

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 sen-

tenced 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.*

Patrick, 983 F.2d 206, 208–10 (11th Cir. 1993) (re-manded: 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)

VE.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 F3d 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 F3d 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-

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 F3d 1104, 1106–08 (11th Cir. 1994) (en banc) (two judges dissented) (superseding opinion at 989 F2d 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 F3d 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 F3d 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 F3d 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 F3d 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 F3d 613, 615–16 (5th Cir. 1994).

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

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Guideline Sentencing Update

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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-

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 IVA.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 VA.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 Stauffer 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 Stauffer was so entrapped in this case.”

U.S. v. Stauffer, 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.”

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.E.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 F3d 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 F3d 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 un consummated, 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 F3d 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 F3d 429, 431 (5th Cir. 1994) (per curiam). *Accord U.S. v. Mueller*, 27 F3d 494, 496–97 (10th Cir. 1994); *U.S. v. Boot*, 25 F3d 52, 54–55 (1st Cir. 1994). *Contra U.S. v. Stoneking*, 34 F3d 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 kilo-

grams 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.

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 F3d 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, conclud-

ing 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 F3d 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 F3d 116, 119–20 (2d Cir. 1994).

See *Outline* at V.E.2.

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 of-

fense 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 num-

ber. 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

Issues in volume 7 of *Update* are now available electronically via the Federal Judicial Center’s Internet home page. Issues from earlier volumes will be added in the future. Information on how to download files and necessary software is included. Issues will be placed there as soon as they are completed, so they will be available there approximately two weeks before you receive your paper copy.

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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-

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 Medellín 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

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 co-defendants’ 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 co-defendant]. . . . 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

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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Departures

Mitigating Circumstances

Ninth Circuit holds that departure for “sentencing entrapment” may be warranted. In a “reverse sting” operation defendant was convicted of conspiracy to possess with intent to distribute five kilograms of cocaine. However, the evidence indicated that defendant agreed to buy the cocaine only after several months of persistent pressure by a confidential informant. Also, defendant preferred and could afford to buy only one kilogram, and agreed to buy the five kilograms only after the undercover agent offered to “front” four of the five kilograms and the informant said he would buy back three or four kilograms from defendant. There was also some doubt that defendant had, in fact, agreed to buy five kilograms. The district court denied defendant’s request for a departure based on sentencing entrapment, held him responsible for five kilograms, and imposed the mandatory minimum sentence of ten years. On appeal defendant conceded he was predisposed to dealing cocaine, but argued that departure was warranted because “he would not have negotiated a transaction for five kilograms of cocaine but for the government’s unusually favorable financial terms,” *see* §2D1.1, comment. (nn. 12 & 17).

The appellate court remanded, finding defendant’s “sentencing entrapment theory convincing. Application Notes 12 and 17 clearly require the district court to determine whether sentencing entrapment has occurred. Under Note 12, the district court ‘shall exclude’ from the calculation the amount of drugs which flow from sentencing entrapment. Further, under Note 17, a downward departure is warranted when sentencing entrapment occurs.” The defendant “has the burden of proof to demonstrate that he had neither the intent nor the resources for completing a five kilogram cocaine transaction . . . , [but] the district court is obligated to make express factual findings as to whether Naranjo met this burden.” The district court’s statement, however, “fails to provide any finding relevant to the critical issue of Naranjo’s predisposition to engage in a five-kilogram cocaine transaction. . . . Our reading of the record strongly suggests that Naranjo had neither the intent nor the resources to engage in a five-kilogram cocaine transaction.” The case was remanded “with instructions to provide specific factual findings to support [the] ruling that Naranjo did not prove sentencing entrapment.”

U.S. v. Naranjo, 52 F.3d 245, 250–51 (9th Cir. 1995).

See *Outline* at VI.C.4.c and II.B.4.a.

Seventh Circuit holds that departure for “sentence manipulation” would be warranted only “for the most outrageous governmental conduct.” Defendant claimed that the government engaged in sentence manipulation when—against government policy—it continued to use a confidential informant (CI) after he made an unauthorized drug purchase from defendant. Defendant argued that the government wanted to ensure that he made another sale of weapons to the CI so that his sentence would be enhanced under §2K2.1(b)(1)(B) (increasing offense level by two for offense involving 5–7 firearms).

The appellate court rejected defendant’s argument. “The doctrine of sentencing manipulation states that a judge cannot use evidence to enhance a defendant’s sentence if the government procured that evidence through outrageous conduct solely for the purpose of increasing the defendant’s sentence under the Sentencing Guidelines. . . . We decline to extend the application of this doctrine any further than for the most outrageous governmental conduct. . . . The defendant would have to establish that the government specifically continued to employ the CI for the purpose of pursuing another two point enhancement such that the defendant’s due process was violated.” Agreeing with the district court that the government had legitimate reasons for continuing to use the CI, the court added that “if the government really wanted to enhance Messino’s sentence, it could have authorized the CI to try to buy other weapons in addition to those already purchased. The fact that it refrained from doing so makes it clear that the government was not engaged in deliberate sentence manipulation.”

U.S. v. Messino, 55 F.3d 1241, 1256 (7th Cir. 1995).

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

Substantial Assistance

Third Circuit holds that §5K1.1 motion—in absence of motion under §3553(e)—does not permit departure below statutory minimum sentence. Defendant’s plea agreement stated that, in return for his cooperation, the government would move under §5K1.1 for a departure from the applicable guideline range. There was no agreement for departure via 18 U.S.C. §3553(e) below the 10-year mandatory minimum. The district court ruled that because the government moved only under §5K1.1, it could not depart below the statutory minimum and imposed the 10-year sentence. Defendant argued on appeal that a §5K1.1 motion also authorizes departure below a mandatory minimum sentence.

The appellate court affirmed. “The root issue for decision here is whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum. A literal reading of §5K1.1 would indicate that a prosecutor has this option. This conclusion is consistent as well with the Congressional judgment reflected in §3553(e). Moreover, no policy considerations appear to counsel against this conclusion and a number counsel in favor. . . . We hold 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.” In so holding the court joined the Eighth Circuit. Four circuits have held that a §5K1.1 motion authorizes departure below the statutory minimum without a separate motion under §3553(e).

U.S. v. Melendez, 55 F.3d 130, 135–36 (3d Cir. 1995) (Huyett, Dist. J., dissenting).

See *Outline* at VI.E3.

Third Circuit requires “individualized, case-by-case consideration of the extent and quality of a defendant’s cooperation in making downward departures under §5K1.1.” In departing downward three offense levels after a §5K1.1 motion, the district court stated that “*my practice*, when I grant a §5K1.1 motion, is to go down three levels, three additional levels, on the theory if Acceptance of Responsibility is worth three levels, Substantial Cooperation should be worth the same.” (Emphasis added by appellate court.) Although the court also gave other reasons to support the final sentence imposed, the appellate court held that remand was required to ensure that the court did not use a “mechanical policy of departing down three levels for substantial cooperation.”

A defendant’s substantial assistance “can involve a broad spectrum of conduct *that must be evaluated by the court on an individual basis.*” Application Note to U.S.S.G. §5K1.1 (emphasis added). A proper exercise of the district court’s discretion under §5K1.1, therefore, involves an individualized qualitative examination of the incidents of the defendant’s cooperation, and would not seem to admit of the use of sentencing ‘practices.’” The district court’s other reasons did not, “as required by §5K1.1, analyze the cooperation itself, as opposed to the crime or the defendant. Moreover, the otherwise detailed statement of reasons was delivered, by its own terms, only to explain why the court sentenced defendant above the minimum of the applicable guideline range of 360 months to life, not to explain why the court chose the three-level adjustment. . . . [W]e conclude that the district court erred as a matter of law in what, at least on the face of the record, appears to have been a mechani-

cal application of the guidelines to this one defendant in the conspiracy.”

U.S. v. King, 53 F.3d 589, 590–92 (3d Cir. 1995).

See *Outline* at VI.E3.

Adjustments

Vulnerable Victim

Ninth Circuit holds that defendant need not specifically, or initially, target vulnerable victim. Defendants were convicted on fraud and other charges in connection with their operation of a fraudulent health insurance scheme. The insurance was originally sold to employer associations, but over the course of the scheme individual claimants did not have their medical claims paid. These individuals continued to pay premiums to defendants to keep their coverage despite the fact that defendants “often stalled and gave claimants ‘the run-around.’” The district court made it clear that it based defendants’ §3A1.1 enhancements on their continuing to take money from these claimants, not because they originally targeted them: “It’s that after they found out victims were vulnerable and they could not pay those claims, they continued to accept premiums from people who had not had claims paid but were afraid not to keep making their premium payments for fear they wouldn’t be covered.” Defendants argued on appeal that §3A1.1 cannot apply because they did not specifically target their victims, as Application Note 1 indicates is required, and that these victims were no more vulnerable than other victims of health insurance fraud.

The appellate court rejected both arguments and affirmed. The court acknowledged that Note 1 “states that §3A1.1 ‘applies to offenses where an unusually vulnerable victim *is made a target* of criminal activity by the defendant.’ . . . (emphasis added). The commentary thus appears to require more than just actual or constructive knowledge—the commentary suggests that the defendant must have an actual intent to ‘target’ a vulnerable victim before §3A1.1 can apply.” However, such a requirement “is inconsistent with the plain language of §3A1.1, which only requires that the defendant ‘should have known’ that the victim was vulnerable.” The commentary can be reconciled with the guideline by reading it to have “a limited purpose—to exclude those cases where defendants do not know they are dealing with a vulnerable person.” Here, defendants had that knowledge because they “personally talked to and engaged in stalling tactics with individual claimants who complained about unpaid medical claims. Appellants thus knew, or at the very least ‘should have known,’ that many vulnerable victims were not getting their claims paid, and yet appellants continued to accept premiums from them.”

The court also held that the “individuals who developed medical problems and then could not get their claims paid fulfill both the unusually vulnerable ‘physical or mental condition’ and the ‘otherwise particularly susceptible’ criteria of §3A1.1. Several of the victims had serious physical or mental conditions that required follow-up care. These individuals realistically could not have switched insurance companies—they were at the mercy of the appellants.” The court “emphasize[d] that appellants in this case did more than just fail to pay for the victims’ medical claims. Appellants continued to accept premiums from these victims, many of whom were ‘afraid not to keep making their premium payments for fear they wouldn’t be covered.’ It is this continual fraud perpetrated upon these victims—who became vulnerable once they developed medical conditions, had outstanding medical bills, and in some cases needed further treatment—that triggered §3A1.1.”

The court specifically disagreed with *U.S. v. Rowe*, 999 F.2d 14, 17 (1st Cir. 1993), which reversed a §3A1.1 enhancement in a similar case. But note that the First Circuit reasoned that the individual claimants were not vulnerable to defendant’s offenses because, unlike the case here, “the thrust of the wrongdoing with which Rowe was charged was the initial fraudulent solicitations and the mismanagement or looting of the plan’s assets. The near certainty that some of the subscribers would be more enmeshed than others appears to have been a collateral aspect of the wrongdoing.”

U.S. v. O’Brien, 50 F.3d 751, 754–57 (9th Cir. 1995).

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

Acceptance of Responsibility

Second Circuit holds that §3E1.1(b)(1) reduction may not be denied because defendant was not truthful about misconduct of others. Defendant received the two-point reduction for acceptance of responsibility but the district court denied the additional point under §3E1.1(b)(1) because it believed that, while defendant provided complete information about his own conduct, he misrepresented the involvement of others in the conspiracy. The appellate court rejected this reasoning and remanded. “A three-level reduction is available to a defendant who, in addition to clearly demonstrating his acceptance of responsibility, ‘assist[s] authorities in the investigation or prosecution of *his own misconduct*’ by ‘timely providing complete information to the government concerning *his own involvement* in the offense.’ See *id.* §3E1.1(b)(1) (emphasis supplied). . . . Section 3E1.1(b)(1) refers only to the defendant’s ‘own misconduct’ and ‘own involvement,’ and a defendant has satisfied the requirements for an adjustment under that section when he has described his

own involvement in the crime. . . . Once it is determined that a defendant has completely and truthfully disclosed his criminal conduct to the government, the inquiry with respect to section 3E1.1(b)(1) is complete.”

U.S. v. Leonard, 50 F.3d 1152, 1158–59 (2d Cir. 1995).

See *Outline* at III.E.4.

Determining the Sentence

Consecutive or Concurrent Sentences

Third Circuit holds that courts are not required to depart downward in order to impose the “reasonable incremental penalty” calculated under §5G1.3(c). At the time of sentencing defendant had served 17 months of a prior 21-month sentence. For each of the instant offenses his guideline range was 15–21 months, and the district court imposed concurrent 15-month sentences that were to run concurrently with the remaining 4 months on the prior sentence. Defendant claimed that this was improper because his *total* time served for the prior and instant offenses should be only 24 months pursuant to Note 3 of §5G1.3(c), which calculates a “reasonable incremental penalty” by “approximat[ing] the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time.” He argued that, following Application Note 3, he should receive no more than 7 additional months of incarceration.

The appellate court affirmed, holding that district courts are not required to depart from the guideline range for the instant offense in order to impose the total punishment calculated under Note 3. “Section 5G1.3 provides guidance in determining whether to run a sentence concurrently or consecutively. While it appears to permit a downward departure from the applicable guideline range to meet its objectives, it does not create a sentencing scheme in itself nor does it require a downward departure. . . . [S]entencing Holifield to less than 15 months to meet the general objectives of §5G1.3 would have been a departure from the guideline range. And although §5G1.3 would permit a departure, the Commentary clearly states that the methodology ‘does not, itself, require the court to depart.’” The court also noted that Illustration D in the Commentary supports this conclusion by indicating that a total sentence in excess of that reached under the Note 3 methodology is proper and a downward departure is not required. See also *U.S. v. Whiteley*, 54 F.3d 85, 91–92 (2d Cir. 1995) (affirmed: “While downward departures are not impermissible . . . §5G1.3(c) does not itself authorize a court to impose a sentence below the guideline minimum in order to replicate the ‘total punishment’ that would

have been imposed upon Whiteley had he been sentenced for all relevant offenses at once”).

The court added that it agreed with “the majority of circuits that have [concluded] that although the district court must calculate the ‘reasonable incremental punishment’ according to the [Note 3] methodology, it need not impose that penalty. Instead, the court may employ a different method in determining the sentence as long as it indicates its reasons for not employing the commentary methodology.”

U.S. v. Holifield, 53 F.3d 11, 14–17 (3d Cir. 1995).

See *Outline* at V.A.3.

General Application

Amendments

Third Circuit upholds “one book rule.” Although defendant was sentenced in November 1993, his crime was completed by May 1988. Following the “one book rule” in §1B1.11(b)(2) (Nov. 1992), the district court used the 1987 Guidelines in their entirety to avoid *ex post facto* problems because the 1993 Guidelines would have required a more severe sentence (by three offense levels). Defendant argued that, following prior Third Circuit cases that disapproved the one book rule, he should have

been sentenced under the 1987 Guidelines but also received the benefit of the three-level, rather than two-level, reduction for acceptance of responsibility that was available in 1993.

The appellate court affirmed. Although the circuit had previously rejected the one book rule, the court concluded that “the Sentencing Commission, through its adoption of section 1B1.11(b)(2), has effectively overruled those opinions insofar as they conflict with the codification of the ‘one book rule.’ . . . [W]e join the majority of other courts of appeal which have already upheld the application of the ‘one book rule.’” The court also rejected defendant’s claim that “because the ‘one book rule’ was not in effect at the time of his offenses, its application violates the *ex post facto* clause” by not allowing the three-level reduction. “In this case, the application of the 1987 guidelines, pursuant to section 1B1.11(b)(2), resulted in a sentence of at least thirteen months *less* than what Corrado would have received under the 1993 guidelines. In our view, where, as here, the applicable guidelines overall work to the defendant’s advantage in terms of the sentence imposed, there is no *ex post facto* violation.”

U.S. v. Corrado, 53 F.3d 620, 623–25 (3d Cir. 1995).

See *Outline* at I.E.

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Determining the Sentence

Consecutive or Concurrent Sentences

Tenth Circuit holds that courts may use estimate of actual, rather than nominal, length of an “undischarged term of imprisonment” under §5G1.3(c). Defendant’s original federal sentence was remanded. Before resentencing he began serving an unrelated 18-year (216-month) state sentence. On remand the district court followed §5G1.3(c) to calculate the “reasonable incremental punishment” on the federal offense. Under Application Note 3, the “combined sentence of imprisonment” defendant would face had all the offenses been federal offenses sentenced at the same time was 210–262 months. The court then found that the time defendant would actually serve for the state offenses was probably no more than 12 years (144 months), rather than 18 years. Using that estimate, the court imposed a wholly consecutive sentence of 87 months for the federal offense, and defendant’s estimated “combined sentence” of 231 months was within the range calculated under Note 3.

The appellate court remanded for more specific findings on the time defendant would likely serve for the state offenses, but affirmed the principle of using such an estimate. The court followed the conclusion in *U.S. v. Whiting*, 28 F.3d 1296, 1311 (1st Cir. 1994), that the 1991 version of §5G1.3(c) refers to “the real or effective [state] sentence—not to a nominal one.” “[C]onsistent with *Whiting*, we hold that the ‘real or effective’ term of imprisonment, rather than the nominal sentence, may be used when applying §5G1.3(c) to calculate a reasonable incremental punishment *if* that ‘real or effective’ term of state imprisonment can be fairly determined on a reliable basis. . . . Here, however, the record contains no evidence to support the district judge’s assumption that Yates’s real or effective state sentence will be 12 years.” The court remanded for the district court to hear evidence and “make a finding on the likely ‘real or effective sentence’ to be served. The judge should state his findings thereon and explain his rationale in determining the reasonable incremental punishment under USSG §5G1.3(c). The trial judge must make such findings on the basis of the evidence before him, including pertinent state statutes and regulations, not relying on an ‘educated guess’ as to the length of Yates’s state incarceration.”

U.S. v. Yates, 58 F.3d 542, 548–49 (10th Cir. 1995). See also *U.S. v. Redman*, 35 F.3d 437, 439 (9th Cir. 1994) (affirming §5G1.3(c) sentence using estimate that defendant would serve 36 months of 15-year sentence).

See *Outline* at V.A.3.

Fifth Circuit holds that district court may not order deportation as condition of supervised release. Defendant pled guilty to making false statements on immigration documents. The district court ordered defendant be deported as a condition of supervised release under 18 U.S.C. §3583(d). That statute provides in part that “if an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.” The Eleventh Circuit has held that this language “authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation.” *U.S. v. Chukwura*, 5 F.3d 1420, 1423–24 (11th Cir. 1993).

However, the appellate court here disagreed and “subscribe[d] to the First Circuit’s interpretation of §3583(d). In *U.S. v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991) (per curiam), the First Circuit held that §3583(d) ‘simply permits the sentencing court to order, as a condition of supervised release, that “an alien defendant [who] is subject to deportation” be surrendered to immigration officials for deportation proceedings under the Immigration and Naturalization Act. In other words, following appellant’s surrender to Immigration authorities, he is entitled to whatever process and procedures are prescribed by and under the Immigration and Naturalization Act for one in appellant’s circumstances, for the purpose of determining whether he is “an alien defendant . . . subject to deportation.”’ . . . We hold that the district court exceeded its statutory power under §3583(d) in ordering Quaye deported as a condition of supervised release.”

U.S. v. Quaye, 57 F.3d 447, 449–50 (5th Cir. 1995).

See *Outline* at V.C.

Departures

Substantial Assistance

Fifth Circuit holds that government breached plea agreement by denying defendant an opportunity to provide substantial assistance. Under the plea agreement defendant would plead guilty to exportation of a stolen vehicle and the government would move for a \$5K1.1 departure if defendant provided substantial assistance in related matters. The district court would not accept the plea because defendant denied knowing that the vehicle was stolen, an element of the offense charged. Defendant and government agreed that defendant would

plead *nolo contendere* and the rest of the plea agreement would be unchanged, and the district court accepted the *nolo* plea. However, at sentencing defendant moved to withdraw his plea, arguing that the government breached the plea agreement by making no effort to determine whether he could provide substantial assistance and then not filing a §5K1.1 motion. The district court denied the motion to withdraw and sentenced defendant.

The appellate court reversed. "It is apparent from the record that the government breached the plea agreement. Having been informed that Laday maintained his lack of knowledge that the subject backhoe was stolen, the prosecutor decided not to interview him. Under the plea agreement the government did not have the prerogative of denying Laday an opportunity to provide substantial assistance." The court also rejected the government's claim that defendant's denial of knowledge that the vehicle was stolen rendered any assistance he might offer insubstantial and thus excused its failure to file. "The government was aware of Laday's claim of lack of guilty knowledge when it committed to the amended plea agreement calling for his plea of *nolo contendere*. The government may not now use that claim to avoid its obligations under the express terms of the plea agreement." *Cf. U.S. v. Ringling*, 988 F.3d 504, 506 (4th Cir. 1993) (remanded: although government did not promise to make §5K1.1 motion, where plea agreement stated that government "will make known at the time of sentencing the full nature and extent of Defendant's cooperation," government breached plea agreement by not even providing opportunity to cooperate).

U.S. v. Laday, 56 F.3d 24, 25–26 (5th Cir. 1995).

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

D.C. Circuit holds that exposure to danger in attempt to provide substantial assistance does not warrant §5K2.0 departure as a "mitigating circumstance of a kind" not adequately considered by Commission. Pursuant to his plea agreement, defendant attempted to provide substantial assistance to the government in its investigation of others. However, the information he provided was either already known to the government or did not lead to any arrests or drug seizures, and the government did not file a §5K1.1 motion. Defendant did not contest that, but moved for a §5K2.0 departure on the ground that in attempting to cooperate with the government he exposed himself to danger and risked injury. The district court denied the motion and defendant appealed.

The appellate court affirmed, concluding that the Sentencing Commission "explicitly considered 'danger or risk of injury to the defendant or his family resulting from his assistance' and included it as a factor under section 5K1.1 to be considered by the district court in determining the appropriate extent of a 'substantial assistance'

sentencing departure. See U.S.S.G. §5K1.1(a)(4), p.s. We find no evidence, or reason to believe, that the Commission inadequately considered this mitigating circumstance in confining its applicability to section 5K1.1 and Watson provides none." *Cf. U.S. v. Garza*, 57 F.3d 950, 953–54 (10th Cir. 1995) (remanded: where government did not file §5K1.1 motion, district court could not depart for "super acceptance of responsibility" based partly on facts that defendant did cooperate with government and spent some time in solitary confinement to protect him from other inmates who might have retaliated against him because of his ongoing cooperation—these factors are accounted for in §5K1.1).

Note that, because it found that defendant did not argue the issue in the district court, the appellate court did not determine whether danger or risk of injury might be a "mitigating circumstance . . . to a degree[]" not adequately taken into consideration by the Sentencing Commission." (Judge Wald dissented on this point, concluding that defendant did raise the issue.)

U.S. v. Watson, 57 F.3d 1093, 1096 (D.C. Cir. 1995) (per curiam).

See *Outline* at VI.C.5.b and F.1.b.i.

Fifth Circuit holds that district courts have "almost complete discretion" in setting the extent of §5K1.1 departure. The government moved for a downward departure under §5K1.1 to reward defendants' substantial assistance. It recommended sentences of 24 and 30 months, well below the guideline ranges and 10-year mandatory minimum sentences defendants faced. However, the district court sentenced each defendant to 60 months, indicating that it was concerned that defendants were "significant criminals" and that less culpable coconspirators had received equal or greater sentences. Defendants argued that because disparity in sentences among codefendants is an improper basis for departure, it is also an improper basis for not departing to the extent recommended by the government.

The appellate court affirmed, holding that "the decision as to the extent of the departure is committed to the almost complete discretion of the district court, which may consider factors beyond the narrower set that could independently support the departure in the first instance. In an analogous context, we have held that the district court may, in determining a specific sentence within the applicable Guideline range, consider a factor that may itself not support an upward or downward departure. . . . The same analysis applies to a sentence outside the Guideline range from which the court had a valid basis for downwardly departing. In both circumstances, because there is no express limitation on the sentencing court's discretion, it is virtually complete, and the sentence is unreviewable unless otherwise in violation of federal statutory or constitutional law." Because

the sentences imposed were not in violation of law, the appellate court affirmed. For the same reasons, the court rejected defendants' claims that the district court erred in considering that defendants could later seek further reduction for future assistance under Rule 35 and that monetary remuneration defendants received for their cooperation constituted some compensation.

U.S. v. Alvarez, 51 F.3d 36, 39–41 & n.5 (5th Cir. 1995).

See *Outline* at VI.E.2.

General Application

Sentencing Factors

Ninth Circuit holds that courts may consider on remand a sentence imposed after the original federal sentencing if the underlying conduct occurred before the original sentencing. In early 1992, defendant conspired to murder someone. In October 1992, defendant was sentenced for unrelated federal offenses. In 1993 he pled guilty to the murder charge in state court. He appealed his federal sentence and it was remanded for resentencing in 1994. At resentencing the district court included the 1993 state conviction as a “prior felony conviction [for] a crime of violence” under §2K2.1(a)(4). Defendant appealed, arguing that “the date of his original sentencing is a ‘watershed’ date, after which additional sentences may not be construed or counted as ‘prior sentences’ at resentencing.”

In what appears to be a case of first impression in the circuit courts, the appellate court affirmed because the conduct underlying the state offense occurred before the original federal sentencing. “Resentencing on remand is de novo but the court may not consider post-sentencing conduct or conduct beyond the scope of a limited remand. . . . The court in this case did not consider post-sentencing conduct, but rather a post-sentencing sentence. As the state court sentence represents Klump’s prior conduct, the policy [above] is not undermined by counting the state court sentence as a ‘prior sentence.’ The conspiracy to commit murder preceded by at least six months the first federal sentencing. This court’s remand was general, not limited. . . . Accordingly, the general rule that resentencing is de novo applies and the court correctly found that the state sentence was a ‘prior sentence.’”

U.S. v. Klump, 57 F.3d 801, 802–03 (9th Cir. 1995).

See *Outline* at I.C.

Ninth Circuit holds that information revealed by defendant under state immunity may not be used in federal sentencing. In a state proceeding unrelated to the instant federal action, defendants were granted transactional immunity for their conduct relating to a death. When defendants were sentenced in federal court, the immunized conduct was considered “prior similar

adult criminal conduct” warranting an upward criminal history departure. The district court concluded that a state grant of *use* immunity could bind a federal court, but not a grant of *transactional* immunity.

The appellate court remanded, holding that Supreme Court precedent established that “once the defendant demonstrates that he has testified under a state grant of immunity, the federal authorities bear the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. . . . Therefore, state transactional immunity can be effective as federal use immunity.” The court also held that the fact that defendants’ testimony had not been compelled did not change this rule. On remand the government must demonstrate an independent and legitimate source for the evidence relating to the death or defendants should be sentenced without reference to that information.

U.S. v. Camp, 58 F.3d 491, 492–93 (9th Cir. 1995).

See *Outline* at I.C.

Amendments

Two circuits hold that the right to appointed counsel does not extend to a post-appeal motion for retroactive application of an amended guideline. The defendant in each circuit was sentenced for an LSD offense and, after the offense level calculation for LSD weight was changed in 1993 and made retroactive, moved under 18 U.S.C. §3582(c)(2) to have the sentence recalculated. Each district court denied the motion and the appellate courts upheld that decision. Defendants also argued that they should have had counsel appointed under the Criminal Justice Act, 18 U.S.C. §3006A(c), which continues the appointment of counsel “at every stage of the proceedings . . . through appeal, including ancillary matters appropriate to the proceedings.”

Both circuits rejected this claim, concluding that §3006A does not extend beyond the initial appeal. The Second Circuit, stating that extending the right would be unworkable because of the potential burden on attorneys and cost to the public, held that “the reference to ancillary matters in §3006A does not require the furnishing of Criminal Justice Act counsel in post-appeal motions for reduction of sentence seeking the benefit of subsequent changes in the Guidelines. The provision of counsel for such motions should rest in the discretion of the district court.” The Fifth Circuit agreed, adding that “as a matter of common sense, a motion to modify a sentence pursuant to §3582(c)(2), which can be filed long after conviction, is too far removed to be considered ‘ancillary’ to the criminal proceeding.”

U.S. v. Whitebird, 55 F.3d 1007, 1010–11 (5th Cir. 1995);
U.S. v. Reddick, 53 F.3d 462, 464–65 (2d Cir. 1995).

See *Outline* at I.E.

Offense Conduct

Mandatory Minimums

Second, Eighth, and Eleventh Circuits join majority in holding that amended guideline calculation for LSD does not apply to mandatory minimum calculation. In *U.S. v. Stoneking*, 34 F.3d 651 (8th Cir. 1994), the Eighth Circuit held that the guideline amendments for calculating the weight of LSD per dosage unit, *see* §2D1.1(c) at n.* and comment. (n.18 and backg'd), which were made retroactive under §1B1.10(d), could be applied to the calculation of LSD weight for mandatory minimum sentencing purposes. Most circuits, however, have held that mandatory minimum amounts must still be calculated under *Chapman v. U.S.*, 500 U.S. 453 (1991), by including the weight of the carrier medium. Sitting en banc, the Eighth Circuit reversed *Stoneking*, concluding that the amendment conflicts with *Chapman* and that “where the per dose approach conflicts with the mandatory minimum sentence approach, the mandatory minimum approach prevails.”

The Eleventh Circuit reached a similar conclusion in reversing a retroactive modification of a sentence to below the mandatory minimum, concluding that “the amendment cannot be reconciled with *Chapman* in that *Chapman* requires that the entire, actual weight of the carrier medium, whatever its composition, be taken into account. . . . [W]e feel constrained to hold that the entire weight rule of *Chapman* must still be followed for purposes of determining whether a defendant is subject to the mandatory, minimum sentence called for in 21 U.S.C. §841(b)(1).”

The Second Circuit followed suit in a direct appeal (defendant was sentenced before the amendment but his appeal was after), concluding that the Sentencing Commission had neither the intent nor authority “to displace the *Chapman* method Until there is either congressional action or a reinterpretation of [§841(b)] by the Supreme Court, *Chapman* governs the meaning of the term

‘mixture or substance’ for purposes of determining LSD quantity under 21 U.S.C. §841(b), and LSD weight will be calculated for sentencing under a dual weight system.”

Ten circuits have now ruled on this issue, and only the Ninth Circuit has held that the amended guideline method should be used for mandatory minimum purposes. The Supreme Court recently granted certiorari on this matter in *U.S. v. Neal*, 46 F.3d 1405 (7th Cir. 1995) (en banc), *cert. granted*, 115 S. Ct. 2576 (1995).

U.S. v. Kinder, No. 94-1333 (2d Cir. Aug. 16, 1995) (Winter, J.) (Leval, J., dissenting); *U.S. v. Stoneking*, 60 F.3d 399, 402 (8th Cir. 1995) (en banc) (four judges dissenting); *U.S. v. Pope*, 58 F.3d 1567, 1570-72 (11th Cir. 1995).

See *Outline* at II.B.1 and cases summarized in 7 *GSU*#7.

Possession of Weapon by Drug Defendant

Fifth Circuit holds that §2D1.1(b)(1) enhancement may not be based on presumption that defendant possessed weapon during drug offense because he was an armed police officer. Defendant pled guilty to possession of cocaine with intent to distribute and received the §2D1.1(b)(1) enhancement for possession of a firearm during a drug trafficking crime. The appellate court vacated and remanded. “The district court in the case at bar based its decision upon a presumption that Siebe was an armed police officer. This is a case of first impression. This court has not addressed the question of whether a presumption based upon the fact that a defendant is a police officer can be used for an enhancement under the Guidelines. In the case at bar there is no evidence absent such a presumption that Siebe possessed a firearm during the commission of the offense. Although the FBI found ninety guns in Siebe’s residence, they found no drugs or drug paraphernalia in the residence. There was no evidence of Siebe’s drug trafficking activities. Based upon the lack of evidence in this case, the court finds that the Government did not satisfy its burden of proof.”

U.S. v. Siebe, 58 F.3d 161, 163 (5th Cir. 1995).

See *Outline* at II.C.1 and 3.

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