's original decision to depart, and to use the amended guideline range as its starting point. "A discretionary decision to depart from the Guidelines range on the basis of substantial assistance made at the original time of sentencing is not a 'guideline application decision' that remains intact when the court considers the new Guideline range. . . . The district court's discretionary decision of whether to depart from the new amended Guidelines range based upon Wyatt's prior substantial assistance is not dictated or mandated by either its prior decision to depart or by the extent of its prior departure, because 'the benefit accruing from a lowered sentencing range is independent of any substantial-assistance considerations.' . . . The district court retains unfettered discretion to consider anew whether a departure from the new sentencing range is now warranted in light of the defendant's prior substantial assistance."

U.S. v. Wyatt, 115 F.3d 606, 608–10 (8th Cir. 1997). *Accord U.S. v. Vautier,* 140 F.3d 1361, 1364–66 (11th Cir. 1998) (in similar case, agreeing with *Wyatt* on two-step inquiry and that district court "has the discretion to decide whether to re-apply a downward departure for substantial assistance when considering what sentence the court would have imposed under the amended guideline"). *See also* USSG § 1B1.10(b), comment. (n.3) ("[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate").

See *Outline* at I.E

Departures

Mitigating Circumstances

First Circuit holds that agreeing to be deported did not warrant downward departure. Defendant pled guilty to unlawful reentry following deportation and the government "agreed to recommend a downward departure under U.S.S.G. § 5K2.0 in return for a stipulation of alienage and deportability following his release from prison, as well as waivers of any deportation hearing and any appeal from the deportation order." The offer was in line with a 1995 memorandum from the Attorney General that authorized U.S. attorneys to recommend departure under these circumstances. The district court rejected the departure, holding that it did not have authority under the Guidelines to do so.

The appellate court agreed, holding that a stipulation to deportation was neither a mitigating circumstance "of a kind" not considered by the Sentencing Commission nor mitigation "to a degree" not contemplated by the Commission. "[W]e think it is quite clear that the Commission would have considered that an alien defendant, particularly one convicted of *unlawful reentry* subsequent to deportation for an aggravated felony, almost certainly would be deported again. . . . Furthermore, we believe it would be farfetched to suppose that the Commission overlooked the central reality that in all likelihood deportation would occur by normal operation of law as a matter of course—*irrespective of the alien defendant's consent*—following a conviction for illegal reentry subsequent to deportation for an aggravated felony."

The court also cited statistics showing that, on average, over a million illegal aliens are expelled from the U.S. each year and that approximately 97% accept a voluntary departure procedure. "These analogous data indicate that

an alien criminal defendant with no plausible basis for contesting deportation—particularly one convicted of illegal reentry subsequent to deportation for an aggravated felony—does not meet the atypicality requirement for a section 5K2.0 departure simply by relying upon whatever administrative convenience presumably may result from a stipulated deportation. . . . We therefore conclude that the Sentencing Commission was fully cognizant that virtually all alien criminal defendants, convicted under 8 U.S.C. § 1326(a) and sentenced pursuant to U.S.S.G. § 2L1.2, would be subjected to deportation and that many undoubtedly would stipulate to deportation. Accordingly, we hold, at least in the absence of a colorable, nonfrivolous defense to deportation, that the proffered ground for departure under U.S.S.G. § 5K2.0 does not constitute a mitigating circumstance of a kind not adequately considered by the Commission."

On the second possible departure rationale, the court stated that "[a] mitigating circumstance is present to a degree not contemplated by the Commission only if it is portentous enough to make the case *meaningfully* atypical. . . . Absent some mitigating circumstance not suggested here, no substantial atypicality is demonstrated where an alien defendant simply stipulates to deportation and no nonfrivolous defense to deportation is discernible." And because no specific facts were alleged that this particular defendant's stipulation was atypical, "the parties essentially are left with their implicit contention that *any* stipulated deportation constitutes an extraordinary mitigating circumstance, for no other reason than that it bears the government's endorsement and dispenses with an administrative hearing. However, were downward departures permitted simply on the conclusory representations in the Memorandum, without regard to whether the alien defendant has a nonfrivolous defense to deportation, individualized guideline sentencing indeed could be undermined by what the district court aptly termed a 'shadow guideline' that would erode the prescribed [base offense level] in any alien-criminal defendant's case to which the government chose to apply the Memorandum, *simpliciter*."

U.S. v. Clase-Espinal, 115 F.3d 1054, 1056–60 (1st Cir. 1997). *Cf. U.S. v. Young,* No. 97-1455 (2d Cir. May 12, 1998) (Keenan, Dist. J.) (reversed: improper to give departure to recently naturalized U.S. citizen defendant—who could not be deported—on ground that had he not been naturalized, he might have received departure for agreeing to be deported).

See *Outline* at VI.C.5.b

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Departures

Mitigating Circumstances

D.C. Circuit holds that "criminal history" in § 5K2.13 has "broader meaning" than "criminal history" calculated in § 4A1.1. Defendant pled guilty to one count of being a felon in possession of a firearm and faced a sentencing range of 37–46 months. His criminal history included four other firearms offenses, some of which involved assaultive or threatening behavior. The district court found that defendant suffered from post-traumatic stress disorder (from service in the Vietnam War) and departed under § 5K2.13 to a sentence of five years' probation. In concluding that "defendant's criminal history does not indicate a need for incarceration to protect the public," § 5K2.13, the court noted that defendant's mental condition was treatable, he would not be released from prison on another, uncompleted sentence until his middle fifties, his criminal history score was erroneous, and he had never actually injured any law enforcement officers during his previous criminal conduct despite repeated opportunities to do so. On appeal, the government argued that "criminal history" as defined in Chapter 4, Part A of the Guidelines was the only relevant factor in assessing whether defendant should be incarcerated to protect the public.

The appellate court disagreed, holding "that the 'criminal history' referred to in section 5K2.13 is not limited to the meaning Chapter 4, Part A gives it." The circuit previously held that "non-violent offense" in § 5K2.13 should not be equated with "crime of violence" in § 4B1.2. "The different purposes behind section 5K2.13 and Chapter 4, Part A likewise suggest that the latter," designed to impose greater punishment on repeat offenders, "should not control the meaning of 'criminal history' as used in the former," whose purpose is lenity. "Moreover, the [Sentencing] Commission could have provided that certain repeat offenders are ineligible for a departure under section 5K2.13. That it chose not to reinforces the view that 'criminal history' means something more in section 5K2.13 than it does in Chapter 4, Part A."

"This is not to say, however, that anything is fair game. Rather, the sentencing court may consider only those factors that bear on whether 'the defendant's criminal history . . . indicate[s] a need for incarceration to protect the public.' U.S.S.G. § 5K2.13. The Ninth Circuit identified four factors: psychiatric or other medical treatment the defendant is receiving and its likelihood of success, the defendant's likely circumstances upon release, the defendant's overall criminal record and the 'nature and circumstances' of the current offense." *See U.S. v. Cantu,* 12 F.3d 1506, 1516 (9th Cir. 1993).

In this case, the court agreed with the government's alternative claim and concluded that "[t]he sentencing court here strayed far from these factors." For example, although defendant's stress disorder is treatable, the court made no findings that defendant would, in fact, receive treatment. Also, although an individual in his fifties may be less inclined to commit some forms of crime, reliance on that supposition "is undermined by the central role of reduced mental capacity, which suggests that the normally beneficent effects of aging may be ineffective" and the fact that "defendant's criminal history involves the use and abuse of firearms, whose exercise requires no youthful vigor." The appellate court found that the other factors relied on by the district court were also inappropriate and remanded for resentencing in accord with its opinion.

U.S. v. Atkins, 116 F.3d 1566, 1569–71 (D.C. Cir. 1997) (per curiam) (Henderson, J., dissented). *Note:* Although a proposed Nov. 1998 amendment would substantially revise § 5K2.13, the language at issue here would remain with only slight modification.

See *Outline* at VI.C.1.b

Aggravating Circumstances

Fifth Circuit holds that non-criminal conduct may be considered for upward departure. Defendant pled guilty to several counts related to possessing, transferring, and manufacturing illegal weapons, including three machine guns and two silencers. As part of one sale, defendant agreed to show an undercover agent how to construct a silencer and videotaped that construction so that others could learn his method. In that tape, he falsely stated that he was properly licensed to manufacture the silencer. At another point, defendant was notified by the manufacturer of some of his weapons (which he had illegally converted to fully automatic) that they were about to become illegal and he should return them; defendant wrote back and falsely claimed that he had sold them. The district court departed upward on several grounds and used the videotape and the letter to support the ground that defendant had attempted to conceal his illegal conduct and to facilitate manufacture and concealment by others. Defendant argued on appeal that "lying in the letter and on the video and participating in the video were not, in themselves, criminal activities and

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thus cannot be used as the basis of an upward departure."

"We are not persuaded that the district court, in contemplating an upward departure, is limited to considering only acts that are criminal or illegal." Although the Fifth Circuit had previously held that non-criminal conduct should not be included in relevant conduct when setting the offense level, *see U.S. v. Peterson,* 101 F.3d 375, 385 (5th Cir. 1996), that case "is distinguishable from the present case because *Peterson* involves calculation of the *base offense level* while Arce complains of the district court's *upward departure.* A sentencing court is not limited to 'relevant conduct' when considering an upward departure. The Sentencing Guidelines provide in § 1B1.4: 'In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation, any* information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.' (emphasis added) . . . . The Guidelines also specifically provide that conduct which does not constitute an element of the offense may be considered in determining a departure, even when that conduct cannot be considered in determining the base offense level under § 1B1.3. USSG § 1B1.2 comment. note 3 . . . . We conclude that a district court can consider conduct that is not itself criminal or 'relevant conduct' under § 1B1.3 in determining whether an upward departure is warranted."

Although the court remanded for resentencing because one of the other grounds of departure was invalid, it upheld the conclusion that the actions evidenced by the videotape and letter "make this case unusual and outside the heartland of cases governed by the Guidelines."

U.S. v. Arce, 118 F.3d 335, 340–43 (5th Cir. 1997).

See *Outline* at I.A.4; generally at I.A.3; I.C; VI.B.1.a; VI.B.1.l

Supervised Release

Revocation

Circuits differ on whether retroactive application of § 3583(h), allowing reimposition of supervised release, is ex post facto violation. Effective Sept. 13, 1994, 18 U.S.C. § 3583(h) authorizes imposition of a new term of supervised release after a previous term is revoked. "The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Before § 3583(h), most circuits had held that supervised release could not be reimposed once it was revoked. Some of those circuits have now considered whether applying § 3583(h) to defendants whose original offenses occurred before Sept. 13, 1994, violates the Ex Post Facto Clause of the Constitution.

The Third Circuit has held that applying § 3583(h) may or may not be an ex post facto violation depending on the type of felony in defendant's original offense. The court found that for a class A felony the maximum penalty was the same under the old and new law. *See U.S. v. Brady,* 88 F.3d 225, 228–29 (3d Cir. 1996) ("The only difference is that now [defendant's] liberty can be restrained with a mix of imprisonment and supervised release. In either event, the legal consequences of his criminal conduct are identical, . . . and we find no ex post facto violation.") [8 *GSU* #9].

Later, however, the court held that § 3583(h) could not be applied retroactively when the original offense was a class B, C, or D felony because the new maximum penalty is greater. "For class B, C, and D felonies, there is a discrepancy between the amount of supervised release authorized and the amount of incarceration that can be imposed" under § 3583(e)(3). All allow a longer period of supervised release than of imprisonment. "Since § 3583(h) ties the length of the total package to the length of supervised release permitted under §3583(b), and since this length exceeds the length of imprisonment authorized under § 3583(e), application of § 3583(h) allows imposition of a sentence two years longer than before for class B felonies (five years rather than three) and one year longer for class C and D felonies (three years as opposed to two). These lengthier periods of restricted liberty authorized under § 3583(h) mean that application of this provision impermissibly increases the punishment for those who commit class B, C, or D felonies. *Brady* in no way bars us from recognizing this fact."

To the government's argument that defendant's could receive more lenient treatment under § 3583(h) because district courts may give shorter prison terms when a new supervised release term is available, the court responded: "Retrospective application of § 3583(h) violates the ex post facto prohibition if there is the potential that such application may even once result in a harsher sentence than previously authorized. The possibility that post § 3583(h) sentences may frequently be less onerous than otherwise is insufficient to redeem the statute."

U.S. v. Dozier, 119 F.3d 239, 243–44 (3d Cir. 1997) (also stating that "[a] sentence imposed upon revocation of supervised release is most properly viewed as a consequence of the original criminal conviction").

The Fourth Circuit agreed that § 3583(h) should not be applied retroactively when the original offense was a class C or D felony. The court also agreed that punishment for violating supervised release is punishment for the original offense, and that it did not matter whether defendants might be treated more leniently under the new law. "'[A]n increase in the *possible* penalty is *ex post facto* regardless of the length of the sentence actually imposed.'" (Emphasis added by court.)

After reviewing what defendant could receive under the old law, the court determined that "§ 3583(h) empowers a court to do much more. In addition to allowing a court to sentence a defendant to virtually the same term

of imprisonment as above, it provides that a new term of supervised release may also be imposed. . . . The length of this new supervised release term is capped at the maximum term of supervised release allowed by § 3583(b) for the original crime with credit given for any prison time imposed under § 3583(e)(3). . . . Therefore, the maximum penalty for violating the terms of one's release under § 3583(e)(3) and (h) is, for Class C and D felonies, two years (less one day) in prison and an additional year and a day of supervised release. . . . This potential punishment is greater than that under § 3583(e) alone." Following *Dozier*, the court noted that the same result holds when the original offense was a class B felony, but for class A or E felonies, or misdemeanors, there is no disparity in the maximum terms of release versus imprisonment "and the application of § 3583(h) cannot disadvantage defendants guilty of these crimes by increasing the possible sanction imposed after a *single* revocation of supervised release."

U.S. v. Lominac, 144 F.3d 308, 312–15 & n.9 (4th Cir. 1998).

Without specifically discussing the effect of the class of the original felony, the Ninth Circuit reached the same result for a pair of class C or D defendants. Both had been given the maximum three-year term of supervised release, and after revocation were given a combination of imprisonment and release equal to three years. After finding that "punishment that follows . . . a violation [of release] is imposed on the authority of conviction for the underlying offense," the court held that "section 3583(h) subjected [defendants] to greater punishment than did the prior law," which for defendants was two years' imprisonment (the terms of release could not be extended because they were already serving the maximum).

"Under the later-enacted section 3583(h), however, the district courts could, and did, impose three years of restriction . . . [which] may reasonably be viewed on its face as a more onerous penalty than two years of restriction. More important, section 3583(h) exposes [defendants] to the possibility of further incarceration (up to their two year maximum) followed by more supervised release if they violate the conditions of the second supervised releases. This is a penalty that . . . [they] could not face in our circuit at the time they committed their offenses." The court also agreed with the Seventh Circuit's later-overruled decision in *Beals*, below, that, even if a more severe punishment is not initially given under § 3583(h), an ex post facto problem arises "from the possibility of repeated violations of the conditions of successive supervised releases" that could lead to greater total punishment.

U.S. v. Collins, 118 F.3d 1394, 1397–98 (9th Cir. 1997).

The Seventh Circuit originally held that retroactive application of § 3583(h) was improper because it could result in greater total punishment. *See U.S. v. Beals,* 87 F.3d 854, 858–60 (7th Cir. 1996) (also holding that punishment for supervised release violation arises from original offense) [8 *GSU* #9]. However, the court later overruled *Beals* and determined that the "speculative nature" of a potentially greater punishment was insufficient to preclude retroactive application of § 3583(h). Defendant had her five-year term of release revoked and was sentenced to seven months' imprisonment and a new term of release under § 3583(h). The court cited Supreme Court precedent for the proposition that "the *Ex Post Facto* Clause does not 'forbid[] any legislative change that has any conceivable risk of affecting a prisoner's punishment' . . . . Retroactive application of new legislation violates the *Ex Post Facto* Clause only when the statute produces a sufficient risk of increasing a defendant's punishment." Considering the "'practical, as opposed to purely theoretical' effect of § 3583(h)'s application" to defendant, the court concluded that defendant "has not suffered increased punishment as a result of this application because under both the old and the new law, the district court could have imposed a prison term for the entire term of supervised release authorized for her original offense. The mere possibility" that defendant might face greater punishment after future violations of release "does not produce a sufficient risk of increasing her punishment."

U.S. v. Withers, 128 F.3d 1167, 1170–72 (7th Cir. 1997).

The Sixth Circuit held that § 3583(h) could be applied to two defendants originally sentenced before Sept. 13, 1994. The court cited an earlier case for the proposition that punishment for a violation of supervised release "impose[s] a new sentence for the later misconduct" and does not add punishment for the original offense. *See U.S. v. Reese,* 71 F.3d 582, 590–91 (6th Cir. 1995) (holding that § 3583(g) can be applied retroactively). Following the reasoning of that case, "section 3583(h) may be applied to defendants . . . without violating the Ex Post Facto Clause because section 3583(h) was passed before they violated the terms of their supervised release . . . . [S]ection 3583(h) does not alter the punishment for defendants' original offenses; section 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release—offenses they committed after section 3583(h) was passed." The court acknowledged that the courts in *Beals* and *Collins, supra,* had reached a different result, but held it was "bound by the holding of this court in *Reese*."

U.S. v. Page, 131 F.3d 1173, 1175–76 (6th Cir. 1997). *See also U.S. v. Evans,* 87 F.3d 1009, 1010–11 (8th Cir. 1996) (same: § 3583(h) "applied to [defendant's] case in 1995 because the district court did not increase the sentence for his original [1992] crime but merely punished him for violating his supervised release" in 1995).

See *Outline* at VII.B.1

Offense Conduct

Calculating Weight of Drugs

Eighth Circuit holds that sentence may be based on *type* of drugs agreed to, even if different drug is actually sold. After several purchases of cocaine from defendant, an undercover officer (Deist) asked about buying methamphetamine. The first attempted buy failed, but another was set up by an informant (Rush). Defendant did not make the sale himself, but arranged for Rush to buy from his source, Pimentel, who agreed to sell three pounds of methamphetamine to Rush in two stages. Pimentel was arrested after selling the first pound. Later analysis showed that the substance sold was actually amphetamine. Defendant was charged with several drug counts, and pled guilty to one count of possession with the intent to distribute cocaine. His sentence was based in part on the three pounds of methamphetamine.

On appeal, defendant challenged the use of the methamphetamine guideline in calculating the drugs attributable to him as a result of the transaction between Pimentel and Rush. He did not contest that the agreement was for methamphetamine or that his act of aiding and abetting the agreement was relevant conduct, but argued that his sentence should be based on amphetamine, the substance that was actually distributed.

"The Sentencing Guidelines call for the inclusion of 'types and quantities of drugs not specified in the count of conviction,' U.S.S.G. § 2D1.1, comment n. 12, that were 'part of the same course of conduct or common scheme or plan as the offense of conviction.' U.S.S.G. § 1B1.3(a)(2). Where a defendant negotiated for or attempted to receive a specific substance but that substance was, unanticipated by and unbeknownst to the defendant, replaced with a different substance, the defendant's culpable conduct is most accurately evaluated by ascribing to the defendant the intended rather than the unintended substance. *See U.S. v. Steward,* 16 F.3d 317, 321 (9th Cir. 1994)" (sentence correctly based on methamphetamine even though substance defendant sold as methamphetamine was actually ephedrine he had been duped into purchasing earlier). "The negotiation itself constitutes the defendant's relevant conduct, and '[t]he nature and seriousness of [the defendant's] conduct is the same no matter' what substance was actually delivered."

"There is no doubt . . . that [Lopez] intended to aid and abet a transaction involving methamphetamine. . . . The fact that the substance Pimentel delivered was amphetamine and not methamphetamine was merely fortuitous. . . . Lopez had previously sold methamphetamine to Rush and had attempted several times to arrange methamphetamine transactions with Deist. Amphetamine was never part of Lopez's scheme or plan. The district court therefore properly concluded that Lopez's sentence should be based on the methamphetamine guideline."

U.S. v. Lopez, 125 F.3d 597, 599–600 (8th Cir. 1997).

See *Outline* generally at II.B.3; II.B.4.a

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General Application Principles

Relevant Conduct

Sixth Circuit vacates adjustment and departure based on conduct that did not have sufficient nexus to offense of conviction. Defendant was part of a cocaine-selling operation. On one occasion, he participated with others in the torture of an acquaintance they thought had stolen some crack cocaine from the group. Defendant and the others were initially charged with conspiracy and other drug offenses, but he pled guilty to only one count of distributing crack. Based on the torture incident, the district court increased the offense level under § 3A1.3 for restraint of victim, and also departed upward under § 5K2.2 (physical injury to victim) and 5K2.8 (extreme conduct). Defendant argued on appeal, and the appellate court agreed, that his participation in the torture, which occurred on Feb. 8, 1995, could not be used at sentencing because it was not sufficiently connected to his Dec. 28, 1994, offense of conviction.

"U.S.S.G. § 1B1.3(a) defines relevant conduct for the purposes of calculating the base offense level, offender characteristics, and adjustments such as the one at issue here under § 3A1.3 for restraint of victim. Section 1B1.3(a) states in relevant part that these levels shall be determined on the basis of [defendant's conduct] '. . . *that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."* U.S.S.G. § 1B1.3(a)(1)(A) (emphasis added). The February 8 torture could not have occurred during or in preparation for the offense of conviction, which took place six weeks earlier. . . . The court never found, or even suggested, that the torture was an attempt to hide Cross's December 28 offense. . . . We therefore cannot affirm the sentence under § 1B1.3(a)(1)(A). . . . For this same reason, § 1B1.3(a)(1)(B), which applies 'in the case of a jointly undertaken criminal activity,' is also inapplicable."

"The next portion of the relevant conduct provision, U.S.S.G. § 1B1.3(a)(2), allows the use of acts that are 'part of the same course of conduct or common scheme,' but applies only to offenses which should be grouped under § 3D1.2(d). . . . Although the offense of conviction was a drug offense, and is thus groupable under this provision, torture clearly falls outside the scope. . . . Section 1B1.3(a)(2) does not apply to this case."

"Nor does the conduct fall within the bounds of § 1B1.3(a)(3), which includes as relevant conduct 'all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions.' . . . As noted above, (a)(2) does not apply at all. The acts and omissions in (a)(1) are those taken in the course of, or in the avoidance of, the offense of conviction, and the court made no findings linking the events of February 8 with Cross's crack cocaine sale on December 28 of the previous year. . . . Finally, although § 1B1.3(a)(4) allows the consideration of 'any other information specified in the applicable guideline,' § 3A1.3 (the applicable guideline for restraint of victim) by its terms applies only when the restraint occurred 'in the course of the offense.'" The court therefore concluded that "the torture was not 'relevant conduct' as to Cross's offense of conviction, and we must vacate Cross's sentence and remand for the district court either to resentence Cross without the enhancement for restraint of victim under § 3A1.3 or to develop a factual record to justify the inclusion of the torture as relevant conduct."

As for the departure, "district courts may consider more than just 'relevant conduct,' as defined in § 1B1.3." However, "[s]ection 1B1.3's detailed definition of 'relevant conduct' demonstrates that the Commission has considered and rejected the notion that conduct completely unrelated to the offense of conviction should factor into the calculation of the Guideline range . . . . Although the Commission has left open the possibility that some conduct that does not fall within the technical definition of 'relevant conduct' (because it relates to the offense of conviction in an unusual way that the Commission did not foresee) may nonetheless be related to the offense of conviction and may therefore be used in departing from the guidelines, there is nothing in the record before us to suggest that this is such an unusual case. We therefore vacate Cross's four-level upward departure and remand to the district court for further factual findings concerning this issue and resentencing."

The court rejected defendant's contention that district courts cannot depart based on conduct in a dismissed count, that the torture was part of the dismissed conspiracy count, and therefore the torture could not be used. "[U]nder § 1B1.4 and its commentary, a district court may depart upwards based on conduct that is covered by a dismissed count."

U.S. v. Cross, 121 F.3d 234, 238–44 (6th Cir. 1997).

See *Outline* generally at I.A and II.A; III.A.3; and IX.A.1

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Adjustments

Obstruction of Justice

Ninth Circuit rejects §3C1.1 enhancement for giving false name and documents at arrest, distinguishes Application Notes 3(c) and 4(a). Defendant was stopped by INS agents as he attempted to enter the U.S. He told a customs officer that he was a U.S. citizen and produced several identification documents bearing a false name. For approximately ten hours defendant maintained the ruse, admitting his real name only after a computer check and several phone calls revealed his true identity, which was verified by a fingerprint check. The district court imposed an obstruction of justice enhancement under Note 3(c) of §3C1.1, "producing . . . a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." Defendant argued on appeal that his conduct fell under Note 4(a), which states that enhancement is not warranted for "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense."

The appellate court agreed. "Although these application notes appear to conflict, [we have held that] application note 3(c) 'anticipate[s] lack of candor toward the *court*—including lack of candor in respect to a[n] . . . investigation for the court,' while application note 4(a) anticipates lack of candor toward law enforcement officers. . . . We have explained that 'application note 3(c) provides that attempting to produce a false document "during an official investigation or judicial proceeding" qualifies for the enhancement, even without a showing of actual obstruction. We must interpret this application note's reference to an "official investigation" narrowly, as reaching only official investigations closely associated with judicial proceedings. A broader reading would conflict with application note 4(a), which provides that giving a false identification document "at arrest" only qualifies for the enhancement if it significantly impedes an investigation.' . . . Thus, the application notes distinguish between false statements and documents presented to judges, magistrates, probation officers and pretrial services officers, which need not impede an investigation or prosecution to constitute an obstruction of justice, and those presented to law enforcement officers, in which circumstance some significant hindrance to an investigation or prosecution must be established."

Before determining whether defendant's actions posed a "significant hindrance," the court noted that his lies could also fall under Note 3(g), "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." The court concluded, however, that the facts did not show that defendant's conduct sufficiently hindered or obstructed the investigation of his offense so as to warrant enhancement. The actions taken by INS officials were either routine or minimal, and the investigation may have taken much less time if the FBI had not lost defendant's fingerprints the first time they were sent.

U.S. v. Solano-Godines, 120 F.3d 957, 962–65 (9th Cir. 1997).

Please note: Because the Nov. 1, 1998, guideline amendments added new Application Note 1, Notes 3 and 4 are now Notes 4 and 5, respectively.

See *Outline* at III.C.1 and 2.b

Departures

Criminal History

Eleventh Circuit holds that district court's belief that defendant was not actually guilty of prior offense cannot warrant departure. Defendant's criminal history warranted sentencing as a career offender, partly because of a prior state conviction for aggravated assault. Because defendant had received an unusually light sentence of probation for that conviction, the district court concluded that, under the charging practices of the county court in which defendant was convicted (with which the district court was familiar), defendant had likely committed a less serious offense and only pled guilty to the aggravated assault charge to avoid lengthy judicial proceedings. Therefore, the court held that the career offender category overrepresented defendant's criminal history, *see* USSG §4A1.3, and sentenced him to the lower guideline range that otherwise applied.

On the government's appeal, the appellate court remanded. "For all intents and purposes, the district court engaged in a collateral attack on Phillips' aggravated assault conviction. The court essentially utilized the downward departure to nullify that conviction . . . . It was error for the district court to do that. Collateral attacks on prior convictions are allowed in federal sentencing proceedings in one narrow circumstance only: when the conviction was obtained in violation of the defendant's right to counsel." Because defendant was represented by an attorney in the prior proceeding at issue here, the sentencing court "was not free to ignore or discount the aggravated assault conviction based upon its concerns about the Fulton County criminal justice system . . . . Just as a district court may not directly negate a prior conviction because of doubts about the verity of the result, it also may not do that indirectly by departing downward because of those same doubts."

The court further held that §4A1.3 "is concerned with the pattern or timing of prior convictions, not with doubts about their validity. . . . When §4A1.3 is applied, the validity of the convictions is assumed. . . . Section 4A1.3 does not permit what [prior cases] prohibit: a lower sentencing range resulting from the judge's doubts about

whether the defendant was truly guilty or fairly convicted of a prior crime."

U.S. v. Phillips, 120 F.3d 227, 231–32 (11th Cir. 1997).

See *Outline* generally at IV.A.3 and VI.A.2

Mitigating Circumstances

Ninth Circuit holds that lack of knowledge of high purity of drugs cannot be categorically proscribed as basis for departure. Defendant, who was acting as a middleman in a drug sale, pled guilty to possession of methamphetamine with intent to distribute. Because the drug was unusually pure (over 80%), he was sentenced on the basis of the weight of the actual methamphetamine rather than the weight of the entire mixture. *See* USSG § 2D1.1(c), n.(B). The district court rejected defendant's claim that, because he was just the middleman in the deal, he did not know that the methamphetamine was so pure and thus could receive a downward departure.

The appellate court remanded, reiterating that under *Koon v. U.S.,* 116 S. Ct. 2035 (1996), there are relatively few factors that may not be considered as potential grounds for departure. *Koon* held "that 'a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, *as a categorical matter*, consideration of the factor.' *Id.* at 2051 (emphasis added). . . . Applying the *Koon* analysis, we conclude that the district court did have legal authority under the Guidelines to consider a downward departure on the ground that Mendoza had no control over, or knowledge of, the purity of the methamphetamine that he delivered. That ground does not involve one of the few factors categorically proscribed by the Sentencing Commission. . . . We are not at liberty, after *Koon*, to create additional categories of factors that we deem inappropriate as grounds for departure in every circumstance."

Following the same reasoning, the court rejected the government's argument that Application Notes 9 and 14 of § 2D1.1 necessarily precluded departure. "Note 9 provides only that a district court cannot depart *upward* on the basis of unusually high purity of methamphetamine; it says nothing about whether a district court can depart *downward* on the ground that the defendant had no control over, or knowledge of, the purity of the methamphetamine that he was transporting." Note 14 restricts the possibility of departing for a defendant who did not reasonably foresee a high *quantity* of drugs. "Whether application note 14 represents a consideration by the Commission of the degree and kind of circumstances presented by Mendoza's case is for the district court in its discretion to decide on remand," not for the appellate court to decide "in the first instance."

U.S. v. Mendoza, 121 F.3d 510, 513–15 (9th Cir. 1997).

See *Outline* at II.A.3.e and X.A.1, generally at VI.B.1.a

Seventh Circuit determines when status as deportable alien may allow possibility of departure. In two cases decided a week apart, the Seventh Circuit distinguished when a defendant's status as a deportable alien may be used for downward departure. In the first case, defendants were all convicted under 8 U.S.C. § 1326, which prohibits deported aliens from returning to the U.S. without first gaining permission of the Attorney General. Requesting downward departures, "[t]he defendants argued that their status as deportable aliens would lead to harsher conditions of confinement . . . . In addition, they will face deportation upon completion of their sentences." The district court rejected the use of their status as deportable aliens as a proper ground, and the appellate court affirmed.

"Here, defendants were sentenced under Guidelines section 2L1.2 . . . . [A]s noted by the Sixth Circuit, '[a]ll of the[ ] crimes [to which section 2L1.2 applies] may be committed only by aliens, and most, if not all, of those aliens are deportable. . . .' *U.S. v. Ebolum,* 72 F.3d 35, 38 (6th Cir. 1995). Because deportable alien status is an inherent element of the crimes to which the guideline applies, this factor was clearly 'taken into consideration by the Sentencing Commission in formulating the guideline[ ]' . . . . Like the Sixth Circuit, 'we must assume that the Sentencing Commission took deportable alien status into account when formulating a guideline that applies almost invariably to crimes, such as 8 U.S.C. § 1326, that may be committed only by aliens whose conduct makes them deportable.' *Ebolum,* 72 F.3d at 38. . . . The district court did not err in deeming deportable alien status an inappropriate basis for departure in these cases."

U.S. v. Gonzalez-Portillo, 121 F.3d 1122, 1124–25 (7th Cir. 1997).

In the later case, a deportable alien defendant was convicted of importing heroin into the U.S. He requested a downward departure on several grounds related to his alien status. The district court did not directly address each specific claim but, following *U.S. v. Restrepo,* 999 F.2d 640 (2d Cir. 1993), and other cases, ruled that conditions of incarceration that result from a defendant's status as a deportable alien do not warrant departure.

The appellate court remanded. *Koon v. U.S.,* 116 S. Ct. 2035 (1996), "allows the court to take into consideration any 'unusual or exceptional' factor present in the case that has not already been taken into consideration by the Guidelines. . . . [W]hen the offense for which the defendant is being sentenced encompasses being present in the United States after having been deported, we ruled [in *Gonzalez-Portillo*] that the Guidelines already took into consideration the defendant's status as a deportable alien. But here, Farouil was charged with importing heroin into the United States, and we have no reason to believe that the Guidelines have accounted for a

defendant's status as a deportable alien in setting the level for that offense. The district court is thus free to consider whether Farouil's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement."

U.S. v. Farouil, 124 F.3d 838, 846–47 (7th Cir. 1997).

See *Outline* at VI.C.5.b

Guideline Amendments

Several of the Nov. 1, 1998, amendments to the Sentencing Guidelines will affect sections of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues.* Those sections of the *Outline* are listed below, along with a brief summary of the relevant amendments.

III.A.1: Amendment 587 changes the language and structure of § 3A1.1(b) and Application Note 2 while adding an additional two-level increase if the offense "involved a large number of vulnerable victims."

III.B.8.a (Victim's perspective): Amendment 580 clarifies that an imposter may be given the § 3B1.3 adjustment for abuse of a position of trust.

III.C.2.c: Amendment 582 adds new Application Note 5(e) "to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under § 3C1.1."

III.C.4.a: Amendment 581 adds new Application Note 1 "to clarify what the term 'instant offense' means" in § 3C1.1. Note that the original Application Notes 1 to 7 are now renumbered 2 to 8, which will affect references to the notes in the rest of *Outline* section III.C.

V.C.3: Amendment 584 adds new subdivision (6) to § 5D1.3(d) to authorize an order of deportation as a condition of supervised release in certain circumstances. (A similar provision was added for probation in § 5B1.3(d)(6).)

VI.B, VI.C, and X.A.1: Amendment 585 amends § 5K2.0 and its Commentary "to reference specifically in the general departure policy statement the United States Supreme Court's decision in *United States v. Koon,* 116 S. Ct. 2035 (1996)."

VI.C.1.b: Amendment 583 replaces § 5K2.13 entirely and removes the "non-violent offense" language that has caused a split in the circuits. A new Application Note provides a definition of "significantly reduced mental capacity."

Note to readers: The new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 1998), has been mailed to all recipients of *GSU.* If you have not received your copy by now, or would like to request additional copies, please contact the FJC's Information Services Office by fax at 202-273-4025.

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Departures

Mitigating Circumstances

Tenth Circuit affirms downward departure under *Koon* for career offender based on overstated criminal history and effect of age and infirmity. Defendant, age 64, pled guilty to a drug felony. With two prior drug convictions, one almost ten years old, he qualified as a career offender subject to 151–180 months in prison (instead of 37–46 months). The district court granted a downward departure, to 42 months, finding that defendant's age, "in addition to his various infirmities, . . . warrant a downward departure from the career offender category" because those factors made it less likely defendant would commit future crimes. The court relied on two other grounds: had defendant's oldest drug conviction been handled in a more timely fashion it would have been more than ten years prior to the instant offense and he would not be a career offender; and, the previous drug convictions were "minor offenses" for which he received "relatively lenient" sentences. USSG § 4A1.3.

The appellate court affirmed, after an extensive overview of *Koon v. U.S.,* 116 S. Ct. 2035 (1996). The court noted that "circumstances making up a defendant's criminal history cannot be used as a basis for an offense-level departure and circumstances surrounding the instant offense cannot be used as a basis for a criminal history category departure." However, "in considering a departure under section 4A1.3, a district court may rely on offender characteristics such as age and infirmity [USSG § 5H1.1] that are logically relevant to a defendant's criminal history or likelihood for recidivism, but only in combination with other circumstances of a defendant's criminal history. . . . Although the terms 'elderly' and 'infirm' are difficult to define, and more difficult to measure in degree, we cannot say that the district court abused its discretion in concluding that the factors of age and infirmity are present in this case to an exceptional degree."

"Similarly, we conclude that the district court properly relied upon the circumstances surrounding Collins's 1986 conviction. . . . [T]he Guidelines recognize that a prior conviction close to the ten-year time limit may be relevant in determining whether a departure is appropriate under section 4A1.3. . . . Thus, a district court properly could conclude that a defendant with a predicate conviction close to ten years prior to the instant offense is not as likely to recidivate as a career offender whose predicate convictions occurred closer to the instant offense. . . . A district court also could conclude that a defendant who received a 'relatively lenient' sentence for a predicate conviction has a less serious criminal history than a career offender whose predicate convictions resulted in lengthy periods of incarceration. . . . Finally, a district court could conclude that delay in the prosecution of a defendant who committed the conduct underlying a predicate conviction more than ten years prior to the instant offense, under some circumstances, may warrant a departure."

"[W]e now move to the second inquiry in our departure analysis: whether the combination of factors identified by the district court warrants a downward departure from the career offender guideline. . . . The district court's ultimate determination that Collins's age, infirmity, and the circumstances surrounding his 1986 conviction remove him from the career offender heartland is 'just the sort of determination that must be accorded deference by the appellate courts.' *Koon,* . . . 116 S. Ct. at 2053. Accordingly, we conclude that the district court did not abuse its discretion in concluding that the various departure factors it relied upon warranted a departure." The court also found the degree of departure reasonable, holding that sentencing within the non-career offender range was justified in this situation.

U.S. v. Collins, 122 F.3d 1297, 1300–09 (10th Cir. 1997).

See *Outline* at VI.A.2, VI.C.1.f, and X.A.1

Third Circuit holds that "significantly reduced mental capacity" includes inability to control conduct defendant knows is wrong. Defendant pled guilty to one count of possession of child pornography. While defendant admitted that he knew his conduct was wrong, he requested a departure under § 5K2.13 based on his inability to control his urges to view pornography because of childhood sexual abuse (and presented extensive expert opinion on this issue). However, the district court denied the departure, concluding that defendant's mental capacity was not "significantly reduced," as required by §5K2.13, because he was "able to absorb information in the usual way and to exercise the power of reason."

The appellate court concluded that was too narrow a reading of "significantly reduced mental capacity," and held that "a defendant's ability to control his or her own conduct is a relevant consideration when determining the defendant's eligibility for a downward departure pursuant to section 5K2.13." Reviewing case law, the Model Penal Code, and the Insanity Defense Reform Act of 1984, the court concluded "that the Sentencing Commission

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intended to include those with cognitive impairments *and* those with volitional impairments within the definition of 'reduced mental capacity.'" The court set forth a two-part test. "A person may be suffering from a 'reduced mental capacity' [under] section 5K2.13 if either:

"(1) the person is unable to absorb information in the usual way or to exercise the power of reason; or

"(2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law.

"The first prong permits sentencing courts to consider defects of cognition. The second prong permits sentencing courts to consider defects of volition. Sentencing courts must consider both prongs before making a determination about a defendant's 'reduced mental capacity.'"

The court emphasized that "a mere reduction in mental capacity is not sufficient to warrant a departure . . . . Taken together, the requirements of section 5K2.13 are not easily met. In addition, the district courts retain their discretion to deny a downward departure even when a defendant does satisfy his burden. We therefore believe that our decision will not open the floodgates to every defendant who 'felt compelled' to commit a crime."

The court added that, "although a defendant must be suffering from something greater than mere 'emotional problems' to obtain a downward departure, . . . certain emotional conditions may be the cause of a defendant's significantly reduced mental capacity." The court agreed with *U.S. v. Cantu,* 12 F.3d 1506, 1512 (9th Cir. 1993), that § 5K2.13 "applies to both mental defects and emotional disorders . . . . As the court concluded in *Cantu,* '[t]he focus of the guideline provision is reduced mental *capacity,* not the cause—organic, behavioral, or both—of the reduction.' *Id.* (emphasis in original)."

Along these lines, the court noted that the district court here properly refused to consider defendant's "troubled childhood" as a reason for departure in and of itself. *See* USSG § 5K2.12. "On remand, however, the sentencing court may look to that childhood to inform its determination regarding whether McBroom suffered from a significantly reduced mental capacity at the time of the offense."

U.S. v. McBroom, 124 F.3d 533, 540–51 (3d Cir. 1997).

See *Outline* at VI.C.1.b

Note: Effective Nov. 1, 1998, USSG § 5K2.13 and its commentary were significantly amended. New Application Note 1 defines "significantly reduced mental capacity" to mean that "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) *control behavior that the defendant knows is wrongful.*" (Emphasis added.) The "Reason for Amendment" explains that the new definition is "in accord with the decision in *United States v. McBroom,* 124 F.3d 533 (3d Cir. 1997)."

Eighth Circuit holds that low purity of methamphetamine cannot warrant downward departure. Defendants, convicted of methamphetamine distribution, requested downward departure based on the low purity of their mixture, which was less than one percent pure methamphetamine. The district court held that it did not have the authority to depart on this basis. The appellate court agreed, concluding that "the Sentencing Commission adequately took into consideration the purity level of methamphetamine in formulating the Guidelines."

"'In the case of a mixture or substance containing . . . methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the . . . methamphetamine (actual), *whichever is greater.*' [§ 2D1.1(c), Note (B)] (emphasis added). The Sentencing Guidelines further provide that trafficking in drug mixtures with unusually high purity levels may warrant an upward departure, '*except* in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity.' USSG § 2D1.1, comment. (n.9) (emphasis added)." Thus, district courts may consider purity only "in instances where the purity of the methamphetamine results in a *greater* offense level than the offense level resulting from the weight of the entire substance or mixture. A departure below this 'greater' offense level solely on the basis of a mixture's low methamphetamine purity would directly contradict and effectively eviscerate the Commission's explicit formula directing courts to sentence methamphetamine violations by the method yielding the greatest base offense level." Low purity of a methamphetamine mixture "is a 'forbidden factor' under *Koon,* . . . 116 S. Ct. at 2045, which cannot be used as a basis for a downward departure."

U.S. v. Beltran, 122 F.3d 1156, 1159 (8th Cir. 1997).

See *Outline* at II.A.3.e

General Application Principles

Relevant Conduct

Seventh Circuit holds that rejected drug shipment should not be included in relevant conduct. Defendants arranged a marijuana purchase from a confidential informant. However, defendants deemed the quality of the marijuana unsatisfactory and declined to take delivery of the 500-pound load. A few months later the parties reached agreement on another deal, and this time defendants accepted 700 pounds of marijuana. The district court included the rejected load as relevant conduct when sentencing defendants, a decision they appealed.

The appellate court reversed. "Here, the defendants were charged with, and pleaded guilty to, a single count of conspiracy to possess with intent to distribute marijuana. The evidence established that Mr. Mankiewicz negotiated . . . for the delivery of a single load of marijuana. As the

government points out in its brief, there is no question that, throughout the charged conspiracy, his intent, and that of Mr. Zawadzki, was to acquire only that load. No other quantity was foreseeable to them."

The court held that "this result is the one most compatible with the intent of the Guidelines. . . . [T]he commentary to U.S.S.G. § 2D1.1 states that, 'in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant.' U.S.S.G. § 2D1.1 comment. (n.12). As counsel pointed out at oral argument, this section is intended to ensure that unscrupulous law enforcement officials do not increase the amount delivered to the defendant and therefore increase the amount of the defendant's sentence. Although there is absolutely no evidence that such a motivation actually existed in this case, the facts demonstrate the danger. At oral argument, we were informed that the marijuana that was supplied was the government's. It would have been possible for the confidential informant to supply low-grade marijuana in the expectation of its being rejected and in that way to increase the amount received, but never retained for distribution, by the defendants."

U.S. v. Mankiewicz, 122 F.3d 399, 402 (7th Cir. 1997).

See *Outline* at II.B.4.a, generally at I.A and II.A

Sentencing Procedure

Waiver of Appeal

Second Circuit holds that broad waivers of right to appeal require careful, fact-specific scrutiny. Defendant's plea agreement stated: "The defendant agrees not to file an appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range *as determined by the Court.*" (Emphasis added.) The agreement estimated that defendant's sentencing range would be 15–21 months. However, as the appellate court noted, defendant "retains no right of appeal unless the court upwardly departs from the range which it determines to be proper, a range which could bear little to no resemblance to the predicted range. No provision for appeal exists simply because the ultimate sentence proves to be beyond, or even considerably beyond, the anticipated range." In fact, the sentencing court determined that the proper range was 27–33 months, and imposed a 27-month term.

The appellate court noted that "[a]n ordinary appeal waiver provision waives the defendant's right to appeal a sentence falling within a range explicitly stipulated within the agreement itself." Because this waiver agreement contained no such stipulation, "the defendant assumes a virtually unbounded risk of error or abuse by the sentencing court," leading the court to determine that such agreements require careful scrutiny. "A request for appeal arising from such a plea bargain will not be summarily denied, as are many such requests arising from standard plea agreements. Instead, such a request will cause us to examine carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it merits our review. In particular, . . . we will focus upon 1) the extent to which the defendant actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range, and 2) the extent of actual discrepancy between the predicted range and the ultimate sentence."

Despite its "serious concerns with the plea bargain waiver provision," the court found that under the facts of the case there was "nothing unconstitutional and nothing so unfair or erroneous as to warrant our refusal to uphold the agreement." Defendant "secured considerable benefits" from the agreement, the final sentence was only six months above the top end of the predicted range, and, "although it is possible that Rosa did not foresee what actually occurred at sentencing, we can see no fundamental unfairness in that result."

U.S. v. Rosa, 123 F.3d 94, 99–102 (2d Cir. 1997). *See also U.S. v. Martinez-Rios,* 143 F.3d 662, 668–69 (2d Cir. 1998) (following *Rosa*, rejecting similar waiver and allowing appeal where there was no colloquy concerning waiver at plea allocution and sentencing judge indicated at least some issues would not be covered by waiver). *Cf. U.S. v. Goodman,* 165 F.3d 169, 174–75 (2d Cir. 1999) (same, for "even broader" waiver that only limited sentence to statutory maximum—defendant "received very little benefit in exchange for her plea of guilty" and during plea allocution judge suggested she would retain right to appeal in some circumstances, contrary to language of agreement). *But cf. U.S. v. Atterberry,* 144 F.3d 1299, 1301 (10th Cir. 1998) (upholding waiver of "right to appeal any sentence that does not exceed the maximum penalty provided by the statute of conviction on any ground"; although district court made passing, "routine" reference to defendant's general right to appeal sentence, that "could not have affected Mr. Atterberry's waiver decision" and nothing indicated waiver was not knowing and voluntary).

See *Outline* at IX.A.5

Probation and Supervised Release

Revocation of Probation

Fourth Circuit holds that, although substantial assistance departure was granted at original sentencing, such departure may not be considered at revocation sentencing unless government makes new § 5K1.1 motion. Defendant was sentenced for fraud offenses in 1993. Although his guideline range was 46–57 months, he was sentenced to five years of probation after a substantial

assistance departure, § 5K1.1. His probation was revoked in 1995 and he was sentenced to 46 months. Between the time of his original sentencing and revocation, 18 U.S.C. § 3565(a)(2) was amended. Courts had held that the earlier version of § 3565(a)(2) limited a revocation sentence to the sentence available at the time of original sentencing, and that departures could not be based on post-sentencing conduct. The amended version allows sentencing under the usual statutory and guideline factors without being limited by the original guideline range. Here, the district court used the earlier version of § 3565(a)(2). Defendant argued that the later version should have been used and, alternatively, that the court could have departed downward under the earlier version.

The first claim failed under the "savings clause," 1 U.S.C. § 109, which provides in pertinent part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty . . . ." "Following the amendment to § 3565(a)(2), the district court was permitted to consider post-sentencing factors as a basis for departure, a situation that Schaefer acknowledges may lead to a less severe sentence than the one that otherwise would be required. Accordingly, § 109 prevents the district court from applying the amended provisions of § 3565(a)(2) to impose a sentence lower than that allowed under the former version of § 3565(a)(2)."

The court also rejected defendant's second claim. Although the prior version of § 3565(a)(2) would normally allow a court to consider departure at a revocation sentencing for a ground that was present at the original sentencing, "a departure under § 5K1.1, p.s. is different from the typical basis for departure, and this difference dictates a different result. Unlike all other grounds for departure, in order for a district court to base a departure upon a defendant's substantial assistance . . . , the Government must first move the district court to do so. . . . Thus, although a sentence based on substantial assistance may have been available at the initial sentencing based on the Government's motion, it cannot be considered to be available at resentencing following a probation revocation absent a renewed motion by the Government. . . . Accordingly, at the sentencing hearing following the probation revocation, because the Government did not move for a departure based on substantial assistance, and because the parties agree that there was no other proper basis for departure brought to the attention of the court during the initial sentencing hearing, the district court properly concluded that it was constrained to sentence Schaefer within the applicable guideline range."

U.S. v. Schaefer, 120 F.3d 505, 507–09 (4th Cir. 1997).

See *Outline* at VII.A.1

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Sentencing Procedure

Supreme Court holds that defendant retained Fifth Amendment rights at sentencing and that adverse inference may not be drawn from silence. Defendant pled guilty to four drug counts, but reserved the right to contest the amount of drugs at sentencing. At the plea hearing, the district court warned her that by pleading guilty she would waive various rights, including "the right to remain silent under the Fifth Amendment." At sentencing, the government presented evidence on the amount of drugs defendant sold. Defendant challenged the adequacy of that evidence, but did not testify or present any evidence of her own. The district court found the government's evidence on quantity credible, partly by drawing an adverse inference from defendant's silence, and sentenced her to a ten-year mandatory minimum term. The court held that defendant, after pleading guilty, had no right to remain silent on the details of her offenses.

The Third Circuit affirmed, concluding that "although Mitchell faced the possibility of a harsher sentence . . . because of her failure to testify at the sentencing hearing, . . . in light of the fact that she does not claim that she exposed herself to future federal or state prosecution, the Fifth Amendment privilege no longer was available to her." *U.S. v. Mitchell,* 122 F.3d 185, 189–91 (3d Cir. 1997).

The Supreme Court remanded, rejecting the government's argument that defendant's guilty plea waived her privilege against compelled self-incrimination and ruling "that petitioner retained the privilege at her sentencing hearing. . . . There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, . . . the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute . . . . Under these circumstances, there is little danger that the court will be misled by selective disclosure."

The Court further reasoned that nothing in a colloquy under Fed. R. Crim. P. 11 "indicates that the defendant consents to take the stand in the sentencing phase or to suffer adverse consequences from declining to do so. Both the Rule and the District Court's admonition were to the effect that by entry of the plea petitioner would surrender the right 'at trial' to invoke the [Fifth Amendment] privilege. As there was to be no trial, the warning would not have brought home to petitioner that she was also waiving the right to self-incrimination at sentencing. The purpose of Rule 11 is to inform the defendant of what she loses by forgoing the trial, not to elicit a waiver of the privilege for proceedings still to follow. A waiver of a right to trial with its attendant privileges is not a waiver of the privileges which exist beyond the confines of the trial."

The Court also rejected the idea that the district court could draw an adverse inference from defendant's silence. "The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. . . . [A] sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case."

The Court added that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it."

Four justices dissented from the adverse inferences holding, but they agreed that defendant "had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case."

Mitchell v. U.S., 119 S. Ct. 1307, 1311–16 (1999).

See *Outline* generally at III.E.2; IX.B and D.3

Departures

Mitigating Circumstances

D.C., Second, and Ninth Circuits hold that rehabilitation following original sentencing may be considered for downward departure at resentencing after remand; Eighth Circuit disagrees. In the first two circuits, defendants were convicted on drug charges and also received a consecutive sentence under 18 U.S.C. § 924(c). After beginning their sentences, each filed a successful motion to have the § 924(c) conviction overturned in light of *Bailey v. U.S.,* 516 U.S. 137 (1995). Both defendants were resentenced, and both requested a downward departure to account for their rehabilitative efforts while serving their original sentences. Both district courts concluded they did not have authority to depart for post-conviction rehabilitation, and both defendants appealed.

The appellate courts remanded, concluding that under *Koon v. U.S.,* 116 S. Ct. 2035 (1996), such a departure could not be categorically excluded. The D.C. Circuit found that "postconviction rehabilitation is not one of the

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[listed] prohibited factors [in the Sentencing Guidelines], nor have we found any other provision of the Guidelines, policy statements, or official commentary of the Sentencing Commission prohibiting its consideration. We therefore hold . . . that sentencing courts may consider post-conviction rehabilitation at resentencing." However, the court also found that because "'post-offense rehabilitative efforts,' . . . a concept linguistically broad enough to cover post-conviction rehabilitation," are covered in § 3E1.1's commentary, post-conviction rehabilitation should be treated as "already taken into account" by the Guidelines. Therefore, it "must be present 'to such an exceptional degree that the situation cannot be considered typical of those circumstances in which the acceptance of responsibility adjustment is granted.'"

The Second Circuit had already held that post-*offense* drug rehabilitation could be considered for departure because it was not adequately considered in the Guidelines. *See U.S. v. Maier,* 975 F.2d 944, 948 (2d Cir. 1992). "We see no significant difference between the post-offense rehabilitation that we [approved] in *Maier* . . . and rehabilitation achieved in prison between imposition of the original sentence and resentencing. When the trial court undertook to resentence Reyes after vacating his §924(c)(1) conviction, it was required to consider him as he stood before the court at that time. . . . [I]f the defendant achieved a rehabilitation sufficiently impressive to be considered 'atypical' and to take his case out of the heartland, we see no reason why this should not be considered, as in *Maier*, a basis for departure."

In the Ninth Circuit case, the district court had departed downward at resentencing after a remand caused by an improper departure. The appellate court concluded that, after *Koon*, "post-sentencing rehabilitative efforts may be a basis for a downward departure. . . . Like the Second Circuit, we cannot ascertain any meaningful distinction between post-offense and post-sentencing rehabilitation. Nor is there support in the Guidelines for the proposition that a court is forbidden from looking at a defendant's rehabilitative efforts upon resentencing. Given the intervening Supreme Court decision in *Koon*," post-sentencing rehabilitation cannot be categorically precluded as a basis for departure. The court went on to affirm the departure for defendant's rehabilitative efforts.

U.S. v. Green, 152 F.3d 1202, 1207–08 (9th Cir. 1998) (per curiam); *U.S. v. Rhodes,* 145 F.3d 1375, 1379–84 (D.C. Cir. 1998) (Silberman, J., dissented); *U.S. v. Core,* 125 F.3d 74, 77–79 (2d Cir. 1997). *Accord U.S. v. Sally,* 116 F.3d 76, 79–82 (3d Cir. 1997). *Cf. U.S. v. Whitaker,* 152 F.3d 1238, 1239 (10th Cir. 1998) (holding that *Koon* effectively overruled circuit precedent that precluded using post-offense/presentencing rehabilitation efforts as basis for departure).

The Eighth Circuit—also in a *Bailey* resentencing case—reached the opposite conclusion. The court reasoned, first, that "*Koon* addressed the matters that a district court may properly consider in departing from the guideline at an original sentencing . . . , [not] whether post-sentencing events might support a departure at a resentencing because that matter was not before it. We therefore do not think that *Koon* should be read to require district courts to consider a defendant's post-sentencing rehabilitative conduct as a basis for downward departure at resentencing." Second, allowing such a departure would increase sentencing disparity by providing a "windfall" for "a few lucky defendants, simply because of a legal error in their original sentencing," that is not available to other prisoners. The court was also concerned that rewarding "exemplary conduct in prison . . . may interfere with the Bureau of Prisons's statutory power to award good-time credits to prisoners."

Finally, the court noted it had previously limited matters that may be considered for departure at resentencing after remand to "any relevant evidence on that issue that it could have heard at the first hearing." Thus, rehabilitative efforts before the original sentencing may be considered, *see U.S. v. Kapitzke,* 130 F.3d 820, 823–24 (8th Cir. 1997), but "[r]ehabilitation that takes place behind the prison walls after the original sentencing . . . is not relevant, since the sentencing court obviously could not have considered it at the time of the original sentencing."

U.S. v. Sims, No. 98-2287 (8th Cir. Apr. 9, 1999) (Arnold, J.).

See *Outline* at VI.C.2.a

Sixth Circuit holds that disparity built into guidelines did not provide basis for downward departure. Defendant pled guilty to mail theft and credit card fraud charges. The amount of loss for sentencing purposes was over $13,000, and she faced a sentence of 12–18 months. The district court departed, however, after finding that the sentence for defendant's "relatively minor white-collar" crime was "disproportionate" compared to the sentence that could result from a more serious white-collar crime, using the example of thirty months for a bank fraud that resulted in a $360,000 loss. The court concluded that the Sentencing Commission had not considered this type of disparity in formulating the Guidelines. The government appealed and the appellate court reversed, holding that defendant's situation is not unusual under the Guidelines and was, in fact, deliberate.

"For theft and fraud offenses, the Commission reasoned that severity would be based, in part, on the amount of loss due to the theft or fraud . . . . In ordinary circumstances, a person who steals credit cards from the mail and makes eleven-thousand dollars of unauthorized charges should receive a sentence below, but not necessarily far below, that of a person who cheats a bank out of hundreds of thousands of dollars. . . . [T]he Commission did not establish a uniform margin of increase. . . . This progressive margin of increase results in fraud offenders at the low end receiving sentences that appear harsh

when compared with high-level fraud offenders. The Commission, however, explicitly classified as 'serious' low-level fraud and other white-collar offenders . . . [and] deliberately prescribed a relatively high sentencing level for low-level white-collar offenders. . . . That this arrangement produces disproportionate results between high and low-level offenders cannot serve as the legal basis for a downward departure absent unusual circumstances in the particular situation." Finding no unusual circumstances here, the court reversed.

U.S. v. Weaver, 126 F.3d 789, 792–94 (6th Cir. 1997).

See *Outline* generally at VI.C.5.b

Criminal History

First Circuit allows departure for serious uncharged conduct that was dissimilar to offense of conviction. After defendant was arrested on a domestic violence charge, police discovered firearms in his house. Defendant was then charged in federal court with three firearms offenses and pled guilty to all three. Although he faced a sentence of 33–41 months, the district court departed under § 4A1.3 by increasing defendant's criminal history category from III to V and imposed a 63-month prison term. The court based the departure on two grounds: seven prior convictions that were not counted because they were too old; and a 17-year "history of persistent and vicious domestic violence," for which there was ample evidence but no criminal convictions. Together, these facts indicated that defendant's criminal history score "does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes," USSG § 4A1.3.

On appeal, defendant argued that, because § 4A1.3(e) expressly invites courts to consider "prior *similar* conduct not resulting in a criminal conviction" (emphasis added), courts should not consider dissimilar, uncharged conduct. The appellate court disagreed, finding that, because § 4A1.3(e) was merely part of a nonexhaustive list of possible departure grounds, "to infer that the guideline's explicit authorization to consider similar misconduct as a basis for departure precludes any consideration of dissimilar misconduct for that purpose not only would frustrate the 'included, but not limited to' caveat that the Sentencing Commission deliberately inserted in the text of section 4A1.3, but also would run counter to a fundamental principle of departure jurisprudence: that, in the absence of an explicit proscription, courts generally should not reject categorically any factor as a potential departure predicate. . . . Accordingly, we hold that, in an appropriate case, a criminal history departure can be based upon prior dissimilar conduct that was neither charged nor the subject of a conviction." Finding this "an appropriate case," the court affirmed the departure.

U.S. v. Brewster, 127 F.3d 22, 25–28 (1st Cir. 1997). *But cf. U.S. v. Chunza-Plazas,* 45 F.3d 51, 56 (2d Cir. 1995) (vacating upward departure based on dissimilar foreign criminal conduct that had not resulted in conviction: "Even assuming that [§ 4A1.3(e)] might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is 'similar' to the crime of conviction.").

See *Outline* generally at VI.A.1.c

Criminal History

Career Offenders

Eleventh Circuit finds that "guilty but mentally ill" plea can count toward career offender status. Defendant was convicted of bank robbery. He had three previous felony convictions, two of which were based on pleas of "guilty but mentally ill" (GBMI) under Georgia law. The sentencing court held that the GBMI plea was analogous to a plea of nolo contendere, which made it a conviction under § 4A1.2(a)(4) that could be used under § 4B1.1 as a "prior felony conviction." *See* § 4B1.2(c) & comment. (n.3). Defendant was sentenced as a career offender and appealed, arguing that § 4B1.1 should be strictly interpreted to exclude consideration of the GBMI pleas.

The appellate court affirmed, concluding that, under Georgia law, "a conviction based on the GBMI plea has the same operation at law as a conviction based on a plea of guilty. . . . The sole substantive distinction between a conviction based on a GBMI plea and one based on a guilty plea relates to the incarceration and treatment of the defendant after sentencing." As the Georgia Supreme Court held, a verdict based on a GBMI plea "has *the same force and effect as any other guilty verdicts*, with [the] additional provision that the Department of Corrections or other incarcerating authority provide mental health treatment for a person found guilty but mentally ill." (Emphasis added by Eleventh Circuit.) "We therefore hold that a plea of 'guilty but mentally ill' is a 'guilty plea' within the meaning of section 4A1.2(a)(4) of the sentencing guidelines, and that the convictions at issue qualify as 'prior felony convictions' under section 4B1.1."

U.S. v. Bankston, 121 F.3d 1411, 1414–16 (11th Cir. 1997).

See *Outline* generally at IV.B.3

Determining the Sentence

Restitution

Most circuits to decide issue hold that Mandatory Victims Restitution Act cannot be applied retroactively; two disagree. The Mandatory Victims Restitution Act of 1996 (MVRA), effective Apr. 24, 1996, added 18 U.S.C. § 3663A and substantially amended the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663–3664. Among other things, the MVRA mandates an order of full restitution for certain offenses regardless of the defen-

dant's ability to pay (which is only to be considered in setting up a schedule of payments). *See* § 3664(f)(1)(A) and (f)(2). Under former § 3664(a), a defendant's financial circumstances were considered in determining the amount of restitution to be paid, if any.

Most circuits to rule on the issue have held that applying the MVRA's mandatory restitution requirement to defendants who committed their crimes before Apr. 24, 1996, would violate the Ex Post Facto Clause of the Constitution. *See U.S. v. Edwards,* 162 F.3d 87, 89–92 (3d Cir. 1998) (remanded: specifically disagreeing with *Newman, infra,* and holding that "retrospective application of the MVRA violates the Ex Post Facto Clause because restitution imposed as part of a defendant's sentence is criminal punishment, not a civil sanction, and the shift from discretionary to mandatory restitution increases the punishment meted out to a particular defendant"); *U.S. v. Siegel,* 153 F.3d 1256, 1259–60 (11th Cir. 1998) (same); *U.S. v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997) (remanded: "amended VWPA . . . had the potential to increase the amount of restitution [defendants] would have to pay"); *U.S. v. Thompson,* 113 F.3d 13, 14 n.1 (2d Cir. 1997) (agreeing with parties' conclusion that applying MVRA retroactively would be ex post facto violation). *See also U.S. v. Bapack,* 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997) (without discussion, applying pre-MVRA provisions on review).

The Eighth Circuit agreed that the MVRA cannot be applied retroactively, but concluded that, because defendant's offense of conviction occurred May 30, 1996, applying the MVRA to order restitution for related conduct that occurred before the MVRA's effective date was not an ex post facto violation. *U.S. v. Williams,* 128 F.3d 1239, 1241–42 (8th Cir. 1997) (affirmed: defendant "had fair warning his criminal conduct could trigger mandatory restitution under § 3663A(a)(3) to persons other than the victims of his May 30 offense").

However, the Seventh Circuit held that the MVRA can be applied retroactively because "we do not believe that restitution qualifies as a criminal punishment. . . . It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense." Thus, because defendant's criminal punishment was not increased, applying the MVRA to his pre-MVRA offense did not violate the Ex Post Facto Clause. *U.S. v. Newman,* 144 F.3d 531, 538–42 (7th Cir. 1998).

Most recently, the Tenth Circuit agreed with the Seventh while "reject[ing] the views of the Second, Third, Eighth, Ninth, Eleventh and D.C. circuits to the contrary." The court reasoned that earlier circuit decisions had held that a restitution order under a previously amended version of the VWPA did not implicate the Ex Post Facto Clause because it "does not inflict punishment," and "the logic of these cases is patently applicable to the MVRA." *U.S. v. Nichols,* 169 F.3d 1255, 1279–80 & nn.8–9 (10th Cir. 1999).

See *Outline* generally at section V.D

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Departures

Substantial Assistance

Third Circuit holds that, even though plea agreement did not specify it, government retained sole discretion to decide whether to file § 5K1.1 motion. Defendant entered into a plea agreement whereby the government agreed to make a § 5K1.1 departure motion if defendant "fully complies with this agreement prior to his sentencing, [and] provides substantial assistance in the investigation or prosecution of one or more persons who have committed offenses." The government did not move for departure, claiming that defendant did not meet his obligations under the agreement. The district court denied defendant's motion to require the government to move for departure or, alternatively, to withdraw his plea.

"On appeal, the central question that concerns us is whether the district court erred in its interpretation that the plea agreement required the defendant to satisfy the Government that he complied with its terms and provided substantial assistance to the Government . . . . [The district court] examined the law pertaining to plea agreements and focused on the absence in this plea agreement of any provision in which the Government expressly reserved the sole discretion to determine whether the defendant is entitled to a motion for a section 5K1.1 departure. The Government [argues] . . . that the plea agreement should be interpreted similarly to those agreements which expressly reserve to the Government 'sole discretion' in the matters of 5K1.1 motions and the exercise of that discretion by the Government on a subjective basis. We are constrained to agree."

The plea agreement "must be interpreted in the context of the circumstances under which it was formulated and general principles of the interpretation of contracts. . . . [A]lthough the agreement did not specifically reserve to the Government the sole discretion to evaluate whether the defendant has rendered substantial assistance, it 'contemplate[d] that any downward departure motion must be made "pursuant to" 18 U.S.C. §3553(e) and Guidelines 5K1.1.' . . . Thus, the plea agreement was implicitly subject to the statute and the Sentencing Guidelines and both expressly lodge the decision to make the motion in the Government's discretion, regardless of whether the Government expressly reserved such decision in the plea agreement. . . . The negotiations between the parties to the agreement are consistent with this conclusion. The district court found that it was undisputed that during the plea negotiations, the defendant's counsel demanded that if the Government decided not to move for a downward departure, it would have to justify that decision in court under an objective standard. The Government rejected that proposal."

"Thus, the district court had a very limited role in reviewing the Government's refusal to move for a downward departure. . . . We, therefore, agree with the district court and hold that the Government's decision not to move for a departure is reviewable only for bad faith or an unconstitutional motive." Defendant did not allege either, so the decision was affirmed.

U.S. v. Huang, 178 F.3d 184, 187–89 (3d Cir. 1998).

See *Outline* at VI.F.1.b.ii

Second and Eighth Circuits hold that wording of plea agreement may limit government's ability to withhold § 5K1.1 motion for reasons unrelated to substantial assistance. In the Second Circuit case, the government had filed motions for downward departure under § 5K1.1 and 18 U.S.C. § 3553(e), advising the district court that defendant had provided substantial assistance. However, defendant failed to appear at his original sentencing hearing and later was arrested for and pled guilty in state court to selling crack cocaine. After this the government successfully moved to withdraw its earlier motions and defendant was sentenced without benefit of a departure. He argued on appeal that he had cooperated as promised in his plea agreement and the district court had the power to depart without a government motion.

The appellate court remanded for resentencing. "The district judge's ruling that the motion could be withdrawn gave no consideration to the plea agreement, which was the basis on which the Government filed the motion." The agreement provides that the government is released from its obligation to file a motion if defendant "has not provided substantial assistance" or "has violated any provision of this Agreement," and included a provision obligating defendant to refrain from committing further crimes. "The agreement, however, is silent with regard to the withdrawal of a Section 5K1.1 and 18 U.S.C. § 3553(e) motion. Further, it specifically recites the consequences if Padilla committed further crimes or otherwise violated the agreement, but the right to withdraw the Section 5K1.1 and 18 U.S.C. § 3553(e) motion is not enumerated as one of such consequences."

"Reading the agreement strictly against the Government, as our precedent requires, we conclude that it prohibits the Government from withdrawing the Section 5K1.1 and 18 U.S.C. § 3553(e) motion because it failed to enumerate specifically the right to withdraw the motion in the several specific and serious consequences that

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would follow if Padilla committed further crimes or otherwise violated the agreement. . . . 'The Government [is] responsible for imprecisions or ambiguities in the agreement.' . . . We therefore hold that allowing the Government to withdraw the motion violated the plea agreement and was erroneous." The court noted that its holding "is necessarily a narrow one because of the limited nature of the issue raised by the attempted withdrawal of the motion."

U.S. v. Padilla, No. 98-1411 (2d Cir. July 14, 1999) (Gibson, J.).

In the Eighth Circuit, the plea agreement provided that "[a]ny cooperation provided by [defendant] will be considered by the government under . . . § 5K1.1." Defendant did provide assistance, but the government refused to file a motion and defendant moved to compel its filing. Although the government agreed that defendant could make a substantial threshold showing that he had provided substantial assistance, the government argued that defendant had recently used and possessed controlled substances, which violated his agreement to "not commit any additional crimes whatsoever." The district court agreed and denied the motion.

The appellate court found a "fundamental defect in the government's position. Its refusal to file a substantial assistance motion was based entirely upon a reason unrelated to the quality of Anzalone's assistance in investigating and prosecuting other offenders. But § 5K1.1 and the related statute . . . 18 U.S.C. § 3553(e), do not grant prosecutors a general power to control the length of sentences. Because sentencing is 'primarily a judicial function,' . . . the prosecutor's virtually unfettered discretion under § 5K1.1 is limited to the substantial assistance issue, which is a question best left to the discretion of the law enforcement officials receiving that assistance. 'The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial assistance is not a permissible basis for exercising the government's power under § 3553(e) [or § 5K1.1].' *U.S. v. Stockdall,* 45 F.3d 1257, 1261 (8th Cir. 1995)."

"Therefore, 'the government cannot base its [§ 5K1.1 motion] decision on factors other than the substantial assistance provided by the defendant.' *U.S. v. Rounsavall,* 128 F.3d 665, 669 (8th Cir. 1997). Once the government concludes that a defendant has provided substantial assistance, and has positively assessed in that regard 'the cost and benefit that would flow from moving,' . . . it should make the downward departure motion and then advise the sentencing court if there are unrelated factors . . . that in the government's view should preclude or severely restrict any downward departure relief. The district court may of course weigh such alleged conduct in exercising its downward departure discretion."

Although the plea agreement provided that the government could refuse to make a motion "which it is otherwise bound by this agreement to make" if defendant violated the agreement, that did not change the result. That provision "by its plain language does not apply to a substantial assistance downward departure motion, because the government was never 'bound' to make such a motion," having agreed to merely "consider" any cooperation by defendant.

U.S. v. Anzalone, 148 F.3d 940, 941–42 (8th Cir. 1998) (note: the decision was vacated and rehearing en banc granted, but was then reinstated and rehearing en banc denied, 161 F.3d 1125; Murphy, J., dissented from the original opinion, and five judges would have granted rehearing en banc).

The Eighth Circuit later distinguished *Anzalone* in a case involving a defendant who claimed to be in the same position. He had provided information to the government and agreed to testify as part of his plea agreement, but before sentencing he failed to appear for drug testing and on four occasions tested positive for cocaine. The government declined to file a § 5K1.1/§ 3553(e) motion and the district court denied defendant's motion to compel the government to do so.

The appellate court affirmed, based on the plea agreement and the district court's finding that the refusal to file was related to defendant's assistance. "The [plea] agreement gave the government the sole right to judge whether Wilkerson continued to provide substantial assistance. The record of the sentencing hearing supports the court's finding that the decision not to make the motion was based on the prosecutor's judgment that Wilkerson had not continued to provide substantial assistance because he did not keep the government apprised of his ongoing drug involvement or his sources and because he had undermined his usefulness as a potential witness, a role he had agreed to play. The government's decision here was based on its evaluation of the quality of Wilkerson's assistance, in contrast to *Anzalone* where it raised no criticism of the assistance provided. The plea agreements are also different, and Wilkerson's created a *continuing* duty to provide substantial assistance. . . . On this record Wilkerson has not shown that the government's reason for not filing a § 5K1.1 motion was irrational or based on bad faith or unconstitutional motive."

U.S. v. Wilkerson, 179 F.3d 1083, 1086 (8th Cir. 1999).

See *Outline* at VI.F.1.b.ii and iii

Aggravating Circumstances

Fourth Circuit holds that § 5K2.3 departure may be based on injury to indirect victims of offense, but only if they have "some nexus or proximity to the offense." Defendant was convicted of involuntary manslaughter, the result of a reckless driving incident in which three people died. The district court departed upward under § 5K2.3 for extreme psychological injury to the families of

two of the deceased, concluding that they were "victims" within the meaning of that term in § 5K2.3. Defendant appealed, arguing that § 5K2.3 is limited to direct victims of the offense of conviction.

The appellate court held that, although the families in this case do not qualify as victims, § 5K2.3 can cover indirect victims. The court reasoned that "the context in which the term 'victim' is used in § 5K2.3 is nearly identical to the context in which it is used in §§ 3A1.1 and 3A1.3," under which the court has upheld enhancements for indirect victims.

"Although a victim need not be the direct victim of the offense of conviction, we do not believe, as the Government contends, that every individual adversely affected by the offense of conviction is an indirect victim. Rather, an indirect victim must have some nexus or proximity to the offense. Put simply, an individual is an indirect victim because of his relationship to the offense, not because of his relationship to the direct victim. Bank tellers and patrons are indirect victims in a bank robbery, *see* U.S.S.G. § 3A1.1, comment. (n.2), credit card holders are indirect victims in a scheme to defraud their credit card issuers . . . , and patients are indirect victims in a plan to defraud their insurance carrier . . . , because of their nexus or proximity to the offense of conviction. Here, however, there is no evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims. Because we conclude that the families of [the deceased] are not victims of the offense of conviction, the district court abused its discretion in departing upward by three levels under § 5K2.3, p.s."

U.S. v. Terry, 142 F.3d 702, 711–12 (4th Cir. 1998). *See also U.S. v. Morrison,* 153 F.3d 34, 35 (2d Cir. 1998) (affirming § 5K2.3 departure of 14 offense levels based in part on injury to "secondary victims" who had direct contact with defendant, although they were not direct victims of offenses of conviction); *U.S. v. Haggard,* 41 F.3d 1320, 1327–28 (9th Cir. 1994) (where defendant deliberately lied to authorities about having information on long-missing child's whereabouts and directed some comments to child's family, "family was a direct victim of [the] criminal conduct" and § 5K2.3 departure was proper). *Cf. U.S. v. Hoyungawa,* 930 F.2d 744, 747 (9th Cir. 1991) (remanded: "§ 5K2.3 applies only to direct victims of the charged offense," and does not apply to family of police officer who was killed on duty by defendant).

See *Outline* at VI.B.1.d; see also cases in III.A.1.b

Tenth and Sixth Circuits hold that vulnerable victim enhancement does not preclude departure under SCAMS Act. In both cases, defendants were convicted of telemarketing fraud against elderly victims. Both received enhancements under § 3A1.1(b) for harming vulnerable victims, plus an upward departure based on the Senior Citizens Against Marketing Scams Act of 1994 (SCAMS Act). Both defendants appealed, claiming that § 3A1.1 adequately accounted for their conduct and that a departure was improper double counting. The appellate courts rejected that argument.

The Tenth Circuit found that "the vulnerable victim enhancement and the SCAMS Act differ on two key dimensions. The SCAMS Act is directed toward criminal telemarketing conduct targeted at or actually victimizing a certain class of individuals, statutorily defined as those over the age of fifty-five. . . . The Act requires the offense target the elderly as a class. In contrast, [§ 3A1.1(b)] does not require a finding the defendant targeted the victim because of his vulnerability. . . . Moreover, the vulnerable victim enhancement cannot be based solely on the victim's membership in a certain class; the sentencing court is required to make particularized findings of vulnerability, focusing on the individual victim and not the class of persons to which the victim belonged. . . . A single vulnerable victim is sufficient to support application of the enhancement. . . . Thus, the focus of the SCAMS Act and that of the vulnerable victim enhancement differ in key respects and are sufficiently distinct to avoid double counting the same offense conduct."

The Sixth Circuit "agree[d] with the analysis of the Tenth Circuit. The SCAMS Act is specifically designed to combat and punish severely the conduct in which Brown engaged, conduct which falls outside of the 'heartland' of cases addressed by the vulnerable victim guideline, U.S.S.G. § 3A1.1(b). In this case, the SCAMS Act authorized the district court to impose an additional ten-year sentence upon Brown. Instead of imposing a ten-year sentence under the SCAMS Act, the district court noted that the SCAMS Act signaled Congress's view that U.S.S.G. § 3A1.1(b) did not adequately address Brown's conduct. . . . We conclude that the district court could properly depart upward based on the SCAMS Act even though Brown also received a two-level enhancement for vulnerable victims under § 3A1.1(b)."

U.S. v. Brown, 147 F.3d 477, 487–88 (6th Cir. 1998); *U.S. v. Smith,* 133 F.3d 737, 749 (10th Cir. 1998). *Accord U.S. v. Scrivener,* No. 98-50513 (9th Cir. Aug. 30, 1999) (Wardlaw, J.) (agreeing with *Brown* and *Smith* in affirming § 3A1.1(b) enhancement and two-level upward departure under §5K2.0 for fraud defendant who targeted elderly victims).

See *Outline* generally at III.A.1.a and c and VI.B.1.a

Mitigating Circumstances

Tenth Circuit holds that extreme remorse may be ground for departure. Defendant pled guilty to three unarmed bank robberies and was sentenced to 41 months, the bottom of the guideline range. The district court denied his request for a downward departure on account of his exceptional remorse, specifically ruling that it did not have discretion to consider that factor so that defendant could appeal. [Note: The specifics of

defendant's remorse are not mentioned in the appellate court's opinion, but it notes that "[t]he record contains evidence supporting Fagan's claim that his remorsefulness was extreme and the government conceded as much during the sentencing hearing."]

The appellate court remanded, concluding that "[b]ecause remorse is not one of the factors specifically forbidden by the Sentencing Guidelines, it may be a permissible departure factor in certain circumstances. . . . The government argues that even if remorse is a permissible factor, Fagan is not entitled to an additional downward departure because remorse is an element of acceptance of responsibility," and defendant already received a § 3E1.1 reduction. Although the court agreed that remorse is taken into account by the Guidelines, an accounted for factor can still be "a permissible factor for departure if it is present to some exceptional degree." Therefore, "a sentencing court may depart downward if it finds that remorse is present to an exceptional degree."

U.S. v. Fagan, 162 F.3d 1280, 1284–85 (10th Cir. 1998). *Accord U.S. v. Jaroszenko,* 92 F.3d 486, 490–91 (7th Cir. 1996) (remanded: "Although the guidelines may discourage the consideration of a defendant's remorse in most decisions about downward departures, they do not contain an absolute ban on a district court's indulging in such a consideration.").

See *Outline* generally at VI.C.5.c

Determining the Sentence

Safety Valve Provision

Sixth Circuit holds that safety valve may not be denied for defendant's refusal to testify at coconspirators' proceedings. The government did not contend that defendant failed to truthfully provide all information he had concerning the offense of conviction and related conduct, and he otherwise met the requirements of 18 U.S.C. § 3553(f) and USSG § 5C1.2. However, defendant told the government that he would refuse to testify before a grand jury or at a trial concerning his coconspirators. The government claimed, and the sentencing court agreed, that "defendant's refusal to testify mean[t] that he has not provided the government with 'all information and evidence' as required by 18 U.S.C. § 3553(f)(5)."

The appellate court reversed, concluding that "[t]he government's position is contradicted by the clear language of the statute—the defendant's obligation is to provide information and evidence to the government, not to a court. . . . Given the phrase 'to the Government,' it is our view that a common-sense reading of the statute leads to the conclusion that evidence is limited to those things in the possession of the defendant prior to his sentencing, excluding testimony, that are of potential evidentiary use to the government."

U.S. v. Carpenter, 142 F.3d 333, 335–36 (6th Cir. 1998).

See *Outline* at V.F.2.c and e

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General Application Principles

Sentencing Factors

Several circuits examine scope of resentencing after remand. When an appellate court remands a guidelines case for resentencing and does not expressly delineate the issues to be examined on remand, should resentencing be conducted de novo or be limited to the issues the appellate court found needed correction? The circuits have split on this question, and recent cases have added to that split.

The Sixth Circuit concluded that, given the nature of the sentencing guidelines, a presumption of de novo resentencing is preferable in order to "give the district judge discretion to consider and balance all of the competing elements of the sentencing calculus." Sentencing under the guidelines "requires a balancing of many related variables. These variables do not always become fixed independently of one another."

To determine whether a remand is limited, a district court must first determine "what part of this court's mandate is intended to define the scope of any subsequent proceedings. The relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language. . . . The key is to consider the specific language used in the context of the entire opinion or order. However, '[i]n the absence of an explicit limitation, the remand order is presumptively a general one.'" The court added that an appellate court "should leave no doubt in the district judge's or parties' minds as to the scope of the remand. The language used to limit the remand should be, in effect, unmistakable."

U.S. v. Campbell, 168 F.3d 263, 265–68 (6th Cir. 1999).

The Fifth Circuit joined those rejecting the de novo resentencing presumption. The court had remanded a case "for sentencing consistent with this opinion." At the resentencing, defendant wanted to present evidence relating to his previous enhancement for obstruction of justice, an issue he had not appealed. The district court declined to hear evidence on that issue.

The appellate court affirmed. "This court specifically rejects the proposition that all resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand. This case was remanded for resentencing. The fact that the appellate court did not expressly limit the scope of the remand order did not imply that a full blown sentencing hearing was permissible for a second time, allowing evidence on all issues that would affect the sentencing guidelines. . . . The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less. All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court."

U.S. v. Marmolejo, 139 F.3d 528, 530–31 (5th Cir. 1998). *Accord U.S. v. Parker,* 101 F.3d 527, 528 (7th Cir. 1996) (same, adding that "the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error.").

The Eighth Circuit similarly rejected attempts by both defendant and government to open a resentencing to additional issues. "Although the [appellate] court's opinion in its conclusion recited that we 'vacate his sentence and remand his case to the district court for resentencing,' that statement must be read with the analysis offered in the opinion," which focused on two particular drug matters. Other issues should not have been in contention at resentencing or in another appeal. The court acknowledged, however, that "an appeals court can avoid the problem of multiple appeals by issuing specifically limited remands . . . , leaving open for resolution only the issue found to be in error on the initial sentencing."

U.S. v. Santonelli, 128 F.3d 1233, 1237–39 (8th Cir. 1997).

The First Circuit also held that resentencing should not be presumed to be de novo, but agreed with a D.C. Circuit decision that new matters may be raised if they are "made newly relevant" by the appellate court's decision. Defendant challenged several issues on appeal, but not drug quantity because the alleged difference would not have affected his sentence. After winning a related issue on his appeal, however, the difference could have reduced his offense level and he tried to challenge the quantity at resentencing. The district court ruled that defendant had waived the issue and declined to hear evidence.

The appellate court had not specified the issues to be considered on remand, so it had to determine whether resentencing should be de novo or limited. It was "persuaded by the reasoning of" *U.S. v. Whren,* 111 F.3d 956,

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959–60 (D.C. Cir. 1997), and held, "as it did, that 'upon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result.' . . . In addition, we hold, along with *Whren*, that: 'A defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing; but neither should a defendant be able to raise an issue for the first time upon resentencing if he did have reason but failed nonetheless to raise it in the earlier proceeding.'"

"Whether there is a waiver depends . . . on whether the party had sufficient incentive to raise the issue in the prior proceedings. . . . This approach requires a fact-intensive, case-by-case analysis. Using such an analysis, we conclude there was no waiver and it was error not to consider the proffer as to the weight issue on remand. . . . Our waiver doctrine does not require that a defendant, in order to preserve his rights on appeal, raise every objection that *might* have been relevant if the district court had not already rejected the defendant's arguments."

U.S. v. Ticchiarelli, 171 F.3d 24, 30–33 (1st Cir. 1999).

See *Outline* at I.C.

Adjustments

Role in the Offense

Third and Eleventh Circuits differ on scope of conduct that may be considered in mitigating role determination for drug courier. The Third Circuit defendant transported to the United States 800 grams of heroin, which had been given to him by two men in Colombia. He was arrested at the airport on arrival, and he unsuccessfully tried to call his U.S. contact in an attempt to cooperate with customs officials. The government agreed with defendant that he was entitled to a reduction under §3B1.2(b), but the district court denied it, stating that "I find that his role is essential for the commission of the crime and that he is not a minor participant." The appellate court remanded for a clearer statement of the basis of the district court's ruling, and set out standards for considering a §3B1.2 reduction for drug couriers.

The court first noted that, because this determination "is highly dependent on the facts of particular cases, . . . a mechanical application of the guidelines by which a court always denies minor role adjustments to couriers because they are 'essential,' regardless of the particular facts or circumstances, would be inconsistent with this guidance." And because §3B1.2 "is ultimately concerned with the defendant's relative culpability, a district court should consider the defendant's conduct . . . in relation to the other participants," examining such factors as "the defendant's relationship to the other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise. . . . [T]he other participants must be criminally responsible[, but] need not have been charged with any offense."

In the same vein, the adjustment "must be made on the basis of all relevant conduct—namely, all conduct within the scope of §1B1.3—and not simply on the basis of the elements and acts referenced in the count of conviction." Thus, a courier who is not charged with conspiracy can still play a minor role in the charged importation if other participants were involved in the relevant conduct. "It is the nature of the relevant conduct shown, and all the participants' roles in it, that is determinative—not the nature or name of the offense charged as such."

The court also rejected the argument that §3B1.2 should not be applied to a defendant who is charged with only the amount of drugs that was actually carried, as in this case. "The scope of the relevant conduct that a court should consider . . . is broader than merely the conduct required by the elements of the offense of conviction. Even if a courier is charged with importing only the quantity of drugs that he actually carried, there may still be other participants involved in the conduct relevant to that small amount or that one transaction. . . . Accordingly, although the amount of drugs with which the defendant is charged may be an important factor which weighs heavily in the court's view of the defendant's relative culpability, it does not necessarily preclude a minor role adjustment with one exception," that being where a defendant "received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct." *See* USSG §3B1.2, comment. (n.4).

"A courier's role can vary widely, and we reject any per se rule regarding the applicability of the minor role adjustment. Rather, there is no limit to the extent of a court's factual inquiry and assessment of the defendant's relative culpability."

U.S. v. Isaza-Zapata, 148 F.3d 236, 238–42 (3d Cir. 1998).

The Eleventh Circuit, sitting en banc, reversed a panel opinion that the Third Circuit had cited as support for its holding that the minor participant reduction is not automatically excluded when defendant is only charged with the amount of drugs actually carried. In that case, defendant was arrested upon arrival in the United States with 512.4 grams of heroin she had ingested. The district court denied a §3B1.2 reduction, but the original appellate panel remanded, holding that the district court had not undertaken a broad enough inquiry into the relevant conduct surrounding the importation scheme—including the roles of other participants who supplied the heroin, who would receive it, and who would distribute it. The panel was also concerned that the district court's stated belief that couriers play an "essential role" would

supersede the required fact-specific inquiry and deny the reduction for any courier. *U.S. v. De Varon,* 136 F.3d 740, 744–46 (11th Cir. 1998).

The en banc court reversed the panel and affirmed the district court's decision. While the court agreed that the inquiry should focus on defendant's role "as compared to that of other participants in her relevant conduct," it emphasized that the relevant conduct is limited to that "attributed to the defendant in calculating her base offense level. . . . Otherwise, a defendant could argue that her relevant conduct was narrow for the purpose of calculating base offense level, but was broad for determining her role in the offense." While citing several other circuits that agree, the court cited *Isaza-Zapata* as "holding that a court must examine all relevant conduct even if defendant is sentenced only for his own acts."

The court held, therefore, that "when a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs. . . . We further note . . . that the amount of drugs imported is a material consideration in assessing a defendant's role in her relevant conduct. . . . Indeed, because the amount of drugs in a courier's possession—whether very large or very small—may be the best indication of the magnitude of the courier's participation in the criminal enterprise, we do not foreclose the possibility that amount of drugs may be dispositive—in and of itself—in the extreme case."

As for comparison to other participants, "the district court may consider only those participants who were involved in the relevant conduct attributed to the defendant. The conduct of participants in any larger criminal conspiracy is irrelevant." The court specifically rejected "defendant's alternate suggestion that the district court was obligated to investigate and make detailed findings concerning the relative roles of all who may participate in a far-flung narcotics enterprise—that may stretch from the grower, to the manufacturer in a foreign land, through the distribution mechanism, to the final street-level distributor in the United States."

Following the foregoing analysis, "[t]he record amply supports the district court's finding that De Varon did not play a minor role in her offense of heroin importation." Defendant "played an important or essential role in her relevant conduct of importing 512.4 grams of 85 percent pure heroin from Colombia into the United States . . . [and] knowingly and intentionally entered the United States with the entire amount of drugs in her possession." Although someone else supplied the heroin, "it was within the trial court's discretion to conclude that her participation was central to the importation scheme."

U.S. v. De Varon, 175 F.3d 930, 939–47 (11th Cir. 1999) (en banc) (one judge dissented).

See *Outline* at III.B.1, 2.d, and 5.

Departures

Substantial Assistance

Three circuits hold that *Koon* did not give district courts authority to depart for substantial assistance under §5K2.0 in absence of government motion. The Third Circuit, as most circuits, had already ruled that "district courts have no authority, in the absence of either a government motion or extraordinary circumstances, to depart downward on the basis of substantial assistance under either §5K1.1 or §5K2.0." However, "we must address this question anew because of the sea change in the departure area effected by *Koon*" *v. U.S.,* 518 U.S. 81 (1996).

The question in this case is "whether §5K2.0, as interpreted in *Koon*, gives a district court any additional authority to consider a downward departure for substantial assistance." Defendant argued that, because "the Guidelines do not mention substantial assistance without a government motion as a sentencing factor," it is an "unmentioned" factor under *Koon* and may provide a basis for departure. The court, however, concluded that "the existence *vel non* of a government motion concerning assistance . . . is not a sentencing factor. . . . The requirement of a government motion under §5K1.1 is a *condition* limiting a court's authority to grant a defendant a substantial assistance departure."

What defendant is actually "proposing the district court should take into account under §5K2.0 is his alleged substantial assistance to the government. But this proposed factor has already been taken into account in the Sentencing Guidelines." Under *Koon*, then, "a district court can consider substantial assistance outside of the explicit terms of §5K1.1 only if a case falls outside of the 'heartland' of cases implicating that provision."

"We believe that departures are permissible under §5K2.0 for substantial assistance without a government motion only in those cases in which a departure is already permitted in the absence of a government motion under §5K1.1. The heartland of §5K1.1 is where the defendant substantially assists the government. We think that the only cases falling outside this heartland are those in which the government improperly—either because it has an unconstitutional motive or because it has acted in bad faith with regard to a plea agreement—refuses to offer a motion, and possibly those in which the assistance is not of the sort covered by §5K1.1."

"We therefore conclude that the district courts have no more authority to grant substantial assistance departures under §5K2.0 in the absence of a government motion than they do under §5K1.1." The court also concluded that "the substantial practical and policy problems that would arise if we adopted the approach proposed by" defendant supported its holding.

U.S. v. Abuhouran, 161 F.3d 206, 210–17 (3d Cir. 1998).

The D.C. and Fifth Circuits joined the Third, but only after replacing earlier panel opinions to the contrary. A D.C. Circuit panel originally remanded a district court's decision that it had no authority to grant defendant's request for a §5K2.0 departure based on his substantial assistance when the government did not file a §5K1.1 motion. The panel concluded that a substantial assistance departure without a government motion is an unmentioned factor under *Koon* that could provide a proper basis for departure. *In re Sealed Case,* 149 F.3d 1198, 1203–04 (D.C. Cir. 1998).

The en banc court vacated the panel opinion and unanimously held that there is no authority to depart under §5K2.0 in this situation. The court agreed with the Third Circuit that substantial assistance with or without a government motion is not "the relevant departure factor here," but rather the substantial assistance itself is. "Once the factor actually at issue here is identified, its place in the *Koon* taxonomy becomes clear. Substantial assistance to authorities cannot be an unmentioned factor since it is specifically mentioned in section 5K1.1." And "it is clear that by authorizing departures with government motions, the Commission did intend to preclude departures without motions."

The court also rejected defendant's claim that §5K2.0 provides an independent source of departure authority. "[I]f we read section 5K1.1 as saying that a substantial assistance departure is permissible only upon motion of the government, then we cannot read section 5K2.0 as countermanding that injunction." As in *Abuhouran*, the court concluded that departure may only occur in the absence of a government motion if the refusal to file was based on an unconstitutional motive, was not rationally related to any legitimate government end, or was attributable to bad faith or other breach of a plea agreement.

In re Sealed Case, 181 F.3d 128, 131–42 (D.C. Cir. 1999) (en banc).

The Fifth Circuit also originally considered substantial assistance without a government motion to be an unmentioned factor under the *Koon* analysis and affirmed a district court's departure under §5K2.0 despite the lack of a §5K1.1 motion. *U.S. v. Solis,* 161 F.3d 281, 284 (5th Cir. 1998). Upon the government's motion for reconsideration, however, the court vacated its opinion and remanded for resentencing.

"We are persuaded by the Third Circuit's reasoning in *Abuhouran* and, therefore, hold that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion. Because the Government did not bargain away its discretion to refuse to offer a §5K1.1 motion and Solis has not alleged that the Government refused to offer the motion for unconstitutional reasons, the district court erred by granting a five-level downward departure."

U.S. v. Solis, 169 F.3d 224, 227 (5th Cir. 1999).

See *Outline* at VI.F.1.a and b.

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Determining the Sentence

Supervised Release

Supreme Court resolves circuit split, holds that supervised release term should not be shortened to give credit for excess time in prison. While in prison, defendant had two of his multiple felony convictions overturned. As a result, his revised sentence was shorter than the time he had already spent in prison. He was released and moved to have his term of supervised release shortened by the excess period of imprisonment. The district court denied the motion, but the Sixth Circuit reversed, holding that "the date of his 'release' for purposes of §3624(a) was the date he was entitled to be released rather than the day he walked out the prison door," and the extra time defendant served in prison should be credited toward his supervised release term. *Johnson v. U.S.*, 154 F.3d 569, 571 (6th Cir. 1998). *Accord U.S. v. Blake,* 88 F.3d 824, 825 (9th Cir. 1996) [9 *GSU* #1]. *Contra U.S. v. Jeanes,* 150 F.3d 483, 485 (5th Cir. 1998); *U.S. v. Joseph,* 109 F.3d 34, 36–39 (1st Cir. 1997) [9 *GSU* #7]; *U.S. v. Douglas,* 88 F.3d 533, 534 (8th 1996) [9 *GSU* #1].

The Supreme Court unanimously reversed. "On the issue presented for review—whether a term of supervised release begins on the date of actual release from incarceration or on an earlier date due to a mistaken interpretation of federal law—the language of 18 U.S.C. § 3624(e) controls." That statute "directs that a supervised release term does not commence until an individual 'is released from imprisonment.' . . . [T]he ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey."

"The phrase 'on the day the person is released,' in the second sentence of § 3624(e), suggests a strict temporal interpretation, not some fictitious or constructive earlier time. The statute does not say 'on the day the person is released or on the earlier day when he should have been released.' Indeed, the third sentence admonishes that 'supervised release does not run during any period in which the person is imprisoned.' "

The Court found further support in § 3583(a), "which authorizes the imposition of 'a term of supervised release after imprisonment.' This provision, too, is inconsistent with respondent's contention that confinement and supervised release can run at the same time. The statute's direction is clear and precise. Release takes place on the day the prisoner in fact is freed from confinement."

The Court noted that defendant does have other avenues of relief. "The trial court, as it sees fit, may modify an individual's conditions of supervised release. 18 U.S.C. § 3583(e)(2). Furthermore, the court may terminate an individual's supervised release obligations 'at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.' § 3583(e)(1). Respondent may invoke § 3583(e)(2) in pursuit of relief; and, having completed one year of supervised release, he may also seek relief under § 3583(e)(1)."

U.S. v. Johnson, 120 S. Ct. 1114, 1117–19 (2000).

See *Outline* at V.C.1

Safety Valve

Several circuits examine when "not later than the time of the sentencing hearing" is, along with the effect of previously lying or withholding information. Can a defendant provide an untruthful or incomplete version of his or her offense conduct until just before the sentencing hearing, or even during it, and still qualify for the safety valve reduction under § 5C1.2 and 18 U.S.C. § 3553(f)? The Seventh Circuit reversed a reduction to a defendant who continually lied or withheld information in a presentence interview and at the sentencing hearing. He did not "truthfully provide" all information until three continuances of the sentencing hearing had been granted to allow him to "come clean" after being confronted by the government with evidence that he had lied.

Although the phrase "is somewhat ambiguous," the appellate court concluded that "not later than the time of the sentencing hearing" in § 5C1.2(5) should be construed to mean "by the time of the commencement of the sentencing hearing," not during the hearing. "Because the statute requires that the defendant truthfully provide all information 'to the Government' rather than to the sentencing court, an interpretation of the safety valve which would allow a defendant to deliberately mislead the government during a presentencing interview and wait until the middle of the sentencing hearing to provide a truthful version to the court runs contrary to the plain language of the statute" and would be inconsistent with its purpose. The court also noted that allowing a defendant to drag out his story can impede the government's efforts to investigate the involvement of others.

U.S. v. Marin, 144 F.3d 1085, 1091–95 (7th Cir. 1998). *See also U.S. v. Long,* 77 F.3d 1060, 1062–63 (8th Cir. 1996) (defendant who lied in presentence interview and only admitted truth under cross-examination during sentencing hearing did not satisfy §3553(f)(5)).

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The Second Circuit distinguished *Marin* in a case that also involved repeated instances of lying or withholding information. Over the course of almost four years, defendant had been given several opportunities to provide information at proffer sessions with the government, but he either lied or refused to attend. Eventually, defendant twice requested new proffer sessions with the government in order to qualify for the safety valve. The government refused, and defendant ultimately provided a letter to the probation department one month before his sentencing hearing, and an affidavit one day before the hearing, that he claimed contained complete and truthful information about his offense. Without deciding whether the information was indeed truthful, the district court refused to apply the safety valve, holding that a defendant who deliberately provides false information and refuses other chances should not be given a final opportunity to make up for previous lies and omissions.

The appellate court remanded to allow defendant to show that his last proffers were complete and truthful. "[W]e find that appellant complied with subsection five by coming forward 'not later than the time of the sentencing hearing.' 18 U.S.C. § 3553(f)(5). The plain words of the statute provide only one deadline for compliance, and appellant met that deadline. Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing 'not later than' sentencing. Similarly, the text provides no basis for distinguishing between defendants who provide the authorities only with truthful information and those who provide false information before finally telling the truth."

"We agree with *Marin* that the deadline for compliance should be set at the time of the commencement of the sentencing hearing. In essence, however, the government urges us to rely on the policy concerns expressed in *Marin* to move the deadline earlier in time. According to the government, the defendant's good faith cooperation is to be evaluated, as a whole, from the start of the criminal proceeding. We decline to stretch the meaning of § 3553(f)(5) in such a manner. . . . [W]e are convinced that the concerns identified in *Marin*, and now pressed by the government, are largely theoretical and do not present a significant risk to the integrity of the safety valve so long as the deadline set by *Marin* is enforced." The court noted that defendant's behavior "prior to allegedly telling the complete truth will be useful in evaluating whether [his] final proffers were complete and truthful."

U.S. v. Schreiber, 191 F.3d 103, 106–09 (2d Cir. 1999). *See also U.S. v. Gama-Bastidas*, 142 F.3d 1233, 1243 (10th Cir. 1998) (remanded: because a defendant "may present information relating to subsection 5 to the government before the sentencing hearing, . . . Defendant's attempt to furnish information to the court and the government in the Judge's chambers prior to the sentencing hearing is not 'too late'").

The Eleventh Circuit similarly held that it was error to deny consideration of a safety valve reduction for a defendant who waited until the day of his sentencing hearing, a year after his arrest, to finally disclose the source of his cocaine. The court rejected the government's attempt to require defendants "to disclose all information in good faith," holding that "[t]he plain language of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 provides only one deadline for compliance, 'not later than the time of the sentencing hearing.' . . . It is undisputed that Brownlee met this deadline. Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief. . . . We follow those circuits who have held that lies and omissions do not, as a matter of law, disqualify a defendant from safety-valve relief so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing."

The court agreed with the Second Circuit, however, in warning defendant that "the evidence of his lies becomes 'part of the total mix of evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant's proffer.'"

U.S. v. Brownlee, No. 98-2106 (11th Cir. Feb. 29, 2000) (Strom, Sr. Dist. J.).

The Eighth Circuit affirmed a reduction for a defendant who "repeatedly lied to government interviewers about aspects of the offense and did not truthfully cooperate until just before her sentencing hearing." The court rejected the government's argument that "we should construe § 3553(f)(5) to prohibit sentencing courts from applying the safety valve to defendants who wait until the last minute to cooperate fully. The government also suggests that § 3553(f)(5) must be denied to those whose tardy or grudging cooperation burdens the government with a need for additional investigation. These factors are expressly relevant to other sentencing determinations, such as the third level of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b), and substantial assistance motions under U.S.S.G. § 5K1.1. But they are not a precondition to safety valve relief."

The court distinguished its decision in *Long, supra*, which had affirmed a denial of the safety valve reduction for a defendant who only admitted the full truth during cross-examination at her sentencing hearing. "In contrast, Tournier's full and truthful cooperation, though grudging and fitful, was completed before the sentencing hearing. The two cases may present only a difference in degree, not in kind, but subtle distinctions are important

in fact finding, and they are for the sentencing court, not this court, to draw."

U.S. v. Tournier, 171 F.3d 645, 647–48 (8th Cir. 1999).

What about the opposite situation, where a defendant is truthful at first but then changes his or her version of events? The Ninth Circuit affirmed a safety valve reduction for a defendant who provided full information concerning his offense shortly after his arrest, but changed his story at his trial and sentencing and denied that he knew he was carrying drugs. Defendant's "recantation does not diminish the information he earlier provided." *U.S. v. Shrestha,* 86 F.3d 935, 939–40 (9th Cir. 1996) [8 *GSU* #9]. The court later distinguished *Shrestha* and affirmed the denial of a reduction for a defendant who seemed to tell the truth at first, but then changed his story about the involvement of other individuals in the offense. The court found it significant that "in *Shrestha* the defendant did not recant as to the information he had provided about others involved in the transaction," and noted that defendant's "recantation casts doubt on his truthfulness." *U.S. v. Lopez,* 163 F.3d 1142, 1143–44 (9th Cir. 1998).

In a similar case the Tenth Circuit affirmed a safety valve denial for a defendant who implicated another when he was first interviewed by a DEA agent, then later denied the other individual was involved and disputed the DEA agent's report on that issue. The appellate court distinguished *Shrestha* as "involv[ing] the need to apply the safety valve statute so as not to interfere with a defendant's right to testify at trial, a factor not involved in this case," and noted that *Lopez* affirmed a denial "[o]utside the trial context."

"Leaving aside the trial testimony question posed by *Shrestha,*" the court held that a defendant who "initially tells the government the whole truth but later recants . . . is no more entitled to safety valve relief than the defendant who never discloses anything about the crime and its participants. In this type of case, if the sentencing court finds that the initial recanted story was truthful, or that in recanting the defendant has been untruthful, the court's ultimate finding that defendant has not 'truthfully provided to the Government all information and evidence the defendant has concerning the offense' is not clearly erroneous."

U.S. v. Morones, 181 F.3d 888, 890–91 (8th Cir. 1999).

See *Outline* at V.F.2.f

Eleventh Circuit holds that coconspirator's possession of weapon does not necessarily preclude application of safety valve. Defendant received an enhancement under §2D1.1(b)(1) because a coconspirator owned a shotgun found in one of the marijuana grow houses defendant had worked in. The district court held that defendant therefore could not benefit from the safety valve provision because of §5C1.2(2), which states that a defendant cannot "possess a firearm . . . (or induce another participant to do so) in connection with the offense." The appellate court reversed, however, based on the language of §5C1.2(2) and Application Note 4.

"Two reasons compel our conclusion that 'possession' of a firearm does not include reasonably foreseeable possession of a firearm by co-conspirators. First, the commentary to the pertinent section adds that '[c]onsistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' U.S.S.G. §5C1.2, comment. (n.4). This commentary, which tracks the language of section 1B1.3(a)(1)(A), implicitly rejects the language of section 1B1.3(a)(1)(B) which holds defendants responsible for 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' It is this 'reasonably foreseeable' language that allows a defendant to be held responsible for a firearm under section 2D1.1(b)(1) even when he physically possessed no firearm."

"Second, the plain language of section 5C1.2 requires that the defendant 'possess a firearm . . . or induce another participant to do so. . . .' If 'possession' in section 5C1.2 encompassed constructive possession by a co-defendant, then 'induce another participant to [possess]' would be unnecessary. Mere possession by a co-defendant, therefore, while sufficient to trigger section 2D1.1(b)(1), is insufficient to knock a defendant out of the safety-valve protections of section 5C1.2."

U.S. v. Clavijo, 165 F.3d 1341, 1343 (11th Cir. 1999) (per curiam). *Accord U.S. v. Wilson,* 114 F.3d 429, 432 (4th Cir. 1997); *In re Sealed Case,* 105 F.3d 1460, 1462–63 (D.C. Cir. 1997) [9 *GSU* #3]; *U.S. v. Wilson,* 105 F.3d 219, 222 (5th Cir. 1997) [9 *GSU* #5]. *Contra U.S. v. Hallum,* 103 F.3d 87, 89–90 (10th Cir. 1996) [9 *GSU* #3].

See *Outline* at V.F.1.c

Adjustments

Vulnerable Victim

Several circuits hold that repeated calls to previously defrauded victims evidences targeting of "vulnerable" victims. In some telemarketing fraud schemes, victims who send money to the telemarketers are retargeted for further fraud, a process sometimes called "reloading." The Ninth Circuit agreed with the Seventh that because individuals who are defrauded again in the "reloading" process have shown themselves to be "particularly susceptible" to the fraud, defendants merited a §3A1.1 enhancement. "While recognizing that a person involved in a scheme to defraud will usually direct his activities toward those persons most likely to fall victim to the scheme and that not all such defendants will deserve the vulner-

able victim sentence enhancement, . . . we agree with the Seventh Circuit's conclusion in" *U.S. v. Jackson,* 95 F.3d 500 (7th Cir. 1996).

"The 'reloading' scheme at issue here seeks out people who have a track record of falling for fraudulent schemes. As the Seventh Circuit stated, '[w]hether these persons are described as gullible, overly trusting, or just naive, . . . their readiness to fall for the telemarketing rip-off, not once but *twice* . . . demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population.' *Jackson,* 95 F.3d at 508 (emphasis in original). Because the victims of this scheme were particularly susceptible, and it is uncontested that [defendant] knew or should have known that the persons 'reloaded' had previously fallen for the scheme, we find that the district court did not clearly err in applying the vulnerable victim enhancement in this case."

U.S. v. Randall, 162 F.3d 557, 560 (9th Cir. 1998). *See also Jackson,* 95 F.3d at 508 (emphasizing that not "all of the victims of the defendants' scheme were unusually vulnerable, just those who were successfully reloaded").

The Sixth Circuit reached the same result for a defendant who purchased "leads lists" of people who were "identified as willing to send in money in the hope of winning a valuable prize. These people were predisposed to the very scam [defendant] was running; indeed, that is why he bought the 'leads lists.' . . . The vulnerability of these people is also evident from the 'reloading' process. Through the reloading process, those known to have already succumbed to the [fraud] scheme were contacted again and again, thereby further honing the original list. . . . The susceptibility of the victims here was a known quantity from the start, only to be refined into a verified 'suckers' list through the reloading process."

U.S. v. Brawner, 173 F.3d 966, 973 (6th Cir. 1999). *See also U.S. v. Robinson,* 152 F.3d 507, 511–12 (6th Cir. 1998) (affirmed: "when the defendant targeted a person or persons who had been previously victimized four or five times, this amounted to targeting an individual who can be deemed 'particularly susceptible' under Guideline § 3A1.1").

The Second Circuit affirmed the enhancement in a scheme that repeatedly targeted elderly victims. "Although being elderly is alone insufficient to render an individual unusually vulnerable, . . . many of the leads given to the sales staff were the names and phone numbers of individuals who previously had done business with a telemarketing company, indicating their susceptibility to criminal conduct that utilizes telemarketing methods. Finally, an important part of the scheme was the reloading process, whereby individuals who already had been victimized by the scheme were contacted up to two more times and defrauded into sending more money to [defendants]."

U.S. v. O'Neil, 118 F.3d 65, 75–76 (2d Cir. 1997).

See *Outline* at III.A.1.a and d

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Offense Conduct

Drug Quantity

Following recent Supreme Court cases, Eighth Circuit rules that courts may determine facts that increase defendant's sentence, or set mandatory minimums, within the statutory range that is authorized by the jury's verdict; however, the jury must find any facts that increase the sentence beyond that range. In *Apprendi v. New Jersey,* 120 S. Ct. 2348, 2262–63 (2000), the Supreme Court concluded that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [for the offense of conviction] must be submitted to a jury, and proved beyond a reasonable doubt." The Court reversed a New Jersey defendant's twelve-year sentence because the sentencing court, not the jury, found that the state's "hate crime" law should be applied to increase defendant's sentence for possession of a firearm for an unlawful purpose, an offense with a maximum prison term of ten years.

The *Apprendi* Court also stated that "we endorse the statement of the rule set forth in the concurring opinions in [*Jones v. U.S.,* 119 S. Ct. 1215, 1228–29 (1999)]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Id.* at 2363. *Jones* held that the federal carjacking statute, 18 U.S.C. § 2119, established three separate offenses, with different maximum penalties, that must be charged and found by a jury beyond a reasonable doubt. It reached that decision in part to avoid the "serious constitutional questions" that would arise by treating the statute as one offense with different sentencing enhancements, found by the court rather than a jury, that increased the maximum statutory penalty. 119 S. Ct. at 1228.

The Eighth Circuit applied *Apprendi* and *Jones* in the case of a defendant who was convicted of conspiring to distribute methamphetamine, 21 U.S.C. § 846, and sentenced under § 841(b), which imposes a range of maximum and minimum sentences depending on drug quantity and prior criminal history. Neither the indictment nor the jury verdict specified the amount of methamphetamine involved, but the sentencing court determined defendant was responsible for "more than 3 but under 15 kilograms." After adjustments, defendant's guideline range was 235–293 months. However, in light of the court's quantity finding and defendant's prior felony drug conviction, he was subject to a mandatory minimum sentence of twenty years and a maximum of life under § 841(b)(1)(A). The court sentenced him to twenty years, plus a mandatory ten-year term of supervised release.

The appellate court noted that the district court followed the usual sentencing procedure of making the drug quantity determination, a practice that it, and several other circuits, had reaffirmed after the *Jones* decision last year. *See, e.g., U.S. v. Jackson,* 207 F.3d 910, 920–21 (7th Cir. 2000) (citing cases). *Jones* stated as a principle, but not a holding, "that 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' *Jones,* 526 U.S. at 243 n.6." The Eighth Circuit now concluded that the holding in *Apprendi*, quoted above, "made it clear that the principle discussed in *Jones* is a rule of constitutional law."

After *Apprendi*, "when a statutory 'sentencing factor' increases the maximum sentence beyond the sentencing range otherwise allowed given the jury's verdict, then the sentencing factor has become the '"tail which wags the dog of the substantive offense."'... A fact, other than prior conviction, that increases the maximum punishment for an offense is the 'functional equivalent of an element of a greater offense than the one covered by the jury's verdict.' . . . Thus, if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to the jury beyond a reasonable doubt. . . . To the extent that [our precedents] are inconsistent with that principle, *Apprendi* requires that we abandon them."

Applying the new approach to the case at hand, the appellate court affirmed the sentence. Because defendant had a prior felony drug conviction, he faced up to thirty years' imprisonment and "at least" six years of supervised release under § 841(b)(1)(C). His sentence was therefore "within the statutory range allowable for conspiracy to distribute methamphetamine regardless of drug quantity, considering his prior drug conviction."

The court also rejected defendant's claim that it was improper for the sentencing court, rather than the jury, to make the drug quantity finding that, combined with his prior conviction, subjected him to the twenty-year mandatory minimum sentence under § 841(b)(1)(A). "The rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence . . . . If the non-jury factual determination only narrows the sentencing judge's discretion within the range already autho-

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rized by the offense of conviction, such as with the mandatory minimums applied to Aguayo-Delgado, then the governing constitutional standard is provided by *McMillan* [*v. Pennsylvania,* 477 U.S. 79 (1986)]. As we have said, *McMillan* allows the legislature to raise the minimum penalty associated with a crime based on non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury. *Apprendi* expressly states that *McMillan* is still good law."

U.S. v. Aguayo-Delgado, No. 99-4098 (8th Cir. July 18, 2000) (Bowman, J.). *See also U.S. v. Sheppard,* No. 00-1218 (8th Cir. July 18, 2000) (affirming twenty-year sentence based on more than 500 grams of methamphetamine despite refusal to submit drug quantity to jury as element of offense—"any error was harmless in this case because the indictment charged Sheppard with conspiring to distribute more than 500 grams, and the jury made a special finding of that quantity"). *Cf. U.S. v. Sustache-Rivera,* No. 99-2128 (1st Cir. July 25, 2000) (affirming dismissal of request to file second § 2255 petition in part because *Apprendi* has not been made retroactive to cases on collateral review). Note that at least one case has been remanded by the Supreme Court for reconsideration "in light of *Apprendi.*" *See U.S. v. Jones,* 194 F.3d 1178, 1183–86 (10th Cir. 1999) (finding "Supreme Court's recent decision in *Jones* . . . does not require us to alter our interpretation of § 841(b)(1)" and rejecting defendant's claim that he could not be sentenced to thirty years on district court's finding of 165.5 grams of cocaine base when the indictment charged defendant with violating § 841(b)(1)(C), which limits a sentence to twenty years), *remanded for reconsideration,* 120 S. Ct. 2739 (2000).

See *Outline* at II.A.3.a and c

Violation of Supervised Release

Revocation

Supreme Court holds that 18 U.S.C. § 3583(h) cannot be applied retroactively, but earlier statute authorized reimposition of supervised release after revocation. Originally, § 3583 did not specify whether a term of supervised release could follow a prison sentence imposed after revocation of the original term of release. Section 3583(e)(3) authorized a court to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release." The circuits split on whether § 3583(e) allowed reimposition of supervised release once it had been "revoked," with most holding it did not. See *Outline* at VII.B.1 for cases. Effective Sept. 13, 1994, § 3583(e) was amended and a new subsection (h) was enacted that specifically authorized reimposition of supervised release after revocation.

The circuits then split on whether § 3583(h) could be applied retroactively. See 10 *GSU* #1 for cases. In the instant case, defendant committed his original offense before, and violated his conditions of supervised release after, enactment of § 3583(h). The district court revoked release and imposed a prison term with a new term of release to follow. The Sixth Circuit held that § 3583(e) did not authorize reimposition of supervised release after revocation, but found that § 3583(h) could be applied because revocation of supervised release was punishment for defendant's violation of release. Thus, there was no ex post facto violation and the court affirmed the new term of supervised release. *See U.S. v. Johnson,* 181 F.3d 105 (6th Cir. 1999) (unpublished table opinion).

The Supreme Court affirmed, but for virtually the opposite reasons. First, violations of supervised release should not be treated as separate offenses. Doing so raises serious constitutional questions, and "[t]reating postrevocation sanctions as part of the penalty for the initial offense . . . (as most courts have done), avoids these difficulties." The Court held, however, that it did not have to determine whether § 3583(h) could be applied retroactively because, absent clear congressional intent to do so, "we do not give retroactive effect to statutes burdening private interests. . . . [T]here being no contrary intent, our longstanding presumption directs that § 3583(h) applies only to cases in which that initial offense occurred after the effective date of the amendment."

"Given this conclusion, the case does not turn on whether Johnson is worse off under § 3583(h) than he previously was under § 3583(e)(3) . . . . The case turns, instead, simply on whether § 3583(e)(3) permitted imposition of supervised release following a recommitment." The Court concluded that it did. By using the word "revoke" instead of "terminate" as it had in § 3583(e)(1), Congress "left the door open to a reading of subsection (3) that would not preclude further supervised release after the initial revocation." The Court reasoned that, although it is an "unconventional" usage, "revoked" does not have to mean nothing is left after revocation, and thus "a 'revoked' term of supervised release [may] retain vitality after revocation." This reading "also enjoys the virtue of serving the evident congressional purpose," to provide a term of release as a transition from prison to society, whether that prison term is for the original offense or follows a revocation sentence.

Finally, supervised release is very comparable to the former parole system, which "revoked" parole when conditions were violated. "[T]here seems never to have been a question that a new term of parole could follow a prison sentence imposed after revocation of an initial parole term . . . , and it is fair to suppose that in the absence of any textual bar 'revocation' of parole's replacement, supervised release, was meant to leave open the possibility of further supervised release, as well."

Johnson v. U.S., 120 S. Ct. 1795, 1800–07 (2000).

See *Outline* at VII.B.1

General Application Principles

Relevant Conduct

Circuits examine whether foreign criminal conduct can be considered in setting offense level. The Seventh and Tenth Circuits affirmed the use of relevant conduct that occurred outside the United States to increase child pornography defendants' offense levels. Both defendants were convicted of possessing child pornography, covered by USSG § 2G2.4, and the Seventh Circuit defendant was also convicted of receiving child pornography, covered by § 2G2.2. Both sections contain a cross-reference to § 2G2.1, which sets a higher offense level for production of child pornography. Each defendant had produced the films they were convicted of possessing, one in Honduras and the other in Thailand. The district courts used the production as relevant conduct and sentenced defendants under the stricter guideline. The defendants appealed, claiming that § 2G2.1 should not be applied to conduct that occurred wholly outside the U.S.

The Seventh Circuit held that defendant's "exploitation of minors in Honduras created the very pornography that he received and possessed here in the United States. In a literal sense, then, Dawn's domestic offenses were the direct result of his relevant conduct abroad; pragmatically speaking, they are inextricable from one another." The court rejected defendant's arguments about improperly applying U.S. laws extraterritorially, noting that defendant's "creation of the films . . . is relevant because it sheds light on the gravity of his conduct as a receiver and possessor of the films," the conduct for which he was convicted and sentenced.

The Tenth Circuit reasoned that defendant "was held criminally culpable only for his conduct (possession of child pornography) that occurred within the territorial jurisdiction of the United States." The court added that "18 U.S.C. § 3661 clearly states . . . that, '*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.' (emphasis added) . . . . Thus, we hold it appropriate for courts, when applying the cross-reference to § 2G2.1 from § 2G2.4, to consider the relevant conduct that occurs wholly outside of the United States."

In a similar case involving possession of child pornography, the Third Circuit remanded because the district court departed upward under § 4A1.3, instead of using the cross-reference to § 2G2.1 in § 2G2.4, for a defendant who shot the pornographic pictures while in the Philippines. The court first found that "§ 2G2.4 implements the Protection of Children Against Sexual Exploitation Act," 18 U.S.C. §§ 2251–2257, through which Congress intended to allow "punish[ment of] the wrongful conduct of its citizens, even if some of that conduct occurs abroad," and that "extraterritorial application of the Act in this case does not violate international law."

The court went on to find that, although foreign criminal activity has been assigned "a rather limited role" under the Guidelines, the Sentencing Commission "included no 'foreign conduct' limitation in § 2G2," and "we believe the Commission must have been aware that child pornography is often distributed internationally . . . . [I]f a U.S. citizen, having been convicted under 18 U.S.C. § 2252 for possession of child pornography in the United States, lured a child into sexually explicit activity in order to produce the pornography, the cross reference applies regardless of where the defendant's conduct occurred."

U.S. v. Wilkinson, 169 F.3d 1236, 1238–39 (10th Cir. 1999); *U.S. v. Dawn,* 129 F.3d 878, 882–85 (7th Cir. 1997); *U.S. v. Harvey,* 2 F.3d 1318, 1326–30 (3d Cir. 1993).

These circuits disagreed with a Second Circuit case that held that drug activity occurring completely on foreign soil should not have been included as relevant conduct. That defendant was part of a conspiracy that imported into New York one kilogram of heroin , which it was unable to sell. Defendant then delivered three kilograms of heroin from Pakistan to Cairo, and later sold 200 grams of heroin in the Philippines. When he then went to New York to attempt to sell the earlier kilogram of heroin, he was arrested and convicted of importing heroin into the U.S. The district judge included all of the heroin as relevant conduct in sentencing defendant.

While agreeing that the foreign drug deals were part of the "same course of conduct" as the offense of conviction, the Second Circuit reversed. The relevant conduct guideline "does not explicitly address the issue of foreign crimes and activities. . . . However, the Guidelines elsewhere note that foreign *sentences* may not be used in computing a defendant's criminal history category, but may be used for upward departures from the otherwise applicable range. *See* U.S.S.G. §§ 4A1.2(h), 4A1.3(a)."

"From these provisions, it follows that Congress, while it has not remained entirely silent, has chosen to assign to foreign crimes a rather limited role. We decline to find that Congress intended to require that foreign crimes be considered when calculating base offense levels simply because Congress did assign foreign crimes a role in fixing upward departures, while remaining silent on their role in calculating base offense levels." The court did indicate, however, that foreign criminal activity could be used in determining where to sentence within the otherwise applicable guideline range.

U.S. v. Azeem, 946 F.2d 13, 16–18 (2d Cir. 1991). *See also U.S. v. Chunza-Playas,* 45 F.3d 51, 56–58 (2d Cir. 1995) (following *Azeem* in rejecting use of alleged drug crimes committed in Colombia to impose upward departure on defendant convicted of possessing fraudulent alien-registration card: although foreign sentences or

convictions may be used for departure, "nowhere do the guidelines specifically authorize the use of unrelated, uncharged foreign criminal conduct, or even foreign arrests, for a departure in the criminal history category"; and, although § 4A1.3(e) allows departure for "prior similar adult criminal conduct not resulting in a criminal conviction," which "might reasonably be extended to include criminal conduct in a foreign country," defendant's alleged prior acts were not "similar" to his offense of conviction). *But cf. U.S. v. Farouil,* 124 F.3d 838, 844–45 (7th Cir. 1997) (distinguishing *Azeem* in affirming use of heroin seized in Belgium from defendant's travelling companion—drugs were part of same scheme to import heroin of which defendant was convicted, it was "mere fortuity" that defendant was arrested in U.S. and his companion in Belgium, and seized heroin was part of crime "directed against the United States, unlike *Azeem* . . . where the foreign crimes did not affect the United States").

The Fifth Circuit held that related foreign criminal conduct that did not meet the Guidelines' definition of relevant conduct may be used for departure. Defendant committed several crimes in Mexico, including murder and assault on law officers, shortly before crossing into the U.S., where he was arrested. He was convicted of illegal importation of a firearm into the U.S. and illegal entry. The district court used defendant's Mexican offenses to increase his sentence under § 2A2.1(a)(1) for the murder and § 3A1.2(b) for the assaults.

Without ruling specifically on whether foreign offenses may be considered as relevant conduct, the appellate court held that defendant's "foreign offenses do not literally fall within the definition of 'relevant conduct'" under either § 1B1.3(a)(1)(A) or (B). The court also held that the cross-reference provision of § 2K2.1, which allows another guideline to be used if the firearm was possessed in connection with another offense and led to the use of §2A2.1, should not be read to include foreign offenses.

"Under the unusual circumstances of the present case, however, the district court could well have departed to impose similar sentences. . . . [T]his is an extraordinary illegal entry and illegal firearm importation case that . . . 'differs significantly from the "heartland" cases covered by the guidelines.'" Because defendant's acts "closely resembled and were analogous to" relevant conduct, "the sentencing court would have been justified in departing upward and applying U.S.S.G. §§ 2K2.1(c)(1)(A); 2X1.1; and 2A2.1 by analogy," and may consider doing so on remand.

The court also found § 3A1.2(b) inapplicable because defendant's assault on the police officers occurred before his offenses of conviction, not during the offenses or in immediate flight therefrom as required by § 3A1.2. Any analogy for departure purposes would also be improper.

U.S. v. Levario-Quiroz, 161 F.3d 903, 906–08 (5th Cir. 1998).

See *Outline* at I.A.4, Other issues

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Offense Conduct

Drug Quantity

More circuits examine effect of *Apprendi* decision on sentencing. The Fifth Circuit remanded some of the sentences in a drug conspiracy case in light of *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000). The court noted that it has "continually endorsed" handling drug quantity as "a sentencing enhancement entrusted to the judge's determination rather than an element of the offense which must be determined by the jury." However, the court did not reconcile its precedent with *Apprendi*'s holding that the jury must find drug amounts that increase a sentence above the maximum otherwise authorized by the jury verdict, "because the government 'conced[es] that the *Apprendi* decision applies to 21 U.S.C. § 841.'"

The district court had followed the usual procedure of determining drug amounts based on a preponderance of the evidence; neither the indictment nor the jury verdict specified amounts for any defendant. Most defendants were sentenced below the statutory maximum for their basic offense of conviction, given their criminal history. However, one defendant's two life sentences, based on the court's quantity findings, were remanded because they exceeded the thirty-year maximum for his basic offenses of conviction. The appellate court also remanded several supervised release terms that exceeded the maximum terms allowed for the base offenses.

The court rejected one defendant's claim that *Apprendi* should be read broadly to preclude giving him "a higher sentence within [the statutory] range based on the application of a Sentencing Guidelines enhancement." Although *Apprendi* did not resolve that issue, "[g]iven that the more limited reading of *Apprendi* is a more plausible reading of the case, and given the profound effect a broader rule would have on existing Supreme Court and Fifth Circuit precedent, we believe the limited reading of *Apprendi* is the more desirable one."

U.S. v. Meshack, No. 99-50669 (5th Cir. Aug. 28, 2000) (Garza, J.). *See also U.S. v. Smith,* 223 F.3d 554, — (7th Cir. 2000) (for defendants who were convicted of operating continuing criminal enterprise under 21 U.S.C. § 848(a), which carries sentence of thirty years to life, *Apprendi* did not require submitting facts to jury that, under § 848(b), would require mandatory life sentence).

The Ninth Circuit did specifically rule on *Apprendi*'s effect on its prior precedent. Finding that *Apprendi* requires "that a fact that increases the prescribed statutory maximum penalty to which a criminal defendant is exposed . . . be submitted to a jury and proven beyond a reasonable doubt," the court held "that the amount of drugs for which a defendant is sentenced under 21 U.S.C. § 841(b)(1) is such a fact, and that our existing precedent to the contrary is overruled to the extent that it is inconsistent with *Apprendi*."

Defendant was convicted of conspiracy to possess with intent to distribute marijuana. The jury verdict did not specify any quantity of marijuana, so "the only sentence under § 841 justifiable under the facts as found by the jury would be a sentence . . . of not more than five years applicable to possession of less than 50 marijuana plants. See 21 U.S.C. § 841(b)(1)(D). The trial court's finding that Nordby possessed 1000 or more plants under § 841(b)(1)(A)(vii) increased Nordby's sentence to 'not [ ] less than 10 years or more than life' and a possible fine. Thus, the judge's finding, made under a preponderance standard, increased the statutory maximum penalty for Nordby's crime from five years to life."

"We conclude that the district court erred by sentencing Nordby under 21 U.S.C. §§ 841 and 846 for manufacturing, possessing with intent to distribute, and conspiring to possess with intent to distribute 1000 or more marijuana plants without submitting the question of marijuana quantity to the jury and without a finding that the marijuana quantity had been proved beyond a reasonable doubt. We further conclude that the constitutional rule in *Apprendi* undermines our existing precedent holding that a defendant's sentence under § 841 can be based on a judge's finding at sentencing of drug quantity under a preponderance-of-the-evidence standard." The court held that, even under plain error review, defendant was entitled to resentencing "subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt, consistently with *Apprendi* and this opinion."

U.S. v. Nordby, No. 99-10191 (9th Cir. Sept. 11, 2000) (Canby, J.). *Cf. In re Joshua,* No. 00-14328 (11th Cir. Aug. 30, 2000) (per curiam) (denying application to file second or successive § 2255 motion based on *Apprendi* because "the Supreme Court has not declared *Apprendi* to be retroactive to cases on collateral review").

The Sixth Circuit applied *Apprendi* in a case where defendant pled guilty to distribution of heroin pursuant to a plea agreement. The agreement stated that defendant understood her maximum term of imprisonment was twenty years for distribution, but that if the district court found that death resulted from the distribution, 21 U.S.C. § 841(b)(1)(A)–(C), she would be sentenced to

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a term of 20 years to life. The district court found, by a preponderance of the evidence, that defendant's distribution of heroin did cause a death, and sentenced her to 292 months in prison. Defendant appealed, claiming that *Jones v. U.S.,* 119 S. Ct. 1215 (1999), dictates that the factual determination as to whether death resulted should have been determined beyond a reasonable doubt.

The appellate court "agree[d] that *Jones* and the subsequent Supreme Court decisions elaborating on *Jones* compel a finding that the death resulted beyond a reasonable doubt." Although "Congress was fairly clear in delineating that the 'if death results' provision is a sentencing provision," the *Apprendi* Court "freed itself from the strictures of legislative intent" in holding that "any fact" (other than a prior conviction) that increases the statutory maximum must be proved beyond a reasonable doubt. "Our duty, in light of this clear dictate from the Court, is to examine whether the sentencing factor in this case was a factual determination, and whether that determination increased the maximum penalty for the crime charged in the indictment. We find that the statute at question here today, 18 U.S.C. § 841, provides for a factual determination of whether the distribution of drugs caused death or serious bodily injury, and that the factual determination significantly impacts the sentence imposed by the court, increasing the maximum penalty from 20 years to that of life imprisonment."

While defendant "waived her right to a jury trial of the issue of whether her distribution of heroin caused the death," she "did not waive the right to have a court decide any remaining elements of the offense beyond a reasonable doubt, as opposed to making those determinations by a mere preponderance of the evidence. Because the provisions at issue are factual determinations and because they increase the maximum penalty to which Rebmann was exposed, we find that they are elements of the offense which must be proven beyond a reasonable doubt." Because it was not clear from the record that the district court would have reached the same conclusion under the stricter standard, the court remanded "for a determination of whether [the] death was caused by the distribution of heroin beyond a reasonable doubt."

U.S. v. Rebmann, No. 98-6386 (6th Cir. Aug. 28, 2000) (Merritt, J.).

See *Outline* at II.A.3.a and c

Departures

Mitigating Circumstances

Replacing earlier decisions, Seventh and Ninth Circuits hold that departures based on sentencing disparities were properly denied and discuss limited circumstances in which disparity might warrant departure. In the Seventh Circuit, three defendants were convicted on three counts related to a bank robbery. One defendant pled guilty to all charges under a plea agreement and cooperated with the government. He received a departure for extraordinary family circumstances and also for substantial assistance under § 5K1.1 (but not 18 U.S.C. § 3553(e)). Although subject to a prison term of 117–131 months, which included a mandatory sixty-month sentence, he was sentenced to twelve months of home confinement. The government did not appeal the departure.

The other two defendants went to trial and received sentences of 138 and 195 months in prison. They unsuccessfully moved for downward departures under the rationale of *U.S. v. Meza,* 127 F.3d 545, 549–50 (7th Cir. 1996), which had stated that, although a disparity between codefendants' sentences that results from the proper application of the Guidelines can never be a basis for departure, an "unjustified disparity" may warrant departure. The defendants claimed that the large difference between their sentences and their codefendant's was such an "unjustified disparity" because the district court wrongly departed below the sixty-month minimum sentence without a government motion under § 3553(e). The appellate court originally agreed, finding that the departure below the minimum was in fact an improper application of the Guidelines and remanding for consideration of "whether the unjustified disparity . . . should serve as a basis for a downward departure" in light of *Meza. See U.S. v. McMutuary,* 176 F.3d 959, 967–70 (7th Cir.), *reh'g granted and opinion vacated,* 200 F.3d 499 (7th Cir. 1999).

On rehearing, the appellate court determined "that the interpretation of the term 'unjustified disparity,' provided as dicta in *Meza,* which would require the sentencing court to consider all unjustified sentencing disparities between co-defendants as a basis to depart from the applicable Guidelines range, focuses too narrowly on comparison of sentences of participants in one offense, rather than on comparison of sentences of all persons convicted of the same offense, nationwide." After looking at the relevant Guidelines and statutes, and considering the problems—including *increased* disparity—that could result from departures based on disparities among codefendants, the court reached a different conclusion:

> In light of the promulgation of Guidelines with the intent to create uniformity of sentencing nationwide for all similarly situated defendants, we believe that the Sentencing Commission implicitly considered the potential for disparity of sentences, whether justified or unjustified, between co-defendants in its creation of an applicable sentencing range. As such, we conclude that disparities between the sentences of co-defendants ordinarily should not be considered as a factor in the decision to depart from the Guidelines. Because district courts must only consider factors that have not been considered by the Sentencing Commission, *see* 28 U.S.C. § 3553(b), our holding that the naked existence of an unjustified disparity between the sentences of co-conspirators should not

> be considered as a basis for departure from the applicable sentencing range of the Guidelines does not conflict with the proscription in *Koon* that the appellate courts not create new classes of impermissible grounds for departure. As such, we believe that the sentencing court should consider only an "unjustified disparity" in the sentencing of co-defendants when the sentence imposed on the appellant co-defendant is "unjustified" in length in comparison to the sentences imposed on all other individuals appropriately sentenced under the Guidelines for similar criminal conduct.

The court added that it did not hold "that unjustified disparities may never be considered as bases for departure. In certain circumstances, such as when an unjustified disparity is created by the abuse of prosecutorial discretion, . . . the sentencing court may consider the disparity as a factor in the determination whether to depart from the sentence of a co-defendant. In addition, a sentencing court abuses its discretion by deciding to depart from the applicable sentencing range for the sentence of any defendant, whenever such departure creates an unjustified disparity between the sentence of that defendant and the sentences of all other similarly situated individuals nationwide." On the record before it, the court affirmed the denial of departures because "even though there was an unjustified sentence disparity relative to their co-defendant . . . , there was no unjustified or unwarranted disparity in these appellants' sentences, as those terms are used in *Koon* or in § 3553(a)(6)."

U.S. v. McMutuary, 217 F.3d 477, 488–90 (7th Cir. 2000). *Cf. U.S. v. Martin,* 221 F.3d 52, 57–58 (1st Cir. 2000) (remanded: "perceived disparity between the defendant's [sentencing range] and the national median sentence for persons convicted of federal drug-trafficking offenses" is improper ground for departure). *But see U.S. v. Wright,* 211 F.3d 233, 238–39 (5th Cir. 2000) (remanding district court's conclusion that it could not consider downward departure "based on discrepancies in sentences among co-defendants"—after *Koon,* such a departure should not be considered categorically prohibited); *U.S. v. Daas,* 198 F.3d 1167, 1180–81 (9th Cir. 1999) (remanded: same—"[d]ownward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances").

In the Ninth Circuit case, defendant pled guilty to illegally reentering the United States after being deported, 8 U.S.C. § 1326(a), and admitted to a prior aggravated felony, which subjected him to a longer sentence under § 1326(b). He argued that he should receive a downward departure based on an alleged disparity between his sentence—70–87 months—and lower sentences similarly situated defendants had received in other California districts at that time. Defendants in the Southern District, for example, were eligible to participate in a "fast-track" plea-bargaining program whereby defendants—including some who would normally qualify for a § 1326(b) increase—were allowed to plead guilty under § 1326(a) for a maximum sentence of two years; defendants who faced sentencing under § 1326(b) were offered plea bargains that limited sentences to five years. The district court concluded that this was not a valid basis for departure as long as defendant was properly sentenced under the guidelines that applied to him.

The appellate court originally reversed, holding that "sentencing disparities among federal districts based on U.S. Attorneys' plea-bargaining practices can be a ground for departure in the appropriate case." Such a ground is not forbidden by the Sentencing Commission and is not otherwise mentioned in the Guidelines, so a district court should consider whether the factor takes a case out of the "heartland" of the applicable guideline. The court concluded that, "given the alleged sentencing disparity, the single most influential factor in an alien's sentencing for a violation of § 1326 is the *location* of his arrest. . . . The 'heartland' of Guideline § 2L1.2 certainly does not take account of that variable." The court also concluded that the effects of the different plea-bargaining polices ran counter to the statutory goal of "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The court remanded for reconsideration, but noted that its decision was "necessarily limited to the unique circumstances" of this case. *U.S. v. Banuelos-Rodriguez,* 173 F.3d 741, 743–47 (9th Cir.), *vacated for reh'g en banc,* 195 F.3d 454 (9th Cir. 1999).

On rehearing en banc, the court affirmed the district court's refusal to depart. While acknowledging that "it was more likely that an illegal alien who was eligible for the enhancement provided by § 1326(b) would be sentenced under § 1326(b) if the alien was apprehended in the Central District" than in districts with the "fast-track" program, the court reasoned that "[n]othing about the . . . 'fast-track' program lessens the severity of Defendant's conduct or makes his criminal or personal history more sympathetic. The fact that, had Defendant been apprehended in the Southern District, he might not have been punished to the fullest extent of the law, does not make his otherwise lawful sentence less justified. Thus, the existence of differing prosecutorial policies regarding § 1326 violators is not a 'mitigating circumstance.'"

The court then noted that the Guidelines define the "heartland" as "a set of typical cases embodying the *conduct* that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where *conduct* significantly differs from the norm, the court may consider whether a departure is warranted." (Emphasis added by court.) In the case at hand, "Defendant and his conduct fall squarely within the heartland of his offense of conviction."

Furthermore, "the Guidelines have sought to achieve uniformity in sentencing only by attempting to equalize the sentences of those who have engaged in similar criminal conduct, have similar criminal backgrounds, *and* have been convicted of the same offense. . . . Here, Defendant agreed to plead guilty to violating § 1326(a) and to admit facts making him eligible for the enhancement provided by § 1326(b)(2). An alien who merely pleads guilty to a simple violation of § 1326(a) and an alien who pleads guilty to violating § 1326(a) and also admits facts demonstrating eligibility for the enhancement under § 1326(b)(2) are not pleading 'guilty to essentially the same crime.' . . . Granting a downward departure on the ground that Defendant received a longer sentence than other defendants who have been convicted of committing a different crime would be inappropriate."

The court also concluded that the Sentencing Commission "considered the effects that the exercise of prosecutorial discretion has on the uniformity of sentences. The Guidelines allow sentencing courts to take certain limited actions in narrow circumstances to address a prosecutor's inappropriate exercise of discretion. In all other circumstances, the Guidelines do not give courts the authority to interfere with a prosecutor's exercise of discretion in charging and plea bargaining by departing from an applicable Guideline range." In addition, "the legislative history of the Guidelines also supports our conclusion that sentencing disparities arising from the charging and plea bargaining decisions of different United States Attorneys is not a proper ground for departing from an otherwise applicable Guideline range." As defendant has not alleged, and no evidence shows, that there was any abuse of prosecutorial discretion, departure was not warranted.

U.S. v. Banuelos-Rodriguez, 215 F.3d 969, 973–78 (9th Cir. 2000) (en banc). *Accord U.S. v. Bonnet-Grullon,* 212 F.3d 692, 705–10 (2d Cir. 2000) (affirming district court's ruling that it did not have authority to consider downward departure for § 1326 defendants who claimed that similarly situated defendants in some California districts receive significantly lower sentences; such departures are "categorically excluded by the terms of §§ 2L1.2 and 5K2.0, by the structure and theory of the Guidelines as a whole, and by the policy statements stating that the courts' sentencing decisions are not to intrude on discretionary prosecutorial charging decisions except as the Guidelines provide"); *U.S. v. Armenta-Castro,* No. 99-4155 (10th Cir. Sept. 12, 2000) (Murphy, J.) (agreeing with Second and Ninth Circuits in similar case where it affirmed denial of departure for § 1326 defendant, concluding that "the governing provisions of the United States Code and the Sentencing Guidelines categorically proscribe the consideration of sentencing disparities flowing from the exercise of prosecutorial discretion in charging and plea bargaining practices.").

See *Outline* at VI.E

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Offense Conduct

Drug Quantity

Eleventh Circuit holds *Apprendi* requires reversal of drug quantity finding by court and also affects calculation under career offender guideline. Defendant was found guilty by a jury of possession of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The sentencing court determined that defendant possessed forty-one grams of crack, an amount that allows a maximum term of forty years under § 841(b)(1)(B), and sentenced defendant to 360 months after calculating a guideline range of 360 months to life. (Note: The court mistakenly referenced § 841(b)(1)(A) in sentencing, but that does not affect the ultimate result on appeal.) The defendant challenged the government's motion under § 851 to enhance his sentence for three prior felony drug convictions, which would have increased the statutory maximum to life under § 841(b)(1)(B) and to forty years under § 841(b)(1)(C), but the district court never ruled on that issue.

The appellate court remanded, finding that *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000), overruled its prior precedent regarding "what may be determined by a sentencing judge by a preponderance of the evidence and what must be charged in an indictment and decided by a jury beyond a reasonable doubt. . . . Applying *Apprendi*'s constitutional principle to section 841 cases, it is clear that the principle is violated if a defendant is sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge rather than the trial jury. The statutory maximum must be determined by assessing the statute without regard to quantity. This means that sections 841(b)(1)(A) and 841(b)(1)(B) may not be utilized for sentencing without a finding of drug quantity by the jury. If a provision of section 841(b) that does not contain a quantity amount applies, for example, section 841(b)(1)(C), then a convicted defendant may still be sentenced under that provision. In short, we hold today that drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*."

Therefore, the defendant here "may only be sentenced under section 841(b)(1)(C), which provides punishment for conviction of an undetermined amount of crack cocaine" and limits the sentence to "not more than 20 years" or, if defendant has a prior felony drug conviction, "not more than 30 years." Although the government initially filed notice under § 851, defendant "was not sentenced under the section 851 enhancement by the district court and because there was no objection or appeal on that issue, we treat the Government as having abandoned its request for a section 851 enhancement." Thus, the allowable maximum is twenty years.

These findings will also affect defendant's guideline range. Although not used for § 851 purposes, his prior offenses were used to classify him as a career offender, and his offense level was determined by the table in USSG § 4B1.1. The applicable offense level for his offense of conviction was 30, which the district court initially raised under § 4B1.1 to 37 because it had determined defendant's "offense statutory maximum" was life. However, under § 841(b)(1)(C) without a prior felony drug conviction, defendant's offense statutory maximum is twenty years and § 4B1.1 sets his offense level at 32. Given his criminal history and other adjustments, defendant's sentencing range would thus be 210–262 months, or 210–240 months in light of the statutory maximum and USSG § 5G1.1. The appellate court remanded for resentencing.

U.S. v. Rogers, 228 F.3d 1318, 1326–30 (11th Cir. 2000).

Fifth Circuit holds *Apprendi* requires jury determination of drug quantity that raises statutory maximum; court later holds *Apprendi* does not apply to mandatory minimum that does not exceed applicable statutory maximum. Defendants were convicted after trial of methamphetamine offenses, 21 U.S.C. §§ 841(a) and 846. "As had been the practice in this circuit, no specified amount of drugs were charged in the indictment or submitted to the jury." The sentencing court determined quantity by a preponderance of the evidence and sentenced one defendant to 235 months, the other to two concurrent life sentences. Under § 841(b), the maximum sentence for a defendant with no prior felony drug convictions is twenty years when no drug amount is specified, thirty years with a prior conviction.

"This case presents the question recently left unanswered in *U.S. v. Meshack,* 225 F.3d 556 . . . (5th Cir. 2000) [11 *GSU* #1], whether drug quantities under § 841(b) are sentencing factors or elements of the offense. We conclude that there is no reasonable construction of § 841 that would allow us to avoid the broad constitutional rule of *Apprendi.* Notwithstanding prior precedent of this circuit and the Supreme Court that Congress did not intend drug quantity to be an element of the crime under 21 U.S.C. §§ 841 and 846, we are constrained by *Apprendi* to find in the opposite."

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"The relevant inquiry is now whether a factual determination is involved, and whether that determination increases the sentence beyond the maximum statutory penalty. . . . Section 841 clearly calls for a factual determination regarding the quantity of the controlled substance, and that factual determination significantly increases the maximum penalty from 20 years under § 841(b)(1)(C) to life imprisonment under § 841(b)(1)(A). Therefore, we hold that if the government seeks enhanced penalties based on the amount of drugs under 21 U.S.C. § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt."

The court found that *Apprendi* does not affect the 235-month sentence given to one defendant because it is within the lowest applicable statutory maximum term of twenty years. It rejected that defendant's argument that "*Apprendi* prohibits the trial court from determining the amount of drugs for relevant conduct purposes under the Sentencing Guidelines . . . . The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines." However, defendant's five-year term of supervised release must be reduced to the three years authorized under § 841(b)(1)(C) and 18 U.S.C. § 3583(b)(2).

As for the other defendant's life sentences, which were based partly on his prior felony drug convictions, "the sentencing court did not err by using Beman's prior convictions to enhance his sentence, even though the prior convictions were not submitted to the jury. *See Apprendi,* . . . 120 S. Ct. at 2362–63 . . . . Nevertheless, even considering the proper enhancement, the maximum penalty for Beman under § 841(b)(1)(C) is 30 years on each count. Because the district court sentenced Beman to two concurrent life sentences, we remand Beman's case for resentencing consistent with this opinion."

U.S. v. Doggett, 230 F.3d 160, 164–66 (5th Cir. 2000).

In a case decided after *Doggett,* defendant was convicted of a crack cocaine count under § 841(a); he also had a previous conviction for a felony drug offense. There was no quantity finding by the jury, and the sentencing court imposed a mandatory twenty-year sentence under § 841(b)(1)(A) based on its finding that the offense involved more than fifty grams of cocaine base. Defendant "argues that because subsection (C) of § 841(b)(1) applies in the absence of an allegation and jury finding of drug quantity, the district court could not impose the statutory minimum sentence of twenty years under § 841(b)(1)(A) based on a non-jury determination of drug quantity. We disagree. Although *Doggett* involved a Sentencing Guidelines enhancement, its reasoning and its holding apply with equal force to a statutory minimum sentence."

In *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), the Supreme Court held that a sentencing judge could impose a mandatory minimum sentence, based on a preponderance of the evidence finding, that was within the applicable statutory maximum. "In *Apprendi*, the Court emphasized that *McMillan* remains good law . . . . Our examination of *Apprendi* in light of *McMillan* and *Doggett* leads inexorably to the conclusion that, as Keith's sentence did not exceed the maximum sentence of thirty years under § 841(b)(1)(C), the offense established by the jury's verdict [and defendant's prior conviction], it does not run afoul of *Apprendi*'s constitutional limitations."

U.S. v. Keith, No. 99-50692 (5th Cir. Oct. 17, 2000) (per curiam). *See also U.S. v. Pounds,* No. 99-15058 (11th Cir. Oct. 20, 2000) (per curiam) (affirmed: *Apprendi* is inapplicable to § 924(c)(1)(A)(iii), which mandates minimum term of ten years when a firearm is discharged during a crime of violence, "because every conviction under § 924(c)(1)(A) carries with it a statutory maximum sentence of life imprisonment, regardless of what subsection the defendant is sentenced under").

Fourth Circuit agrees *Apprendi* requires jury finding of quantity to raise statutory maximum, but holds sentencing court determines guideline range within the applicable statutory maximum. Defendants were found guilty by a jury of conspiracy to distribute cocaine, 21 U.S.C. § 846. With no drug quantity charged or submitted to the jury, the sentencing court determined the amount and sentenced one defendant to 210 months, the other to 292. However, under *Apprendi,* without a quantity finding by the jury "a violation of § 846 authorizes sentences for the defendants under § 841(b)(1)(C) to terms of not more than twenty years."

"Pursuant to *Apprendi,* in order for imprisonment penalties under § 841(b)(1)(A) or (B) to apply to the defendants, . . . the drug quantity must be treated as an element [of the offense]: charged in the indictment, submitted to a jury, and proven to beyond a reasonable doubt. Where no drug quantity is charged in the indictment or found by a jury, but a jury has found a violation of § 841(a), the standard statutory term of imprisonment is not more than twenty years. *See* § 841(b)(1)(C). In these cases, where the quantity is not charged, the drug amount is still a proper aggravating or mitigating factor to be considered by the judge in determining a sentence at or below the statutory maximum sentence. . . . Thus, the judge still may determine the amount of drugs by a preponderance of the evidence for the purposes of calculating the offense level and relevant conduct under the U.S. Sentencing Guidelines." *See also* USSG § 5G1.1(a).

Therefore, for the defendant sentenced to 210 months, "consideration by the district court judge of the quantity of drugs in determining the appropriate sentence at or below the statutory maximum was proper under

Apprendi." That sentence was remanded, however, for more specific quantity findings.

For the defendant sentenced to 292 months, "it is clear that the district court did not sentence in accordance with the applicable statutory penalty of § 841(b)(1)(C), . . . which authorizes a term of imprisonment not more than twenty years." Although the court's action was proper under the circuit's prior rule "that drug quantity is a sentencing factor that may be proven by a preponderance of the evidence," that rule "must be abandoned to the extent that the rule is inconsistent with *Apprendi*," and defendant should be resentenced accordingly.

U.S. v. Angle, 230 F.3d 113, 121–24 (4th Cir. 2000).

Sixth Circuit affirms, on review for plain error, sentences on multiple counts that exceed the statutory maximum allowable under *Apprendi* for each individual count. Defendants were convicted by a jury of conspiracy to distribute and to possess with the intent to distribute cocaine base. Three of the four defendants were also convicted on substantive distribution counts. The district court determined drug quantity at sentencing and sentenced one defendant to 292 months, the other three to 360 months each. Defendants challenged their sentences in light of *Apprendi.*

The Sixth Circuit previously found *Apprendi* applied to the determination of whether death resulted from the distribution of drugs because it would raise the statutory maximum. *See U.S. v. Rebmann,* 226 F.3d 521 (6th Cir. 2000) [11 *GSU* #1]. The court now found "the principles set forth in *Apprendi* applicable to [these] cases." Because there was no mention of quantity in the indictment and the jury made no findings regarding quantity, the statutory maximum for each count was limited to twenty years under § 841(b)(1)(C).

"Defendants, however, failed to object to the district judge making the determination of drug quantities. Where there has been no objection, review is for plain error." Although the court found that failure to follow *Apprendi* met the requirements for plain error and requires resentencing one defendant, "the government contends that the sentencing errors . . . with respect to [three defendants] were not prejudicial and, therefore, should not be noticed on plain error review. These defendants were convicted [of two or more charges], each of which carries a statutory maximum of twenty years pursuant to 21 U.S.C. § 841(b)(1)(C). Thus, the total statutory maximum is dramatically increased depending on the number of counts of which each defendant was convicted. The government argues that there would be no change in defendants' sentences if remanded for resentencing. Rather than running the sentences concurrently, the Sentencing Guidelines would require that the sentence imposed on one or more of the substantive counts run consecutive to the sentence on the conspiracy count, to the extent necessary to produce a combined sentence equal to the total punishment. *See* U.S.S.G. § 5G1.2(d)."

The court first noted that *Apprendi* "appears to foreclose this argument" because it ruled that, even if the same sentence could have been given by using consecutive sentences, it was "legally significant" that the count in question in that case could double the possible statutory maximum. "However, the decision in *Apprendi* was not limited by the standard of review for plain error. . . . In the case of defendants Linton, Hill, and Powers, we find that they were not prejudiced and that the fairness of the proceedings was not affected by the error since, absent the error, their sentences would have been the same as those which were imposed. We therefore decline to exercise our discretion as to these three defendants because they can show no meaningful benefit they would receive from vacating their sentences and remanding for resentencing."

U.S. v. Page, No. 99-5361 (6th Cir. Nov. 9, 2000) (Katz, Dist. J.).

Seventh Circuit rejects habeas petition based on *Apprendi* and summarizes limits of that case. A prisoner filed a request for a second or successive collateral attack on his federal sentence based on *Apprendi.* In this case, that request could only be granted if *Apprendi* established "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §§ 2244(b)(2)(A), 2255. "We held [previously] that retroactive application must be declared by the Supreme Court itself. . . . *Apprendi* does not state that it applies retroactively to other cases on collateral review. No other decision of the Supreme Court applies *Apprendi* retroactively to cases on collateral review. So, . . . no application based on *Apprendi* can be authorized under § 2244(b)(2)(A) or § 2255."

The appellate court went on to note that "[p]risoners seem to think that *Apprendi* reopens every sentencing issue decided by a federal court in the last generation. It does not. All *Apprendi* holds is that most circumstances increasing a statutory maximum sentence must be treated as elements of the offense—and, if the defendant has demanded a jury trial, this means that they must be established beyond a reasonable doubt to the jury's satisfaction. *Apprendi* does not affect application of the relevant-conduct rules under the Sentencing Guidelines to sentences that fall within a statutory cap."

"When a drug dealer is sentenced to less than 20 years' imprisonment—the limit under 21 U.S.C. § 841(b)(1)(C) for even small-scale dealing in Schedule I and II controlled substances—again *Apprendi* is irrelevant . . . . To put this otherwise, *Apprendi* does not affect the holding of *Edwards v. United States,* 523 U.S. 511 . . . (1998), that the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum.

And, more to the point of Talbott's application, *Apprendi* does not affect the holding of *Custis v. United States,* 511 U.S. 485 . . . (1994), that the validity of prior convictions is not open to reexamination at sentencing for a new offense, unless the defendant lacked counsel when convicted of the prior offenses."

Talbott v. Indiana, 226 F.3d 866, 868–70 (7th Cir. 2000). *Accord Rodgers v. U.S.,* 229 F.3d 704, 706 (8th Cir. 2000) (per curiam) (defendant cannot file second or successive motion under §2255 to vacate sentence based on *Apprendi* "because the Supreme Court has not made *Apprendi* retroactive to cases on collateral review, as required by the plain language of § 2255. . . . Nowhere in the *Apprendi* decision itself, or in any subsequent decision, does the Supreme Court discuss *Apprendi*'s retroactivity. Therefore, *Apprendi* is not available to a prisoner filing a second or successive petition under § 2255."); *In re Joshua,* 224 F.3d 1281, 1283 (11th Cir. 2000) (same); *Sustache-Rivera v. U.S.,* 221 F.3d 8, 15 (1st Cir. 2000) (same).

See *Outline* at II.A.3.a and c

Guideline Amendments

Some of the Nov. 1, 2000, amendments to the Sentencing Guidelines will affect sections of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 2000). Those sections are listed below, with a brief summary of the relevant amendments.

I.A.3 at p. 7 and **IX.A.1** at p. 414: New policy statement § 5K2.21 specifically authorizes departures for dismissed or uncharged conduct that was not otherwise accounted for. The Background Commentary to § 1B1.4 was also amended to reflect this policy. A majority of the circuits had already reached this conclusion.

VI.C.1.c at p. 329: New policy statement § 5K2.20 provides a definition of "aberrant behavior" and outlines the circumstances under which a departure may or may not be appropriate. This resolves a split among the circuits with new guidance that may affect the value of circuit precedent.

VI.C.2 at p. 340: New policy statement § 5K2.19 prohibits departure at resentencing for rehabilitation efforts undertaken after imprisonment, even when exceptional, and resolves a split among the circuits. Most circuits to decide the issue had held that exceptional post-sentencing rehabilitation could warrant departure.

Note to readers: The new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (Sept. 2000), has been mailed to all recipients of *GSU*. If you have not received your copy by now, or would like to request additional copies, please contact the FJC's Information Services Office by fax at 202-502-4077.

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Criminal History

Consolidated or Related Cases

Supreme Court holds that decision whether an offender's prior convictions were consolidated for Guidelines purposes is reviewed deferentially. In *U.S. v. Buford,* 201 F.3d 937 (7th Cir. 2000), defendant pled guilty to armed robbery. She had five prior felony convictions for violent or drug-related crimes, any two of which would subject her to career offender status if they were not "related." *See* USSG §§4A1.2(a)(2), 4B1.1, and 4B1.2(c). Four robberies were related, but the district court held that the fifth conviction, a drug offense, was not related to the robberies because of a lack of formal consolidation, different prosecutors, separate proceedings, and little linkage between the crimes. Those factors outweighed defendant's claims that the offenses were related because the drug possession occurred around the same time as the robberies (which defendant said were motivated by her drug addiction), they had been "functionally consolidated" for sentencing, and she received concurrent sentences from the same judge. *See* §4A1.2, comment. (n.3).

The court of appeals determined that "whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals," thus agreeing with the majority of circuits to decide this issue. *See* 201 F.3d at 941–42. Although "elements of Buford's situation support either characterization," the court affirmed because the district court "did not commit a clear error in finding that the joint sentencing was a matter of administrative convenience rather than a 'consolidation for sentencing.'" *Id.* at 942.

The issue for the Supreme Court was "should the appeals court review the trial court's decision deferentially or de novo? We conclude . . . that deferential review is appropriate, and we affirm." In this circumstance, "the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates 'functional consolidation.' . . . [A] district judge sees many more 'consolidations' than does an appellate judge. As a trial judge, a district judge is likely to be more familiar with trial and sentencing practices in general, including consolidation procedures. . . . Experience with trials, sentencing, and consolidations will help that judge draw the proper inferences from the procedural descriptions provided."

The Court added that "factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details. . . . And the fact-bound nature of the decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes."

Buford v. U.S., 121 S. Ct. 1276, 1278–81 (2001). *Cf. U.S. v. Hardin,* 248 F.3d 489, 493–95 (6th Cir. 2001) (affirmed: although not using it here because the case was argued before *Buford* was decided, stating that *Buford*'s deferential review standard would be appropriate for decision whether weapon was used "in connection with" another felony offense under § 2K2.1(b)(5)).

See *Outline* at IV.A.1.c and generally at X.C

Apprendi Issues

Mandatory Minimums

Sixth Circuit holds that *Apprendi* applies to imposition of mandatory minimum sentences; most circuits hold otherwise. A defendant in the Sixth Circuit was convicted of possession with intent to distribute cocaine. The district court sentenced him to a mandatory life term based on its finding that defendant possessed more than five kilograms of cocaine and had two prior felony convictions. 21 U.S.C. § 841(b)(1)(A). Although the indictment charged defendant with possession of 5.2 kilograms of cocaine, that issue was not decided by the jury.

Following *Apprendi v. New Jersey,* 120 S. Ct. 2348 (2000), the appellate court reversed. "The ultimate effect of the trial judge's finding in this case is the same as the effect of the judge's finding in *Apprendi*: the trial judge made a factual finding that determined the appropriate length of the criminal sentence. More specifically, a finding as to the weight of the drugs determined the range of penalties that would apply to Flowal. Given Flowal's two prior felony convictions, life imprisonment without parole was mandatory if he possessed five or more kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A). If he possessed less than five kilograms but more than 500 grams, he could be sentenced from ten years to life. . . . § 841(b)(1)(B). Finally, if he possessed less than 500 grams, he could be imprisoned as long as thirty years but would not face a statutory minimum. . . . § 841(b)(1)(C). Because the amount of the drugs at issue determined the appropriate statutory punishment, a jury should have determined the weight of the drugs beyond a reasonable doubt."

Although defendant could still receive a life term for possession of 4.997 kilograms [to which he admitted], "such a penalty is not mandatory under the latter provi-

Guideline Sentencing Update is distributed periodically to inform judges and other judicial branch personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. *Update* refers to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission, but is not intended to report Commission policies or activities. *Update* should not be considered a recommendation or official policy of the Center; any views expressed are those of the author.

sion. This difference is significant in this case because the trial judge's determination of the weight of the drugs took away any discretion in terms of imposing a shorter sentence. It is not a foregone conclusion that the trial judge would have sentenced Flowal to life without the possibility of release if a jury had determined the drugs weighed 4.997 kilograms. In fact, if the jury had determined that the drugs weighed less than 500 grams, a life sentence would not have even been an option . . . . The judge's determination effectively limited the range of applicable penalties and deprived Flowal of the opportunity to receive less than life imprisonment without the possibility of release." In sum, "a fact that increases the applicable statutory penalty range for a particular crime must be proved beyond a reasonable doubt to the trier of fact." The court remanded for resentencing, stating that, if the parties agree that sentencing under § 841(b)(1)(B) for 4.997 kilograms of cocaine is appropriate, submitting the issue of weight to the jury would not be necessary.

U.S. v. Flowal, 234 F.3d 932, 936–38 (6th Cir. 2000).

In a later case, where defendant received a mandatory twenty-year sentence under § 841(b)(1)(A) following a judicial finding of quantity, the court verified that the holdings of ***Apprendi*** and ***Flowal*** should be applied when the minimum sentence is increased. The court first stated that the second part of the "basic holding of ***Apprendi*** is . . . that it 'is unconstitutional for a legislature' to treat 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' as mere sentencing factors, rather than facts to be established as elements of the offense."

In combination with ***Flowal***, then, "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved. From a practical perspective, this means that when a defendant is found guilty of violating 21 U.S.C. § 841(a)(1), he must be sentenced under 21 U.S.C. § 841(b)(1)(C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B). Because in this case the government did not charge or attempt to prove to the jury a quantity of drugs that would permit a mandatory sentence, we remand this case to the District Court with instructions to sentence the defendant under 21 U.S.C. § 841(b)(1)(C) and in accordance with the U.S. Sentencing Guidelines."

U.S. v. Ramirez, 242 F.3d 348, 350–52 (6th Cir. 2001) (Siler, J., concurred in the decision because "we cannot overrule the decision of another panel," but "question[ed] whether ***Apprendi*** . . . is as far-reaching as we determine in this case, following ***Flowal***"). ***Cf. U.S. v. Camacho,*** 248 F.3d 1286, 1289–90 (11th Cir. 2001) (following holding of ***U.S. v. Rogers,*** 228 F.3d 1318, 1327 (11th Cir. 2000) [11 ***GSU*** #2], that "drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt," in finding that district court erred in sentencing defendant to mandatory minimum ten years under § 841(b)(1)(A) even though that was within otherwise applicable twenty-year maximum; however, error was harmless because defendant stipulated to amount of drugs that authorized the mandatory sentence).

Other circuits to decide the issue have held that, because ***Apprendi*** specifically stated that it did not overrule ***McMillan v. Pennsylvania,*** 477 U.S. 79 (1986), which allows imposition of a mandatory minimum term based on a preponderance of the evidence finding by a judge, ***Apprendi*** does not apply to the finding of facts that result in a mandatory sentence that is within the statutory maximum allowed by the jury's verdict. ***See, e.g., U.S. v. Rodgers,*** 245 F.3d 961, 965–67 (7th Cir. 2001) ("the Court's opinion in ***Apprendi*** leaves no doubt that ***McMillan*** remains good law insofar as mandatory minimum terms are concerned," and "since ***Apprendi*** was decided, we have specifically rejected the notion that a factual determination which has the effect of triggering a mandatory minimum sentence constitutes an element of the offense that must be submitted to the jury"); ***U.S. v. Harris,*** 243 F.3d 806, 809 (4th Cir. 2001) ("While the Supreme Court may certainly overrule ***McMillan*** in the future and apply ***Apprendi*** to any factor that increases the minimum sentence or 'range' of punishment, rather than only the maximum punishment, . . . that is not our role."); ***U.S. v. LaFreniere,*** 236 F.3d 41, 49–50 (1st Cir. 2001) (affirmed: refusing defendant's invitation "to read ***Apprendi*** more broadly to include mandatory minimums" and holding "that no ***Apprendi*** violation occurs when the district court sentences the defendant within the statutory maximum, regardless that drug quantity was never determined by the jury beyond a reasonable doubt"); ***U.S. v. Pounds,*** 230 F.3d 1317, 1319–20 (11th Cir. 2000) ("***Apprendi*** is inapplicable" to imposition of mandatory ten-year term under 18 U.S.C. § 924(c)(1)(A)(iii) because "every conviction under § 924(c)(1)(A) carries with it a statutory maximum sentence of life imprisonment"); ***U.S. v. Keith,*** 230 F.3d 784, 787 (5th Cir. 2000) (affirming twenty-year mandatory term because under ***Apprendi*** and ***McMillan*** "a fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt"); ***U.S. v. Aguayo-Delgado,*** 220 F.3d 926, 934 (8th Cir. 2000) (same). ***Cf. U.S. v. Garcia-Guizar,*** 234 F.3d 483, 489 (9th Cir. 2000) (affirming because "sentencing range of 168–210 months . . . exceeded the higher statutory minimum applied by the district court . . . [and] any ***Apprendi*** error could not have affected Garcia's sentence").

Effect on Sentencing Guidelines

Most circuits rule that *Apprendi* does not apply to application of the Sentencing Guidelines within the statutory maximum. Addressing a defendant's "assertion that *Apprendi* requires a district court to find drug quantities it considers to be a part of a defendant's relevant conduct beyond a reasonable doubt," the Seventh Circuit held that "pursuant to the sentencing guidelines, district courts may still determine a drug offender's base level offense by calculating quantities of drugs that were not specified in the count of conviction but that the court concludes, by a preponderance of the evidence, were a part of the defendant's relevant conduct, as long as that determination does not result in the imposition of a sentence that exceeds the statutory maximum penalty for that crime." ***U.S. v. Jones,*** 245 F.3d 645, 651 (7th Cir. 2001).

See also U.S. v. Sealed Case, 246 F.3d 696, 698–99 (D.C. Cir. 2001) ("declining to extend ***Apprendi***" to Guidelines decisions within statutory range); ***U.S. v. Sanchez,*** 242 F.3d 1294, 1299–1300 (11th Cir. 2001) ("Because a finding under the Sentencing Guidelines determines the sentence within the statutory range rather than outside it, the decision in ***Apprendi*** . . . has no application to the Guidelines."); ***U.S. v. Caba,*** 241 F.3d 98, 101 (1st Cir. 2001) ("***Apprendi*** simply does not apply to guideline findings (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum"); ***U.S. v. Garcia,*** 240 F.3d 180, 183–84 (2d Cir. 2001) ("a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury"); ***U.S. v. Heckard,*** 238 F.3d 1222, 1226 (10th Cir. 2001) ("Judges may still ascertain drug quantities . . . under the Sentencing Guidelines, so long as they do not sentence above the statutory maximum for the jury-fixed crime."); ***U.S. v. Kinter,*** 235 F.3d 192, 201–02 (4th Cir. 2000) ("Because ***Apprendi*** does not apply to a judge's exercise of sentencing discretion within a statutory range, the current practice of judicial factfinding under the Guidelines is not subject to the ***Apprendi*** requirements—at least so long as that factfinding does not enhance a defendant's sentence beyond the maximum term specified in the substantive statute."); ***U.S. v. Williams,*** 235 F.3d 858, 862–63 (3d Cir. 2000) (nothing in ***Apprendi*** precludes, and the holding of ***Edwards v. U.S.,*** 523 U.S. 511 (1998), supports, conclusion that jury finding is not required under Sentencing Guidelines where sentence is within statutory maximum); ***U.S. v. Doggett,*** 230 F.3d 160, 166 (5th Cir. 2000) ("The decision in ***Apprendi*** was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purpose of determining the applicable Sentencing Guidelines.").

Harmless Error

Some circuits have held that, when there was "overwhelming" or uncontroverted evidence of drug quantity, there was no plain error or *Apprendi* error was harmless. For example, the Fourth Circuit affirmed, on review for plain error, lengthy sentences for several defendants convicted of conspiracy to distribute cocaine and cocaine base where drug quantity was neither charged in the indictment nor found by the jury. "[W]e easily conclude, beyond a reasonable doubt, that the jury verdict would have been the same had the jury been asked specifically to find whether the conspiracy in this case involved more than 5 kilograms of cocaine or 50 grams of crack cocaine. No defendant suggested that these amounts had not been proven at trial, and we conclude that the uncontroverted evidence demonstrated amounts hundreds of times more than the amounts charged. . . . In short, the evidence establishing the threshold amounts of cocaine and crack cocaine for life imprisonment sentences was not only overwhelming, but also uncontested." ***U.S. v. Strickland,*** 245 F.3d 368, 380–81 (4th Cir. 2001).

Other circuits have reached similar conclusions. ***See, e.g., U.S. v. Terry,*** 240 F.3d 65, 74–75 (1st Cir. 2001) (affirmed: because defendant did not contest quantity evidence, and essentially admitted to the charges in claiming a defense of entrapment, "[t]here is no question that the petit jury in this case would have found Terry's offenses to involve 50 or more grams of cocaine base"); ***U.S. v. Anderson,*** 236 F.3d 427, 429–30 (8th Cir. 2001) (affirmed: error harmless because "there was overwhelming evidence that appellants conspired to produce amphetamine in a quantity sufficient such that appellants' thirty-year sentences do not exceed the statutory maximum as proscribed by ***Apprendi***"); ***U.S. v. Nealy,*** 232 F.3d 825, 829–30 (11th Cir. 2000) (affirmed: where 14.8 grams of cocaine base were seized from defendant's backpack, he did not contest that amount at trial or sentencing, and he was convicted of possessing that cocaine, "failure to submit drug quantity to the jury was harmless beyond a reasonable doubt" because "no reasonable jury could have rationally concluded that Defendant was guilty . . . but that the amount of cocaine [base] possessed was less than [the] 5 grams" necessary for sentencing under § 841(b)(1)(B)).

See also U.S. v. Noble, 246 F.3d 946, 955–56 (7th Cir. 2001) (remanded: although plain ***Apprendi*** error is harmless "when evidence supporting a sentence above the statutory maximum is overwhelming," here there was "limited physical evidence and minimal corroborating testimony" insufficient to support quantity finding); ***U.S. v. Wims,*** 245 F.3d 1269, 1273–74 (11th Cir. 2001) (affirmed: where purchase of six kilograms of cocaine was undisputed at trial and sentencing and only issue was whether drugs belonged to defendant, "jury's guilty verdict reveals that they did attribute the drugs to Wims" and it was not plain error to sentence him to life term based on court's

finding of that amount); ***U.S. v. Fields,*** 242 F.3d 393, 398 (D.C. Cir. 2001) (affirmed: although "the issue of leadership must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt" when it "may increase a defendant's sentence beyond the prescribed statutory maximum," as here, "the record evidence overwhelmingly demonstrates that Fields managed and masterminded various offenses" and "there is proof beyond a reasonable doubt that Fields held a leadership role in the criminal activities for which he was convicted").

Several circuits also find harmless error or no plain error when the defendant had stipulated or otherwise agreed to the amount of drugs used in sentencing. In the Eleventh Circuit, defendant had "stipulated to the quantity of drugs involved in his crime—39.77 kilograms. The stipulation took the issue away from the jury, and the jury's guilty verdict on the substantive offense rested upon the quantity to which [he] stipulated. The stipulation thus acts as the equivalent of a jury finding on drug quantity . . . [and] the imposition of [his] sentence under section 841(b)(1)(A) was error [under ***Apprendi***]—but harmless error." ***U.S. v. Camacho,*** 248 F.3d 1286, 1290 (11th Cir. 2001).

See also U.S. v. DeLeon, 247 F.3d 593, 597–98 (5th Cir. 2000) (affirmed: "neither the omission of a specific drug quantity from the indictment nor the absence of a jury charge on drug quantity rises to the level of plain error" when "defendant stipulated at trial that the substance seized was 1035.2 pounds (469.47 kilograms) of marijuana," which supported sentence under § 841(b)(1)(B); also noting that use of drug quantity range in the indictment, rather than precise amount, satisfies ***Apprendi***); ***U.S. v. Duarte,*** 246 F.3d 56, 62–64 (1st Cir. 2001) (affirmed on plain error review because defendant "signed a plea agreement in which he unequivocally accepted responsibility for a specified amount of drugs (1,000 to 3,000 kilograms) . . . [that] took any issue about drug quantity out of the case"); ***U.S. v. White,*** 240 F.3d 127, 134 (2d Cir. 2001) (affirmed: ***Apprendi*** error was harmless in sentencing defendant for sale of cocaine base because "the parties entered stipulations regarding the type and quantity of drugs involved . . . , well over the 5 gram minimum required for sentencing under section 841(b)(1)(B)"); ***U.S. v. Jackson,*** 240 F.3d 1245, 1249 (10th Cir. 2001) (defendant "stipulated to a quantity of cocaine base at trial (24.36 grams) sufficient to support a sentence of up to forty years under . . . §841(b)(1)(B); therefore, drug type and quantity were no longer facts required to be determined by the jury"); ***U.S. v. Poulack,*** 236 F.3d 932, 938 (8th Cir. 2001) (no plain error in sentence where defendant stipulated to quantity used by court in sentencing).

See ***Outline*** generally at II.A.3.a and c.

Note to readers: ***U.S. v. Angle,*** 230 F.3d 113 (4th Cir. 2000), summarized in 11 ***GSU*** #2, was vacated for rehearing en banc on Jan. 17, 2001.

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Apprendi Issues

Consecutive Sentences

Several circuits hold, under plain error review, that the total sentence for multiple counts may exceed the maximum authorized by *Apprendi* for any one count if the same sentence would result from imposing consecutive terms under USSG § 5G1.2. For example, a defendant in the Fourth Circuit was convicted on three counts. He was sentenced to concurrent terms of 292 months for a drug offense and 240 months for each of two money laundering counts. Because neither the indictment nor the jury verdict specified the amount of drugs involved, defendant's statutory maximum sentence on the drug count was 240 months. The appellate court held that the sentence did not violate *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

Defendant was convicted "of three crimes, exposing him to a total statutory maximum prison term of 60 years. In the case of multiple counts of conviction, the sentencing guidelines instruct that if the total punishment mandated by the guidelines exceeds the statutory maximum of the most serious offense of conviction, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment. *See* U.S.S.G. § 5G1.2(d). . . . Had the district court been aware when it sentenced Phifer that the maximum penalty for his drug trafficking conviction was 20 years, § 5G1.2(d) would have obligated it to achieve the guideline sentence of 292 months imprisonment by imposing a term of imprisonment of 240 months or less on each count of conviction and ordering those terms to be served consecutively to achieve the total punishment mandated by the guidelines." The court noted that "*Apprendi* does not foreclose this result" because *Apprendi* did not decide the issue of whether consecutive sentences could have led to the same sentence in that case.

U.S. v. Angle, 254 F.3d 514, 518–19 (4th Cir. 2001) (en banc). *See also U.S. v. Le,* 256 F.3d 1229, 1240 & n.11 (11th Cir. 2001) (affirming on direct appeal 262-month total sentence of 240 months on one count and consecutive 22-month sentence on second count, where each had twenty-year statutory maximum—"*Apprendi* does not apply when the sentences on two related offenses are allowed to run consecutively under the relevant law and the sentence on *each* offense does not exceed the prescribed statutory maximum for that particular offense").

Other circuits have reached the same result when review is for plain error. *See, e.g., U.S. v. Price,* No. 99-7078 (10th Cir. Sept. 11, 2001) (Murphy, J.) (affirmed: although imposition of concurrent life sentences under § 841(b)(1)(A) was plain error, "[b]ecause § 5G1.2(d) is a mandatory provision, . . . [t]he district court would be required to impose twenty-year terms on Defendant's seven drug convictions and to run these sentences, as well as Defendant's sentences on the other convictions, consecutively, resulting in a total consecutive sentence of 208 years"); *U.S. v. Kentz,* 251 F.3d 835, 842 (9th Cir. 2001) (affirmed: any error in 160-month sentence was harmless for defendant convicted of twenty-one counts, each with five-year maximum, where § 5G1.2(d) would require consecutive sentences to achieve total punishment); *U.S. v. Sturgis,* 238 F.3d 956, 960–61 (8th Cir. 2001) (affirmed: although 262-month sentence on one count violated *Apprendi*, under § 5G1.2(d) "the district court could have capped Sturgis's 262-month sentence on the crack count at the maximum 240 months, and run 22 of the 60 months on the marijuana count consecutively, thereby achieving the 262-month sentence imposed by the Guidelines"); *U.S. v. Page,* 232 F.3d 536, 542 (6th Cir. 2000) (affirming despite *Apprendi* error "since, absent the error, their sentences would have been the same" because § 5G1.2(d) "would require that the sentence imposed on one or more of the substantive counts run consecutive to the sentence on the conspiracy count, to the extent necessary to produce a combined sentence equal to the total punishment" that was imposed).

The Second Circuit, in another case under plain error review, found that "[t]he district court's use of section 5G1.2(d) did not result in a sentence on any one count above the maximum available on that count" under *Apprendi.* However, it remanded defendant's effective life sentence under the Guidelines—a total of 240 years reached by making the sentences for the six counts of conviction consecutive—because the district court erroneously indicated it had no discretion to depart. "[N]otwithstanding the apparent mandatory nature of section 5G1.2, a sentencing court may depart from the 'stacking' provision of that section to impose concurrent sentences where the imposition of multiple stacked sentences based on similar conduct created 'an aggravating or mitigating circumstance . . . .' More broadly, we have suggested that a sentencing court may depart downward where findings as to uncharged relevant conduct made by the sentencing court based on a preponderance of the evidence substantially increase the defendant's sentence under the Sentencing Guidelines." The case was remanded for the district court to "consider whether, on the

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particular facts of this case, a downward departure from the mandatory stacking provisions of section 5G1.2 or based on the substantial effect of the court's relevant conduct findings might be appropriate."

U.S. v. White, 240 F.3d 127, 132–37 (2d Cir. 2001).

See *Outline* generally at II.A.3.a and c, V.A.1

Retroactivity

Eighth and other circuits hold that *Apprendi* is not a "watershed rule" requiring retroactive application on collateral review. An Eighth Circuit defendant's appeal of the denial of his motion under 28 U.S.C. § 2255 was pending when *Apprendi* was decided. The government conceded that defendant's sentence would violate *Apprendi*, but argued that *Apprendi* set forth a new rule of constitutional law that, under *Teague v. Lane,* 489 U.S. 288 (1989), is inapplicable to cases on collateral review. The appellate court agreed that *Apprendi* did not fall within any of *Teague*'s exceptions to the general rule.

"Relevant to our inquiry is the exception permitting watershed rules, ones which 'implicate the fundamental fairness of the trial,' to be raised collaterally. . . . [W]e hold today that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review." Although *Apprendi* "unmistakably altered the legal landscape and is easily categorized as a new rule, . . . we do not believe *Apprendi*'s rule recharacterizing certain facts as offense elements that were previously thought to be sentencing factors resides anywhere near that central core of fundamental rules that are absolutely necessary to insure a fair trial."

Exceptions have been allowed only for rules that "impart a fundamental procedural right that . . . is a necessary component of a fair trial," and that "not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." The court concluded that "[p]ermitting a judge-found fact to affect the sentence imposed after a valid conviction, even if it is found under a more lenient standard, cannot be said to have resulted in a fundamentally unfair criminal proceeding," and "*Apprendi* appears no more 'important' to a fair trial than rules previously addressed by the [Supreme] Court, including the rule announced in *Batson v. Kentucky,* 176 U.S. 79 (1986), which the Court refused to apply retroactively in *Teague*."

U.S. v. Moss, 252 F.3d 993, 997–1001 (8th Cir. 2001) (Richard S. Arnold, J., dissented). *Accord McCoy v. U.S.,* No. 00-16434 (11th Cir. Sept. 25, 2001) (Hull, J.) (affirmed: agreeing with *Moss* and others that "the new rule announced by the Supreme Court in *Apprendi* does not fall within either exception to *Teague*'s non-retroactivity standard"); *U.S. v. Sanders,* 247 F.3d 139, 147–51 (4th Cir. 2001) (affirmed: "a rule which merely shifts the fact-finding duties from an impartial judge to a jury clearly does not fall within the scope of the second *Teague* exception"). *See also Jones v. Smith,* 231 F.3d 1227, 1236–38 (9th Cir. 2000) (in § 2254 proceeding, finding that *Apprendi* rule does not fit within *Teague* exception "at least as applied to the omission of certain necessary elements from the state court information" where those elements were argued at trial and included in jury instructions).

A recent Supreme Court decision may end the need for lower courts to determine whether *Apprendi* set forth a "watershed rule." The Court examined the exception in § 2244(b)(2)(A) that allows a second or successive § 2254 petition based on a new rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." It concluded that "'made' means 'held' for purposes of § 2244(b)" and thus "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." The Court discussed *Teague* and the watershed rule, but indicated that, at most, *Teague* could be used only to determine whether "this Court *should* make [a prior case] retroactive to cases on collateral review." That does not help petitioner because his motion must be dismissed under § 2244 unless the Court had *already* made the new rule retroactive. *Tyler v. Cain,* 121 S. Ct. 2478, 2482–85 (2001).

Following *Tyler*, the Sixth Circuit determined it did not have to reach petitioner's watershed rule claim in denying a motion to file a second petition under § 2255, which has the same exception. The court reasoned that *Tyler* "stated that *Teague* is not controlling for collateral cases [under §§ 2254 and 2255]. . . . As the Supreme Court has not held that *Apprendi* applies retroactively to cases on collateral review, Clemmons's second petition fails to satisfy the requirements of 28 U.S.C. § 2255." *In re Clemmons,* 259 F.3d 489, 492–93 (6th Cir. 2001). *Accord Forbes v. U.S.,* 262 F.3d 143, 145–46 (2d Cir. 2001).

Offense Conduct

Drug Quantity

Two more circuits hold that drug amounts for personal use should not be counted in setting offense level for distribution offense. The Seventh and Ninth Circuits have held that drugs intended for personal consumption should not be included when sentencing for the offense of possession with intent to distribute. *See U.S. v. Wyss,* 147 F.3d 631, 632 (7th Cir. 1998); *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993). Such amounts are counted, however, when defendant is convicted of conspiracy. See, for example, *U.S. v. Page,* 232 F.3d 536, 542 (affirmed: "drugs obtained by defendant from his supplier for his personal use were properly included by the district court in determining the quantity of drugs that the defendant knew were distributed by the conspiracy"), cases cited therein, and *Outline* at II.A.1.c, p. 39.

The Eighth Circuit recently found "*Wyss* and *Kipp* persuasive. For sentencing purposes, we note an important

distinction between a conviction for conspiracy to distribute and a conviction for possession with intent, or an attempt to possess with the intent to distribute. . . . When a defendant, who is a member of a conspiracy to distribute, purchases drugs for her personal use from a co-conspirator, the personal-use quantities 'are relevant in determining the quantity of drugs the defendant knew were distributed by the conspiracy.' . . . What the buyer intends to do with the drugs, in this situation, is irrelevant." However, for possession with intent to distribute, or an attempt to do so, "those drugs acquired for personal consumption are possessed without the intent to distribute, and they were not acquired from another person who was a party to a conspiracy to distribute. Keeping drugs for oneself is not within 'the common scheme or plan' of selling, giving, or passing them to another; therefore, personal-use quantities are not relevant conduct."

U.S. v. Fraser, 243 F.3d 473, 475–76 (8th Cir. 2001) (remanded for calculation of amounts that were for personal use and must be excluded) (Hansen, J., dissented).

The Second Circuit also agreed that "in sentencing defendants convicted of possession with intent to distribute, drugs meant only for personal use must be excluded from the drug quantity assessment. . . . Where . . . there is no conspiracy at issue, the act of setting aside narcotics for personal consumption is not only not a ***part of*** a scheme or plan to distribute these drugs, it is actually ***exclusive*** of any plan to distribute them." Because defendant was also subject to a mandatory sentence of twenty years under 21 U.S.C. § 841(b)(1)(A) if found to have possessed at least 50 grams of cocaine base (the government alleged he had 68.9 grams), the court added that "in calculating the quantity of drugs relevant for purposes of sentencing under 21 U.S.C. § 841, any fractional quantity of drugs intended for personal use must be excluded."

U.S. v. Williams, 247 F.3d 353, 357–59 (2d Cir. 2001) (remanded). ***See also U.S. v. Asch,*** 207 F.3d 1238, 1243–46 (10th Cir. 2000) (exclude drug amounts kept for personal consumption in setting penalty for conspiracy offense under § 841(b), including possible mandatory minimum); ***U.S. v. Rodriguez-Sanchez,*** 23 F.3d 1488, 1493–96 (9th Cir. 1994) (same, for possession with intent to distribute offense).

See *Outline* at II.A.1.c

Departures

Mitigating Circumstances

Eighth Circuit holds that departure is not warranted for interdistrict sentencing disparity based on one district's blanket refusal to enter into § 1B1.8 agreements. Under USSG § 1B1.8(a), a defendant and the government may enter into a cooperation agreement that allows defendant to provide information about the illegal activity of others, which could lead to a lower sentence, without having any self-incriminating information that is provided under the agreement used to increase the sentence. The district court found that there was a significant disparity between the Northern District of Iowa, which rarely used such agreements, and the Southern District, and that it had the authority to depart downward based on the disparate practices of the prosecutors. The court departed downward for a Northern District defendant who cooperated with the government and, as a result of information he provided, had his offense level increased from 28 to 36.

The appellate court reversed. Citing cases that have found "no authority to depart based on sentencing disparities that resulted from interdistrict differences in plea-bargaining policies," and the general proposition that "disparities in sentences among codefendants resulting from a routine exercise of prosecutorial discretion are unsuitable for departure," the court reasoned that "'justified' disparities—those resulting from the proper application of the Guidelines to each individual case—are not an appropriate basis for departure. . . . However, unjustified disparities may warrant a departure."

"Determining whether the interdistrict disparity in prosecutorial practices in these cases is justified turns upon prosecutorial authority. Only if the prosecutors do not possess the authority to rarely agree to section 1B1.8 protection would that practice result in an improper application of the Guidelines, resulting in an unjustified disparity that could be corrected through the departure power. . . . [A]fter separating the wheat from the chaff in this case, we are left with the following question: is a general policy or practice of rarely granting section 1B1.8 protection within the government's proper exercise of prosecutorial discretion?"

Examining § 1B1.8 and its commentary, which "contain no language that would limit the prosecutor's discretion concerning when or how often to enter into agreements to extend section 1B1.8 protection," and the similar discretion under § 5K1.1, the court concluded that "the most natural reading of section 1B1.8 is that the [Sentencing] Commission intended a decision about entering into agreements to be left to the prosecutor's discretion." Therefore, absent improper or unconstitutional conduct, "any disparities arising from appropriate prosecutorial practices (or sentences resulting from those practices) are justified under the Guidelines. . . . [D]isparities resulting from proper exercises of the discretion by prosecutors cannot be said to be 'unusual' or 'atypical' enough to warrant departure under section 5K2.0."

U.S. v. Buckendahl, 251 F.3d 753, 758–63 (8th Cir. 2001) (Heaney, J., dissented). See also summaries of *McMutuary* and *Banuelos-Rodriguez* in 11 *GSU* #1.

See *Outline* at VI.E

En banc Eighth Circuit reverses panel decision, holds that post-sentencing rehabilitation may not be used as basis for departure at § 3582(c)(2) resentencing. After defendant was sentenced to life on drug charges, the drug quantity tables were retroactively amended and, after her motion for resentencing under 18 U.S.C. § 3582(c)(2) was granted, led to a new guideline range of 324–405 months. The district court then granted her request for a departure based on her rehabilitation while in prison, and sentenced her to 144 months. A divided appellate panel affirmed the departure, reasoning that in other circumstances the court had previously allowed consideration of departures at § 3582(c)(2) resentencings on grounds not available at the original sentencing. *U.S. v. Hasan,* 205 F.3d 1072, 1074–75 (8th Cir. 2000).

The en banc court reversed. Under § 3582(c)(2), as implemented by USSG §1B1.10, a district court first determines what a defendant's sentencing range would have been had the amended guideline been in effect at the original sentencing. Then the court determines whether to reduce the sentence to that level based on "the facts before it at the time of the resentencing, in light of the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable." In that second step, "the guiding factors in § 3553(a) and the applicable policy statements of the Sentencing Commission are not grounds for an additional departure below the new sentence length already determined by the district court in step one. . . . The statute does not say that the court may reduce the term of imprisonment below the amended sentencing range or that the § 3553(a) factors or the applicable policy statements should be considered for such an additional reduction."

"The only time a district court is authorized by § 1B1.10 to depart downward from the amended sentencing range at a § 3582(c) resentencing is when a downward departure previously had been granted at the original sentencing." *See* USSG § 1B1.10, comment. (n.3). "It goes without saying that Ms. Hasan did not and could not have received a downward departure at her original sentencing for *post-sentencing* in-prison good conduct. The departure granted by the district court to Ms. Hasan at her resentencing is not consistent with the applicable policy statement (§ 1B1.10) issued by the Sentencing Commission to govern § 3582(c)(2) resentencings, and therefore runs afoul of § 3582(c)(2) itself, which requires action 'consistent with applicable policy statements issued by the Sentencing Commission.'" The court also distinguished the cases relied upon by the previous panel.

U.S. v. Hasan, 245 F.3d 682, 684–90 (8th Cir. 2001) (en banc) (four judges dissented). *Cf. U.S. v. Maldonado,* 242 F.3d 1, 5 (1st Cir. 2001) (although amendment to Guidelines prospectively prohibited departures based on post-sentence rehabilitation, effective Nov. 1, 2000, this circuit had previously allowed such departures and, where original sentencing occurred before amendment, defendant could argue for departure after successful 28 U.S.C. § 2255 motion resulting in de novo resentencing).

See *Outline* at I.E.6, p. 29, and VI.C.2.a, p. 341

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Apprendi Issues

Supreme Court holds that failure to allege quantity in indictment may be subject to plain error review. Following *Apprendi v. New Jersey,* 530 U.S. 466 (2000), courts have held that drug quantity is an element of the offense that must be charged in the indictment and proved beyond a reasonable doubt. Some circuits had held that failure to charge quantity in the indictment cannot be harmless error because it deprives a court of jurisdiction to sentence a defendant to a term greater than the maximum that applies when no specific threshold drug quantity has been charged or proven, even if there are stipulations to or overwhelming evidence of a larger quantity. *See U.S. v. Cotton,* 261 F.3d 397, 404–07 (4th Cir. 2001); *U.S. v. Gonzalez,* 259 F.3d 355, 360 at n.3 (5th Cir. 2001). The Supreme Court granted certiorari in *Cotton* to "address whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court."

The Court unanimously reversed, holding that "defects in an indictment do not deprive a court of its power to adjudicate a case." The Court therefore "appl[ied] the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim." Although the indictment charged a conspiracy to distribute "a detectable amount of cocaine and cocaine base," respondents were sentenced for more than fifty grams and received sentences above the twenty-year maximum applicable to the lowest quantities under 21 U.S.C. § 841(b). Under *Apprendi*, then, there was plain error that arguably affected respondents' substantial rights.

However, "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. . . . The evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.' . . . Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." The Court added that, in light of the graduated penalties in § 841(b), "[t]he real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."

U.S. v. Cotton, 122 S. Ct. 1781, 1783–87 (2002). See also cases in 11 *GSU* #3 affirming sentences despite *Apprendi* error where there was overwhelming or uncontroverted evidence of drug quantity.

Mandatory Minimum Sentences

Supreme Court affirms mandatory minimum sentence imposed by court under preponderance standard, holds *Apprendi* did not overrule *McMillan.* Petitioner was convicted of carrying a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A). The sentencing court found that petitioner "brandished" the firearm and imposed the seven-year mandatory minimum sentence required by § 924(c)(1)(A)(ii). Petitioner appealed, arguing that brandishing was an element of a separate offense that had to be charged in the indictment and proved at trial. He also argued that if brandishing is a sentencing factor as a statutory matter, the statute is unconstitutional in light of *Apprendi.* The Fourth Circuit affirmed the sentence, holding that the statute makes brandishing a sentencing factor that, under *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), may be used to impose a mandatory minimum sentence. *See U.S. v. Harris,* 243 F.3d 806, 809–12 (4th Cir. 2001).

In a sharply divided opinion, the Supreme Court affirmed. Based on the statute's structure, text, and history, the majority first held that, "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." Therefore, "the statute does just what *McMillan* said it could" by imposing minimum sentences within the statutory maximum.

A four-justice plurality next concluded that *McMillan* is not inconsistent with *Apprendi* (Justice Breyer concurred in the judgment but did not join this part of the opinion). "Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi.*"

"Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.

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Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date."

Four justices dissented, stating that *McMillan* conflicts with *Apprendi* and should be overruled, with *Apprendi* being extended to cover facts that increase a defendant's mandatory minimum sentence.

Harris v. U.S., 122 S. Ct. 2406, 2412–20 (2002).

Previously, the Sixth Circuit had held that *Apprendi* applies generally to the imposition of mandatory minimum sentences. See summaries of *Flowal* and *Ramirez*, and summaries of cases that disagreed, in 11 *GSU* #3.

Before *Harris*, the Second Circuit held that "if drug quantity is used to trigger a mandatory minimum sentence that exceeds the top of the Guideline range that the district court would otherwise have calculated (based on the court's factual findings, with or without departures), that quantity must be charged in the indictment and submitted to the jury." *U.S. v. Guevara,* 277 F.3d 111, 116–23 (2d Cir. 2001) (remanded). After *Cotton* and *Harris* were decided, the Second Circuit reheard and amended the case, finding that *Cotton* required affirming the sentence because the evidence of drug quantity was overwhelming and therefore supported the sentence imposed. The court "d[id] not consider the impact (if any) of *Harris* on the *Apprendi* analysis set out in" its earlier opinion. *U.S. v. Guevara,* 298 F.3d 124, 127–28 (2d Cir. 2002).

See *Outline* generally at II.A.2.a and c

Departures

Mitigating Circumstances

First Circuit holds that defendant must be "irreplaceable" for departure based on extraordinary family responsibilities. Defendant's guideline range was 21–27 months. The district court granted a downward departure under USSG § 5H1.6 for defendant's extraordinary family ties and responsibilities, namely, the need for him to provide care for his elderly parents. Departing six levels, the court sentenced him to three years' probation and six months' home detention, to be served on weekends.

The appellate court reversed, concluding that defendant's situation "falls short of what the caselaw has defined as 'extraordinary circumstances.'" Although defendant's efforts are "significant and commendable, . . . it is the unfortunate norm that innocent family members suffer considerable hardship when a relative is incarcerated." To remove a case from the "heartland" of the applicable guideline, "[a]t the very least, the caselaw requires a showing that the defendant is irreplaceable before his circumstances are considered extraordinary." Unlike cases cited by the court that approved departures where a defendant was shown to be irreplaceable, "the instant case is replete with evidence demonstrating alternative sources of care for Pereira's parents."

U.S. v. Pereira, 272 F.3d 76, 81–83 (1st Cir. 2001). *See also U.S. v. Sweeting,* 213 F.3d 95, 105 (3d Cir. 2000) (vacating departure based partly on defendant's care of a son with Tourette's Syndrome, stating "there simply is nothing about the type of care that he requires that suggests to us that it is so unique or burdensome that another responsible adult could not provide the necessary supervision and assistance"); *U.S. v. Faria,* 161 F.3d 761, 762–63 (2d Cir. 1998) (stating that downward departure under § 5H1.6 has been allowed where "the family was uniquely dependent on the defendant's ability to maintain existing financial and emotional commitments," but remanding departure here because this defendant's family was not "uniquely dependent on the support it currently receives from him"). *But cf. U.S. v. Dominguez,* 296 F.3d 192, 195–200 (3d Cir. 2002) (remanded: distinguishing *Sweeting* in holding that district court could have departed for defendant whose elderly and infirm parents "were physically and financially dependent upon her" and there was "no [other] family member who could help and there are no funds to employ outside assistance").

See *Outline* at VI.C

Adjustments

Multiple Counts—Grouping

Several Circuits hold that money laundering amendments are not to be applied retroactively. Effective Nov. 1, 2001, Amendment 634 significantly altered the guidelines for money laundering. It merged § 2S1.2 into a revised §2S1.1, tied offense levels more closely to the underlying criminal conduct, and directed courts to group money laundering counts with the underlying offenses that generated the laundered funds. Some defendants sentenced before Amendment 634 took effect have claimed on appeal that their sentences should be vacated and the amendment applied at resentencing to allow them to benefit from an allegedly lower offense level calculation or by having their offenses grouped.

The circuits to decide the issue have concluded that Amendment 634 did not merely clarify the guideline, so as to allow retroactive application, but imposed substantive changes that are not to be applied retroactively. The Eighth Circuit, for example, stated that "considering the amendment's language, its effect and purpose, and the earlier version, we conclude amendment 634 substantively changes the Guidelines." The court added that the Commission "did not include amendment 634 in the list of amendments to be applied retroactively. *See* USSG § 1B1.10(c) (2001). Also, the amendment's commentary does not state the amendment is intended to clarify, but

instead reflects substantive intent." *U.S. v. King,* 280 F.3d 886, 891 (8th Cir. 2002). *Accord U.S. v. Descent,* 292 F.3d 703, 707–09 (11th Cir. 2002); *U.S. v. McIntosh,* 280 F.3d 479, 485 (5th Cir. 2002); *U.S. v. Sabbeth,* 277 F.3d 94, 96–99 (2d Cir. 2002) (also rejecting claim that direction to group offenses was merely clarifying). *Cf. U.S. v. Martin,* 278 F.3d 988, 1003–04 (9th Cir. 2002) (where defendant's sentence is remanded for other reasons, decision whether to group money laundering and mail fraud offenses on resentencing should be determined under amended § 2S1.1).

See *Outline* at III.D.1

Using Minor to Commit Crime

Courts address several issues arising under § 3B1.4. USSG § 3B1.4 calls for an increase of two offense levels if defendant "used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense." Some circuits have held that § 3B1.4 does not require that a defendant know that the minor is, in fact, under age eighteen. The Eleventh Circuit looked to the similarly worded 21 U.S.C. § 861(a), which has been held to not contain a scienter requirement. "We see no reason why section 3B1.4 of the Sentencing Guidelines should be interpreted to give less protection to minors than similarly worded federal statutes, absent a showing of Congress's contrary intent. . . . We find no qualifying language in section 3B1.4 reserving the enhancement for defendants who knew that the person drawn into their criminal activity was a minor."

The court also held that a defendant need not be the one to actually involve the minor in the offense. "Any defendants who could have reasonably foreseen the use of a minor . . . are culpable under the plain language of sections 3B1.4 and 1B1.3(a)(1)(B)." The enhancement was affirmed here because defendant was a leader of the conspiracy and the recruitment of minors by an underling was reasonably foreseeable to defendant.

U.S. v. McClain, 252 F.3d 1279, 1285–88 (11th Cir. 2001). *Accord U.S. v. Gonzalez,* 262 F.3d 867, 870 (9th Cir. 2001) (affirmed: "plain language of the guideline does not require that a defendant have knowledge that the individual is under eighteen"). *See also U.S. v. Patrick,* 248 F.3d 11, 27–28 (1st Cir. 2001) (affirmed: "because [defendant] was convicted of conspiracy, his sentence could be enhanced based on his co-conspirators' reasonably foreseeable use of juveniles to further the [conspiracy's] activities").

The Fourth Circuit rejected a claim by an eighteen-year-old defendant that the Sentencing Commission exceeded its authority in making § 3B1.4 apply to all defendants when the legislation directing the Commission to act referred to "a defendant 21 years of age or older." The court reasoned that, "because Congress did not direct that *only* defendants over age 21 receive the enhancement, it actually did *not* require the Commission to limit the application of § 3B1.4 to defendants of a certain age."

U.S. v. Murphy, 254 F.3d 511, 513 (4th Cir. 2001). *Accord U.S. v. Ramsey,* 237 F.3d 853, 855–58 (7th Cir. 2001). *Contra U.S. v. Butler,* 207 F.3d 839, 849–52 (6th Cir. 2000) (remanded: "Commission failed to comport with a clear Congressional directive when it eliminated the requirement that the defendant be at least twenty-one years old to be subject to . . . § 3B1.4"; however, defendant was not shown to "use" minor and thus § 3B1.4 did not apply).

The circuits have disagreed on whether defendant must take some action beyond merely partnering with a minor in committing the offense. The Sixth Circuit determined that § 3B1.4 did not apply where a defendant committed a bank robbery with a minor but there was no evidence that it was not a simple partnership. "A consideration of the definitions of 'use' supports the notion that § 3B1.4 would require more affirmative action." For example, placement of § 3B1.4 in the "Adjustments" section, and the legislation's use of the term "solicitation of a minor," implies that a defendant must "play a particular role in the offense" and "do more than simply participate in crime with a minor. . . . Congress likely imagined an offender who actually exercised some control or took some affirmative role in involving the minor. . . . Thus, . . . 'using' a minor to carry out criminal activity entails more than being the equal partner of that minor."

U.S. v. Butler, 207 F.3d 839, 847–49 (6th Cir. 2000) (remanded because court did not find that defendant "directed, commanded, intimidated, counseled, trained, procured, recruited, or solicited" the minor). *Accord U.S. v. Parker,* 241 F.3d 1114, 1120–21 (9th Cir. 2001) (agreeing with *Butler* in remanding: "The district court's finding was that Parker and [the minor] were merely co-conspirators. The fact that Defendant was the minor's partner and profited from his participation in the crime does not show that he acted affirmatively to involve" the minor). *See also U.S. v. Suitor,* 253 F.3d 1206, 1210 (10th Cir. 2001) (although facts showed that defendant did in fact "use" minors in his offense, court cited *Parker* for proposition that evidence "must demonstrate more than the simple fact that Suitor was involved in a conspiracy with the minors").

However, the Seventh Circuit disagreed, concluding that a defendant "uses" minors "if his affirmative actions involved minors in his criminal activities. . . . This test can be met when the minor is a partner in the criminal offense. . . . By forming a partnership with a minor, a criminal defendant is undeniably encouraging that minor to commit a crime. The fact that the minor is a voluntary participant and equal does not make the act socially acceptable. . . . Thus, regardless of whether the minor is a partner or a subordinate, the enhancement will be applied where the defendant affirmatively involved the minor in the commission of a crime." The court held that

defendant not only encouraged the minor, but also directed and commanded him during the offense.

U.S. v. Ramsey, 237 F.3d 853, 859–62 (7th Cir. 2001).

Several circuits have held that the minor does not have to be an active, knowing, or willing participant in the crime. For example, the Ninth Circuit upheld the enhancement for using a child as a decoy to reduce the chance of detection, rejecting defendant's argument that "'active involvement or employment of the minor person in the offense' is required." Although the enabling statute directs the Sentencing Commission to enhance the sentences of defendants who use a minor "with the intent that the minor would commit a Federal offense," other wording that calls for enhancement "'if the defendant involved a minor in the commission of the offense,' is broad enough to cover intentionally using a minor as an innocent decoy. . . . [A] minor's own participation in a federal crime is not a prerequisite to the application of §3B1.4. It is sufficient that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense." Here, the evidence supported the finding that defendant "used" his three-year-old son—by having him with him in his truck as he tried to bring a load of marijuana from Mexico into the United States—to "assist in avoiding detection of, or apprehension for, the offense."

U.S. v. Castro-Hernandez, 258 F.3d 1057, 1059–60 (9th Cir. 2001). *Accord U.S. v. Alarcon,* 261 F.3d 416, 423 (5th Cir. 2001) (affirmed: using children as decoys while attempting to drive marijuana into United States warranted §3B1.4 enhancement).

Along similar lines, some courts have held that the minor need not have knowledge that he or she is participating in a crime for §3B1.4 to apply. The Tenth Circuit affirmed the enhancement for a defendant who, without explaining why, paid a sixteen-year-old to pick him up at the airport and drive him and others around town to cash counterfeit checks. The court relied on the "clear and unambiguous" language of §3B1.4 to reject the argument that "defendant must inform the minor of the criminal purpose for which the minor's services are wanted and induce, or try to induce, the minor to commit the federal offense in question."

U.S. v. Tran, 285 F.3d 934, 937–38 (10th Cir. 2002). *See also U.S. v. Anderson,* 259 F.3d 853, 864 (7th Cir. 2001) (affirmed for embezzler who directed seventeen-year-old bank teller to unknowingly make improper withdrawals—§3B1.4 "focuses on whether the defendant used a minor in the commission of a crime, not whether the minor knew that he was being used to commit a crime"). *Cf. U.S. v. Warner,* 204 F.3d 799, 800–01 & n.2 (8th Cir. 2000) (finding enhancement appropriate for defendant who brought his eight-year-old daughter to drug deal with undercover officers and, when they balked at paying him before he went to get drugs, offered to leave his daughter with undercover agents as guarantee he would return).

[To be put in next *Outline* at new section III.B.10]

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