Guideline Sentencing

An Outline of Appellate Case Law On Selected Issues

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

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Contents

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

This outline replaces all previous Center outlines under this title. It includes Supreme Court decisions through June 30, 2002, a comprehensive survey of appellate court cases up to December 31, 2001, and selected additional cases through July 31, 2002. Brackets at the end of a citation give the volume and issue numbers for cases that were summarized in *Guideline Sentencing Update* through volume 11, number 5. Denials of petitions for certiorari and per curiam references are omitted. Because policy statements are, for the most part, treated like guidelines, we have not added "p.s." after the section number of policy statements unless that status seems significant.

Note that recent amendments to the guidelines may affect some of the issues reported here as case law develops. Amendments that have been proposed to take effect Nov. 1, 2002, are noted in the appropriate sections.

I. General Application Principles

A. Relevant Conduct

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

1. Jointly Undertaken Criminal Activity

"[I]n the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" are used to set a defendant's offense level. USSG §1B1.3(a)(1)(B). The 1992 amendment to Application Note 2 states that any conduct of others attributed to defendant must be *both* "(i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that activity." Note 2 adds that "the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." Thus, the sentencing court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objec-

tives embraced by the defendant's agreement)." A court should make specific findings as to both the scope of the agreement and the foreseeability of others' conduct. See, e.g., *U.S. v. Studley*, 47 F.3d 569, 574–76 (2d Cir. 1995) (remanded: court must "make a particularized finding of the scope of the criminal activity agreed upon by the defendant. . . . [T]he fact that 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.") [7#8]; *U.S. v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994) ("The extent of a defendant's vicarious liability under conspiracy law is always determined by the scope of his agreement with his co-conspirators. Mere foreseeability is not enough."); *U.S. v. Jenkins*, 4 F.3d 1338, 1346–47 (6th Cir. 1993) (remanding attribution of drug amounts based only on foreseeability—district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake") [6#2]; *U.S. v. Evbuomwan*, 992 F.2d 70, 73–74 (5th Cir. 1993) ("mere knowledge that criminal activity is taking place is not enough"—"the government must establish that the defendant agreed to jointly undertake criminal activities with the third person, and that the particular crime was within the scope of that agreement") [5#15]; *U.S. v. Gilliam*, 987 F.2d 1009, 1012–13 (4th Cir. 1993) ("in order to attribute to a defendant for sentencing purposes the acts of others in jointly-undertaken criminal activity, those acts must have been within the scope of the defendant's agreement and must have been reasonably foreseeable to the defendant"); *U.S. v. Olderbak*, 961 F.2d 756, 764 (8th Cir. 1992) ("Under subsection (a) of Section 1B1.3 of the Sentencing Guidelines, each conspirator is responsible for all criminal acts committed in furtherance of the conspiracy. . . . '[S]uch conduct is *not* included in establishing the defendant's offense level,' however, if it 'was neither within the scope of the defendant's agreement nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake.'").

Whether a defendant can be held accountable for coconspirators' activities that occur after he has been arrested was addressed by the Tenth Circuit in a counterfeiting case. Defendant was a minor participant in the scheme, he was arrested before any phony money was actually printed, and after his arrest the government ran a sting operation on the remaining participants. Nonetheless, he was held responsible for the entire $30 million that was printed. The appellate court remanded because, while defendant may have reasonably foreseen that up to $30 million might have been printed, there was no evidence that he had agreed to that amount and he had no part whatsoever in determining that amount or producing it. "Courts must examine a conspirator's position within a conspiracy and whether that position gave him firsthand knowledge of the quantity of counterfeit money involved to determine whether the conduct of other conspirators is reasonably foreseeable to him." Furthermore, once the government sting operation was set up, whatever agreement defendant had with the other conspirators was abandoned for one that he never agreed to or had a role in. Thus, although "a conspirator's arrest or incarceration by itself is insufficient to constitute his withdrawal from the conspiracy," in this case defendant's "participation in the conspiracy terminated with his arrest and . . . [t]he acts of Mr. Melton's fellow conspirators therefore cannot be attrib-

uted to him following his arrest." *U.S. v. Melton,* 131 F.3d 1400, 1404–06 (10th Cir. 1997). See also *U.S. v. Price,* 13 F.3d 711, 732 (3d Cir. 1994) ("While we reject a *per se* rule that arrest automatically bars attribution to a defendant of drugs distributed after that date, . . . a defendant cannot be held responsible for conduct committed after he or she could no longer assist or monitor his or her co-conspirators.").

See also cases in section II.A.2

2. Same Course of Conduct, Common Scheme or Plan

Under USSG §1B1.3(a)(2), relevant conduct includes, "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." The D.C. Circuit has stated that when certain conduct is alleged to be relevant "the government must demonstrate a connection between [that conduct] and *the offense of conviction*, not between [that conduct] and the other offenses offered as relevant conduct." *U.S. v. Pinnick,* 47 F.3d 434, 438–39 (D.C. Cir. 1995) (remanded: although conduct in dismissed count was arguably part of the same course of conduct as two other dismissed counts that were properly deemed relevant conduct, it was not sufficiently related to offense of conviction) [7#8]. "'Common scheme or plan' and 'same course of conduct' are two closely related concepts." §1B1.3, comment. (n.9). Application Notes 9(A) and (B) define these terms and largely adopted the holdings of the Second and Ninth Circuit decisions discussed below.

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

The Ninth Circuit cited *Santiago* in holding that the "essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." *U.S.*

v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992) [4#20]. "When one component is absent, however, courts must look for a stronger presence of at least one of the other components. In cases . . . where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of the third component." Id. Application Note 9(B) of §1B1.3, effective Nov. 1, 1994, adopted this analysis for "same course of conduct."

Several circuits have followed *Santiago* and *Hahn*. See, e.g., *U.S. v. Jackson,* 161 F.3d 24, 28–30 (D.C. Cir. 1998) (affirmed inclusion of four-year-old cocaine deal—although regularity and temporal proximity were lacking, inclusion was justified by "extreme similarity" of deals and fact that lapse of time was partly caused by imprisonment of key participant); *U.S. v. Hill,* 79 F.3d 1477, 1480–85 (6th Cir. 1996) (error to include crack from 1991 charge at sentencing for crack and powder cocaine offense committed nineteen months later—temporal proximity was "extremely weak," regularity was "completely absent," and there was too little similarity to meet relevant conduct test); *U.S. v. Roederer,* 11 F.3d 973, 979–80 (10th Cir. 1993) (cocaine sales in conspiracy that ended in 1987 were part of same course of conduct as instant offense of cocaine distribution in May 1992; defendant "was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. [His] conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate") [6#9]; *U.S. v. Cedano-Rojas,* 999 F.2d 1175, 1180–81 (7th Cir. 1993) (drug transactions almost two years before offense of conviction were part of same course of conduct—they were "conducted in substantially similar fashion," in the same city, and involved large amounts of cocaine; also, two-year span was partly explained by defendant having lost his supplier); *U.S. v. Sykes,* 7 F.3d 1331, 1336–38 (7th Cir. 1993) (following test for "similarity, regularity, and temporal proximity," it was error to include fourth fraud count that was dismissed—it bore only "general similarity" to other three frauds, and regularity and proximity were insufficient) [6#6]; *U.S. v. Chatman*, 982 F.2d 292, 294–95 (8th Cir. 1991) (following *Hahn* test, crack subject to state possession charge was related to federal offense of distributing crack occurring days earlier); *U.S. v. Bethley,* 973 F.2d 396, 401 (5th Cir. 1992) (similar and continuous distributions of cocaine over six-month period prior to offense of conviction); *U.S. v. Mullins,* 971 F.2d 1138, 1144–46 (4th Cir. 1992) (remanding finding that uncharged conduct was relevant to offense of conviction—"[r]egularity and temporal proximity are extremely weak here, if present at all," and the conduct "was not sufficiently similar"). Cf. *U.S. v. Phillippi,* 911 F.2d 149, 151 (8th Cir. 1990) (holding that the dates and nature of conduct occurring "as remotely as two years before [defendant's] arrest" must be "clearly established" in order to be considered relevant).

The *Hahn* court also stated, "When regularity is to provide most of the foundation for temporally remote, relevant conduct, *specific repeated events* outside the offense of conviction must be identified. Regularity is wanting in the case of a solitary, temporally remote event, and therefore such an event cannot constitute relevant conduct without a strong showing of substantial similarity." *Hahn,* 960 F.2d

at 911. Cf. *U.S. v. Nunez,* 958 F.2d 196, 198–99 (7th Cir. 1992) [4#20] (affirmed: uncharged cocaine sales that occurred from 1986–1988 and in 1990 for defendant arrested in Oct. 1990 "amounted to the same course of conduct"—all sales were made to same buyer and were interrupted only by buyer's imprisonment); *U.S. v. Mak,* 926 F.2d 112, 114–16 (1st Cir. 1991) (affirmed: four similar drug deals all part of relevant conduct although each was separated by several months). The *Hahn* court noted, however, that "[i]n extreme cases, the span of time between the alleged 'relevant conduct' and the offense of conviction may be so great as to foreclose as a matter of law consideration of extraneous events as 'relevant conduct.'" 960 F.2d at 910 n.9. See, e.g., *U.S. v. Kappes,* 936 F.2d 227, 230–31 (6th Cir. 1991) (although the two were similar, "[i]t would take an impermissible stretch of the imagination to conclude that the 1983 offense was part of the same 'course of conduct' as the 1989 offense").

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

Other examples: *U.S. v. Gomez,* 164 F.3d 1354, 1356–57 (11th Cir. 1999) (remanded: sale of two kilograms of cocaine by defendant to one individual occurred near the time he started supplying cocaine to conspiracy of conviction, but should not have been included as relevant conduct because it was totally separate from conspiracy activities); *U.S. v. Young,* 78 F.3d 758, 763 (1st Cir. 1996) (common source for drugs in New York and common transport of drugs to Maine for sale demonstrated common scheme or plan); *U.S. v. Maxwell,* 34 F.3d 1006, 1010–11 (11th Cir. 1994) (remanded: unrelated cocaine distribution that occurred a year earlier and involved different people than Dilaudid conspiracy and other cocaine distribution on which defendant was convicted was not relevant conduct) [7#6]; *U.S. v. Fermin,* 32 F.3d 674, 681 (2d Cir. 1994) (remanded: drug quantities from 1983–1985 drug records could not be used as relevant conduct in 1990–1991 conspiracy offense—government failed to show high degree of similarity or regularity required where temporal proximity is lacking); *U.S. v. Jones,* 948 F.2d 732, 737–78 (D.C. Cir. 1991) (although current offense and prior criminal conduct both involved fraud, they were not related under §1B1.3 because they occurred more than a year apart, were different in nature, and involved different individuals); *Kappes,* 936 F.2d at 230–31 (remanded: unlawful false statement by defendant in 1983 that enabled him to make another unlawful false statement in 1989 for which he was prosecuted was not relevant conduct for the instant offense; although the two offenses were similar, "[t]he fact that Kappes may not have been in a position to commit the second offense if he had not committed the first offense does not, by itself,

make the second offense 'part of the same course of conduct or common scheme or plan' as the first offense"); *U.S. v. Wood,* 924 F.2d 399, 404–05 (1st Cir. 1991) [3#19] (remanded: drug transaction conducted solely by defendant's wife and about which defendant knew nothing until afterward should not have been included under §1B1.3(a)(2) as relevant conduct for defendant's drug conspiracy conviction, even though part of his drug debt was paid off during the deal—"Wood's only connection with the [wife's] transaction was as a beneficiary of someone else's criminal activity, a link that had nothing to do with *his* conduct."); *U.S. v. Sklar,* 920 F.2d 107, 111 (1st Cir. 1990) (affirmed: twelve packages of cocaine sent to defendant were part of a single course of conduct—"The repetitive nature of the mailings, their common origin and destination, their frequency over a relatively brief time span, the unvarying use of a particular mode of shipment, Sklar's admission that he supported himself . . . by selling drugs, . . . his lack of any known employment during that interval, and his acknowledgment . . . that he owed the sender money for an earlier debt, were more than enough to forge the requisite linkage.").

3. Conduct from a Prior Acquittal or Uncharged Offenses

"[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *U.S. v. Watts*, 117 S. Ct. 633, 635–38 (1997) [9#1]. See also *U.S. v. Hull,* 160 F.3d 265, 270 (5th Cir. 1998) ("whether the defendant was charged with, convicted of, or acquitted of conspiracy should not dispositively affect attributable conduct for sentencing purposes as per §1B1.3(a)(1)(B)"); *U.S. v. Boney*, 977 F.2d 624, 635–36 (D.C. Cir. 1992) (drugs from acquitted counts as relevant conduct); *U.S. v. Romulus,* 949 F.2d 713, 717 (4th Cir. 1991) ("well settled that acquitted conduct may properly be used to enhance a sentence"); *U.S. v. Averi,* 922 F.2d 765, 766 (11th Cir. 1991) ("facts relating to acquitted conduct may be considered"); *U.S. v. Fonner,* 920 F.2d 1330, 1332–33 (7th Cir. 1990) (departure may be based on prior misconduct despite acquittal on charges arising out of that misconduct); *U.S. v. Duncan,* 918 F.2d 647, 652 (6th Cir. 1990) (enhancement for possessing weapon during drug offense, §2D1.1(b)(1), after acquittal on firearm charge); *U.S. v. Rodriguez-Gonzalez,* 899 F.2d 177, 181–82 (2d Cir. 1990) (same) [3#6]; *U.S. v. Dawn,* 897 F.2d 1444, 1449–50 (8th Cir. 1990) (same); *U.S. v. Mocciola,* 891 F.2d 13, 16–17 (1st Cir. 1989) (same) [2#18]; *U.S. v. Johnson,* 911 F.2d 1394, 1401–02 (10th Cir. 1990) (enhancement for conduct in acquitted conspiracy count); *U.S. v. Isom,* 886 F.2d 736, 738–39 (4th Cir. 1989) (acquitted on counterfeiting charge but received enhancement for printing counterfeit obligations, §2B5.1(b)(2)); *U.S. v. Juarez-Ortega,* 866 F.2d 747, 748–49 (5th Cir. 1989) (acquitted of carrying firearm during drug offense, but underlying facts used for departure) [2#1]; *U.S. v. Ryan,* 866 F.2d 604, 606–10 (3d Cir. 1989) (acquitted of possession with intent to distribute, but evident packaging of drugs for sale used as basis for departure) [2#1]. Cf. *U.S. v. Concepcion,* 983 F.2d 369, 389 (2d Cir. 1992) (use of acquitted conduct to increase sentence from maximum of three years to

almost twenty-two years is factor not adequately considered by Commission and downward departure may be considered).

Effective Nov. 1, 2000, policy statement §5K2.21 specifically authorizes departures for conduct that was dismissed or not charged if it was not otherwise accounted for in determining the guideline range.

The Ninth Circuit had held that acquitted conduct could not be used as a basis for departure, *U.S. v. Brady,* 928 F.2d 844, 850–52 (9th Cir. 1991) [4#1], enhancements, *U.S. v. Pinckney,* 15 F.3d 825, 829 (9th Cir. 1994), or as relevant conduct, *U.S. v. Putra,* 78 F.3d 1386, 1387–90 (9th Cir. 1996). However, even before the recent Supreme Court decision in *Watts* reversed Ninth Circuit practice, the circuit had decided that *Koon v. U.S.,* 116 S. Ct. 2035 (1996), required that *Brady* and its progeny be abandoned. The Court's emphasis that the Sentencing Commission, not the courts, is to identify the facts relevant to sentencing, and emphasis on "the deference due the sentencing judge," led the Ninth Circuit to conclude that "[w]e therefore acted beyond our authority when we declared in *Brady* that district courts, at sentencing, may not reconsider facts necessarily rejected by a jury's verdict." *U.S. v. Sherpa,* 110 F.3d 656, 661 (9th Cir. 1996). Even before *Sherpa,* the circuit had limited the holding in *Brady* to cover only the specific facts that the jury "necessarily rejected by its acquittal." See, e.g., *U.S. v. Karterman,* 60 F.3d 576, 581–82 (9th Cir. 1995) (affirmed: although defendant was acquitted of cocaine conspiracy charge, offense level for income tax counts could be enhanced for unreported income from drug trafficking because the jury "did not *necessarily* reject Karterman's involvement in the substantive conduct underlying the conspiracy charge"); *U.S. v. Vgeri,* 51 F.3d 876, 881–82 & n.2 (9th Cir. 1995) (affirmed: court could find that defendant convicted of conspiracy to distribute cocaine was responsible for 830 grams despite acquittal on charges of possession of cocaine with intent to distribute and importation of cocaine). See also *U.S. v. Newland,* 116 F.3d 400, 404 (9th Cir. 1997) (after *Watts*, court may consider relevant conduct involved in offense that was reversed on appeal).

Courts have also held that uncharged but relevant conduct may be used. See, e.g., *U.S. v. Sanders*, 982 F.2d 4, 10 (1st Cir. 1992) (for departure); *U.S. v. Galloway*, 976 F.2d 414, 427–28 (8th Cir. 1992) (en banc) (proper to include similar but uncharged thefts) [5#3]; *U.S. v. Newbert,* 952 F.2d 281, 284–85 (9th Cir. 1991) (may include uncharged state offense) [4#17]; *U.S. v. Perdomo,* 927 F.2d 111, 116–17 (2d Cir. 1991) (role in offense properly based on uncharged conduct); *U.S. v. Ebbole,* 917 F.2d 1495, 1501 (7th Cir. 1990) (uncharged drug activity). But cf. *U.S. v. Shonubi,* 103 F.3d 1085, 1087–92 (2d Cir. 1997) (remanded: requiring more rigorous standard of proof than preponderance of evidence when uncharged relevant conduct "will significantly enhance a sentence") [9#4]. However, some circuits have held that the obstruction of justice enhancement is limited to the offense of conviction, and that the acceptance of responsibility guideline limits the use of relevant conduct. See sections III.C.4 and III.E.3.

The uncharged conduct must be sufficiently connected to the offense of conviction to qualify as relevant conduct. The Sixth Circuit rejected the use of an incident

of restraint and torture that occurred during the course of a cocaine-selling operation because defendant was only convicted of one count of cocaine distribution, an act that occurred several months before and was unrelated to the restraint and torture. The uncharged conduct did not fit any of the definitions of relevant conduct under §1B1.3. *U.S. v. Cross,* 121 F.3d 234, 238–40 (6th Cir. 1997) [10#2].

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

4. Double Jeopardy and Other Issues

Double jeopardy: The Supreme Court resolved a circuit split by holding that there is no bar to a separate prosecution and sentence for conduct that was previously used as relevant conduct to increase an earlier guidelines sentence. Defendant was first sentenced on a federal marijuana charge and his offense level was increased under §1B1.3 for related conduct involving cocaine. He 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. 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) (note: defendant's name, Witte, was misspelled in original case) [6#16].

The Supreme Court agreed, holding 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. . . . 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. . . . 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 added that the guidelines account for a second sentencing on conduct previously considered by "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." *Witte v. U.S.,* 115 S. Ct. 2199, 2206–09 (1995) [7#9].

See also *U.S. v. Rohde,* 159 F.3d 1298, 1300–06 (10th Cir. 1998) (reversing dismissal of perjury prosecution: §3C1.1 "sentence enhancement for perjury, even if

the perjury was committed after conviction for the underlying offense, does not bar a subsequent prosecution for the same perjury"); *U.S. v. Grisanti,* 116 F.3d 984, 987–88 (2d Cir. 1997) (affirmed: following *Witte*, "double jeopardy principles neither bar prosecution nor punishment for the conduct giving rise to the obstruction of justice indictment, even though that same conduct was used to enhance [earlier] sentence for bank fraud"); *U.S. v. Bellrichard,* 62 F.3d 1046, 1051–52 (8th Cir. 1995) (following *Witte*, defendant properly tried and sentenced on twelve counts that had formed basis of §3C1.1 enhancement in prior sentencing); *U.S. v. Jernigan,* 60 F.3d 562, 564–65 (9th Cir. 1995) (following *Witte*, affirming prosecution and sentencing for obstruction of justice offense after defendant received §3C1.1 enhancement for same conduct in prior prosecution); *U.S. v. Cruce,* 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: same, no violation of double jeopardy to indict defendants in Texas on bank fraud conspiracy charges that include loan transaction that was used as relevant conduct when defendants were sentenced in Kansas on other bank fraud charges). Accord *U.S. v. Duarte,* 28 F.3d 47, 48 (7th Cir. 1994) (affirmed: defendant, who received §3C1.1 obstruction enhancement in prior sentencing, could be prosecuted for same obstructive conduct and given sentence concurrent to first one). Cf. *U.S. v. Brown,* 31 F.3d 484, 494–95 (7th Cir. 1994) (affirmed: no double jeopardy violation where §3B1.1(a) enhancements here and in prior Texas sentencing were partly based on two common participants); *U.S. v. Nyhuis,* 8 F.3d 731, 738–40 (11th Cir. 1993) (defendant properly convicted of cocaine conspiracy, although cocaine activities may have been used to increase prior pre-guidelines sentence for marijuana CCE).

The decision in *Witte* overturned cases in the Second and Tenth Circuits, which had held that the "punishment component" of the double jeopardy clause may be violated when relevant conduct that was used to increase a guidelines sentence is then used as the basis for a later conviction, even if the second sentence runs concurrently with the first. *U.S. v. McCormick*, 992 F.2d 437, 439–41 (2d Cir. 1993) (following Tenth Circuit analysis, affirmed dismissal of charges that were used as relevant conduct in a prior guideline sentence) [5#13]; *U.S. v. Koonce,* 945 F.2d 1145, 1149–54 (10th Cir. 1991) ("there is no evidence that Congress intended that an individual who distributes a controlled substance should receive punishment both from an increase in the offense level under the guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding") [4#9].

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

The Seventh Circuit affirmed consecutive sentences for a RICO offense that was sentenced under the guidelines and the predicate act offenses that were pre-guidelines. Defendants argued that separate consecutive sentences for the predicate acts—

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

Other issues: "For conduct to be considered 'relevant conduct' for the purpose of establishing one's offense level that conduct must be criminal." *U.S. v. Peterson*, 101 F.3d 375, 385 (5th Cir. 1996). Accord *U.S. v. Shafer,* 199 F.3d 826, 830–31 (6th Cir. 1999) ("district court may not include conduct in its sentencing calculation pursuant to §1B1.3(a)(2) unless the conduct at issue amounts to an offense for which a criminal defendant could potentially be incarcerated"); *U.S. v. Dickler*, 64 F.3d 818, 830–31 (3rd Cir. 1995); *U.S. v. Sheahan*, 31 F.3d 595, 600 (8th Cir. 1994). See also *U.S. v. Miranda,* 197 F.3d 1357, 1361 (11th Cir. 1999) (remanded: improper to include in relevant conduct money that was laundered before money laundering statute enacted). But cf. *U.S. v. Arce,* 118 F.3d 335, 340–43 (5th Cir. 1997) (concluding that, under §1B1.4 and 18 U.S.C. §3661, "a district court can consider conduct that is not itself criminal or 'relevant conduct' under §1B1.3 in determining whether an upward departure is warranted") [10#1].

The Ninth Circuit held that relevant conduct is not limited to conduct that would constitute a federal offense. *U.S. v. Newbert*, 952 F.2d 281, 284 (9th Cir. 1991) (affirming sentence that took into account fraudulent conduct amounting to a state offense only) [4#17]. However, the Second Circuit concluded that under §1B1.3(a)(2), "state offenses are not counted as conduct relevant to a federal offense unless the state offense would have been a federal offense but for lack of a jurisdictional element such as transportation across state lines or conduct that affects interstate commerce. . . . Conduct that may only be charged as a state crime, because it involves elements criminalized under state law that are not elements of a federal crime, may not be grouped under §3D1.2(d) and thus may not be considered as 'relevant conduct' under §1B1.3(a)(2)." Therefore, defendant's possession of seven firearms without having the required state and local licenses, which violated only state law, should not have been considered conduct relevant to his federal offense of illegally possessing six other firearms. *U.S. v. Ahmad,* 202 F.3d 588, 590–92 (2d Cir. 2000).

The Sixth Circuit held that "quasi-criminal juvenile conduct" may be considered under §1B1.3, regardless of whether that conduct could be prosecuted in federal court. "Even if the district court lacked jurisdiction to prosecute [defendant] for his juvenile conduct as a separate crime, it did not lack jurisdiction to consider his juvenile behavior in calculating his sentence under §1B1.3(a)(2) for a crime he com-

mitted as an adult." *U.S. v. Hough,* 276 F.3d 884, 898 (6th Cir. 2002). See also *U.S. v. Gibbs,* 182 F.3d 408, 442 (6th Cir. 1999) ("As long as the government successfully prosecutes a defendant for a crime that occurred after the defendant reached the age of majority, the district court may consider relevant conduct that occurred before the defendant reached the requisite age as long as such conduct falls within the limitations set forth in §1B1.3(a)(2)."); *U.S. v. Thomas,* 114 F.3d 228, 262–67 (D.C. Cir. 1997) (conduct committed by juvenile as part of conspiracy that continued after age eighteen may be included).

The First Circuit held that, in a RICO case, "all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs" may be included as relevant conduct. However, the statutory maximum sentence for a RICO offense "must be determined by the conduct alleged within the four corners of the indictment," not by uncharged relevant conduct. *U.S. v. Carrozza,* 4 F.3d 70, 75–77 (1st Cir. 1993) (remanded) [6#4].

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

Criminal conduct that occurred outside the statute of limitations for the offense of conviction may be considered as relevant conduct under the guidelines. *U.S. v. Wishnefsky*, 7 F.3d 254, 257 (D.C. Cir. 1993) (affirmed inclusion of amounts embezzled from 1980 to 1986 as relevant conduct in calculating loss caused by defendant convicted of embezzlement during 1987 to 1990) [6#6]. Accord *U.S. v. Amirault,* 224 F.3d 9, 15 (1st Cir. 2000) (such conduct may also be considered for departure); *U.S. v. Williams,* 217 F.3d 751, 754 (9th Cir. 2000); *U.S. v. Stephens,* 198 F.3d 389, 391 (3d Cir. 1999); *U.S. v. Matthews*, 116 F.3d 305, 307–08 (7th Cir. 1997); *U.S. v. Behr*, 93 F.3d 764, 766 (11th Cir. 1996); *U.S. v. Silkowski*, 32 F.3d 682, 688–89 (2d Cir. 1994) (but also holding that when restitution is limited to offense of conviction, statute of limitations applies to calculation of loss for restitution purposes); *U.S. v. Neighbors*, 23 F.3d 306, 311 (10th Cir. 1994); *U.S. v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994); *U.S. v. Lokey*, 945 F.2d 825, 840 (5th Cir. 1991). And several circuits have affirmed use of pre-guidelines activity as relevant conduct when appropriate. See, e.g., Pierce, 17 F.3d at 150; *U.S. v. Kienenberger*, 13 F.3d 1354, 1357 (9th Cir. 1994); *U.S. v. Kings*, 981 F.2d 790, 794 n.6 (5th Cir. 1993); *U.S. v. Haddock*, 956 F.2d 1534, 1553–54 (10th Cir. 1992); U.S. v. Watford, 894 F.2d 665, 668 n.2 (4th Cir. 1990); *U.S. v. Allen*, 886 F.2d 143, 145–46 (8th Cir. 1989).

See also section I.I. Continuing Offenses

Foreign conduct: The Second Circuit held that a foreign drug transaction was part of the "same course of conduct" as the offense of conviction, but that it could not be used as relevant conduct to increase the base offense level "because it was not a crime against the United States." The court concluded that Congress intentionally gave foreign crimes a very limited role in the guidelines, limited to criminal history

considerations, and that there were good reasons for not using them in the offense level calculation. The court left open, however, the possible use of foreign crimes for departure. *U.S. v. Azeem*, 946 F.2d 13, 16–18 (2d Cir. 1991). Cf. *U.S. v. Levi,* 229 F.3d 677, 679 (8th Cir. 2000) (affirming §4A1.3 departure because of extensive history of foreign convictions, some of which were similar to instant offense); *U.S. v. Levario-Quiroz,* 161 F.3d 903, 906–08 (5th Cir. 1998) (remanded: although foreign offenses committed by defendant just before instant offenses "do not literally fall within the definition of 'relevant conduct'" and should not have been used to increase his offense level, that conduct provides a legitimate basis for upward departure and "the sentencing court reasonably could have looked to analogous relevant conduct and offense guideline sections in determining the extent of the departure" because the foreign offenses "closely resembled and were analogous to" acts that would qualify as relevant conduct).

The Seventh Circuit, however, allowed defendant's conduct of producing a child pornography film in another country to enhance his sentence for the offenses of conviction, which were receiving and possessing the same film in the United States Defendant's "exploitation of minors in Honduras created the very pornography that he received and possessed here in the United States. In a literal sense, then, Dawn's domestic offenses were the direct result of his relevant conduct abroad; pragmatically speaking, they are inextricable from one another." *U.S. v. Dawn,* 129 F.3d 878, 882–85 (7th Cir. 1997) (distinguishing *Azeem* because "the conduct in question [there] . . . took place wholly on foreign soil and had no link to the offense of conviction . . . other than being part of the same course of narcotics trafficking"). See also cases summarized in 10 *GSU* #8. See also *U.S. v. Chmielewski,* 218 F.3d 840, 843 (8th Cir. 2000) (also distinguishing *Azeem* in allowing inclusion of loss suffered by South Africa from crime that occurred in the United States).

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

Section 1B1.2(a), as amended Nov. 1, 1992, provides that "in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense." In *U.S. v. Braxton,* 903 F.2d 292, 298 (4th Cir. 1990) [3#8], the court held that a stipulation under §1B1.2(a) may be oral and that a "stipulation" need not be formally designated as such to fall within §1B1.2(a). The Supreme Court reversed *Braxton* because it found the stipulation was not supported by the facts, but left unresolved whether a §1B1.2(a) stipulation could be oral. *Braxton v. U.S.,* 500 U.S. 344, 348 (1991) [4#4]. That the stipulation may be oral was made clear by the 1992 amendment, plus the 1991 clarifying amendment to the Commentary that stated a stipulation may be "set forth in a written plea agreement or made between the par-

ties on the record during a plea proceeding." USSG §1B1.2(a), comment. (n.1) (Nov. 1991).

However, the circuits disagreed about whether admissions by a defendant outside the actual plea agreement should be considered "stipulations" under §1B1.2(a). Application Note 1 was amended, effective Nov. 1, 2001, to resolve the conflict. It now reads, in relevant part: "A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a)."

Before the amendment, several circuits concluded that some formality is required under §1B1.2(a). See *U.S. v. Saavedra,* 148 F.3d 1311, 1314–15 (11th Cir. 1998) (remanded: although defendant "conceded that his drug activities took place within the requisite proximity to a school to satisfy a conviction under 21 U.S.C. §860 . . . , he never made the sort of formal stipulation that would support sentencing him for a violation of §860. Saavedra's oral plea agreement did not contain a stipulation that his drug activity took place near a school," and there is no written stipulation in the record); *U.S. v. McCall,* 915 F.2d 811, 816 n.4 (2d Cir. 1990) ("stipulation [must] be a part of the plea agreement, whether oral or written"); *U.S. v. Warters,* 885 F.2d 1266, 1273 n.5 (5th Cir. 1989) ("formal stipulation of [defendant's] guilt" required). See also *U.S. v. Nathan,* 188 F.3d 190, 200–01 (3d Cir. 1999) (remanded: error to use facts admitted at plea hearing as stipulations—a statement "is a 'stipulation' only if: (i) it is part of a defendant's written plea agreement; (ii) it is explicitly annexed thereto; or (iii) both the government and the defendant explicitly agree at a factual basis hearing that the facts being put on the record are stipulations that might subject a defendant to the provisions of section 1B1.2(a)").

The Seventh Circuit held otherwise, finding that it is sufficient to "read[] 'stipulation' to mean any acknowledgment by the defendant that he committed the acts that justify use of the more serious guideline. . . . Defendants' protection against undue severity lies not in reading 'stipulation' as requiring a formal agreement (under seal, perhaps?) but in taking seriously the requirement that the basis of the more serious offense be established 'specifically.'" Thus, §1B1.2(a) was properly used where defendants accepted the prosecutor's evidentiary proffer and acknowledged committing the conduct that constituted the more serious offense. *U.S. v. Loos,* 165 F.3d 504, 507–08 (7th Cir. 1998). The Eleventh Circuit concluded that the defendant need not expressly agree that the stipulated facts in a formal plea agreement establish the more serious offense. *U.S. v. Day,* 943 F.2d 1306, 1309 (11th Cir. 1991) (question is not how defendant characterizes actions, but whether as matter of law facts establish more serious offense) [4#11].

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

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

The court in *Martin* also cautioned courts to "proceed with due deliberation" when using §1B1.2(a), holding that "the determination that the stipulation contained in or accompanying the guilty plea 'specifically establishes a more serious offense' than the offense of conviction must be expressly made on the record by the court prior to sentencing." Moreover, "the trial court must follow the directive contained in Fed. R. Crim. P. 11(f) and satisfy itself that a 'factual basis for each essential element of the crime [has been] shown.'" 893 F.2d at 75. See also *U.S. v. Domino,* 62 F.3d 716, 722 (5th Cir. 1995) (stipulation "must *specifically establish*" each element of more serious offense and "the factual basis for each element of the greater offense must appear in the *stipulated* facts as made *on the record*"); *Day,* 943 F.2d at 1309 (the relevant inquiry is "whether, as a matter of law, the facts provided the essential elements of the more serious offense") [4#11].

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

enacted, affirmed inclusion of two uncharged stipulated robberies—§1B1.2(a) "is unambiguous on its face and . . . directs the sentencing court to treat a stipulated offense as an 'offense of conviction'").

C. Sentencing Factors

General: In choosing the term of imprisonment within the guideline range, courts "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." USSG §1B1.4. Under this provision courts may consider factors that may already be accounted for in other guidelines. See, e.g., *U.S. v. Bass,* 54 F.3d 125, 132–33 (3d Cir. 1995) (may impose higher sentence within range for perjury in prior exclusionary hearing); *U.S. v. Boyd,* 924 F.2d 945, 947–48 (9th Cir. 1991) (actual nature of road flare that was technically "dangerous weapon" under §2B3.1(b)(2)(C)) [3#20]; *U.S. v. Lara-Velasquez,* 919 F.2d 946, 954 (5th Cir. 1990) (rehabilitative potential) [3#18]; *U.S. v. Duarte,* 901 F.2d 1498, 1500–01 (9th Cir. 1990) (letters attesting to defendant's character) [3#7]; *U.S. v. Ford,* 889 F.2d 1570, 1573 (6th Cir. 1989) (information given by defendant to probation officer during presentence investigation that was also used to deny reduction for acceptance of responsibility) [2#18]; *U.S. v. Soliman,* 889 F.2d 441, 444–45 (2d Cir. 1989) (foreign conviction that was not used in criminal history score) [2#17]. But cf. *U.S. v. Onwuemene,* 933 F.2d 650, 651 (8th Cir. 1991) (may not consider defendant's status as alien); *U.S. v. Hatchett,* 923 F.2d 369, 373–75 (5th Cir. 1991) (do not consider socio-economic status) [3#19].

Whether a defendant's silence or failure to cooperate may be used as a factor that increases a sentence may depend upon the circumstances. The Supreme Court held that a defendant's silence at the sentencing hearing regarding drug amounts could not be used for an adverse inference against her in finding a higher amount. *Mitchell v. U.S.,* 119 S. Ct. 1307, 1311–16 (1999), *rev'g* 122 F.3d 185 (3d Cir. 1997) [10#4]. The Second Circuit held that a five-year increase in sentence for a defendant's continued refusal to cooperate with the government after he was convicted was an unconstitutional penalty that violated his Fifth Amendment right to remain silent. Defendant faced a 360 months to life sentence, was sentenced to 480 months, and the sentencing judge specifically attributed 60 months to the failure to cooperate. *U.S. v. Rivera,* 201 F.3d 99, 101–02 (2d Cir. 1999). The Seventh Circuit, however, ruled that defendant's Fifth Amendment rights were not violated when the sentencing judge considered his failure to cooperate as one factor in sentencing him near the top of the applicable guideline range (180 months from a range of 151–188 months). *U.S. v. Klotz,* 943 F.2d 707, 710–11 (7th Cir. 1991). Cf. *U.S. v. Jones,* 997 F.2d 1475, 1478 (D.C. Cir. 1993) (en banc) (sentencing judge who grants a defendant credit for acceptance of responsibility may consider defendant's decision to go to trial when sentencing within new, lower range) [6#2]. See also cases in section III.E.2.

The Eleventh Circuit held that §1B1.4 and 18 U.S.C. §3661 are subject to the limitations set forth in 18 U.S.C. §3553(a), most notably the "four penological goals

courts must consider in fashioning a sentence. Any sentence imposed in order to accomplish some other purpose would violate section 3553(a) and would be unlawful." In addition, 28 U.S.C. §§991–998 "constrain and limit the discretion of the Sentencing Commission and, necessarily, the discretion of sentencing judges." Following these limitations, the court held that the district court abused its discretion in sentencing defendant to the highest end of the guideline range because she refused to cooperate in an investigation into an unrelated offense allegedly committed by her husband. There was no indication that her conduct in the instant offense was related to her husband's case and penalizing her for refusing to cooperate in that unrelated case "simply does not achieve any of the goals set forth in section 3553(a)(2), and, consequently, exceeds the district court's sentencing discretion." *U.S. v. Burgos,* 276 F.3d 1284, 1288–91 (11th Cir. 2001).

The Fifth Circuit held that, although non-criminal conduct should not be included in relevant conduct when setting the offense level, "a district court can consider conduct that is not itself criminal or 'relevant conduct' under §1B1.3 in determining whether an upward departure is warranted." *U.S. v. Arce,* 118 F.3d 335, 340–43 (5th Cir. 1997) [10#1].

The Ninth Circuit held that state-immunized testimony that was not compelled may be used as a basis for upward departure. *U.S. v. Camp,* 72 F.3d 759, 761–62 (9th Cir. 1995) (affirmed: testimony revealing defendants' role in death that was given under state transactional immunity agreement which did not compel self-incrimination was properly used to support upward departure) [8#4], *superseding* 58 F.3d 491 (9th Cir. 1995) [7#11] *and* 66 F.3d 187 (9th Cir. 1995) [8#2].

The Eleventh Circuit held that "it is inappropriate to imprison or extend the term of imprisonment of a federal defendant for the purpose of providing him with rehabilitative treatment." The district court improperly made defendant's sentence consecutive to a state sentence so defendant would serve enough time in federal prison to undergo a full drug treatment program. *U.S. v. Harris,* 990 F.2d 594, 595–97 (11th Cir. 1993) [5#13]. However, the Seventh Circuit held that it was not improper to consider defendant's need for medical care and rehabilitation in sentencing him to the high end of the guideline range and maximum supervised release term. *U.S. v. Hardy,* 101 F.3d 1210, 1212–13 (7th Cir. 1996). See also cases in Section VII.B.1.c.

A panel of the Sixth Circuit had held that a district court should determine "at the outset of the sentencing process whether there were aggravating or mitigating circumstances" and, if so, should not follow the guidelines but should sentence the defendant under 18 U.S.C. §3553(a). *U.S. v. Davern,* 937 F.2d 1041 (6th Cir. 1991) [4#6]. The en banc court vacated *Davern* and reissued the opinion holding that the guidelines are mandatory and a court may only depart pursuant to 18 U.S.C. §3553(b). *U.S. v. Davern,* 970 F.2d 1490, 1492–93 (6th Cir. 1992) (en banc) [5#1]. See also *U.S. v. Fields,* 72 F.3d 1200, 1216 (5th Cir. 1996) (following *Davern* in holding that "Sections 3553(a) and 3661 are not inconsistent with the guidelines, but rather set out factors that courts should consider when sentencing within the guidelines); *U.S. v. Boshell,* 952 F.2d 1101, 1106–07 (9th Cir. 1991) (reconciling 18 U.S.C.

§3661 and guidelines by holding that information courts may consider is limited to departures from guideline range but not sentences within range). The Second Circuit reached a similar conclusion in *U.S. v. DeRiggi,* 45 F.3d 713, 716–19 (2d Cir. 1995) (remanded: "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") [7#7]. See also *U.S. v. Johnston,* 973 F.2d 611, 613 (8th Cir. 1992) (guidelines are mandatory).

Resentencing after remand: When a sentence is remanded for resentencing without limits (a complete or "de novo resentencing" rather than a limited remand), some courts have held that this "permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *U.S. v. Ortiz,* 25 F.3d 934, 935 (10th Cir. 1994) (affirmed: district court properly considered new evidence of amount of drugs in offense of conviction). Accord *U.S. v. Atehortva,* 69 F.3d 679, 685 (2d Cir. 1995); *U.S. v. Johnson,* 46 F.3d 636, 639–40 (7th Cir. 1995); *U.S. v. Moored,* 38 F.3d 1419, 1422 (6th Cir. 1994); *U.S. v. Caterino,* 29 F.3d 1390, 1394 (9th Cir. 1994); *U.S. v. Bell,* 5 F.3d 64, 67 (4th Cir. 1993); *U.S. v. Cornelius,* 968 F.2d 703, 705 (8th Cir. 1992).

However, the Tenth Circuit held that this rule does not apply to new conduct that occurred after the first sentencing. "While [*Ortiz*] indicates resentencing is to be conducted as a fresh procedure, the latitude permitted is circumscribed by those factors the court could have considered 'at the first sentencing hearing.' Thus, events arising after that time are not within resentencing reach." *U.S. v. Warner,* 43 F.3d 1335, 1339–40 (10th Cir. 1994) (remanded: regardless of whether a defendant's post-sentencing rehabilitative conduct may ever provide ground for downward departure, it was improper to consider it when resentencing defendant after remand) [7#5]. See also *U.S. v. Davis,* 182 F.3d 1201, 1202 (10th Cir. 1999) (affirmed: request at resentencing for §3E1.1 reduction based on rehabilitative efforts while in prison properly denied because "a defendant may not utilize post-sentencing contrition to warrant an acceptance of responsibility reduction at resentencing on remand if he was ineligible for such a reduction at the time his initial sentence was imposed"); *U.S. v. Gomez-Padilla,* 972 F.2d 284, 285–86 (9th Cir. 1992) (affirmed: where remand was limited to issue concerning defendant's role in offense, district court properly concluded that Rule 35(a) prohibited consideration of defendant's post-sentencing conduct at resentencing after remand). Cf. *U.S. v. Ticchiarelli,* 171 F.3d 24, 35–36 (1st Cir. 1999) (remanded: when resentencing defendant in Maine, court should not have considered Florida conviction that occurred after original Maine sentencing, concluding that finding Florida sentence is not a "prior sentence" under §4A1.2(a)(1) in this situation "is most consistent with the mandate rule, . . . statutes limiting resentencing, and with the distinction the law has long drawn between remands where a conviction has been vacated and remands where only a sentence has been vacated"; specifically disagreeing with *Klump* below). But cf. *U.S. v. Klump,* 57 F.3d 801, 802–03 (9th Cir. 1995) (affirmed: court properly considered on remand state sentence imposed after original federal sentencing where underlying conduct in state offense occurred before original federal sentencing—

"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.' . . . Accordingly, the general rule that resentencing is de novo applies and the court correctly found that the state sentence was a 'prior sentence.'") [7#11].

New matters also should not be considered at resentencing when the case was remanded only for reconsideration of specific issues. See, e.g., *Caterino,* 29 F.3d at 1394 ("We have limited this general rule to preclude consideration of post-sentencing conduct, as well as conduct beyond the scope of a limited remand"); *U.S. v. Apple,* 962 F.2d 335, 336–37 (4th Cir. 1992) (proper to refuse to consider mitigating conduct after original sentence and, per Rule 35, limit resentencing hearing to issues appellate court had specified might be incorrect). If a sentence is remanded because new evidence may affect certain aspects of sentencing, only those aspects should be reconsidered. The guidelines "fixed scheme of sentencing avoids the need to remand for reconsideration of every aspect of the defendants' sentences. . . . [O]nly the portions of the sentence that are affected by the new evidence should be considered." *U.S. v. Severson,* 3 F.3d 1005, 1013 (7th Cir. 1993) (possibly exculpatory evidence discovered after sentencing may affect imposition of obstruction enhancement and denial of acceptance of responsibility reduction).

When the appellate court remands a case without specifically limiting the issues for remand, most circuits to decide the issue have held that the resentencing hearing should not be conducted de novo but limited to the relevant issues. If specific direction is lacking, "the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error. A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it." *U.S. v. Parker,* 101 F.3d 527, 528 (7th Cir. 1996). Accord *U.S. v. Marmolejo,* 139 F.3d 528, 531 (5th Cir. 1998) ("This court specifically rejects the proposition that all resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand. The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. . . . [T]he resentencing court can consider whatever this court directs—no more, no less.") [10#6]; *U.S. v. Santonelli,* 128 F.3d 1233, 1237–39 (8th Cir. 1997) ("Although the [appellate] court's opinion in its conclusion recited that we 'vacate his sentence and remand his case to the district court for resentencing,' that statement must be read with the analysis offered in the opinion") [10#6].

The First and D.C. Circuits agree that resentencing should not be presumed to be de novo, but held that new matters may be raised if they are "made newly relevant" by the appellate court's decision. See *U.S. v. Whren,* 111 F.3d 956, 960 (D.C. Cir. 1997) (rejecting de novo approach and holding that "upon a resentencing occasioned by a remand, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly

relevant by the court of appeals' decision—whether by the reasoning or by the result"; also, "[a] defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing; but neither should a defendant be able to raise an issue for the first time upon resentencing if he did have reason but failed nonetheless to raise it in the earlier proceeding"); *Ticchiarelli,* 171 F.3d at 35–36 (agreeing with *Whren* and adding: "Whether there is a waiver depends . . . on whether the party had sufficient incentive to raise the issue in the prior proceedings. . . . This approach requires a fact-intensive, case-by-case analysis. . . . Our waiver doctrine does not require that a defendant, in order to preserve his rights on appeal, raise every objection that *might* have been relevant if the district court had not already rejected the defendant's arguments.") [10#6].

The Sixth Circuit, however, concluded that a presumption of de novo resentencing is preferable in order to "give the district judge discretion to consider and balance all of the competing elements of the sentencing calculus." Sentencing under the guidelines "requires a balancing of many related variables. These variables do not always become fixed independently of one another." Before engaging in a de novo resentencing, a district court must first determine "what part of this court's mandate is intended to define the scope of any subsequent proceedings. The relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language. . . . The key is to consider the specific language used in the context of the entire opinion or order." The court also urged appellate courts to make "[t]he language used to limit the remand . . . unmistakable." *U.S. v. Campbell,* 168 F.3d 263, 265–68 (6th Cir. 1999) [10#6]. See also *U.S. v. Washington,* 172 F.3d 1116, 1118–19 (9th Cir. 1999)(affirmed: "the general practice in a remand for resentencing [i]s to vacate the entire sentence. We will presume that this general practice was followed unless there is 'clear evidence to the contrary'"; thus, although sentence was remanded "for the limited purpose of recalculating [the] base offense level" under the correct guideline, because it also said "and resentenc[e] him accordingly," court could impose upward departure at resentencing).

Note also that the "law of the case" doctrine precludes consideration at resentencing after remand of any issues that were expressly or implicitly decided by the appellate court. See, e.g., *U.S. v. Bartsh,* 69 F.3d 864, 866 (8th Cir. 1995) (affirmed: where sentence was affirmed on appeal except for remand "'for the limited purpose' of recalculating the amount of restitution due," defendant cannot challenge other aspects of sentence: "When an appellate court remands a case to the district court, all issues decided by the appellate court become the law of the case"); *Caterino,* 29 F.3d at 1395 (remanded: defendant's claim not barred by law of case doctrine because appellate court did not decide issue in question at resentencing); *U.S. v. Minicone,* 994 F.2d 86, 89 (2d Cir. 1993) (remanded: district court improperly granted downward departure for minor role after appellate court affirmed its earlier denial of such a departure and stated that defendant's claims of a minor role were without merit). See also *U.S. v. Polland,* 56 F.3d 776, 778–79 & n.1 (7th Cir. 1995) (affirmed: where appellate court specifically "remanded for resentencing on

the issue of obstruction of justice," mandate rule precluded consideration of other issues; also noting that, because opinion implicitly rejected defendant's other arguments as meritless, law of case doctrine would preclude revisiting any of those claims).

Similarly, the district court may not hear issues that were not raised in the initial appeal unless the remand is for de novo resentencing. See, e.g., *U.S. v. Stanley,* 54 F.3d 103, 107–08 (2d Cir. 1995) (remanded: defendant could not challenge restitution order and enhancement for more than minimal planning when he had not originally appealed them and remand was only for recalculation of loss); *U.S. v. Pimentel,* 34 F.3d 799, 800 (9th Cir. 1994) (affirmed: district court properly refused to address on remand defendant's grouping claim that was not appealed initially where remand was limited to departure issue); *U.S. v. Bell,* 988 F.2d 247, 250 (1st Cir. 1993) (where sentence is remanded for consideration of specific issue, mandate rule prevents district court from hearing an issue not raised on initial appeal).

D. Incriminating Statements as Part of Cooperation Agreement

USSG §1B1.8(a) provides:

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

In *U.S. v. Shorteeth,* 887 F.2d 253, 256–57 (10th Cir. 1989) [2#15], the court found that language in the plea agreement promising that defendant would "not be subject to additional federal criminal prosecution for crimes committed in this judicial district" that might be revealed during her cooperation fell within §1B1.8(a). The court held that a "full disclosure approach" was required, that the agreement had "to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." Cf. *U.S. v. Cox,* 985 F.2d 427, 431 (8th Cir. 1993) (may use incriminating statements when agreement stated that "testimony or other information provided by you . . . may be considered by the court or probation office . . . to determine the length of your sentence"); *U.S. v. Shacklett,* 921 F.2d 580, 583 (5th Cir. 1991) (remanded: may not use additional drug amounts revealed by defendant after plea agreement without adequate proof that government knew of those amounts beforehand—"bald assertion" by probation officer to that effect, without more, is inadequate).

When an agreement precludes prosecution for "activities that occurred or arose out of [defendant's] participation in the crimes charged . . . that are known to the government at this time," self-incriminating information that is provided to the probation officer in reliance on the plea agreement may not be used in sentencing. *U.S. v. Marsh,* 963 F.2d 72, 73–74 (5th Cir. 1992) (remanded: Application Note 5 indicates such information is protected) [4#24]. Accord *U.S. v. Fant,* 974 F.2d 559, 562–64 (4th Cir. 1992) (remanded) [5#5]. See also *U.S. v. Washington,* 146 F.3d

219, 221–22 (4th Cir. 1998) (remanded: where defendant's agreement required him to be "completely forthright and truthful with federal officials," court could not deny §3B1.2 reduction based on defendant's admission to probation officer that he had distributed more drugs than he stipulated to). But cf. *U.S. v. Kinsey,* 910 F.2d 1321, 1325–26 (6th Cir. 1990) (statement made to probation officer is not statement made to "government" within meaning of §1B1.8).

When an agreement under §1B1.8(a) is involved, "and the defendant questions the sources of the evidence used against him at sentencing, the burden is on the government to show that the evidence is from outside sources. . . . The threshold for meeting this burden is low; in many cases the government need only present testimony as to the source of the information. When the government relies on bald assertions, however, as they have done in the present case, the government fails to meet this burden." *U.S. v. Taylor,* 277 F.3d 721, 726–27 (5th Cir. 2001) (remanded: government could not rely on PSR without some evidence as to where its information came from).

Note that the information provided by defendant "shall not be used . . . except to the extent provided in the agreement." In a case where defendant's §1B1.8(a) agreement required him to provide the government with a completely truthful account of his activities, and he later deviated from his original proffer statement, the information provided could be used to find that he was ineligible for a safety valve reduction because he did not meet §5C1.2(5)'s requirement to truthfully provide all information of his activities. Because the §1B1.8(a) agreement covered this situation, "the government was certainly within its rights to use the statement for the sole purpose of showing that his cooperation was untruthful or incomplete and that he was therefore not eligible for exemption from the statutory mandatory minimum." *U.S. v. Cobblah,* 118 F.3d 549, 551 (7th Cir. 1997).

The Second Circuit held that there must actually be a cooperation agreement for §1B1.8(a) to apply. Where defendant had only engaged in discussions with the government, pursuant to a "proffer agreement," to explore the possibility of entering into a cooperation agreement, but no actual cooperation agreement was reached, statements about related criminal activity made during the discussions were not protected by §1B1.8(a). Thus, when defendant sought a safety valve reduction, he was not allowed to insist that his admission of additional drug dealing be ignored when deciding whether he met the requirement to disclose "all information" about related conduct. *U.S. v. Cruz,* 156 F.3d 366, 370–71 (2d Cir. 1998).

Similarly, it has been held that §1B1.8(a) does not apply to the situation where the defendant relies on general assurances from arresting officers that cooperation could help. See, e.g., *U.S. v. Evans,* 985 F.2d 497, 499 (10th Cir. 1993) (affirmed: agent's offer to notify prosecutor of defendant's cooperation could not be construed as promise that self-incriminating information would not be used); *U.S. v. Rutledge,* 900 F.2d 1127, 1131 (7th Cir. 1990) (same, where arresting officer told defendant "his cooperation would be helpful").

Information voluntarily offered by the defendant that is outside the scope of the plea agreement may not be protected by §1B1.8(a). The Sixth Circuit allowed evi-

dence of defendant's past drug use—which he admitted to a probation officer during a presentence interview—to increase his offense level under §2K2.1(a)(4)(B). Defendant "has not directed this court to any persuasive evidence that his disclosure of personal drug use . . . was furnished by him in the context of the defendant-government cooperation agreement. See U.S.S.G. §1B1.8 commentary, applic. note 5. Also, it is evident that Jarman's disclosure was completely extraneous to 'information concerning the unlawful activities of other persons.'" *U.S. v. Jarman,* 144 F.3d 912, 914–15 (6th Cir. 1998).

The Sixth Circuit held that information prohibited by §1B1.8 cannot be used as a basis for departure. *U.S. v. Robinson,* 898 F.2d 1111, 1117–18 (6th Cir. 1990) [3#4]. Amended Application Note 1 (Nov. 1992) makes it clear that prohibited information "shall not be used to increase the defendant's sentence . . . by upward departure." However, that note and §1B1.8(b)(5) (Nov. 1992) state that a downward departure for substantial assistance under §5K1.1 may be refused or limited on the basis of such information. Previously, the Fourth Circuit had held it was error to base the denial of a substantial assistance motion on information protected by §1B1.8(a). See *U.S. v. Malvito,* 946 F.2d 1066, 1067–68 (4th Cir. 1991) [4#12]. Cf. *U.S. v. Davis,* 912 F.2d 1210, 1213 (10th Cir. 1990) (agreement under §1B1.8 was not violated when court based upward departure on codefendant's statements about drug quantity where there was "no indication that the co-defendants' statements were elicited as a result of Davis' plea agreement with the government, and Davis provided no evidence that, had he refused to cooperate, his co-defendants likewise would not have offered the information about the correct quantity of drugs involved").

Note that a §1B1.8(a) agreement may still protect defendant even if it is superseded by a later plea agreement. A Second Circuit defendant signed an agreement in 1995 wherein the government agreed not to use his statements against him. The government later claimed defendant breached the agreement, but that claim was never resolved. Instead, a new agreement was reached in 1998 that did not protect defendant's statements, but also did not specify that the old agreement's protections were abrogated. The appellate court held that defendant's post-plea statements should not have been used against him because he had inadequate notice that they could be. *U.S. v. Bradbury,* 189 F.3d 200, 206–08 (2d Cir. 1999). But cf. *U.S. v. Stevens,* 918 F.2d 1383, 1384 (8th Cir. 1990) (protection of earlier agreement was lost when defendant admitted breaching that agreement, entered new agreement that stipulated to larger amount of drugs, and indicated he understood and accepted new agreement).

E. Amendments

1. General

A defendant's sentence should be based on the guidelines "that are in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(4); USSG §1B1.11(a). (Nov.

1992). Most circuits have held or indicated, however, that amendments that occur after defendant's offense but before sentencing should not be applied if doing so would increase the sentence because that would violate the ex post facto clause of the Constitution. See *U.S. v. Seacott,* 15 F.3d 1380, 1386 (7th Cir. 1994); *U.S. v. Bell*, 991 F.2d 1445, 1448–52 (8th Cir. 1993); *U.S. v. Kopp,* 951 F.2d 521, 526 (3d Cir. 1991); *U.S. v. Nagi,* 947 F.2d 211, 213 n.1 (6th Cir. 1991); *U.S. v. Sweeten,* 933 F.2d 765, 772 (9th Cir. 1991); *U.S. v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); *U.S. v. Smith,* 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); *U.S. v. Morrow,* 925 F.2d 779, 782–83 (4th Cir. 1991) [3#20]; *U.S. v. Lam,* 924 F.2d 298, 304–05 (D.C. Cir. 1991) [3#19]; *U.S. v. Harotunian,* 920 F.2d 1040, 1042 (1st Cir. 1990); *U.S. v. Worthy,* 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); *U.S. v. Suarez,* 911 F.2d 1016, 1021–22 (5th Cir. 1990) [3#12]. But cf. *U.S. v. Gerber,* 24 F.3d 93, 97 (10th Cir. 1994) (not a violation of ex post facto clause to apply stricter version of §5K1.1 in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than earlier version in effect when defendant committed her offenses—"Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted") [6#13].

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

If, using a later version of the guidelines, a defendant's offense level is increased but is offset by a new reduction, resulting in the same or a lower adjusted offense level and sentence, there is no ex post facto problem and it does not matter if the earlier or later guidelines version is used. See *U.S. v. Anderson,* 61 F.3d 1290, 1303 (7th Cir. 1995) ("guideline amendments will not raise ex post facto concerns if, 'taken as a whole,' they are 'ameliorative'"); *U.S. v. Keller,* 58 F.3d 884, 890–92 (2d Cir. 1995) (remanded: although 1993 amendment to one guideline would have increased defendant's base offense level above 1989 guidelines, another amendment would actually lower final sentence so that 1993 guidelines should have been used); *U.S. v. Nelson,* 36 F.3d 1001, 1004 (10th Cir. 1994) (using 1992, rather than 1988, guidelines resulted in one point increase, but it was offset by extra point reduction under §3E1.1(b), not available in 1988). See also *Berrios v. U.S.,* 126 F.3d 430, 433 (2d Cir. 1997) ("The relevant inquiry for *ex post facto* analysis is not whether a

particular amendment to the Sentencing Guidelines is detrimental to a defendant, but whether application of the later version of the Sentencing Guidelines, considered as a whole, results in a more onerous penalty.").

Note that under §1B1.11(b)(1), "the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed" before the amendment, that date "is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred" after the amendment. §1B1.11, comment. (n.2). See, e.g., *U.S. v. Zagari,* 111 F.3d 307, 324–25 (2d Cir. 1997) (discussing and using Note 2); *U.S. v. Bennett,* 37 F.3d 687, 700 (1st Cir. 1994) (affirmed: proper to use 1988 rather than 1989 guidelines even though relevant conduct occurred as late as 1990—conduct charged in indictment ended before 1989 amendments).

2. The "One Book" Rule

Section 1B1.11(b)(1), effective Nov. 1, 1992, states that if using the Guidelines Manual in effect on the date of sentencing would violate the ex post facto clause, use the Guidelines Manual in effect on the date the crime was committed. Whichever date is chosen, the guidelines in effect on that date should be used in their entirety, although "subsequent clarifying amendments are to be considered." USSG §1B.11(b)(2) and comment. (n.1). See also *U.S. v. Nelson,* 36 F.3d 1001, 1004 (10th Cir. 1994); *U.S. v. Springer,* 28 F.3d 236, 237–38 (1st Cir. 1994) [7#1]; *U.S. v. Milton,* 27 F.3d 203, 210 (6th Cir. 1994); *U.S. v. Lance,* 23 F.3d 343, 344 (11th Cir. 1994); *U.S. v. Boula,* 997 F.2d 263, 265–66 (7th Cir. 1993); *U.S. v. Warren*, 980 F.2d 1300, 1305–06 (9th Cir. 1992) [5#8]; *U.S. v. Lenfesty*, 923 F.2d 1293, 1299 (8th Cir. 1991); *U.S. v. Stephenson*, 921 F.2d 438, 441 (2d Cir. 1990).

The Third Circuit originally rejected the "one book rule" but later 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 upheld application of the "one book rule" even though it was not in effect when defendant committed his offenses. *U.S. v. Corrado,* 53 F.3d 620, 623–25 (3d Cir. 1995) [7#10]. Cf. *U.S. v. Seligsohn*, 981 F.2d 1418, 1424–26 (3d Cir. 1992) (before 1992 amendment, expressly disapproving "one book rule"—different versions of guidelines should be used for different counts as necessary) [5#8].

3. Multiple Counts

When grouping multiple counts, some of which occurred before and some after an amendment, the one book rule calls for applying the amendment to the earlier of-

fenses even if punishment is increased. See USSG §1B1.11(b)(3) ("If defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition . . . is to be applied to both offenses") (Nov. 1993). The Background Commentary adds that this approach "should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless the clause would be violated, Congress' directive to apply the sentencing guidelines in effect at the time of sentencing must be followed."

The Eighth Circuit followed §1B1.11(b)(3) for a defendant who committed two firearms offenses before and one firearm offense after the Nov. 1991 amendments that increased penalties and required aggregation of multiple firearms offenses. The appellate court affirmed sentencing under the amended guidelines on all three counts even though the sentence was greater than it would have been under the pre-amendment guidelines. The court ruled there was no ex post facto violation because when defendant "elected to commit the third firearms violation he was clearly on notice of the 1991 amendments . . . [and thus] had fair warning that commission of the January 23, 1992, firearm crime was governed by the 1991 amendments that provided for increased offense levels and new grouping rules that considered the aggregate amount of harm." The court also reasoned that defendant's offenses could be likened to a continuing offense or "same course of conduct," for which "the date the crimes are completed determines the version of the Sentencing Guidelines to be applied. . . . The offense conduct to which Cooper pled guilty involved a series of firearm offenses spanning from August 24, 1991, to January 23, 1992." *U.S. v. Cooper,* 35 F.3d 1248, 1250–52 (8th Cir. 1994) [7#2], reaffirmed after being vacated and remanded by Supreme Court, 63 F.3d 761 (8th Cir. 1995).

Several other circuits have also applied §1B1.11(b)(3) after finding no ex post facto problem. See *U.S. v. Sullivan,* 255 F.3d 1256, 1260–63 (10th Cir. 2001) (defendant had sufficient notice that two pre-amendment offenses would be grouped with or included as relevant conduct of third, post-amendment offense); *U.S. v. Lewis,* 235 F.3d 215, 217–18 (4th Cir. 2000) (affirmed: where defendant committed tax offenses before and after 1993 amendments that increased penalty for offense and added §1B1.11(b)(3), amended guideline was properly used for all counts because defendant "had ample warning" that 1993 amendments would apply when she committed later offenses); *U.S. v. Vivit,* 214 F.3d 908, 917–19 (7th Cir. 2000) (affirmed: although only count of conviction where defendant used minor occurred before enactment of §3B1.4, it was grouped with other conviction that occurred thereafter and §3B1.4 enhancement was proper); *U.S. v. Kimler,* 167 F.3d 889, 893–94 (5th Cir. 1999) (affirmed: defendant "had adequate notice at the time he committed the counterfeiting offense in 1990 that his [1988] mail fraud offenses would be grouped with the counterfeiting offense and therefore that the 1990 guidelines would apply"; "the Ex Post Facto Clause is not violated when a defendant is sentenced, pursuant to the one book rule, under revised sentencing guidelines for grouped offenses"); *U.S. v. Bailey,* 123 F.3d 1381, 1405–06 (11th Cir. 1997) (remanded: defen-

dant should have been sentenced under Nov. 1991 Guidelines for series of related offenses that occurred from Feb. 1989 to Apr. 1992); *U.S. v. Regan,* 989 F.2d 44, 48–49 (1st Cir. 1993) (no ex post facto violation where defendant was sentenced for multiple counts of embezzlement based on revised guidelines when some counts were committed before revision—counts were all part of same course of conduct, earlier counts could be used as relevant conduct for later counts, and all sentences were concurrent).

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

The Ninth Circuit also refused to apply a later guideline to an earlier count, concluding that that would violate the Ex Post Facto Clause and that §1B1.11(b)(3) should not be followed. "Application of the policy statement in this case would violate the Constitution; its application would cause Ortland's sentence on earlier, completed counts to be increased by a later Guideline. Moreover, the Commission's explanation is not entirely logical. The harm caused by the earlier offenses *can* be counted in sentencing the later one. . . . That does not mean that the punishment for the earlier offenses themselves can be increased, simply because the punishment for the later one can be. In fact, were the later count to fall at some time after sentencing, all that would remain would be the earlier sentences, which would be too long." *U.S. v. Ortland,* 109 F.3d 539, 546–47 (9th Cir. 1997) [9#6].

4. Clarifying Amendments

Generally, an amendment to commentary that merely "clarifies" the meaning of a guideline is retroactive. See, e.g., *U.S. v. Carillo,* 991 F.2d 590, 592 (9th Cir. 1993). However, the circuits have split as to whether a "clarifying" amendment to commentary should be applied retroactively when it conflicts with circuit precedent. The Tenth Circuit has held that when a change in the commentary requires a circuit "to overrule precedent . . . in order to interpret the guideline consistent with the amended commentary, we cannot agree . . . that the amendment merely clarified the pre-existing guideline." Such an amendment is a substantive change that impli-

cates the ex post facto clause, and will not be applied retroactively if defendant is disadvantaged. *U.S. v. Saucedo,* 950 F.2d 1508, 1512–17 (10th Cir. 1991) (Nov. 1990 amendment to §3B1.1 commentary to "clarify" that adjustment should be based on all relevant conduct would not be applied retroactively because it conflicted with circuit precedent and would disadvantage defendant). Accord *U.S. v. Capers,* 61 F.3d 1100, 1110–12 (4th Cir. 1995) (1993 amendment to §3B1.1, comment. (n.2), "is not a mere clarification because it works a substantive change in the operation of the guideline in this circuit" and "its retroactive application would require us to scrap our earlier interpretation of that guideline"); *U.S. v. Bertoli,* 40 F.3d 1384, 1407 n.21 (3d Cir. 1994) ("we have rejected the proposition that the Sentencing Commission's description of an amendment as 'clarifying' is entitled to substantial weight. *U.S. v. Menon,* 24 F.3d 550, 567 (3d Cir. 1994). . . . Rather, our own independent interpretation of the pre-amendment language is controlling"); *U.S. v. Prezioso,* 989 F.2d 52, 53–54 (1st Cir. 1993) (although labeled as "clarifying," amendment to §4A1.2(d) commentary that a fine is not a "criminal justice sentence" would not be given retroactive effect "in light of clear circuit precedent to the contrary") [5#13].

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

Other circuits have reevaluated precedent in light of amendments that they held "clarified," rather than substantively changed, the guideline. See, e.g., *U.S. v. Garcia-Cruz,* 40 F.3d 986, 990 (9th Cir. 1994) (amendment re felon in possession should be applied retroactively despite contrary precedent); *U.S. v. Fitzhugh,* 954 F.2d 253, 255 (5th Cir. 1992) (earlier case holding felon in possession could be crime of violence "no longer controlling" in light of amendment); *U.S. v. Thompson,* 944 F.2d 1331, 1347–48 (7th Cir. 1991) (amendment to §3C1.1 commentary "makes clear" that previous holding to contrary should not be followed) [4#10]; *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991) (earlier decision holding that role in offense should be based only on conduct in offense of conviction was "nullified by the clarifying amendment" to §3B1's Introductory Commentary). See also cases in section IV.B.1.b.

The Third Circuit took a middle ground, holding that "[w]here the Commission adopts an interpretive commentary amendment that the text of the guideline cannot reasonably support," the new commentary should not be followed. Where the guideline is ambiguous, however, amended commentary clarifying the guideline may be considered, even if the commentary mandates a result different from a prior panel's pre-amendment interpretation of the guideline. *U.S. v. Joshua*, 976 F.2d 844, 854–56 (3d Cir. 1992) (will follow amendment to §4B1.2 commentary that clarified that "crime of violence" is determined only by conduct charged in the count of conviction and that unlawful weapons possession by felon is not a crime of violence, but not to extent that amendment would make unlawful possession *never* a crime of violence) [5#5]. The court later summarized that "there is no bright-line test for determining whether an amendment to the Guidelines 'clarifies' the existing law; these categories [are] unclear, and as is usually the case, there are factors supporting either side. . . . Among other factors, we have considered: (1) whether, as a matter of construction, the guideline and commentary in effect at that time is really consistent with the amended manual . . . ; and (2) whether the amendment resolves an ambiguity in the guideline or commentary." *U.S. v. Roberson,* 194 F.3d 408, 417 (3d Cir. 1999) (internal quotations and cites omitted).

5. Retroactive Amendments Under §1B1.10, 18 U.S.C. §3582(c)(2)

The First Circuit held, and most circuits agree, that where a defendant's guideline level is lowered after sentencing because of an amendment listed in §1B1.10(c) (formerly §1B1.10(d)), the defendant is not necessarily entitled to a reduction in offense level, but is entitled to have the sentence reviewed for discretionary reduction under §1B1.10(a). *U.S. v. Connell,* 960 F.2d 191, 197 (1st Cir. 1992) [4#19]. Accord *U.S. v. Ursery,* 109 F.3d 1129, 1137 (6th Cir. 1997) ("district court has the discretion to deny an [18 U.S.C. §] 3582(c)(2) motion"); *U.S. v. Turner,* 59 F.3d 481, 483 (4th Cir. 1995) ("district courts have discretion to apply Amendment 488 retroactively to reduce sentences previously imposed"); *U.S. v. Vazquez,* 53 F.3d 1216, 1228 (11th Cir. 1995); *U.S. v. Telman,* 28 F.3d 94, 96 (10th Cir. 1994) (affirmed: under §1B1.10(a) "a reduction is not mandatory but is instead committed to the sound discretion of the trial court") [6#15]; *U.S. v. Marcello,* 13 F.3d 752, 758 (3d Cir. 1994); *U.S. v. Coohey,* 11 F.3d 97, 101 (8th Cir. 1993); *U.S. v. Wales,* 977 F.2d 1323, 1327–28 (9th Cir. 1992). Cf. *U.S. v. Parks,* 951 F.2d 634, 635–36 (5th Cir. 1992) (under facts of case, the amendment listed in §1B1.10(d) (now (c)) "should be applied retroactively") [4#19]. See also the commentary added to §1B1.10 in Nov. 1997 at Application Note 3 ("the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section") and the fourth paragraph of the Background ("The authorization of such a discretionary reduction . . . does not entitle a defendant to a reduced term of imprisonment as a matter of right."). See also the cases in section I.E.6. Departures.

In determining whether to reduce a sentence under 18 U.S.C. §3582(c)(2), a court

is instructed by §1B1.10(b) to "consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." Application Note 2 further states that "the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected." In applying §1B1.10, the Eighth Circuit held that the language of the guideline supported its finding that the sentencing court should not have revisited the number of marijuana plants used in the original sentencing when applying a retroactive amendment: "We think it implicit in this directive that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively." However, it rejected defendant's contention that Note 2 means a district court cannot reconsider factual decisions, concluding that the note refers to "decisions with respect to what other guidelines are applicable and to their meaning, not to prior factual findings." *U.S. v. Adams,* 104 F.3d 1028, 1030–31 (8th Cir. 1997) [9#4]. See also *U.S. v. Wyatt,* 115 F.3d 606, 608–10 (8th Cir. 1997) (specifying two-step procedure for courts to follow in resentencing under §3582(c)(2), namely first determining sentence it would have imposed by substituting only the amended guideline while leaving other previous factual decisions intact, then deciding whether to modify sentence in light of that determination and general sentencing considerations of §3553(a); court also discussed other factors that may be considered in decision to modify sentence) [9#8]; *U.S. v. Vautier,* 144 F.3d 756, 760 (11th Cir. 1998) (agreeing with two-step procedure outline in *Wyatt*). But see *U.S. v. Legree,* 205 F.3d 724, 728–29 (4th Cir. 2000) (in rejecting requirement for on the record two-step procedure, stating that "we respectfully disagree with the necessity and utility of this method. . . . 'It is sufficient if . . . the district court rules on issues that have been fully presented for determination. Consideration is implicit in the court's ultimate ruling.'").

Note that, "in determining whether to grant or deny a defendant the benefit of retroactive application, the district court should 'set forth adequate reasons' for its conclusion. . . . Although the decision on retroactive application is a discretionary one to which we will accord deference, we must be able to assess whether the district court abused its discretion." *U.S. v. Aguilar-Ayala,* 120 F.3d 176, 179 (9th Cir. 1997) (remanding because district court incorrectly believed it did not have authority to apply amendment retroactively). Cf. *U.S. v. Brown,* 104 F.3d 1254, 1256 (11th Cir. 1997) ("Although the district court did not present particular findings on each individual factor listed in 18 U.S.C. §3553, the court clearly considered those factors and set forth adequate reasons for its refusal to reduce Brown's sentence.").

When it is not a question of legal authority, however, the Ninth Circuit later indicated that the district court's discretionary decision to deny a §3582(c)(2) motion is not subject to appellate review. "Like the district court's decision to sentence at a particular point within the applicable guideline range, the district court's discretionary decision whether to reduce a sentence under §3582(c)(2) is constrained

only by the requirement that the court consider the factors enumerated in §3553(a), together with any relevant policy statements of the Sentencing Commission. Our conclusion . . . that the district court's exercise of such discretion is not reviewable under §3742(a)(1) or (2), compels the same result in this case. We hold that §3742 does not authorize an appeal that challenges a district court's discretionary decision not to reduce a sentence under §3582(c)(2)." *U.S. v. Lowe,* 136 F.3d 1231, 1233 (9th Cir. 1998).

The Fifth Circuit held that "in deciding whether to resentence a prisoner under §3582(c)(2), a court may consider the testimony from other proceedings. This consideration, however, is not unrestrained; a defendant must have notice that the court is considering the testimony such that he will have the opportunity to respond to that testimony. It was error to deny a motion on the basis of testimony from a different case because, although the pro se defendant received a copy of the transcript the government sent to the court, "he was never notified that the court intended to rely on it in reaching a decision nor was he told to respond to the testimony." *U.S. v. Townsend,* 55 F.3d 168, 172 (5th Cir. 1995) (remanded: "court must timely advise the defendant in advance of its decision that it has heard or read and is taking into account that testimony, such that the defendant has the opportunity to contest the testimony").

The Second Circuit held that guideline amendments that might benefit defendant that are adopted after the sentence is imposed should not be applied retroactively by a court of appeals to cases pending on direct review. Rather, the district court has discretion to review the sentence in light of the amendments. *U.S. v. Colon,* 961 F.2d 41, 44–46 (2d Cir. 1992) [4#21]. The court noted, however, that appellate courts may apply post-sentence amendments that merely clarify. The D.C. Circuit cautioned that amendments that occur during an appeal should not automatically lead to resentencing: "our disposition of this case does not mean that a defendant is entitled to resentencing anytime a relevant Guideline is amended during the pendency of an appeal. The result here is dictated by unique circumstances—an amendment that appears to render a substantial constitutional issue without future importance and a record that does not reveal the precise basis for the district court's ruling. We doubt that many similar cases will arise in the future." *U.S. v. Hicks,* 978 F.2d 722, 726 (D.C. Cir. 1992) (remanded in light of change in §3E1.1 limiting acceptance of responsibility to offense of conviction) [5#5]. See also *U.S. v. Glinton,* 154 F.3d 1245, 1259 (11th Cir. 1998) (disagreeing with defendant's suggestion that appellate court approve §3582(c)(2) reduction in sentence, remanding to district court to decide whether change is warranted); *U.S. v. Windham,* 991 F.2d 181, 183 (5th Cir. 1993) (regarding §3E1.1 change, agreeing with holding in *Colon* "that guidelines changes ought not generally be applied to cases in which the defendant was sentenced by the district court before the amendment took effect").

The Second and Fifth Circuits have held that the right to appointed counsel under 18 U.S.C. §3006A(c) of the Criminal Justice Act does not extend to a post-appeal motion under 18 U.S.C. §3582(c)(2) for retroactive application of an amended guideline. "The provision of counsel for such motions should rest in the discretion

of the district court." *U.S. v. Reddick,* 53 F.3d 462, 464–65 (2d Cir. 1995) [7#11]. Accord *U.S. v. Whitebird,* 55 F.3d 1007, 1010–11 (5th Cir. 1995) [7#11].

Where a defendant's original sentence resulted from a binding plea agreement, the Tenth Circuit held that he may not later benefit from a retroactive amendment. *U.S. v. Trujeque,* 100 F.3d 869, 871 (10th Cir. 1996) (remanded: because defendant's sentence under Fed. R. Crim. P. 11(e)(1)(C) was based on a valid plea agreement and not "on a sentencing range that has subsequently been lowered by the Sentencing Commission," §3582(c)(2) cannot be applied and his motion to lower his sentence should have been dismissed).

6. Departures

When applying a retroactive amendment, it has been held that a court has the discretion whether to reapply a downward departure given at the original sentencing. Application Note 3 of USSG §1B1.10(b), effective Nov. 1, 1997, states that "[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate." The Eleventh Circuit concluded that the "negative inference of this permissive language indicates that a downward departure may also be inappropriate. Thus, whether to consider a downward departure in determining what sentence the court would have imposed under the amended guideline remains discretionary, and the court is not bound by its earlier decision at the original sentencing to depart downward from the sentencing guidelines range." *U.S. v. Vautier,* 144 F.3d 756, 760–61 (11th Cir. 1998) (affirming decision not to depart on resentencing). Accord *U.S. v. Wyatt,* 115 F.3d 606, 608–10 (8th Cir. 1997) (affirmed: "The district court retains unfettered discretion to consider anew whether a departure from the new sentencing range is now warranted in light of the defendant's prior substantial assistance.") [9#8]. See also *U.S. v. Shaw,* 30 F.3d 26, 28–29 (5th Cir. 1994) (affirmed: where district court had already departed downward and sentence under retroactive amendment would not have been lower than sentence imposed, court could refuse to apply amendment and depart further—"application of §3582(c)(2) is discretionary") [7#2].

The Eighth Circuit held that a §3553(e) motion for a substantial assistance departure may be made by the government when a defendant moves under §3582(c)(2) for a sentence reduction. See summary of *Williams* in section VI.F.3 (Timing).

The First Circuit followed the language of §1B1.10 and its commentary in holding that a defendant could not use §3582(c)(2) to seek a departure unrelated to the retroactive amendment that allowed him to request resentencing. Defendant sought resentencing after Amendment 505, which lowered the highest offense levels in the drug tables and was made retroactive, and also requested a §5K2.0 departure based on a "combination of circumstances," a ground made available only after his original sentencing by a non-retroactive amendment to §5K2.0's commentary. "Because the §5K2.0 argument was . . . unavailable *at the time he was sentenced*, by the very terms of the guideline, it cannot be considered." *U.S. v. Jordan,* 162 F.3d 1, 6–7 (1st Cir. 1998). See also *U.S. v. Hasan,* 245 F.3d 682, 684–90 (8th Cir. 2001) (en banc)

(remanded: "The only time a district court is authorized by §1B1.10 to depart downward from the amended sentencing range at a §3582(c) resentencing is when a downward departure previously had been granted at the original sentencing," which precludes departure for post-sentencing rehabilitation) [11#4], *rev'g* 205 F.3d 1072 (8th Cir. 2000); *U.S. v. Bravo,* 203 F.3d 778, 781 (11th Cir. 2000) (because "a sentencing adjustment undertaken pursuant to §3582(c)(2) does not constitute a de novo resentencing" and "all original sentencing determinations remain unchanged with the sole exception of the guideline range that has been amended since the original sentencing," district court correctly held that it lacked authority to consider downward departure based on deterioration of defendant's medical condition after his original sentencing).

Several circuits have concluded that amendments post-dating the guidelines used at sentencing may be looked to for guidance in determining the degree of an upward departure without violating the ex post facto prohibition. See, e.g., *U.S. v. Coe,* 220 F.3d 573, 578–79 (7th Cir. 2000) (court properly looked to amendment calling for two-level increase for using mass marketing to effectuate a fraud in finding that earlier guideline did not adequately consider that conduct); *U.S. v. Logal,* 106 F.3d 1547, 1551 (11th Cir. 1997) (district court could look to post-1989 amendments to §2F1.1 in setting extent of departure for defendants sentenced under pre-1989 version of §2F1.1); *U.S. v. Saffeels,* 39 F.3d 833, 838 (8th Cir. 1994) (in dicta, stating that "subsequent guidelines can be a useful touchstone in making the determinations of reasonableness called for in upward departure cases"); *U.S. v. Tisdale,* 7 F.3d 957, 967–68 (10th Cir. 1993) (no ex post facto violation as long as district court "makes clear its understanding that a subsequently enacted guideline does not *govern*"); *U.S. v. Willey,* 985 F.2d 1342, 1350 (7th Cir. 1993) (affirming use of later amendment as model for upward departure); *U.S. v. Rodriguez*, 968 F.2d 130, 140 (2d Cir. 1992) (appropriate to seek guidance from amended guideline for extent of departure); *U.S. v. Bachynsky,* 949 F.2d 722, 735 (5th Cir. 1991) (approving district court's consideration of proposed amendments to §2F1.1 "as a yardstick to measure the appropriate number of levels to depart"); *U.S. v. Harotunian,* 920 F.2d 1040, 1046 (1st Cir. 1990) (approving use of amended guideline "as a means of comparison in fixing the departure's extent"). But see *U.S. v. Canon,* 66 F.3d 1073, 1080 (9th Cir. 1995) (ex post facto violation to base upward departure on analogy to career offender guideline, §4B1.4, when offense occurred before that guideline was enacted).

F. Commentary

The Supreme Court held that, with limited exceptions, courts must treat guidelines commentary as binding: "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. U.S.,* 113 S. Ct. 1913, 1915 (1993) [5#12]. See, e.g., *U.S. v. Powell,* 6 F.3d 611, 613–14 (9th Cir. 1993) (Application Note 1 of §3A1.2, which limits that section's

application to "when specific individuals are victims of the offense," conflicts with plain language of §3A1.2(b) and Note 5; thus, §3A1.2(b) takes precedence and was properly applied to defendant for assault on officer during course of unlawful possession of weapon by felon, a victimless crime). Accord *U.S. v. Ortiz-Granados,* 12 F.3d 39, 42–43 (5th Cir. 1994) [6#10].

Prior to *Stinson,* the Ninth Circuit had concluded that the type of commentary that "may interpret the guideline or explain how it is to be applied," USSG §1B1.7, should be treated as "something in between" legislative history and the guidelines themselves. When using such commentary, sentencing courts should "(1) consider the guideline and commentary together, and (2) construe them so as to be consistent, if possible, with each other and with the Part as a whole, but (3) if it is not possible to construe them consistently, apply the text of the guideline." *U.S. v. Anderson,* 942 F.2d 606, 612–14 (9th Cir. 1991) (en banc) [4#7]. The court noted that its holding "comports with the approach taken by other circuits." See, e.g., *U.S. v. Bierley,* 922 F.2d 1061, 1066 (3d Cir. 1990); *U.S. v. Smith,* 900 F.2d 1442, 1446–47 (10th Cir. 1990); *U.S. v. DeCicco,* 899 F.2d 1531, 1535–37 (7th Cir. 1990); *U.S. v. Smeathers,* 884 F.2d 363, 364 (8th Cir. 1989).

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

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

G. Policy Statements

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

In an earlier case, the Supreme Court stated that "to say that guidelines are distinct from policy statements is not to say that their meaning is unaffected by policy statements. Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the

applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was 'imposed as a result of an incorrect application of the sentencing guidelines' within the meaning of [18 U.S.C.] §3742(f)(1)." *Williams v. U.S.,* 112 S. Ct. 1112, 1119 (1992) (holding use of prior arrest record alone as departure ground when §4A1.3 prohibits it is "incorrect application" of the guidelines) [4#17].

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

The Eighth Circuit has interpreted *Stinson* to mean that "[p]olicy statements are binding only if they interpret a guideline or prohibit district courts from taking a specified action." *U.S. v. Goings,* 200 F.3d 539, 543 (8th Cir. 2000) (finding that §5K2.2 did not prevent district court from imposing a two-level departure for each of two dissimilar injuries despite that section's statement that "the increase ordinarily should depend on the extent of the injury").

H. Cross-References to Other Guidelines

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

I. Continuing Offenses

The guidelines should be applied to a continuing offense, such as conspiracy, that began before but ended after the effective date of the guidelines, Nov. 1, 1987. See *U.S. v. Dale,* 991 F.2d 819, 853 (D.C. Cir. 1993); *U.S. v. Fazio,* 914 F.2d 950, 959 (7th Cir. 1990); *U.S. v. Sloman,* 909 F.2d 176, 182–83 (6th Cir. 1990); *U.S. v. Meitinger,* 901 F.2d 27, 28–29 (4th Cir. 1990); *U.S. v. Williams,* 897 F.2d 1034, 1040 (10th Cir.

1990); *U.S. v. Terzado-Madruga,* 897 F.2d 1099, 1122–24 (11th Cir. 1990); *U.S. v. Thomas,* 895 F.2d 51, 57 (1st Cir. 1990); *U.S. v. Tharp,* 892 F.2d 691, 693–95 (8th Cir. 1989) [2#13]; *U.S. v. Rosa,* 891 F.2d 1063, 1069 (3d Cir. 1989); *U.S. v. Story,* 891 F.2d 988, 992–96 (2d Cir. 1990); *U.S. v. Gray,* 876 F.2d 1411, 1418 (9th Cir. 1989); *U.S. v. White,* 869 F.2d 822, 826–27 (5th Cir. 1989) [2#3]. See also *U.S. v. Boyd,* 208 F.3d 638, 648–49 (7th Cir. 2000) (affirmed: although defendant did not have a leadership role after Nov. 1, 1987, he remained a member of the conspiracy after that date and §3B1.1(a) was properly applied).

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

Note that this issue may also affect the calculation of the criminal history score, such as whether defendant will receive points under §4A1.1(d) for committing the offense while still on probation. See, e.g., *U.S. v. Mitchell,* 49 F.3d 769, 784 (D.C. Cir. 1995) (affirming use of §4A1.1(d) because defendant did not meet burden of proving he withdrew from drug conspiracy before being placed on probation for other offense).

As with continuing offenses, the version of the Guidelines Manual in effect at the end of a series of related offenses will be applied at sentencing. "[T]he one book rule, together with the Guidelines grouping rules and relevant conduct, provide that related offenses committed in a series will be sentenced together under the Sentencing Guidelines Manual in effect at the end of the series. Thus, a defendant knows, when he continues to commit related crimes, that he risks sentencing for all of his offenses under the latest, amended Sentencing Guidelines Manual. Analogous to a continuous criminal offense, like conspiracy, the one book rule provides notice that otherwise discrete criminal acts will be sentenced together under the Guidelines in effect at the time of the last of those acts." *U.S. v. Bailey,* 123 F.3d 1381, 1404–05 (11th Cir. 1997) (remanded: defendant should have been sentenced under Nov. 1991 Guidelines for series of related offenses that occurred from Feb.

1989 to Apr. 1992). See also section I.E.3 and the summary of *U.S. v. Cooper,* 35 F.3d 1248 (8th Cir. 1994).

For defendants whose participation in a continuing offense falls on both sides of their eighteenth birthday, courts may need to distinguish between conduct attributable to them as juveniles and as adults. The D.C. Circuit examined this issue extensively in a recent case, including the effect federal juvenile delinquency law may have. The court ultimately concluded that, because "there was overwhelming evidence of post-eighteen action [by defendant] in furtherance of the conspiracy . . . , the Guidelines unambiguously permit the court to consider his and his co-conspirator's foreseeable conduct 'that occurred during the commission of the [entire conspiracy] offense,' . . . starting when he joined the conspiracy at age eleven." *U.S. v. Thomas,* 114 F.3d 228, 262–67 (D.C. Cir. 1997) [9#8]. Cf. *U.S. v. Gibbs,* 182 F.3d 408, 442 (6th Cir. 1999) ("As long as the government successfully prosecutes a defendant for a crime that occurred after the defendant reached the age of majority, the district court may consider relevant conduct that occurred before the defendant reached the requisite age as long as such conduct falls within the limitations set forth in §1B1.3(a)(2).").

J. Assimilative Crimes Act, Indian Major Crimes Act

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

The Ninth Circuit made clear that a state statutory minimum sentence, like a federal mandatory minimum, becomes the guideline sentence pursuant to §5G1.1(b), even if the guideline range is lower. An ACA defendant was subject to a 24–30 month guideline range but, as a repeat offender, he faced a forty-month minimum under state law. His forty-month sentence was affirmed. "The U.S. Sentencing Guidelines, U.S.S.G. §2X5.1 comment. (n.1); the Sentencing Reform Act, 18 U.S.C. §3551(a); and the Ninth Circuit precedent all make clear that the federal sentencing guidelines do not preempt the state sentencing statutes under the ACA. Rather, the state sentencing law is 'assimilated' into federal law and is applied in conjunction with the guidelines to offenses occurring on federal enclaves to ensure

that such offenders receive 'like punishment.' . . . In this case, [the Hawaii Repeat Offender Statute] is treated the same as if it were a mandatory minimum sentencing provision contained in the U.S. Code, such as 21 U.S.C. §841(b), and U.S.S.G. §5G1.1(b) applies." *U.S. v. Kaneakua,* 105 F.3d 463, 466 (9th Cir. 1997).

The "like punishment" clause in 18 U.S.C. §13 has been read to require "similar," not identical, punishment. See, e.g., *U.S. v. Pierce,* 75 F.3d 173, 177 (4th Cir. 1996) ("a term of supervised release is 'like' [state] parole for the purposes of the ACA"); *U.S. v. Engelhorn,* 122 F.3d 508, 511–13 (8th Cir. 1997) (following reasoning of *Pierce* in affirming imposition of supervised release term to follow state maximum sentence of one-year prison term); *U.S. v. Burke,* 113 F.3d 211, 211 (11th Cir. 1997) (adopting reasoning of *Pierce*); *U.S. v. Reyes,* 48 F.3d 435, 438–39 (9th Cir. 1995) (purpose and operation of federal supervised release is similar enough to probation in Hawaii to constitute like punishment); *Marmolejo,* 915 F.2d at 984–85 (same, for parole in Texas); *Garcia,* 893 F.2d at 255–56 (finding that sentence with one-year supervised release term was consistent with state sentence that included mandatory one-year parole term). See also *U.S. v. Rapal,* 146 F.3d 661, 665 (9th Cir. 1998) (affirmed: "like punishment" clause of ACA "does not preclude a combined term of imprisonment (within the state statutory maximum) and supervised release that exceeds the maximum term of incarceration permitted under state law"); *Engelhorn,* 122 F.3d at 513 (affirmed: court may impose maximum prison term to be followed by term of supervised release).

The Eleventh Circuit "extend[ed] the reasoning in *Burke*, *Pierce*, and *Engelhorn* to the context of probation and h[e]ld that federal probation policy warrants an exception to the ACA's general requirement that a federal defendant receive a sentence within the maximum and minimum terms set by assimilated state law. . . . When assimilated state law provisions conflict with federal policy, federal policy controls." The court thus allowed a five-year term of probation, despite the state maximum of one year, in "a clear example of a case in which a federal judge sentencing under the ACA needed to depart from state law to preserve the policies behind the federal probation statutes, 18 U.S.C. §§3561–3566." The court noted that a six-month prison term could have been imposed, and that "our holding merely permits federal judges the flexibility to impose a term of *probation* in excess of what state law would permit. We leave intact the established rule that a term of incarceration under the ACA cannot exceed the limits set by assimilated state law." *U.S. v. Gaskell,* 134 F.3d 1039, 1043–45 (11th Cir. 1998). But cf. *U.S. v. Martinez,* 274 F.3d 897, 906–09 (5th Cir. 2001) (remanded: where state law mandated concurrent sentences and the state maximum was ten years, error to make sentences consecutive and depart upward to achieve thirty-two-year sentence).

The Ninth Circuit held that the guidelines apply to the Indian Major Crimes Act only if the offense is defined and punished under federal law; otherwise, defendant should be sentenced under state law. *U.S. v. Bear,* 932 F.2d 1279, 1282–83 (9th Cir. 1990) (replacing 915 F.2d 1259 [3#15]). The court later agreed with the Eighth Circuit that "the Guideline range must still be confined by state law, as it must fall within the minimum, if any, and the maximum sentence established by state law."

U.S. v. Male Juvenile, 280 F.3d 1008, 1024 (9th Cir. 2002) (following *U.S. v. Norquay,* 905 F.2d 1157, 1161 (8th Cir. 1990)). The *Norquay* court also interpreted the Indian Major Crimes Act to require district courts to follow the sentencing guidelines, rather than state law, when choosing between consecutive and concurrent sentences. 905 F.2d at 1162–63.

K. Juvenile Sentencing

In general, the guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act, but under 18 U.S.C. §5037(c), a juvenile delinquent may not receive a sentence longer than he or she would be subject to if sentenced as an adult under the guidelines. *U.S. v. R.L.C.,* 112 S. Ct. 1329, 1339 (1992) [4#19], *aff'g* 915 F.2d 320, 325 (8th Cir. 1992) [3#14], *and overruling U.S. v. Marco L.,* 868 F.2d 1121, 1124 (9th Cir. 1989) ("maximum term of imprisonment" is "that term prescribed by the statute defining the offense") [3#14]. The sentence may exceed the otherwise applicable guideline range if there is an aggravating factor that warrants upward departure, see USSG §1B1.12, and one court has held that the procedural requirements that apply to adult departures should be used for juveniles, *U.S. v. Juvenile PWM,* 121 F.3d 382, 384 (8th Cir. 1997) (remanded). Cf. *U.S. v. A.J.,* 190 F.3d 873, 875 (8th Cir. 1999) (affirming sentence of nineteen months after revocation of probation—although §7B1.4 would have called for three- to nine-month sentence for adult, the Guidelines do not apply to juveniles and, in any event, Chapter 7 is not mandatory).

The Ninth Circuit held that a juvenile cannot be sentenced to a term of release to follow detention. "Nothing in the [Federal Juvenile Delinquency] Act authorizes supervised release as a sentencing option." The court rejected the government's claims that other statutes authorized supervised release for delinquents." *U.S. v. Doe,* 53 F.3d 1081, 1083–84 (9th Cir. 1995). Similarly, the Fifth Circuit held that a juvenile cannot be sentenced to a term of supervised release after probation is revoked and a prison term imposed, even if the juvenile is over eighteen at the time of revocation. "[W]hen a juvenile's probation is revoked, that juvenile must be resentenced as a juvenile under 18 U.S.C. §5037," which "does not include supervised release as a possible sentencing alternative." *U.S. v. Sealed Appellant,* 123 F.3d 232, 233–35 (5th Cir. 1997).

Note that conduct committed by a juvenile may be included as relevant conduct if related to an offense for which defendant is prosecuted after age eighteen. See cases in sections I.A.4 (Other issues) and I.I.

II. Offense Conduct

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

A. Drug Quantity—Setting Offense Level

1. Relevant Conduct—Defendant's Conduct

The offense level should be determined by the amount of drugs in the defendant's relevant conduct, not just amounts in the offense of conviction or charged in the indictment. *U.S. v. Cousineau,* 929 F.2d 64, 67 (2d Cir. 1991); *U.S. v. Restrepo,* 903 F.2d 648, 652–53 (9th Cir. 1990) [3#7] (partially withdrawn and replaced by 946 F.2d 654 (1991) [4#9]); *U.S. v. Alston,* 895 F.2d 1362, 1369–70 (11th Cir. 1990) [3#5]; *U.S. v. White,* 888 F.2d 490, 500 (7th Cir. 1989); *U.S. v. Allen,* 886 F.2d 143, 145–46 (8th Cir. 1989) [2#13]; *U.S. v. Sailes,* 872 F.2d 735, 737–39 (6th Cir. 1989) [2#5]; *U.S. v. Sarasti,* 869 F.2d 805, 806–07 (5th Cir. 1989) [2#4]. This may include drug quantities in counts that have been dismissed, *U.S. v. Mak,* 926 F.2d 112, 113 (1st Cir. 1991); *U.S. v. Williams,* 917 F.2d 112, 114 (3d Cir. 1990); *U.S. v. Turner*, 898 F.2d 705, 711 (9th Cir. 1990); *U.S. v. Smith,* 887 F.2d 104, 106–08 (6th Cir. 1989) [2#14], or on which defendant was acquitted, *U.S. v. Rivera-Lopez,* 928 F.2d 372, 372–73 (11th Cir. 1991).

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

The Sixth Circuit held that uncharged conduct used for adjustment or departure must have a sufficient connection to the offense of conviction to meet the definition of relevant conduct. The court rejected the use of conduct that, although it occurred in the course of defendant's overall drug dealing, was not connected to the one drug distribution of which he was convicted. *U.S. v. Cross,* 121 F.3d 234, 238–40 (6th Cir. 1997) [10#2].

a. "Same course of conduct"

Under §1B1.1(a)(2), the quantity of drugs attributable to defendant includes amounts "that were part of the same course of conduct . . . as the offense of conviction." Application Note 9(B) explains that other offenses are included in the same course of conduct "if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." Factors to consider "include the degree of similarity of the of-

fenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required." See also discussion in section I.A.2.

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

The latter part of Note 9(B) was taken from a Ninth Circuit case that held that "the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity. . . . When one component is absent, however, courts must look for a stronger presence of at least one of the other components." *U.S. v. Hahn,* 960 F.2d 903, 909–11 (9th Cir. 1992) (remanded to determine whether past drug sales meet test) [4#20]. See also *U.S. v. Wall,* 180 F.3d 641, 645–47 (5th Cir. 1999) (remanded: although 1992 offense of conviction and dismissed 1996 and 1997 charges all involved bringing marijuana to U.S. from Mexico, "temporal distance between the offenses, the lack of regularity, and the weak similarity between the offense of conviction and the later offenses compel us to conclude that the later offenses cannot properly be considered as relevant conduct"); *U.S. v. Jackson,* 161 F.3d 24, 28–30 (D.C. Cir. 1998) (affirmed inclusion of four-year-old cocaine deal—although regularity and temporal proximity were lacking, inclusion was justified by "extreme similarity" of deals and fact that lapse of time was partly caused by imprisonment of key participant); *U.S. v. Robins*, 978 F.2d 881, 890 (5th Cir. 1992) (affirmed: marijuana distributions prior to eighteen-month hiatus were still part of same course of conduct or common scheme or plan as subsequent distributions); *U.S. v. Nunez,* 958 F.2d 196, 198–99 (7th Cir. 1992) (affirmed: uncharged 1986–1988 and 1990 cocaine sales for defendant arrested in Oct. 1990 "amounted to the same course of conduct"—all sales made to same buyer and sole interruption was buyer's imprisonment); Cf. *U.S. v. Hill,* 79 F.3d 1477, 1480–85 (6th Cir. 1996) (error to include crack from 1991 charge at sentencing for crack and powder cocaine offense committed nineteen months later—temporal proximity was "extremely

weak," regularity was "completely absent," and there was too little similarity to meet relevant conduct test); *U.S. v. Fermin,* 32 F.3d 674, 681 (2d Cir. 1994) (remanded: drug quantities from 1983–1985 drug records could not be used as relevant conduct in 1990–1991 conspiracy offense—government failed to show high degree of similarity or regularity required where temporal proximity is lacking); *U.S. v. Montoya,* 952 F.2d 226, 229 (8th Cir. 1991) (reversed: later attempt to purchase marijuana was not part of "same course of conduct" as conviction for conspiracy to distribute cocaine—only common element was presence of defendant). See also cases in section I.A.2.

The Eleventh Circuit held that a drug sale to one individual that occurred at about the same time as, but was totally separate from, defendant's sales to the conspiracy of conviction, was not relevant conduct under §1B1.3(a)(2). "[T]he background commentary to U.S.S.G. §1B1.3(a)(2) states that it is generally meant to apply to offenses that 'involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units.' When an act of misconduct can be easily distinguished from the charged offense, a separate charge is required. . . . This is not to say that, in calculating a defendant's base offense level for a drug conspiracy conviction, uncharged drug sales to persons outside of the conspiracy can never be included. . . . [U]ncharged criminal activity outside of a charged conspiracy may be included in sentencing if the uncharged activity is sufficiently related to the conspiracy for which the defendant was convicted. . . . Under the facts of this case, however, the uncharged drug sales were totally unrelated to the conspiracy, and thus should not have been included in calculating the defendant's base offense level." *U.S. v. Gomez,* 164 F.3d 1354, 1357 (11th Cir. 1999).

b. Knowledge of amount

Note that it has been held that a defendant need not know the exact amount of drugs he or she actually possessed in order to be held responsible for the full amount. "[I]n a possession case the sentence should be based on the total amount of drugs in the defendant's possession, without regard to foreseeability. . . . [A] defendant who knows she is carrying some quantity of illegal drugs should be sentenced for the full amount on her person." *U.S. v. de Velasquez,* 28 F.3d 2, 4–6 (2d Cir. 1994) (affirmed: proper to include heroin hidden in defendant's shoes, though she claimed she did not know it was there) [6#17]. Accord *U.S. v. Mesa-Farias,* 53 F.3d 258, 260 (9th Cir. 1995) (affirmed: adopting reasoning of *de Velasquez*, holding that reasonable foreseeability test does not apply to drugs possessed by conspirator). See also *U.S. v. Imariagbe,* 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant is responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; court noted that "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," but this is not such a case); USSG §1B1.3, comment. (n.2) ("the defendant is accountable for all quantities of contraband with which he was directly involved," and the reasonable foreseeability requirement "does not apply to conduct that the

defendant personally undertakes"). Cf. *U.S. v. Taffe,* 36 F.3d 1047, 1050 (11th Cir. 1994) (affirmed: defendant properly held responsible for full amount of cocaine in bags that he conspired to steal for distribution even though he did not know how much was in the bags—object of conspiracy was to possess all of the cocaine; however, defendant only responsible for one bag on possession count because that is all he actually possessed).

c. Amounts for personal use

Whether drugs possessed by a defendant for personal use are used in setting the offense level may depend on the offense of conviction. For example, the Ninth Circuit held that drugs possessed by defendant that were solely for personal use should not be used to set the offense level for possession of cocaine with intent to distribute. "Drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution." *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993) [6#9]. Accord *U.S. v. Williams,* 247 F.3d 353, 357–59 (2d Cir. 2001) (remanded: when there is no conspiracy, "the act of setting aside narcotics for personal consumption is not only not a *part of* a scheme or plan to distribute these drugs, it is actually *exclusive* of any plan to distribute them"); *U.S. v. Fraser,* 243 F.3d 473, 475–76 (8th Cir. 2001) (remanded: agreeing with *Kipp* that, for possession with intent to distribute offense, "[k]eeping drugs for oneself is not within 'the common scheme or plan' of selling, giving, or passing them to another; therefore, personal-use quantities are not relevant conduct") [11#4]; *U.S. v. Wyss,* 147 F.3d 631, 632 (7th Cir. 1998) (remanded: "Possession of illegal drugs for personal use cannot be grouped with other offenses. §3D1.2(d); see §2D2.1. It was therefore improper for the judge to take account of the defendant's [uncharged] possession of cocaine for personal use (if that is what she did) in sentencing him for possession with intent to distribute [marijuana]"; but also agreeing with cases below, noting that "[t]he case would be different . . . if the charge were conspiracy rather than possession.").

However, most circuits have held that, when the offense charged is a conspiracy, drugs for personal use should be included if they were "part of the same course of conduct or common scheme or plan" as the conspiracy. See *U.S. v. Page,* 232 F.3d 536, 542 (6th Cir. 2000) (affirmed: "drugs obtained by defendant from his supplier for his personal use were properly included by the district court in determining the quantity of drugs that the defendant knew were distributed by the conspiracy"); *U.S. v. Antonietti*, 86 F.3d 206, 209–10 (11th Cir. 1996) (affirmed: marijuana retained for personal use was relevant to amount distributed by conspiracy); *U.S. v. Snook*, 60 F.3d 394, 396 (7th Cir. 1996) (affirmed: all cocaine came from same supplier, whether sold or consumed by defendant, and amount defendant used directly affected conspiracy—"the more Snook used, the more he had to sell to bank-roll his habit") [8#1]; *U.S. v. Precin*, 23 F.3d 1215, 1219 (7th Cir. 1994) (affirmed: proper to include cocaine defendant received as "commission" for selling—"cocaine which

Precin received for his personal use was necessarily intertwined with the success of the distribution" conspiracy); *U.S. v. Brown*, 19 F.3d 1246, 1248 (8th Cir. 1994) (affirmed: it was not error to include amounts of cocaine base that drug conspirator purchased for personal use); *U.S. v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993) (same—"defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy"). Cf. *U.S. v. Wood*, 57 F.3d 913, 920 (10th Cir. 1995) (affirmed: "defendants were convicted of manufacturing marijuana. Thus, the entire quantity of marijuana manufactured by defendants was properly included in the aggregate drug quantity amount," including amounts they claimed were for personal use); *U.S. v. Thomas*, 49 F.3d 253, 259–60 (6th Cir. 1995) (affirmed: not clearly erroneous for district court to reject defendant's claim that 2.15 grams of the crack he possessed was for his personal use—undercover agent testified that "a mere user would never have this much" crack at one time, only dealers would).

The Tenth Circuit agreed that drugs possessed for personal consumption may be considered as relevant conduct in setting the guideline range for a defendant convicted of conspiracy to distribute and to possess with intent to distribute controlled substances. However, for sentencing under 21 U.S.C. §841(b), including possible mandatory minimums, only drugs that relate to the conspiracy's "common objective of distribution and possession with intent to distribute" may be counted. Absent evidence that the defendant "agreed to or intended to distribute the drugs she personally consumed," those amounts cannot be included under §841(b). Although the government bears the "ultimate burden of proof" on drug quantity, "defendant bears the burden of producing evidence of her intent to consume" in order to exclude those amounts. *U.S. v. Asch,* 207 F.3d 1238, 1243–46 (10th Cir. 2000). See also *Williams,* 247 F.3d at 358–59 (remanded: for possession with intent to distribute offense, "in calculating the quantity of drugs relevant for purposes of sentencing under 21 U.S.C. §841, any fractional quantity of drugs intended for personal use must be excluded") [11#4]; *U.S. v. Rodriguez-Sanchez,* 23 F.3d 1488, 1493–96 (9th Cir. 1994) (remanded: for defendant convicted of possessing methamphetamine with intent to distribute, drug amounts for mandatory minimum sentences under §841(b)(1)(A) include only amount defendant intended to distribute, not amounts possessed for personal use—"the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession") [6#14].

d. Other issues

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

from previously imposed state sentence that was part of or related to conduct underlying instant federal offense may be included as relevant conduct; see §4A1.2(a)(1), "prior sentence" does not include sentence for conduct that was "part of the instant offense") [4#2].

Normally, proof of drug quantities from uncharged relevant conduct need to be proved only by a preponderance of the evidence. However, the Second Circuit has held that "a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence." The court remanded a finding of drug quantity because the government had not provided "specific evidence" that connected defendant to a particular quantity of drugs. See *U.S. v. Shonubi,* 103 F.3d 1085, 1087–92 (2d Cir. 1997) [9#4].

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

2. Relevant Conduct—"Jointly Undertaken Criminal Activity"

a. General requirements

The relevant conduct guideline, §1B1.3, and its commentary and examples were substantially revised, effective Nov. 1, 1992. Application Note 2 makes clear that in the case of jointly undertaken criminal activity, defendant is responsible for the conduct of others only if it "was both: (i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that activity." Note 1 adds that "[t]he principles and limits of sentencing accountability are not always the same as the principles and limits of criminal liability." Thus, a sentencing court must first determine the scope of each defendant's agreement with others, and then determine whether drugs attributed to others were reasonably foreseeable to that defendant within the scope of the agreement. See also *U.S. v. Weekly,* 118 F.3d 576, 578 (8th Cir. 1997) ("Relevant to the determination of reasonable foreseeability is whether and to what extent the defendant benefitted from his co-conspirator's activities, and whether the defendant demonstrated a substantial level of commitment to the conspiracy.").

Some courts had previously held that knowledge or foreseeability alone were enough, but now require reasonable foreseeability within the scope of the jointly undertaken criminal activity. See, e.g., *U.S. v. Cabrera-Baez,* 24 F.3d 283, 288 (D.C. Cir. 1994) ("Mere foreseeability is not enough: someone who belongs to a drug conspiracy may well be able to foresee that his co-venturers, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side

deals"); *U.S. v. Jenkins,* 4 F.3d 1338, 1346–47 (6th Cir. 1993) ("to charge one participant in a conspiracy with the conduct of the other participants" requires findings of foreseeability and conduct in furtherance of jointly undertaken criminal activity) [6#2]; *U.S. v. Irvin,* 2 F.3d 72, 75–78 (4th Cir. 1993) (in a drug conspiracy, "determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement") [6#2]; *U.S. v. Maserati,* 1 F.3d 330, 340 (5th Cir. 1993) ("Application Note 2 makes clear that criminal liability and relevant conduct are two different concepts, regardless of whether the indictment includes a conspiracy allegation"); *U.S. v. Garrido,* 995 F.2d 808, 813 (8th Cir. 1993) (simple knowledge that coconspirator possessed other drugs not enough—must show that those amounts were reasonably foreseeable and in furtherance of agreement) [5#15]; *U.S. v. Ismond,* 993 F.2d 1498, 1499 (11th Cir. 1993) ("to determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. . . . Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation") [5#15]. See also cases above in section I.A.1.

The Seventh Circuit held that a defendant is not accountable for prior or subsequent drug quantities unless the court specifically finds they were "reasonably foreseeable" to that defendant, and it stressed that "the most relevant factor in determining reasonable foreseeability" is "the scope of the defendant's agreement with other co-conspirators." *U.S. v. Edwards,* 945 F.2d 1387, 1391–97 (7th Cir. 1991) (remanding several sentences, originally based on entire amount of drugs distributed by conspiracy, for determination of specific amount of drugs attributable to each defendant) [4#12]. See also *U.S. v. Collado,* 975 F.2d 985, 991–95 (3d Cir. 1992) ("whether an individual defendant may be held accountable for amounts of drugs involved in reasonably foreseeable transactions conducted by co-conspirators depends upon the degree of the defendant's involvement in the conspiracy") [5#3]; *U.S. v. Jones,* 965 F.2d 1507, 1517 (8th Cir. 1992) ("For activities of a coconspirator to be 'reasonably foreseeable' to a defendant, they must fall within the scope of the agreement between the defendant and the other conspirators. . . . Thus, if a defendant agrees to aid a large-volume dealer in completing a single, small sale of drugs, the defendant will not be liable for prior or subsequent acts of the dealer that were not reasonably foreseeable. . . . Simply because a defendant knows that a dealer he works with sells large amounts of drugs to other people does not make the defendant liable for the dealer's other activities."). Cf. *U.S. v. Russell,* 76 F.3d 808, 812–13 (6th Cir. 1996) (remanded: drug transaction for which defendant "provided protection" was not "in furtherance of" drug sales that he made four months earlier or drug possession that occurred four months later); *U.S. v. Castellone,* 985 F.2d 21, 24–26 (1st Cir. 1993) (remanded: no evidence that defendant, who had made two drug sales to undercover officer, foresaw separately made third sale between officer and defendant's supplier, or that third sale was in furtherance of a common plan between defendant and his supplier). See also cases in next section.

Amount or type of drugs: Note that a defendant need not necessarily know or

foresee the *exact* amount of drugs involved in a criminal activity in order to be held responsible for the entire amount. "A defendant who conspires to transport for distribution a large quantity of drugs, but happens not to know the precise amount, pretty much takes his chances that the amount actually involved will be quite large." *U.S. v. De La Cruz,* 996 F.2d 1307, 1314 (1st Cir. 1993) (affirmed: defendant who drove truck transporting cocaine from warehouse may not have known exact amount but "must have known . . . that a very large quantity was involved"). See also USSG §1B1.3, comment. (n.2(a)(1)) (defendant who helps offload shipment of marijuana accountable for entire amount regardless of knowledge).

However, it has been held that a defendant must know, or reasonably foresee, the *type* of drug involved. The Fifth Circuit held that it was error to hold defendant responsible for crack cocaine when everyone involved thought it would be for powder cocaine, defendant was not present at the purchase, and only afterward was it discovered that crack cocaine was supplied. *U.S. v. Fike,* 82 F.3d 1315, 1326–27 (5th Cir. 1996).

Reasonable foreseeability is not, however, relevant under §1B1.3(a)(1)(A), comment. (n.2), which states that a defendant in a drug offense "is accountable for all quantities of contraband with which he was directly involved . . . . The requirement of reasonable foreseeability . . . does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A)." The Eighth Circuit followed Note 2 in holding defendants responsible for a cocaine shipment they personally received, despite their claim that they were expecting to receive marijuana as they had in the two previous shipments. "Through their own actions, the two men aided, abetted, and willfully caused the conveyance . . . of at least three packages. . . . [T]hey are accountable at sentencing for the full quantity of all illegal drugs located within the parcels." *U.S. v. Strange,* 102 F.3d 356, 359–61 (8th Cir. 1996).

Other circuits have reached similar conclusions. See, e.g., *U.S. v. Barbosa,* 271 F.3d 438, 459 (3d Cir. 2001) ("a defendant who is in actual possession of a particular controlled substance, while intending to distribute another, may be punished for the drug with which he is found to be in possession"); *U.S. v. Valencia-Gonzales,* 172 F.3d 344, 345–46 (5th Cir. 1999) (affirmed: although defendant claimed, and government stipulated he believed, that he was carrying cocaine rather than heroin, defendant was properly sentenced for heroin); *U.S. v. Mesa-Farias,* 53 F.3d 258, 260 (9th Cir. 1995) (affirmed: reasonable foreseeability test does not apply to drugs actually possessed by conspirator); *U.S. v. Lockhart,* 37 F.3d 1451, 1454 (10th Cir. 1994) (affirmed: defendant who drove car to facilitate drug transaction "knew that the purpose of the trip was to obtain cocaine. He therefore aided, abetted, and willfully caused the transaction. Under these circumstances, the quantity of drugs need not be foreseeable."); *U.S. v. Corral-Ibarra,* 25 F.3d 430, 437–38 (7th Cir. 1994) (despite defendant's claims that he only foresaw the two kilos of cocaine that he was sent to test, and evidence that other conspirators did not want him to know that fifty kilos were involved, defendant can be held responsible for full amount under §1B1.3(a)(1)(A), which does not require reasonable foreseeability; by testing the

cocaine, defendant "played a direct, personal role in furtherance of the attempt to obtain and distribute a large quantity of cocaine"). Cf. *U.S. v. Taffe,* 36 F.3d 1047, 1050 (11th Cir. 1994) (affirmed: although conspiracy defendant did not know how much cocaine was in warehouse and his attempted theft was interrupted by authorities after he had only stolen a portion of the drugs, he was properly held responsible for all 146 kilograms because "[n]othing in the actions of Taffe or his associates indicated that they planned to steal only a portion of the drugs at the warehouse").

The Second Circuit agrees that "the quantity of drugs attributed to a defendant need not be foreseeable to him when he personally participates, in a direct way, in a jointly undertaken drug transaction." However, the court ruled that §1B1.3(a)(1)(A) was not applicable to a conspiracy defendant who drove the car to an attempted cocaine sale because his "involvement . . . was not direct," he "was not aware that the purpose of his trip to the scene was to purchase cocaine," and he "did not constructively possess drugs or actually possess them." Thus, subsection 1(B) applied. Because the district court's finding that defendant did not foresee any amount was not clearly erroneous, it properly sentenced defendant using the offense level for the least amount of cocaine in the Drug Quantity Table. *U.S. v. Chalarca,* 95 F.3d 239, 244–45 (2d Cir. 1996). See also *U.S. v. Palafox-Mazon,* 198 F.3d 1182, 1187–91 (9th Cir. 2000) (affirmed: defendant "mules" properly held responsible for only marijuana each carried in backpack—although they traveled together, they were recruited separately, had never met until just before crossing the border, were led by a guide, and the circumstances generally indicated that their criminal activity was not "jointly undertaken").

Following the reasoning of *Chalarca,* the Tenth Circuit upheld a district court's decision to sentence a defendant only under the money laundering guidelines even though he was convicted of one count of conspiracy to distribute cocaine as well as two counts of money laundering. "[W]e believe the record supports the court's finding that no quantity of drugs was reasonably foreseeable to Mr. Morales. As stated, the record indicates Mr. Morales was simply a money launderer. . . . [T]here is no evidence Mr. Morales was present at the scene of any drug transaction. In fact, the government does not even allege Mr. Morales had any knowledge of the occurrence of a single drug transaction. . . . Because the district court did not err in determining Mr. Morales was not directly involved in the distribution of cocaine and no quantity of cocaine was reasonably foreseeable to Mr. Morales, the district court's decision to sentence Mr. Morales pursuant to the money laundering guidelines was proper." *U.S. v. Morales,* 108 F.3d 1213, 1227 (10th Cir. 1997) (also ruling that, although district court could have converted amount of money laundered into quantity of cocaine, "we do not believe the trial court was obligated to do so").

Where defendants clearly negotiated to purchase one load of marijuana and "[n]o other quantity was foreseeable to them," it was error to include as relevant conduct an initial load of marijuana that was rejected as inferior by defendants before they later accepted another load. "[T]he commentary to U.S.S.G. §2D1.1 states that, 'in a reverse sting, the agreed-upon quantity of the controlled substance would more

accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant.' U.S.S.G. §2D1.1 comment. (n.12). . . . [T]his section is intended to ensure that unscrupulous law enforcement officials do not increase the amount delivered to the defendant and therefore increase the amount of the defendant's sentence. Although there is absolutely no evidence that such a motivation actually existed in this case, the facts demonstrate the danger. . . . It would have been possible for the confidential informant to supply low-grade marijuana in the expectation of its being rejected and in that way to increase the amount received, but never retained for distribution, by the defendants." *U.S. v. Mankiewicz,* 122 F.3d 399, 402 (7th Cir. 1997) [10#3].

b. Conduct before or after defendant's involvement

May drug quantities distributed by the conspiracy before defendant joined be used to set the offense level? A Nov.1994 amendment to §1B1.3, comment. (n.2), addressed this issue as follows: "A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct . . . . The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted." See also *U.S. v. Bad Wound,* 203 F.3d 1072, 1077–78 (8th Cir. 2000) (applying Note 2 in money laundering conspiracy case). Cf. *U.S. v. Thomas,* 114 F.3d 228, 262–67 (D.C. Cir. 1997) (discussing under what circumstances defendant may be held responsible for co-conspirators' conduct before he turned eighteen) [9#8].

Previously, courts had indicated it was possible, but not likely. The Seventh Circuit indicated earlier quantities could be included if "reasonably foreseeable" and within the scope of the agreement, *U.S. v. Edwards*, 945 F.2d 1387, 1397 (7th Cir. 1991), and the later affirmed such an attribution to a defendant who joined in the middle of a conspiracy but was "an experienced drug dealer who was accustomed to dealing with 'kilo quantities' of cocaine." *U.S. v. Mojica,* 984 F.2d 1426, 1446 (7th Cir. 1993) (finding that defendant could reasonably foresee that 6.5 kilograms of cocaine were involved in conspiracy was not clearly erroneous). See also *U.S. v. Phillips,* 37 F.3d 1210, 1214–15 (7th Cir. 1994) (affirmed: defendant properly held responsible for amounts distributed in two months before he joined conspiracy based on his "degree of commitment to the conspiracy," role in collecting debts for cocaine sold before his joining, and "extensive dealings with two individuals" who were members of conspiracy before him).

The First Circuit, however, held that a conspiracy defendant could not logically be found to have "reasonably foreseen" drug amounts distributed before he joined the conspiracy, and thus should not have the earlier amounts used to set his base offense level. "We are of the view that the base offense level of a co-conspirator at sentencing should reflect only the quantity of drugs he reasonably foresees it is the object of the conspiracy to distribute after he joins the conspiracy. In making [that

determination], the earlier transactions of the conspiracy before he joins but of which he is aware will be useful evidence. However, a new entrant cannot have his base offense level enhanced at sentencing for drug distributions made prior to his entrance merely because he knew they took place." *U.S. v. O'Campo,* 973 F.2d 1015, 1023–26 (1st Cir. 1992). See also *U.S. v. Perulena,* 146 F.3d 1332, 1335–37 (11th Cir. 1998) (following relevant conduct guidelines to reject inclusion of drugs smuggled into U.S. eleven months before defendant joined conspiracy); *U.S. v. Carreon,* 11 F.3d 1225, 1235–36 (5th Cir. 1994) ("'relevant conduct' as defined in §1B1.3(a)(1)(B) is prospective only, and consequently cannot include conduct occurring before a defendant joins a conspiracy"; however, knowledge of prior conduct may be evidence of what defendant agreed to and reasonably foresaw when he joined conspiracy) [6#10]; *U.S. v. Collado,* 975 F.2d 985, 997 (3d Cir. 1992) ("In the absence of unusual circumstances . . . conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of that agreement") [5#3]; *U.S. v. Chavez-Gutierrez,* 961 F.2d 1476, 1479 (9th Cir. 1992) (for defendant convicted of aiding and abetting one drug sale, it was error to attribute prior distributions to him absent a showing that he aided and abetted prior distributions or was member of conspiracy to do so—defendant must be "criminally liable" for distribution to be charged to him) [4#23]; *U.S. v. Miranda-Ortiz,* 926 F.2d 172, 178 (2d Cir. 1991) (defendant who joined conspiracy near its end for only one transaction involving one kilogram of cocaine should have sentence based on that amount without inclusion of four to five kilograms distributed before he joined and that he did not know about) [4#2].

Note, however, that drugs distributed by a defendant before joining a conspiracy may be included in that defendant's offense calculation if they qualify as being "part of the same course of conduct or common scheme or plan as the offense of conviction" under §1B1.3(a)(2). The Tenth Circuit upheld the inclusion of cocaine that one defendant distributed before he joined the conspiracy of conviction because the only difference with distributions during the conspiracy was the source of supply. *U.S. v. Ruiz-Castro,* 92 F.3d 1519, 1536–37 (10th Cir. 1996).

The Fifth Circuit has held that a defendant might be held responsible for drugs distributed by the conspiracy after he was incarcerated, depending on whether he effectively withdrew from the conspiracy. However, the incarceration may have "some effect on the foreseeability of the acts of his co-conspirators occurring after his" arrest. *U.S. v. Puig-Infante,* 19 F.3d 929, 945–46 (5th Cir. 1994) (remanded). The Third Circuit agreed that incarceration may affect foreseeability: "While we reject a *per se* rule that arrest automatically bars attribution to a defendant of drugs distributed after that date, we agree that since '[t]he relevant conduct provision limits accomplice attribution to conduct committed in furtherance of the activity the defendant agreed to undertake,' . . . a defendant cannot be held responsible for conduct committed after he or she could no longer assist or monitor his or her co-conspirators." *U.S. v. Price,* 13 F.3d 711, 732 (3d Cir. 1994) (affirmed because district court relied on amounts distributed before incarceration). Cf. *U.S. v. Schorovsky,* 202 F.3d 727, 729 (5th Cir. 2000) (remanded: defendant should not have been sen-

tenced for drugs distributed after she effectively withdrew from heroin conspiracy by breaking with coconspirators, entering rehab program, and having no further contact with conspiracy members); *U.S. v. Chitty,* 15 F.3d 159, 161–62 (11th Cir. 1994) (remanded for resentencing under pre-guidelines law: defendant whose only participation in drug conspiracy was limited solely to helping with one drug shipment in June 1987 was properly convicted of conspiracy, but cannot be sentenced for later actions of other conspirators—"There is no evidence that Chitty knew anything of the conspiracy's past operations . . . or that future shipments were contemplated . . . . At most, the evidence showed Chitty to be a participant in a one-shot, transitory storage of a single shipment").

c. Findings

Generally, the circuits have stressed the need for specific findings on the quantity of drugs that were reasonably foreseeable to each defendant. See *U.S. v. Anderson,* 39 F.3d 331, 353 (D.C. Cir. 1994) (remanded for "specific, individualized findings regarding the quantity of drugs each appellant might have reasonably foreseen his or her agreed-upon participation would involve"), *vacated in part on other grounds,* 59 F.3d 1323 (D.C. Cir. 1995) (en banc); *U.S. v. Rogers,* 982 F.2d 1241, 1246 (8th Cir. 1993) (remanded: finding that "by virtue of the conspiracy conviction" LSD sales attributed to codefendant are also attributable to defendant was insufficient statement of reasons); *U.S. v. Lanni*, 970 F.2d 1092, 1093 (2d Cir. 1992) (remanded: must make specific findings of drug amounts reasonably foreseeable by each coconspirator) [5#2]; *U.S. v. Perkins,* 963 F.2d 1523, 1528 (D.C. Cir. 1992) (remanded: court must make express finding that drugs possessed by codefendant were foreseeable); *U.S. v. Chavez-Gutierrez,* 961 F.2d 1476, 1481 (9th Cir. 1992) (remanded: court must make express finding that defendant was accountable for drugs distributed by others before the date of defendant's drug offense) [4#23]; *U.S. v. Blankenship,* 954 F.2d 1224, 1227–28 (6th Cir. 1992) (remanded for specific findings as to whether defendant knew or should have known that codefendant possessed other drugs, or that object of conspiracy was to possess such drugs); *U.S. v. Puma,* 937 F.2d 151, 159–60 (5th Cir. 1991) (remanded: district court must make specific finding of amount each conspirator knew or should have known or foreseen was involved; conviction does not automatically mean every conspirator foresaw total amount involved). See also *U.S. v. Mitchell,* 964 F.2d 454, 458–61 (5th Cir. 1992) (remanded: while defendant had previously purchased small amounts of cocaine, no evidence that he knew conspiracy was dealing with twenty kilograms) [5#1]; *U.S. v. Johnson,* 956 F.2d 894, 906–07 (9th Cir. 1992) ("minor" participant in drug conspiracy can be sentenced only for drugs distributed before he was taken into custody) [4#16].

Findings on the extent of a defendant's involvement in a conspiracy must be supported by evidence, not simply based on hypothesis. See, e.g., *U.S. v. Hoskins,* 173 F.3d 351, 355–57 (6th Cir. 1999) (remanded: error to assume that any marijuana grown and sold by either of two top dealers in area could be attributed to each

one—"We believe the sentencing guidelines require a more particularized finding."); *U.S. v. Adams,* 1 F.3d 1566, 1580–81 (11th Cir. 1993) (remanded: for defendant who participated in only one attempted flight to pick up marijuana, it was error to attribute to him "a hypothetical second load that [he] never attempted to transport. . . . There was no evidence that Adams intended to be involved with another flight or that it was foreseeable to him that there would be another flight") [6#4]. Cf. *U.S. v. Booze,* 108 F.3d 378, 381, 384 (D.C. Cir. 1997) (when defendant challenges amount of drugs reasonably foreseen, "the government must proffer sufficiently reliable evidence to support its factual assertions as to the scope of a defendant's conspiratorial agreement and the quantity of drugs reasonably foreseeable to the defendant. . . . Once the government follows these procedures, it remains for the defense to proffer evidence of its own, placing factual issues in dispute, or to point out that the government's proffers are deficient or insufficiently comprehensive. Where the defense offers no evidence to refute the factual assertions by the government, the district court may adopt those facts without further inquiry. . . . Absent specific challenges by appellant, the district court was entitled to rely on the trial record references cited by the government as the basis for its own factual findings.").

3. Mandatory Minimum Sentences and Other Issues

a. Mandatory minimums

Some circuits have held that the amount of drugs attributable to a conspiracy defendant for purposes of statutory minimums under 21 U.S.C. §§841(b) and 846 is not set by the jury verdict or indictment but should be calculated by the district court under the same standards used for the guidelines. See, e.g., *U.S. v. Aguayo-Delgado,* 220 F.3d 926, 929–34 (8th Cir. 2000) (affirmed, but noting that sentence must be within statutory maximum authorized by jury verdict) [10#8]; *U.S. v. Swiney,* 203 F.3d 397, 401–03 (6th Cir. 2000) (remanded: determination of whether and which defendants should receive mandatory minimum sentence under 21 U.S.C. §841(b)(1)(C), for death resulting from heroin distributed by conspiracy, should be determined under guidelines treatment of conspiracy and relevant conduct); *U.S. v. Jinadu,* 98 F.3d 239, 247–49 (6th Cir. 1996) (remanded: "district court erred in determining that the amount of drugs charged in the indictment controlled in regard to the imposition of a mandatory minimum sentence"); *U.S. v. Ruiz,* 43 F.3d 985, 992 (5th Cir. 1995) ("standards for determining the quantity of drugs involved in a conspiracy for guideline sentencing purposes apply in determining whether to impose the statutory minimums prescribed in §841(b)"); *U.S. v. Castaneda,* 9 F.3d 761, 769–70 (9th Cir. 1993) (remanded: amounts listed in indictment do not control sentencing; quantity is determined "in accord with the Guidelines, [by] the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty") [6#5]; *U.S. v. Irvin,* 2 F.3d 72, 75–78 (4th Cir. 1993) (use relevant conduct section of the guidelines to "determine the application of §841(b) for a defendant who has been convicted of §846") [6#2]; *U.S. v. Young,* 997 F.2d 1204, 1210 (7th Cir. 1993) (remanded: "in imposing a sentence for conspiracy

under the mandatory provisions of section 841(b), the district court must determine the quantity of drugs that the defendant could reasonably have foreseen," using the analysis from *U.S. v. Edwards,* 945 F.2d 1387 (7th Cir. 1991)) [5#15]; *U.S. v. Martinez,* 987 F.2d 920, 924–26 (2d Cir. 1993) (remanded: must find that defendant knew or reasonably should have known about cocaine sold by other conspiracy defendant—"the same 'reasonable foreseeability' standard of the Guidelines must be applied to sentencing for conspiracy under 21 U.S.C. §846") [5#10]; *U.S. v. Jones,* 965 F.2d 1507, 1516–17 (8th Cir. 1992) (fact that government stated amount in indictment and jury convicted defendant on that charge did not determine amount of drugs for sentencing: "The same standards govern the district court's drug quantity determination for section 841(b) and the Sentencing Guidelines"). See also *U.S. v. Madkins,* 14 F.3d 277, 279 (5th Cir. 1994) (indicating agreement with above cases); *U.S. v. Moore,* 968 F.2d 216, 224 (2d Cir. 1992) ("district court, rather than the jury, must determine pursuant to Guidelines Section 2D1.4 the quantities involved in narcotics offenses for the purpose of Section 841(b)").

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

However, several circuits have held that relevant conduct may not be considered for mandatory minimum purposes when that conduct is outside the offense of conviction. The Second Circuit vacated a mandatory sentence that was based on the inclusion of relevant conduct that was not part of the offense of conviction. "Unlike the Guidelines, which require a sentencing court to consider similar conduct in setting a sentence, the statutory mandatory minimum sentences of 21 U.S.C. §841(b)(1) apply only to the conduct which actually resulted in a conviction under that statute." *U.S. v. Darmand,* 3 F.3d 1578, 1581 (2d Cir. 1993) (in sentencing for Feb. 1992 cocaine conspiracy, drugs from dismissed Nov. 1991 cocaine possession count were properly used to compute guideline range, but cannot be used toward mandatory minimum quantity) [6#4]. See also *U.S. v. Rodriguez,* 67 F.3d 1312, 1324 (7th Cir. 1995) (citing *Darmand* and stating that "[w]hile the guidelines look to behavior that was part of the same course of conduct as the offense of conviction, . . . the statute looks 'only to the conduct which actually resulted in a conviction under that statute'"). The Fourth Circuit agreed, holding that "[t]he mandatory minimum sentence is applied based only on conduct attributable to the offense of conviction." Thus, marijuana from a separate conspiracy that was not charged "could not be properly considered in determining the applicability of the mandatory minimum

sentence under §841(b)." *U.S. v. Estrada,* 42 F.3d 228, 231–33 (4th Cir. 1994) (remanded) [7#5]. Cf. *U.S. v. Carrozza,* 4 F.3d 70, 81 (1st Cir. 1993) (statutory maximum sentence for RICO offense "must be determined by the conduct alleged within the four corners of the indictment," not by uncharged relevant conduct) [6#4].

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

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

The Tenth Circuit originally held that quantities of drugs that trigger a mandatory minimum sentence are not limited to those in the indictment, but also include amounts in relevant conduct. When this may happen, however, the court must so advise defendant in taking a guilty plea. *U.S. v. McCann,* 940 F.2d 1352, 1358 (10th Cir. 1991) (remanded: court should have considered quantities of drugs in relevant conduct, even though they were not listed in indictment; however, defendant "is entitled to plead anew" because he was not informed he could thus be subject to mandatory minimum). See also *U.S. v. Watch,* 7 F.3d 422, 426–29 (5th Cir. 1993) (remanded: district court violated Rule 11 by not informing defendant at the plea colloquy that he could be subject to mandatory minimum even though the indictment purposely omitted alleging drug quantity in order to avoid a mandatory minimum—quantity is determined by court at sentencing, not by indictment) [6#6]. The court later joined the circuits above in holding that "drug quantities triggering the mandatory sentences prescribed in §841(b) are determined exclusively by reference to the offense of conviction. . . . Nothing [in §841(b)] suggests consideration

of drug quantities collateral to the underlying §841(a) violation." *U.S. v. Santos,* 195 F.3d 549, 551–53 (10th Cir. 1999). The court partially abrogated *U.S. v. Reyes,* 40 F.3d 1148, 1151 (10th Cir. 1994), which, following *McCann,* had included drug amounts outside the offense of conviction to reach the mandatory minimum.

Similarly, the guidelines method of using negotiated amounts, see §2D1.1, comment. (n.12), may not be appropriate for mandatory minimum calculations. The Fifth Circuit held that, for a defendant convicted of conspiracy to distribute heroin, only amounts that defendant "actually possessed or conspired . . . to actually possess" could be used for mandatory sentences under §841(b)(1)(A)(i). "Mere proof of the amounts 'negotiated' with the undercover agents . . . would not count toward the quantity of heroin applicable to the conspiracy count." *U.S. v. Mergerson,* 4 F.3d 337, 346–47 (5th Cir. 1993) (remanded: proof of negotiated amounts was sufficient to set guideline range, but insufficient for statutory minimum) [6#1]. See also *U.S. v. Flowal,* 163 F.3d 956, 960 (6th Cir. 1998) (remanded: "it is improper for the court to use intent as an element in determining the weight of narcotics for sentencing purposes" under §841(b)). The First Circuit, however, concluded that "application note 12 provides the *threshold* drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. §841(b)(1)(A)(ii)" and held that a defendant's "inability to produce the additional three kilograms was no impediment to [the] imposition of the ten-year minimum sentence mandated by statute." Defendant was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective." *U.S. v. Pion,* 25 F.3d 18, 24–25 & n.12 (1st Cir. 1994) [6#16].

The Eleventh Circuit held that it would use the new, narrower guidelines definition for cocaine base in §2D1.1(c) ("cocaine base" means "crack") in determining whether a mandatory minimum sentence applied under 21 U.S.C. §960(b), contrary to an earlier decision that all forms of cocaine base were included in §960(b): "[W]e think it is proper for us to look to the Guidelines in the mandatory minimum statute, especially since both provisions seek to address the same problem. . . . There is no reason for us to assume that Congress meant for 'cocaine base' to have more than one definition." *U.S. v. Munoz-Realpe,* 21 F.3d 375, 377–78 (11th Cir. 1994) (because defendant's liquid cocaine base mixture was not "crack," it should be treated as cocaine hydrochloride) [6#13]. But cf. Contra *U.S. v. Jackson,* 59 F.3d 1421, 1422–24 (2d Cir. 1995) (refusing to follow *Munoz-Realpe* rationale, holding that it would not change circuit precedent by using broader definition of cocaine base for statutory minimums under 21 U.S.C. §841(b) in favor of narrower definition in amendment to guidelines).

On the other hand, most circuits have held that the Nov. 1993 amendments to §2D1.1(c) that changed the guideline method for calculating the weight of LSD do not control the calculation for mandatory minimums. Rather, that calculation is still controlled by the holding of *Chapman v. U.S.,* 500 U.S. 453, 468 (1991), that the weight of the carrier medium is included. See cases in section II.B.1 below.

The Ninth Circuit held that, for a defendant convicted of possessing methamphetamine with intent to distribute, drug amounts for mandatory minimum sen-

tences under §841(b)(1)(A) include only the amount defendant intended to distribute, not amounts possessed for personal use. *U.S. v. Rodriguez-Sanchez,* 23 F.3d 1488, 1493–96 (9th Cir. 1994) (remanded: "the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession") [6#14]. The court held that it was not bound by *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1994), see section II.A.1, but that "the principle behind that decision guides our decision." Accord *U.S. v. Asch*, 207 F.3d 1238, 1243–46 (10th Cir. 2000) (although amounts for personal consumption may be counted as relevant conduct under the Guidelines, cannot be used under §841(b)).

b. Reduction under §2D1.1(b)(6)

> If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

USSG §2D1.1(b)(6) (as amended Nov. 1, 2001) (formerly §2D1.1(b)(4).

The Second Circuit held that, although application of §2D1.1(b)(6) is tied to meeting the requirements of §5C1.2, it can be applied to a defendant who is not subject to a statutory minimum sentence. "Had the Sentencing Commission intended to limit the application of §2D1.1 to those defendants who are subject to a mandatory minimum sentence, it could easily have done so . . . . Instead, Congress and the Commission chose to draft §5C1.2 in such a way that, by its plain terms, it applies whenever the offense level is 26 or greater and the defendant meets all of the criteria set forth in §5C1.2(1)–(5), regardless of whether §5C1.2 applies independently to the case." In addition, the Commission "placed the reduction in §2D1.1, which applies to *all* defendants who have been convicted of drug crimes, regardless of whether or not they are subject to mandatory minimum sentences." *U.S. v. Osei,* 107 F.3d 101, 102–05 (2d Cir. 1997) (remanding for determination of whether defendant met §5C1.2(1)–(5) criteria) [9#6]. See also *U.S. v. Leonard,* 157 F.3d 343, 346 (5th Cir. 1998) ("The language of §2D1.1(b)(4) is clear and unambiguous. Its directive is not discretionary. Thus, given that the appellant clearly met the criteria of §5C1.2(1)–(5), his offense level was greater than 25, and he did not waive the error, the district court committed plain error in failing to decrease the appellant's offense level by two, instead of one, levels."). Cf. *U.S. v. Mertilus,* 111 F.3d 870, 874 (11th Cir. 1997) (remanded: although §2D1.1(b)(4) uses the factors listed in §5C1.2, the two sections operate independently and it was error not to consider §2D1.1(b)(4) reduction because offense of conviction is not listed in §5C1.2 as eligible for safety valve).

[Note: Unless rejected by Congress, a new Application Note to §2D1.1 will largely incorporate the holding of the preceding cases. Note 21 will clarify that "[t]he applicability of subsection (b)(6) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b) . . . is not pertinent to the determination of whether subsection (b)(6) applies."

As some circuits have done with §5C1.2, see *Outline* at V.F.2.f, the Seventh Circuit distinguished §2D1.1(b)(6) from §3E1.1 in holding that a defendant may meet the requirements of §5C1.2—and thus receive the §2D1.1(b)(6) reduction—even if an acceptance of responsibility reduction is denied. "Section 5C1.2(5) in one respect demands more of an effort from the defendant than §3E1.1(a), . . . but in other respects may demand less. Under §5C1.2(5), the defendant is required to provide the necessary information 'not later than the time of the sentencing hearing.' . . . In contrast, the commentary to §3E1.1 advises the district court that it may consider whether the defendant provided information in a timely manner. . . . Likewise, the commentary to §3E1.1 points to prompt and voluntary surrender and voluntary termination of criminal conduct as factors for consideration, while neither the text nor commentary for §5C1.2 highlights such factors. Assuming that the district court in Webb's case appropriately awarded a §5C1.2 reduction, it was nevertheless permitted to refuse a §3E1.1(a) reduction." *U.S. v. Webb,* 110 F.3d 444, 447–48 (7th Cir. 1997) (affirmed: proper to deny §3E1.1 reduction to defendant who failed to appear for plea hearing, turned himself in seven months later, and did not fully admit his criminal conduct until sentencing hearing, while granting §2D1.1(b)(6) reduction because he did fully admit his conduct) [9#7]. See also *U.S. v. Sabir,* 117 F.3d 750, 753–54 (3d Cir. 1997) (citing *Webb* for proposition that defendant who qualifies for safety valve does not necessarily qualify for §3E1.1 reduction).

See also section V.F. Exception to Mandatory Minimum, §5C1.2

c. Amounts in verdict, evidence, or indictment

Note: The Eighth Circuit recently held that, although a court may determine facts that increase a defendant's sentence, or that require a mandatory minimum, within the statutory range authorized by the jury's verdict, facts that would increase the sentence beyond that range must be found by the jury. The opinion, *U.S. v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000), is based on two recent Supreme Court cases and is summarized in 10 GSU #8.

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

The Supreme Court recently affirmed that the sentencing court, not the jury, determines the kind and amount of drugs attributable to a defendant. "The Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon

amount and kind. . . . Consequently, regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine whether the 'controlled substances' at issue—and how much of those substances—consisted of cocaine, crack, or both." The Court did note that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," but that was not the case here. *Edwards v. U.S.,* 118 S. Ct. 1475, 1477 (1998) [9#8], *aff'g* 105 F.3d 1179 (7th Cir. 1997). See also *U.S. v. Lewis,* 113 F.3d 487, 490 (3d Cir. 1997) (jury instruction that it had to find that defendant distributed cocaine or cocaine base to convict him of §841(a)(1) distribution offense was not improper—district court determines weight and identity of controlled substance for sentencing under §841(b)).

Nor does a conspiracy conviction require a sentence based on all drugs charged in the indictment. See, e.g., *U.S. v. Jinadu,* 98 F.3d 239, 247–49 (6th Cir. 1996) (remanded: "district court erred in determining that the amount of drugs charged in the indictment controlled in regard to the imposition of a mandatory minimum sentence" for conspiracy defendant); *U.S. v. Gilliam,* 987 F.2d 1009, 1012–13 (4th Cir. 1993) (remanded: error to automatically attribute to conspiracy defendant total quantity of drugs attributed to conspiracy in indictment to which he pled guilty; unless there is a specific attribution to defendant, an admission or stipulation, the court must make an independent determination under §1B1.3(a)(1) of amount attributable to defendant) [5#9]; *U.S. v. Navarro,* 979 F.2d 786, 788–89 (9th Cir. 1992) (remanded: improper to hold defendant accountable for drugs sold subsequent to his participation in conspiracy despite conspiracy conviction) [5#6]. See also USSG §1B1.3, comment. (n.1) (1992) ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability.").

d. Felony or misdemeanor?

When quantity determines whether the conviction is a felony or misdemeanor, as in a possession offense under 21 U.S.C. §844(a), the circuits are split on whether the jury must find quantity in the verdict or the court determines it at sentencing. Because this decision is driven by quantity and can increase the statutory maximum, it would appear that *Apprendi v. New Jersey* would require quantity to be considered an element of the offense that must be found by the jury. See summary of *Apprendi* in section II.A.4.

Some circuits have held that the third sentence of §844(a), which specifies penalties for defendants convicted of possessing certain amounts of cocaine base, is a penalty provision and the sentencing court determines whether defendant possessed the required quantity. See *U.S. v. Butler,* 74 F.3d 916, 921–24 (9th Cir. 1996) ("the first sentence of §844(a) establishes the crime of possession of a controlled substance. The second and third sentences . . . are penalty provisions which set forth factors to be determined by the sentencing court"); *U.S. v. Monk,* 15 F.3d 25, 27 (2d

Cir. 1994) ("quantity is not an element of simple possession because [21 U.S.C.] §844(a) prohibits the possession of *any* amount of a controlled substance, including crack. . . . The task of determining [quantity] falls to the sentencing judge . . . to find that *Monk* possessed more than 5 grams of crack in order to treat the crime as a felony") [6#8]; *U.S. v. Smith,* 34 F.3d 514, 518–20 (7th Cir. 1994) (following *Monk*). But see *U.S. v. Thomas,* 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (overruling *Monk* "insofar as [it] held that, under 21 U.S.C. 841, drug quantity resulting in a sentence above a statutory maximum constituted a sentencing factor, not an element of the offense").

Other circuits hold that the third sentence creates a separate offense that must be charged in the indictment and decided by the jury. See *U.S. v. Stone,* 139 F.3d 822, 834–38 (11th Cir. 1998) (concluding that "quantity of the substance is an element of the substantive §844(a) offense"); *U.S. v. Fitzgerald,* 89 F.3d 218, 222 (5th Cir. 1996) ("Because a quantity of cocaine base in excess of five grams makes misdemeanor possession of cocaine base a felony, the quantity of cocaine base is an essential element of felony possession of cocaine base proscribed in the third sentence of §844(a)" and indictment must charge amount for felony conviction); *U.S. v. Sharp,* 12 F.3d 605, 608 (6th Cir. 1993) (simple possession of crack is "a 'quantity dependant' crime, . . . and the facts relevant to guilt or innocence of that crime—including possession of a quantity of crack cocaine exceeding five grams—were for the jury to decide") [6#7]; *U.S. v. Puryear,* 940 F.2d 602, 604 (10th Cir. 1991) (same, for cocaine: "Absent a jury finding as to the amount of cocaine, the trial court may not decide of its own accord to enter a felony conviction and sentence, instead of a misdemeanor conviction and sentence, by resolving the crucial element of the amount of cocaine against the defendant"). See also *U.S. v. Michael,* 10 F.3d 838, 839 (D.C. Cir. 1993) (concluding that "the third sentence of §844(a) . . . creates an independent crime of possession of cocaine base, which is not included within §841(a) as a lesser included offense).

e. Purity

A court may consider the purity of the drugs in determining where to sentence within the guideline range, *U.S. v. Baker,* 883 F.2d 13, 15 (5th Cir. 1989) [2#13], but is not required to reduce the offense level for low drug purity, *U.S. v. Davis,* 868 F.2d 1390 (5th Cir. 1989) [2#3]. The Ninth Circuit has concluded that "the low purity of heroin involved in a crime cannot be categorically excluded as a basis for a downward departure." *U.S. v. Mikaelian,* 168 F.3d 380, 390 (9th Cir. 1999) (but affirming refusal to depart because defendant did not factually establish heroin was of low purity).

The Eighth Circuit held that departure was prohibited for low purity of methamphetamine. In addition to Note 9, §2D1.1 at Note (B) provides that offense levels for methamphetamine mixtures are determined "by the entire weight of the mixture or substance, or the offense level determined by the weight of the . . . methamphetamine (actual), whichever is greater." Thus, "departure below this 'greater' of-

fense level solely on the basis of a mixture's low methamphetamine purity would directly contradict and effectively eviscerate the Commission's explicit formula directing courts to sentence methamphetamine violations by the method yielding the greatest base offense level." *U.S. v. Beltran,* 122 F.3d 1156, 1159 (8th Cir. 1997) [10#3].

However, the Ninth Circuit held that a defendant's lack of knowledge of the high purity of methamphetamine should not have been categorically excluded as a potential basis for downward departure. The court reasoned that Note 9 only precludes *upward* departure for an unusually high purity of methamphetamine, and that whether Note 14—which limits departures based on quantity—should be read to limit departures based on purity was a question for the district court to resolve in the first instance under the specific facts of the case. *U.S. v. Mendoza,* 121 F.3d 510, 513–15 (9th Cir. 1997) [10#2]. Cf. *U.S. v. Eads,* 191 F.3d 1206, 1212 (10th Cir. 1999) (rejecting defendant's argument that, since government supplied methamphetamine in undercover operation, and therefore controlled the purity, his sentence should not be based on amount of actual methamphetamine but on weight of entire mixture, which would result in lower sentence).

Unusually high drug purity, "except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity," may provide a basis for upward departure. USSG §2D1.1, comment. (n.9). See also *U.S. v. Legarda,* 17 F.3d 496, 501 (1st Cir. 1994); *U.S. v. Connor*, 992 F.2d 1459, 1463 (7th Cir. 1993); *U.S. v. Ryan,* 866 F.2d 604, 606–10 (3d Cir. 1989) [2#1].

Note 9 states in part that "[t]he purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution." The Seventh Circuit read this to mean that "this is the *only* function of Application Note 9: a higher sentence is appropriate only when purity 'is probative of the defendant's role or position in the chain of distribution,'" not simply on the basis of high purity in and of itself. "Note 9 permits an increase when it is not possible to establish a supervisory role in the conventional way, and the position in the organization must be inferred from the purity of the drug." Because of this, "departure should be limited to the number of levels that could be awarded under §3B1.1," and it was error for the district court to base the extent of its departure by using "traditional street-level purities" to calculate that defendant's 250 grams of 70 percent pure heroin would have resulted in over 2.5 kilograms of "street purity heroin." The court also held that no departure was warranted, because the district court "made it clear that his *only* reason for adjusting Cones's sentence was a belief that drug quantities *as a rule* should be converted to street-level purity." *U.S. v. Cones,* 195 F.3d 941, 944–45 (7th Cir. 1999).

4. *Apprendi* Issues

a. General and procedural issues

In *Apprendi v. New Jersey,* 120 S. Ct. 2348, 2362–63 (2000), the Supreme Court changed longstanding sentencing practice by requiring that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The *Apprendi* decision built upon the reasoning of *Jones v. U.S.,* 119 S. Ct. 1215, 1228–29 (1999), which had interpreted the federal carjacking statute, 18 U.S.C. §2119, to establish three separate offenses, with different maximum penalties, that would have to be charged and found by a jury beyond a reasonable doubt. It reached that decision in part to avoid the "serious constitutional questions" that would arise by treating the statute as one offense with different sentencing enhancements, found by the court rather than a jury, that increased the maximum statutory penalty.

Although *Apprendi* involved a state statute, one of its greatest impacts has been on the federal drug sentencing statute at 21 U.S.C. §841(b). The usual practice had been for the district court to treat quantity as a sentencing factor that it determined at sentencing by a preponderance of the evidence. The circuits have uniformly held that *Apprendi* applies to drug quantities that increase the statutory maximum sentence under §841(b)(1)(A) or (B). Therefore, before a defendant can be sentenced above the basic statutory maximums in §841(c)(1)(C), the quantities required for the higher maximums in subsections (A) and (B) must be charged in the indictment and found by a jury. See, e.g., *U.S. v. Promise,* 255 F.3d 150, 156–57 (4th Cir. 2001) (en banc); *U.S. v. Doggett,* 230 F.3d 160, 164–66 (5th Cir. 2000) [11#2]; *U.S. v. Rogers,* 228 F.3d 1318, 1326–30 (11th Cir. 2000) [11#2]; *U.S. v. Nordby,* 225 F.3d 1053, 1058–59 (9th Cir. 2000) [11#1]; *U.S. v. Aguayo-Delgado,* 220 F.3d 926, 929–34 (8th Cir. 2000) [10#8].

Note that it has been held that "drug identity must be treated as an element only when it results in a sentence beyond the relevant statutory maximum. *Apprendi* therefore does not necessarily preclude a sentencing judge from determining the drug identity involved in a §841 offense or considering it as relevant conduct under the Sentencing Guidelines using a preponderance of the evidence standard. So long as the resulting, and possibly enhanced, sentence is below the statutory maximum authorized by the jury's factual findings, no *Apprendi* problem exists and drug identity need not be treated as an element of the offense." *U.S. v. Barbosa,* 271 F.3d 438, 457 (3d Cir. 2001). Cf. *U.S. v. Henry,* 282 F.3d 242, 244–45 (3d Cir. 2001) (in light of *Apprendi* error, remanded "for a determination by a jury, beyond a reasonable doubt, as to the identity and quantity of the drug possessed by Henry with intent to distribute, and then for resentencing").

Plain error review: The Supreme Court recently resolved a conflict in the circuits over whether failure to allege quantity in the indictment was subject to plain error review when defendant failed to object in the district court. The Court held that "defects in an indictment do not deprive a court of its power to adjudicate a case"

and the plain error test of Fed. R. Crim. P. 52(b) applied. The Court concluded that there was error under the rule of *Apprendi*, but "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the evidence in support of the sentence imposed was "overwhelming" and "essentially uncontroverted." *U.S. v. Cotton,* 122 S. Ct. 1781, 1783–87 (2002) [11#5].

Two circuits had held that failure to charge quantity in the indictment could not be harmless error because it deprives a court of jurisdiction to sentence a defendant to a term greater than the maximum that applies when no specific threshold drug quantity has been charged or proven, even if there are stipulations to or overwhelming evidence of a larger drug quantity. See *U.S. v. Cotton,* 261 F.3d 397, 404–07 (4th Cir. 2001); *U.S. v. Gonzalez,* 259 F.3d 355, 360 at n.3 (5th Cir. 2001).

However, most circuits to decide the issue had already been applying harmless error review, and had affirmed cases where the evidence of drug quantity was, as in *Cotton*, overwhelming or uncontroverted. See, e.g., *U.S. v. Vazquez,* 271 F.3d 93, 104–06 (3d Cir. 2001) (en banc); *U.S. v. Strickland,* 245 F.3d 368, 380–81 (4th Cir. 2001) [11#3]; *U.S. v. Terry,* 240 F.3d 65, 74–75 (1st Cir. 2001) [11#3]; *U.S. v. Anderson,* 236 F.3d 427, 429–30 (8th Cir. 2001) [11#3]; *U.S. v. Nealy,* 232 F.3d 825, 829–30 (11th Cir. 2000) [11#3]. See also *U.S. v. Noble,* 246 F.3d 946, 955–56 (7th Cir. 2001) (same, but here the evidence was insufficient to support quantity finding).

Similarly, several circuits also found harmless error or no plain error when the defendant had stipulated or otherwise agreed to the amount of drugs used in sentencing. See, e.g., *U.S. v. Camacho,* 248 F.3d 1286, 1290 (11th Cir. 2001) (affirmed: stipulation "acts as the equivalent of a jury finding on drug quantity") [11#3]; *U.S. v. DeLeon,* 247 F.3d 593, 597–98 (5th Cir. 2000) (affirmed: defendant's stipulation to quantity at trial supported his sentence under §841(b)(1)(B); also noting that use of a drug quantity range in the indictment, rather than a precise amount, satisfies *Apprendi* requirements) [11#3]; *U.S. v. Harper,* 246 F.3d 520, 530–31 (6th Cir. 2001) (affirmed: no *Apprendi* error when quantity is stipulated to and court did not rely on any facts outside plea agreement); *U.S. v. Duarte,* 246 F.3d 56, 62–64 (1st Cir. 2001) (affirmed: defendant "signed a plea agreement in which he unequivocally accepted responsibility for a specified amount of drugs . . . [that] took any issue about drug quantity out of the case"); *U.S. v. White,* 240 F.3d 127, 134 (2d Cir. 2001) (affirmed: "the parties entered stipulations regarding the type and quantity of drugs involved . . . , well over the 5 gram minimum required for sentencing under section 841(b)(1)(B)") [11#3]; *U.S. v. Jackson,* 240 F.3d 1245, 1249 (10th Cir. 2001) (affirmed: defendant "stipulated to a quantity of cocaine base at trial sufficient to support a sentence of up to forty years under 21 U.S.C. §841(b)(1)(B); therefore, drug type and quantity were no longer facts required to be determined by the jury") [11#3]; *U.S. v. Poulack,* 236 F.3d 932, 938 (8th Cir. 2001) (affirmed: no plain error where defendant stipulated to quantity) [11#3].

Consecutive sentences: When there are multiple counts of conviction, *Apprendi* applies to each individual count, not to the total sentence. Thus, if the calculated guideline range exceeds the highest statutory maximum available for any of the

counts, the sentences may be imposed consecutively to the extent necessary to reach the guideline sentence. In fact, some circuits have held that USSG §5G1.2(d) is mandatory and requires imposition of consecutive sentences in such circumstances. See, e.g., *U.S. v. Diaz,* 296 F.3d 680, 684–85 (8th Cir. 2002) (en banc); *U.S. v. McLean,* 287 F.3d 127, 136–37 (2d Cir. 2002); *U.S. v. Price,* 265 F.3d 1097, 1109 (10th Cir. 2001) [11#4]; *U.S. v. Angle,* 254 F.3d 514, 518–19 (4th Cir. 2001) (en banc) [11#4]; *U.S. v. Kentz,* 251 F.3d 835, 842 (9th Cir. 2001) [11#4]; *U.S. v. Page,* 232 F.3d 536, 542 (6th Cir. 2000) [11#2]. Other courts had held that §5G1.2(d) allows consecutive sentences without violating *Apprendi.* See, e.g., *U.S. v. McWaine,* 290 F.3d 265, 275–76 (5th Cir. 2002); *U.S. v. Le,* 256 F.3d 1229, 1240 & n.11 (11th Cir. 2001) [11#4]; *U.S. v. Parolin,* 239 F.3d 922, 929–30 (7th Cir. 2001); *U.S. v. Sturgis,* 238 F.3d 956, 960–61 (8th Cir. 2001) [11#4].

The Second Circuit agreed that using §5G1.2(d) does not violate *Apprendi*, but it remanded a defendant's effective life sentence under the Guidelines, reached by making consecutive the sentences for the six counts of conviction for a total of 240 years, because the district court erroneously indicated it had no discretion to depart. "[N]otwithstanding the apparent mandatory nature of section 5G1.2, a sentencing court may depart from the 'stacking' provision of that section to impose concurrent sentences where the imposition of multiple stacked sentences based on similar conduct created 'an aggravating or mitigating circumstance . . . .' More broadly, we have suggested that a sentencing court may depart downward where findings as to uncharged relevant conduct made by the sentencing court based on a preponderance of the evidence substantially increase the defendant's sentence under the Sentencing Guidelines." *U.S. v. White,* 240 F.3d 127, 132–37 (2d Cir. 2001) [11#4].

b. Mandatory minimums

The Supreme Court recently resolved another circuit split by holding that facts used to impose mandatory minimum sentences that are within the proper statutory maximum do not need to be charged in the indictment and proved beyond a reasonable doubt. The Court concluded that *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), was not overruled by *Apprendi* and courts may continue to impose mandatory minimum sentences after finding facts based on a preponderance of the evidence. *Harris v. U.S.,* 122 S. Ct. 2406, 2412–20 (2002) (affirming seven-year mandatory sentence for "brandishing" firearm as required by §924(c)(1)(A)(ii)) [11#5].

Most circuits had already held that facts used to impose a mandatory minimum sentence that is within the *Apprendi*-approved statutory maximum do not need to be found by a jury or otherwise proved beyond a reasonable doubt. See, e.g., *U.S. v. Sanchez,* 269 F.3d 1250, 1279 (11th Cir. 2001) (en banc); *U.S. v. Rodgers,* 245 F.3d 961, 965–67 (7th Cir. 2001) [11#3]; *U.S. v. Harris,* 243 F.3d 806, 809–12 (4th Cir. 2001); *U.S. v. LaFreniere,* 236 F.3d 41, 49–50 (1st Cir. 2001) [11#3]; *U.S. v. Keith,* 230 F.3d 784, 787 (5th Cir. 2000) [11#2]; *U.S. v. Aguayo-Delgado,* 220 F.3d 926, 934 (8th Cir. 2000) [11#3]. See also *U.S. v. Smith,* 223 F.3d 554, 563–66 (7th Cir. 2000)

(for defendants convicted of operating continuing criminal enterprise under 21 U.S.C. §848(a), which carries sentence of thirty years to life, *Apprendi* did not require submitting facts to jury that, under §848(b), would require mandatory life sentence) [11#1]. *Cf. U.S. v. Garcia-Guizar,* 234 F.3d 483, 489 (9th Cir. 2000) (affirming because "sentencing range of 168–210 months . . . exceeded the higher statutory minimum applied by the district court . . . [and] any *Apprendi* error could not have affected Garcia's sentence").

Before *Harris*, the Sixth Circuit had applied *Apprendi*'s reasoning to mandatory minimums, concluding that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." See *U.S. v. Ramirez,* 242 F.3d 348, 350–52 (6th Cir. 2001) [11#3]; *U.S. v. Flowal,* 234 F.3d 932, 936–38 (6th Cir. 2000) [11#3].

Also before *Harris*, the Second Circuit held that "if drug quantity is used to trigger a mandatory minimum sentence that exceeds the top of the Guideline range that the district court would otherwise have calculated (based on the court's factual findings, with or without departures), that quantity must be charged in the indictment and submitted to the jury." *U.S. v. Guevara,* 277 F.3d 111, 116–23 (2d Cir. 2001) (remanded). After *Cotton* and *Harris* were decided, the Second Circuit reheard the case and amended it, finding that *Cotton* required affirming the sentence because the evidence of drug quantity was overwhelming and therefore supported the sentence imposed. The court "d[id] not consider the impact (if any) of *Harris* on the *Apprendi* analysis set out in" its earlier opinion. *U.S. v. Guevara,* 298 F.3d 124, 127–28 (2d Cir. 2002) [11#5]. *See also U.S. v. Yu,* 285 F.3d 192, 196–98 (2d Cir. 2002) (remanded: applying *Guevara* to remand twenty-year mandatory minimum that was above guideline range for defendant who pled guilty to offenses charged in indictment but refused to admit to amounts specified in indictment and contested quantity at sentencing; on remand, any sentence based on §841(b)(1)(A) or (B) must be based on admission or beyond reasonable doubt fact-finding, or court may allow defendant to withdraw or modify plea). A later case noted that "[a]lthough at this time neither *Yu,* nor the case on which it relied for acceptance of the above-stated proposition, *United States v. Guevara,* . . . has been expressly overruled, we recognize that the Supreme Court's recent decision in *Harris* . . . , finding the imposition of a mandatory minimum sentence under 18 U.S.C. §924(c) not subject to *Apprendi* analysis, potentially undermines both these holdings." *U.S. v. Doe,* 297 F.3d 76, 89 at n.16 (2d Cir. 2002).

c. Interaction with the Sentencing Guidelines

Most circuits have now specifically held that, for sentences within the properly applicable statutory maximum, *Apprendi* does not apply to calculations under the Sentencing Guidelines. See, e.g., *U.S. v. Sealed Case,* 246 F.3d 696, 698–99 (D.C. Cir. 2001) [11#3]; *U.S. v. Jones,* 245 F.3d 645, 651 (7th Cir. 2001) [11#3]; *U.S. v.*

Sanchez, 242 F.3d 1294, 1299–1300 (11th Cir. 2001) [11#3]; *U.S. v. Caba,* 241 F.3d 98, 101 (1st Cir. 2001) [11#3]; *U.S. v. Garcia,* 240 F.3d 180, 183–84 (2d Cir. 2001)[11#3]; *U.S. v. Heckard,* 238 F.3d 1222, 1226 (10th Cir. 2001)[11#3]; *U.S. v. Kinter,* 235 F.3d 192, 201–02 (4th Cir. 2000) [11#3]; *U.S. v. Williams,* 235 F.3d 858, 862–63 (3d Cir. 2000) [11#3]; *U.S. v. Meshack,* 225 F.3d 556, 576 (5th Cir. 2000) [11#1].

However, the "Offense Statutory Maximum" is used to set the offense level under the career offender guideline. Note 2 of §4B1.1 defines the offense statutory maximum, in part, as "the maximum term of imprisonment authorized for the offense of conviction." Since *Apprendi* determines the "authorized" statutory maximum, courts must follow that case in setting the offense level under §4B1.1. See, e.g., *U.S. v. Webb,* 255 F.3d 890, 899–902 (D.C. Cir. 2001) ("Whatever the Sentencing Commission thought constituted an 'offense of conviction' when the guidelines were initially promulgated, we are confident that it intended that only a conviction that was in accord with governing law would qualify"; however, sentence survives plain error review because amounts were charged in indictment and evidence of quantity "was both overwhelming and uncontroverted"); *U.S. v. Gilliam,* 255 F.3d 428, 436 (7th Cir. 2001) (affirmed: recognizing that *Apprendi* is applicable to determination of "offense statutory maximum," but sentence survives plain error review because evidence of drug quantity was "overwhelmingly established"); *U.S. v. Saya,* 247 F.3d 929, 941–42 (9th Cir. 2001) (same, because defendant did not receive sentence longer than that authorized by jury's verdict); *U.S. v. Rogers,* 228 F.3d 1318, 1326–30 (11th Cir. 2000) (because *Apprendi* limited defendant's maximum sentence for offense of conviction to twenty years, it was error to set §4B1.1's "offense statutory maximum" at life and offense level at 37) [11#2]. See also *U.S. v. Alvarez,* 254 F.3d 725, 728 (8th Cir. 2001) (noting *Apprendi* error in setting "offense statutory maximum," but error was moot in this case).

d. Retroactivity

The Supreme Court did not rule that *Apprendi* was to be applied retroactively, and so far it has been applied only to cases on direct review. The circuits have rejected defendants' arguments that it should be applied retroactively on collateral review. For example, the Eighth Circuit rejected a defendant's appeal of the denial of his motion under 28 U.S.C. §2255, which had been pending when *Apprendi* was decided. The court agreed that defendant's sentence would have violated *Apprendi*, but held that *Apprendi* set forth a new rule of constitutional law that, under *Teague v. Lane,* 489 U.S. 288 (1989), is inapplicable to cases on collateral review. Nor did *Apprendi* fall within any of *Teague*'s exceptions, such as being a "watershed rule" that would "implicate the fundamental fairness of the trial" and allow for collateral review. *U.S. v. Moss,* 252 F.3d 993, 997–1001 (8th Cir. 2001) [11#4]. Accord *Curtis v. U.S.,* 294 F.3d 841, 842–44 (7th Cir. 2002) (agreeing with other circuits that *Apprendi* does not fall within any *Teague* exceptions that would allow retroactive application on collateral review); *McCoy v. U.S.,* 266 F.3d 1245, 1256–58 (11th Cir.

2001) ("*Apprendi* does not fall within either exception to *Teague*'s non-retroactivity standard") [11#4]; *U.S. v. Sanders,* 247 F.3d 139, 147–51 (4th Cir. 2001) (affirmed: "a rule which merely shifts the fact-finding duties from an impartial judge to a jury clearly does not fall within the scope of the second *Teague* exception"). See also *U.S. v. Sanchez-Cervantes,* 282 F.3d 664, 667–71 (9th Cir. 2002 (*Apprendi* has not been made retroactive so initial §2255 petition properly denied); *Jones v. Smith,* 231 F.3d 1227, 1236–38 (9th Cir. 2000) (in §2254 proceeding, finding that *Apprendi* rule does not fit within *Teague* exception "at least as applied to the omission of certain necessary elements from the state court information" where those elements were argued at trial and included in jury instructions).

The circuits have also held that *Apprendi* cannot be applied on a second or successive petition because it has not been "made retroactive to cases on collateral review by the Supreme Court," as required by §2244(b)(2)(A) (for §2254 petitions) and §2255. See, e.g., *Rees v. Hill,* 286 F.3d 1103, 1104 (9th Cir. 2002) (no successive §2244 petition because Supreme Court has not made *Apprendi* retroactive); *Rodgers v. U.S.,* 229 F.3d 704, 706 (8th Cir. 2000) (defendant cannot file second or successive motion under §2255 to vacate sentence based on *Apprendi* "because the Supreme Court has not made *Apprendi* retroactive to cases on collateral review, as required by the plain language of §2255") [11#2]; *Talbott v. Indiana,* 226 F.3d 866, 868–70 (7th Cir. 2000) (same, for §2244(b)(2)(A) also) [11#2]; *In re Joshua,* 224 F.3d 1281, 1283 (11th Cir. 2000) (same, for §2255) [11#1]; *Sustache-Rivera v. U.S.,* 221 F.3d 8, 15 (1st Cir. 2000) (same).

The Seventh Circuit issued a certificate of appealability after denial of a first petition under §2255 for the district court to decide the issue in the first instance. The court noted that the differences in wording, purpose, and procedure between the statutes for initial versus second or successive petitions warrant finding that a Supreme Court decision is not required before a newly recognized right may be made retroactive to cases on initial collateral review. "District and appellate courts, no less than the Supreme Court, may issue opinions 'holding' that a decision applies retroactively to cases on collateral review." See *Ashley v. U.S.,* 266 F.3d 671, 673 (7th Cir. 2001). See also *U.S. v. Lopez,* 248 F.3d 427, 431–32 (5th Cir. 2001) (same, but interpreting §2255 on different issue).

A recent Supreme Court decision may end the need for lower courts to determine whether *Apprendi* set forth a "watershed rule," at least for second or successive petitions. The Court examined the exception in §2244(b)(2)(A) that allows a second or successive §2254 petition based on a new rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." It concluded that "'made' means 'held' for purposes of §2244(b)" and thus "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." The Court discussed *Teague* and the watershed rule, but indicated that, at most, *Teague* could be used only to determine whether "this Court *should* make [a prior case] retroactive to cases on collateral review." That does not help petitioner because his motion must be dismissed under §2244 unless the Court had *already* made the new rule retroactive. *Tyler v. Cain,* 121 S. Ct. 2478, 2482–85

(2001) [11#4]. Following *Tyler*, the Sixth Circuit determined it did not have to reach petitioner's watershed rule claim in denying a motion to file a second petition under §2255, which has the same exception and language. The court reasoned that *Tyler* "stated that *Teague* is not controlling for collateral cases [under §§2254 and 2255]. . . . As the Supreme Court has not held that *Apprendi* applies retroactively to cases on collateral review, Clemmons's second petition fails to satisfy the requirements of 28 U.S.C. §2255." *In re Clemmons,* 259 F.3d 489, 492–93 (6th Cir. 2001). Accord *In re Turner,* 267 F.3d 225, 228–31 (3d Cir. 2001); *Forbes v. U.S.,* 262 F.3d 143, 145–46 (2d Cir. 2001).

B. Calculating Weight of Drugs

1. Drug Mixtures

a. LSD

The guidelines have been amended to provide a new method of establishing the weight of LSD, based on number of doses and an assigned weight per dose. See §2D1.1(c) at Note (H) and comment. (n.18) (Nov. 1993). This change is retroactive under §1B1.10. See *U.S. v. Coohey,* 11 F.3d 97, 100–01 (8th Cir. 1993) (upholding new method and remanding for consideration of retroactive application pursuant to §1B1.10) [6#9]. But cf. *U.S. v. Telman,* 28 F.3d 94, 96 (10th Cir. 1994) (under §1B1.10 a reduction "is not mandatory but is instead committed to the sound discretion of the trial court"; district court could properly conclude defendant did not merit lower sentence under amended LSD computation) [6#15]. See also the cases on retroactive application of amendments in section I.E.

The Supreme Court previously held that, under 21 U.S.C. §841(b), the weight of LSD includes the weight of the carrier medium. *Chapman v. U.S.,* 500 U.S. 453, 468 (1991), *aff'g U.S. v. Marshall,* 908 F.2d 1312, 1317–18 (7th Cir. 1990) (en banc). Other circuits had held the same. See *U.S. v. Elrod,* 898 F.2d 60, 61–63 (6th Cir. 1990); *U.S. v. Bishop,* 894 F.2d 981, 985–86 (8th Cir. 1990) [3#2]; *U.S. v. Daly,* 883 F.2d 313, 316–18 (4th Cir. 1989) [2#13]; *U.S. v. Taylor,* 868 F.2d 125, 127–28 (5th Cir. 1989) [2#3]. The First Circuit relied on *Chapman* to hold that a sentence based on the gross weight of LSD and the water it was dissolved in did not violate due process. *U.S. v. Lowden,* 955 F.2d 128, 130–31 (1st Cir. 1992) (defendant failed to show water was "unusual medium" for LSD).

Most circuits concluded that *Chapman* still controls the calculation for LSD mandatory minimum sentences, rather than the amended §2D1.1(c) method, and the Supreme Court reaffirmed *Chapman* and held that the guideline amendment does not affect the Court's interpretation of §841(b). See *Neal v. U.S.,* 116 S. Ct. 763, 766–69 (1996); *U.S. v. Muschik,* 89 F.3d 641, 644 (9th Cir. 1996) (following *Neal* and reversing earlier decision at 49 F.3d 512 that had held that amended guideline could be used to compute mandatory minimum amounts); *U.S. v. Kinder,* 64 F.3d 757, 760 (2d Cir. 1995) [7#11]; *U.S. v. Stoneking,* 60 F.3d 399, 402 (8th Cir. 1995) (en banc) (reversing decision at 34 F.3d 651 (8th Cir. 1994) [7#3]) [7#11]; *U.S. v.*

Pope, 58 F.3d 1567, 1570–72 (11th Cir. 1995) [7#11]; *U.S. v. Hanlin,* 48 F.3d 121, 124–25 (3d Cir. 1995) [7#7]; *U.S. v. Andress,* 47 F.3d 839, 841 (6th Cir. 1995) [7#7]; *U.S. v. Neal,* 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc) [7#7]; *U.S. v. Pardue,* 36 F.3d 429, 431 (5th Cir. 1994) (affirming denial of resentencing under amendment because defendant still subject to ten-year minimum under *Chapman*) [7#4]; *U.S. v. Mueller,* 27 F.3d 494, 496–97 (10th Cir. 1994) (defendant was not entitled to resentencing under §1B1.10 because, even though amended §2D1.1(c) would result in range of 18–24 months, defendant was still subject to five-year minimum) [6#15]; *U.S. v. Boot,* 25 F.3d 52, 54–55 (1st Cir. 1994) (defendant resentenced under amended §2D1.1(c) could not have his sentence reduced below five-year mandatory minimum that applied under *Chapman,* even though his guideline range was lowered from 121–151 months to 27–33 months) [6#15].

Before *Neal*, the Ninth Circuit had disagreed, finding the reasoning of the original *Stoneking* decision persuasive and holding 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,* 49 F.3d 512, 516–18 (9th Cir. 1995) [7#7], *vacated and remanded*, 116 S. Ct. 899 (1996).

Note that if a defendant qualifies for the safety valve provision, "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence." USSG §5C1.2. The Sixth Circuit held that, in such a case, the "gross weight" calculation of *Chapman* and *Neil* is not used. Rather, the weight-per-dose method of the Guidelines is used. *U.S. v. Powers,* 194 F.3d 700, 705–07 (6th Cir. 1999) (remanded: error to base offense level on gross weight of LSD mixture once defendant qualified for safety valve).

Some circuits have held that the amended, retroactive guideline calculation for LSD should be used to calculate the offense level for "liquid LSD," or LSD that is suspended in a solvent liquid that is not a carrier medium. See §2D1.1, comment. (n.16 & backg'd). Courts should calculate the weight of the LSD for guidelines purposes by using the weight of the pure LSD in the liquid or the number of doses, and may depart if the resulting offense level does not adequately reflect the seriousness of the offense. See *U.S. v. Ingram,* 67 F.3d 126, 128–29 (6th Cir. 1995) (remanded: however, *Chapman* still controls for calculating mandatory minimum sentence) [8#3]; *U.S. v. Turner,* 59 F.3d 481, 484–91 (4th Cir. 1995) [8#1]. See also *U.S. v. Morgan,* 292 F.3d 460, 463–65 (5th Cir. 2002) (remanded: same, and following *Ingram* regarding mandatory minimum); *U.S. v. Camacho,* 261 F.3d 1071, 1074–75 (11th Cir. 2001) (following *Turner* in holding Guidelines require using weight of LSD alone to determine offense level, with possibility of departure).

b. Other drug mixtures

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

A November 1995 amendment changed the method of determining the offense level for Schedule I and II depressants and Schedule III, IV, and V controlled substances from gross weight to "units," i.e., number of pills, capsules, or tablets. See §2D1.1(c) at Note (F) and changes in Drug Quantity Table and commentary. (Pills containing ephedrine, however, are treated as a listed chemical in §2D1.11.) This amendment is retroactive.

For other mixtures, a November 1993 amendment to §2D1.1's commentary, Note 1, generally directs that only usable amounts of drug mixtures be counted, but leaves room for departure in some instances: "Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. . . . If such material cannot readily be separated from the mixture or substance . . . , the court may use any reasonable method to approximate the weight of the mixture or substance to be counted. An upward departure nonetheless may be warranted when the mixture or substance . . . is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection." Note that this change is retroactive under §1B1.10(c). See *U.S. v. Innie,* 77 F.3d 1207, 1209 (9th Cir. 1996) ("Amendment 484 is a clarifying, retroactive amendment which the district court should have applied" to recalculate methamphetamine quantity); *U.S. v. Deninno,* 29 F.3d 572, 579 (10th Cir. 1994) (should have applied amendment, but in this case it would not have changed offense level); *U.S. v. Towe,* 26 F.3d 614, 617 (5th Cir. 1994) (remanding methamphetamine calculation for retroactive application of amendment). Cf. *U.S. v. Dorrough,* 84 F.3d 1309, 1311 (10th Cir. 1996) (affirmed: district court did not abuse discretion in finding that facts did not warrant retroactive application of Amendment 484 to change sentence for P2P offense). See also *U.S. v. Sprague,* 135 F.3d 1301, 1306 (9th Cir. 1998) (error to refuse §3582 motion to recalculate methamphetamine quantity

because mixture was intermediate solution in manufacturing process: "The inquiry under Amendment 484 is not whether the liquid mixtures seized . . . were waste product or intermediary solutions. Rather, what matters is the amount of material in the mixtures that had to be separated from the methamphetamine before it could be used.").

For purposes of calculating the mandatory minimum sentence, the Tenth Circuit held that *Chapman* requires using the full weight of a methamphetamine mixture rather than only the usable amounts under amended Note 1. See *U.S. v. Richards,* 87 F.3d 1152, 1156–57 (10th Cir. 1996) (en banc) (following decision in *Neal v. U.S.,* 116 S. Ct. 763, 766–69 (1996), that interpretation of §841(b) in *Chapman* applies to calculation of statutory minimums) [8#9], *rev'g* 67 F.3d 1531 (10th Cir. 1995) [8#3].

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

But several circuits read *Chapman* as calling for a market-oriented approach, which means excluding substances that are not normally sold or used as part of the final product. Thus, the weight of waste liquid, poisonous by-products, packing or transport materials, and other unmarketable substances should not be included as part of the drug mixture. See *U.S. v. Jackson,* 115 F.3d 843, 848 (11th Cir. 1997) (remanded: in kilogram package that was 99% sugar and only 1% cocaine, do not include weight of sugar); *U.S. v. Johnson,* 999 F.2d 1192, 1195–97 (7th Cir. 1993) (waste water, which contained trace of cocaine base, was "merely a by-product of the manufacturing process" with no market value and should not have been included) [6#2]; *U.S. v. Newsome,* 998 F.2d 1571, 1578 (11th Cir. 1993) (error to include discarded and unusable "sludge" with less than 1% methamphetamine) [6#3]; *U.S. v. Rodriguez*, 975 F.2d 999, 1004–07 (3d Cir. 1992) (do not include distinguishable, unusable boric acid that is neither cutting agent nor transport medium) [5#4]; *U.S. v. Acosta,* 963 F.2d 551, 553–57 (2d Cir. 1992) (unmarketable, distillable creme liqueur mixed with cocaine should not be included) [4#23]; *U.S. v. Salgado-Molina,* 967 F.2d 27, 28 (2d Cir. 1992) (following *Acosta*) [4#23]; *U.S. v. Bristol,* 964 F.2d 1088, 1090 (11th Cir. 1992) (where cocaine mixed with wine for

transporting, exclude wine); *U.S. v. Jennings,* 945 F.2d 129, 136–37 (6th Cir. 1991) (non-distributable, poisonous by-products should not be included in weight of methamphetamine mixture) [4#9]; *U.S. v. Rolande-Gabriel,* 938 F.2d 1231, 1235–38 (11th Cir. 1991) (unusable "liquid waste material" mixed with cocaine should not be included) [4#8]. Cf. *U.S. v. Tucker,* 20 F.3d 242, 244 (7th Cir. 1994) (proper to use weight of cocaine base at time of arrest for guidelines and mandatory minimum sentence purposes, rather than the smaller weight when reweighed several months later—weight loss was due to the evaporation of water, and water is part of the drug "mixture," not an excludable carrier medium or waste product) [6#12]; *U.S. v. Coleman,* 166 F.3d 428, 432 (2d Cir. 1999) (agreeing with *Tucker* in holding that weight of residual water did not have to be excluded from crack cocaine mixture that, "water included, was ready for sale and for use *as it was*").

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

c. Other methamphetamine issues

A November 1995 amendment to the Drug Equivalency Tables, §2D1.1, comment. (n.10.d), deleted the distinction between D- and L-methamphetamine and treats all forms of the drug as D-methamphetamine. (Note: For purposes of statutory minimum sentences, all methamphetamine has been treated the same. See, e.g., *U.S. v. DeJulius,* 121 F.3d 891, 894–95 (3d Cir. 1997) (remanded: "§841(b)(1)(A)(viii) makes no distinction between the different isomeric types of methamphetamine").)

Before this amendment, several circuits had held that the government must prove that the offense involved D-methamphetamine before the guideline offense level could be based on that form rather than the less severely punished L-methamphetamine. See *U.S. v. McEntire,* 153 F.3d 424, 432 (7th Cir. 1998) (government must

prove offense involved D-methamphetamine); *U.S. v. O'Bryant,* 136 F.3d 980, 981–82 (5th Cir. 1998) (same); *U.S. v. Burt,* 76 F.3d 1064, 1069 (9th Cir. 1996) ("failure to determine the type of methamphetamine constitutes plain error"); *U.S. v. Ramsdale,* 61 F.3d 825, 831–32 (11th Cir. 1995) (same); *U.S. v. Bogusz,* 43 F.3d 82, 88–92 (3d Cir. 1994) (remanded); *U.S. v. Deninno,* 29 F.3d 572, 580 (10th Cir. 1994) (but affirmed because defendant failed to timely object) [7#1]; *U.S. v. Patrick,* 983 F.2d 206, 208–10 (11th Cir. 1993) (remanded). See also *U.S. v. Wessels,* 12 F.3d 746, 754 (8th Cir. 1993) (error for district court to take judicial notice that methamphetamine in offense was D-methamphetamine—government has burden of proof on this issue). Cf. *U.S. v. Scrivener,* 114 F.3d 964, 968–69 (9th Cir. 1997) (affirmed: burden is on government to show initially that methamphetamine is involved; burden is on defendant to challenge type of methamphetamine).

The Third Circuit added that the "type of proof required to satisfy this standard will also vary from case to case. In some cases, the evidence will include a chemical analysis or expert testimony. In others, circumstantial evidence of which isomer is present may be sufficient to meet the preponderance of the evidence standard." *Bogusz,* 43 F.3d at 91–92 & n.17. See also *McEntire,* 153 F.3d at 432–34 (affirmed: examining other cases and agreeing that circumstantial evidence can be used to show substance was D-methamphetamine); *U.S. v. Dudden,* 65 F.3d 1461, 1471 (9th Cir. 1995) (remanded: although circumstantial evidence may be used, "general affidavits" from experts that, based on their experience, it was highly unlikely that L-methamphetamine was involved, are not sufficient); *U.S. v. Lande,* 40 F.3d 329, 331 (10th Cir. 1994) (affirming district court's finding of D-methamphetamine based upon circumstantial evidence); *U.S. v. Koonce,* 884 F.2d 349, 352–53 (8th Cir. 1989) (affirming D-methamphetamine determination based on circumstantial evidence of defendant's prior methamphetamine shipment).

However, some courts had also held that the term "Methamphetamine (actual)," see §2D1.1(c) at Note (B) (formerly n.*), refers to both 100% pure D-methamphetamine and a mixture of 100% pure DL-methamphetamine (50% of each type). See *U.S. v. Decker,* 55 F.3d 1509, 1512–13 (10th Cir. 1995) (affirmed: proper to use 50–50 mix of DL-methamphetamine to determine weight of "methamphetamine (actual)"); *U.S. v. Carroll,* 6 F.3d 735, 743–46 (11th Cir. 1993) (remanded: using earlier version of guidelines, holding that "pure methamphetamine" refers to either D- or DL-methamphetamine). Cf. *U.S. v. Behler,* 100 F.3d 632, 636–37 (8th Cir. 1996) (affirmed: "Since d,l-methamphetamine is a mixture or substance containing both l-methamphetamine and the more serious substance of d-methamphetamine, this more serious substance determines the category of the whole quantity for sentencing purposes."). But cf. *Bogusz,* 43 F.3d at 91 (without specifically ruling on status of DL-methamphetamine, holding that "the references to methamphetamine and methamphetamine (actual) . . . refer solely to quantities of D-methamphetamine").

See also section II.B.4.b

2. Marijuana

a. Live plants

There is a split in the circuits as to whether live plants must be seized in order to base the offense level on the number of marijuana plants, see §2D1.1(c) at Note (E) (formerly n.*), rather than actual weight. The commentary at Note 18 defines "plant" as "an organism having leaves and a readily observable root formation." Some circuits hold that live plants must have been seized. See, e.g., *U.S. v. Stevens,* 25 F.3d 318, 321–23 (6th Cir. 1994) (remanded: error to use number of plants defendant's supplier grew rather than weight of marijuana defendant distributed—the calculation for live plants should be applied "only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute 'relevant conduct' that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived") [6#17]; *U.S. v. Blume,* 967 F.2d 45, 49–50 (2d Cir. 1992) (remanded: when estimating past marijuana growing activity for relevant conduct, treat previously grown plants as dried and use weight, not number of plants); *U.S. v. Corley,* 909 F.2d 359, 361 (9th Cir. 1990) [3#11]; *U.S. v. Bradley,* 905 F.2d 359, 360 (11th Cir. 1990). See also *U.S. v. Osburn,* 955 F.2d 1500, 1509 (11th Cir. 1992) (upholding live plant ratio for growers versus weight for those who have harvested plants). Cf. *U.S. v. Silvers,* 84 F.3d 1317, 1321–25 (10th Cir. 1996) (defendant need not have actually grown the marijuana to have live plant ratio applied).

A growing number of circuits, however, have held that live plants need not have been seized if there is evidence that defendant was connected with growing the marijuana. The Seventh Circuit held that when a marijuana growing operation completes harvesting and processing of plants into the final product for distribution, the one plant = one kilogram ratio (now one plant = 100 grams) should still be used even though the weight of the final product is less. *U.S. v. Haynes,* 969 F.2d 569, 571–72 (7th Cir. 1992) (and noting holding is limited to cultivation, harvesting, and processing of marijuana—"it does not encompass the activities of those individuals who enter the marijuana distribution chain after the processing stage"). See also *U.S. v. Young,* 34 F.3d 500, 506 (7th Cir. 1994) (remanded: when basing weight on number of plants, that number "*must* have been reasonably foreseeable to the defendant"). Faced later with the specific issue of whether discarded, or "dead," plants can be used under Note E, the court "explicitly" held that "dead or alive, all 'plants' count." *U.S. v. Swanson,* 210 F.3d 788, 792 (7th Cir. 2000).

Similarly, the Ninth Circuit concluded that if "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." The court distinguished its contrary holding in *Corley* as based on an earlier version of the guidelines and statute, before Congress increased the ratio from 100 grams to

one kilogram per plant for producers of more than fifty plants. *U.S. v. Wegner,* 46 F.3d 924, 925–28 (9th Cir. 1995) [7#7]. Accord *U.S. v. Fitch,* 137 F.3d 277, 281–82 (5th Cir. 1998) (when "applying the mandatory minimum sentences found in §841(b) it is irrelevant whether the plants . . . were alive, cut, harvested or processed when seized, provided that they were alive sometime during the commission of the offense"); *U.S. v. Layman,* 116 F.3d 105, 109 (4th Cir. 1997) ("the equivalency ratio of §2D1.1(c) (n.*(E)) applies to all offenses involving the growing of marijuana, regardless of whether plants are seized"); *Oliver v. U.S.,* 90 F.3d 177, 179 (6th Cir. 1996) ("So long as the government can prove, by a preponderance of the evidence, that a particular grower charged with manufacture grew a particular plant, sentencing should be based on the equivalency ratio in the sentencing guidelines."); *U.S. v. Shields,* 87 F.3d 1194, 1195–97 (11th Cir. 1996) (en banc) ("where there is sufficient evidence that the relevant conduct for a defendant involves growing marijuana plants, the equivalency provision of §2D1.1 applies") [8#9], *rev'g* 49 F.3d 707 (11th Cir. 1995) [7#9]; *U.S. v. Wilson,* 49 F.3d 406, 409–10 (8th Cir. 1995) (affirmed: "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") [7#8]. See also *U.S. v. Silvers,* 84 F.3d 1317, 1325–27 (10th Cir. 1996) (affirmed: nothing in statute or guidelines requires plants to be live or in plant form at time of seizure); *U.S. v. Fletcher,* 74 F.3d 49, 55–56 (4th Cir. 1996) (affirmed: proper to count "plants that had been cut and were no longer being cultivated").

b. 100 grams per plant

After a November 1995 amendment to §2D1.1(c) at n.* (now Note (E)), each plant should be treated as the equivalent of 100 grams of marijuana for any number of plants. This amendment is retroactive. Note, however, that for mandatory minimum purposes under §841(b), offenses involving 100 or more marijuana plants are still subject to a ratio of one plant equals one kilogram. See *U.S. v. Eggersdorf,* 126 F.3d 1318, 1320 (11th Cir. 1997) ("Regardless of the guideline amendment, the language of the statutory minimum is clear and has been unaltered by Congress"; citing other cases in support).

The Fourth and Eighth Circuits had held that former §2D1.1(c)(n.*) was invalid as to offenders possessing fewer than fifty plants, finding that actual weight, rather than presumed weight of 100 grams, was required by 21 U.S.C. §841. *U.S. v. Hash,* 956 F.2d 63, 64–65 (4th Cir. 1992) [4#17]; *U.S. v. Streeter,* 907 F.2d 781, 790 (8th Cir. 1990). After *Streeter* was decided, the background commentary to §2D1.1 was amended to explain that "[t]he decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana." (Nov. 1991). The Eighth Circuit declined to apply the amendment retroactively and adhered to its holding in *Streeter,* reversing a determination of marijuana quantity based on multiplying the number of plants by 100 grams. *U.S. v. Evans,* 966 F.2d 398, 402 (8th Cir. 1992). Other circuits have dis-

agreed with *Streeter,* holding that the 100-gram figure has a rational basis and should be used. See *U.S. v. Dahlman,* 13 F.3d 1391, 1399–1400 (10th Cir. 1993); *U.S. v. Thompson,* 976 F.2d 666, 672–73 (11th Cir. 1992).

Before the 1995 amendment, for more than fifty plants, courts had upheld the constitutionality of treating each plant as the equivalent of 100 grams of marijuana, or as one kilogram after the Anti-Drug Abuse Act of 1988 and the Nov. 1989 guideline amendments. See *U.S. v. Taylor*, 985 F.2d 3, 9 (1st Cir. 1993) (kilogram); *U.S. v. Murphy,* 979 F.2d 287, 289–91 (2d Cir. 1992) (kilogram); *U.S. v. Smith,* 961 F.2d 1389, 1390 (8th Cir. 1992) (kilogram); *U.S. v. Holmes,* 961 F.2d 599, 601–02 (6th Cir. 1992) (kilogram); *U.S. v. Lee,* 957 F.2d 778, 783–85 (10th Cir. 1992) (kilogram); *U.S. v. Belden,* 957 F.2d 671, 675–76 (9th Cir. 1992) (kilogram); *U.S. v. Osburn,* 955 F.2d 1500, 1505–10 (11th Cir. 1992) (kilogram); *U.S. v. Webb,* 945 F.2d 967, 968–69 (7th Cir. 1991) (100 grams); *U.S. v. Motz,* 936 F.2d 1021, 1025–26 (9th Cir. 1991) (100 grams). See also *U.S. v. Angell,* 11 F.3d 806, 811–12 (8th Cir. 1993) (remanded: must use guideline ratio of one kilogram per plant—testimony of expert, including government's expert, that plant's marketable yield is less is irrelevant).

c. Definition of "plant"

Generally, a marijuana plant need not be fully developed in order to be counted under §2D1.1(c)—plant cuttings with observable evidence of root formation, such as root hairs, are counted. See *U.S. v. Foree,* 43 F.3d 1572, 1581 (11th Cir. 1995); *U.S. v. Delaporte,* 42 F.3d 1118, 1121 (7th Cir. 1994); *U.S. v. Robinson,* 35 F.3d 442, 446 (9th Cir. 1994); *U.S. v. Burke,* 999 F.2d 596, 600–01 (1st Cir. 1993); *U.S. v. Edge,* 989 F.2d 871, 879 (6th Cir. 1993); *U.S. v. Bechtol,* 939 F.2d 603, 605 (8th Cir. 1991); *U.S. v. Eves,* 932 F.2d 856, 860 (10th Cir. 1991). The Guidelines essentially adopted this definition in Application Note 18 (Nov. 1995), which states that "a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant)." The Ninth Circuit rejected a claim that marijuana plants growing in the same space with intertwined root systems should be counted as one plant. *Robinson,* 35 F.3d at 447–48 ("Each stalk protruding from the ground and supported by its own root system should be considered one plant, no matter how close to other plants it is and no matter how intertwined are their root systems.").

Male marijuana plants are counted even though they do not produce the controlled substance THC. See Note E to §2D1.1(c), added Nov. 1995, which states that plants should be counted "regardless of sex." See also *U.S. v. Gallant,* 25 F.3d 36, 40 (1st Cir. 1994); *U.S. v. Traynor*, 990 F.2d 1153, 1160 (9th Cir. 1993); *U.S. v. Proyect,* 989 F.2d 84, 87–88 (2d Cir. 1993); *U.S. v. Curtis,* 965 F.2d 610, 615 (8th Cir. 1992). Cf. *U.S. v. Benish,* 5 F.3d 20, 26–28 (3d Cir. 1993) ("male, old, and possibly weak" plants not a ground for departure) [6#4]; *U.S. v. Upthegrove,* 974 F.2d 55, 56 (7th Cir. 1992) (poor quality of marijuana not a ground for departure).

d. Other

Although for purposes of determining whether 21 U.S.C. §960(b)'s statutory penalties apply, mature stalks, fibers, and nongerminating seeds are not weighed, 21 U.S.C. §802(16), it is proper to include the stalks, fibers, and seeds in calculating the actual weight of the marijuana under §2D1.1(c) (Note A). See, e.g., *U.S. v. Swanson,* 210 F.3d 788, 792 (7th Cir. 2000); *U.S. v. Moreno,* 94 F.3d 1453, 1456 (10th Cir. 1996); *U.S. v. Vincent,* 20 F.3d 229, 238 (6th Cir. 1994) [6#12]; *U.S. v. Vasquez,* 951 F.2d 636, 637–38 (5th Cir. 1992).

Some circuits have held that the weight of marijuana may include its moisture content. See *U.S. v. Pinedo-Montoya,* 966 F.2d 591, 595 (10th Cir. 1992); *U.S. v. Garcia,* 925 F.2d 170, 172 (7th Cir. 1991). However, the Eleventh Circuit concluded that "excess moisture content" that renders marijuana unusable should be excluded from the weight calculation. The court reasoned that §2D1.1, comment. (n.1), excludes "unusable parts of a mixture or substance." Also, a clarifying amendment to Note 1, which was pending at the time of the decision and was used by the court as "subsequent legislative history to interpret the meaning of prior Application Notes," specifies that "moisture content that renders the marihuana unsuitable for consumption without drying" should be excluded from the weight of marijuana. *U.S. v. Smith,* 51 F.3d 980, 981 (11th Cir. 1995) (replacing opinion at 43 F.3d 642). See also *U.S. v. Carter,* 110 F.3d 759, 761 (11th Cir. 1997) (remanded: court should have retroactively applied "unusable parts" amendment as clarified by later amendment specifying that dry weight of excessively wet marijuana should be estimated, even though later amendment was not specifically made retroactive under §1B1.10(c)). Accord *U.S. v. Garcia,* 149 F.3d 1008, 1010 (9th Cir. 1998).

3. Cocaine and Cocaine Base

a. Conversion of cocaine to cocaine base

Several circuits have held that, when only cocaine powder is seized, it may be converted into cocaine base to calculate the offense level if the facts show that defendant was involved in a conspiracy to distribute crack rather than powdered cocaine. See, e.g., *U.S. v. Fox,* 189 F.3d 1115, 1119 (9th Cir. 1999) (affirmed: conversion for sentencing purposes proper "when the object of the conspiracy involved the conversion or the conversion was foreseeable," as it was here); *U.S. v. Alix,* 86 F.3d 429, 437 (5th Cir. 1996) (affirmed: "it is proper to sentence a defendant under the drug quantity table for 'crack' cocaine if the conversion of powder cocaine into 'crack' cocaine is foreseeable to him"); *U.S. v. Chisholm,* 73 F.3d 304, 307–09 (11th Cir. 1996) (remanded: may convert, but not if conversion was not reasonably foreseeable or within scope of agreement; also, it was plain error for district court to assume, with no evidence, that cocaine powder could be converted to equal weight of crack cocaine); *U.S. v. Angulo-Lopez,* 7 F.3d 1506, 1511 (10th Cir. 1993) (affirmed: "it is proper to sentence a defendant under the drug quantity table for cocaine base if the record indicates that the defendant intended to transform powdered cocaine into cocaine base") [6#6]; *U.S. v. Paz,* 927 F.2d 176, 180 (4th Cir. 1991) (where "a

defendant is convicted of conspiracy to manufacture crack, but the chemical seized was cocaine, the district court must . . . approximate the total quantity of crack that could be manufactured from the seized cocaine"); *U.S. v. Haynes,* 881 F.2d 586, 592 (8th Cir. 1989) (where evidence showed that defendant convicted of conspiracy to distribute cocaine sold crack, not cocaine powder, it was proper to convert seized powder cocaine and currency into crack for sentencing).

See also *U.S. v. Quinn,* 123 F.3d 1415, 1424–25 (11th Cir. 1997) (affirmed: where defendant was charged with conspiracy to possess powder cocaine with the purpose of then manufacturing crack, but jury verdict did not specify object of conspiracy, defendant could be sentenced under guideline for crack because, under §1B1.2(d), comment. (n.5), sentencing court, "were it sitting as a trier of fact, would convict the defendant of conspiring to" manufacture crack); *U.S. v. Bingham,* 81 F.3d 617, 629 (6th Cir. 1996) (evidence supported finding that defendants were accountable for twenty-five kilograms of cocaine powder, of which a minimum of ten kilograms was converted into crack cocaine during course of conspiracy); *U.S. v. Shorter,* 54 F.3d 1248, 1261 (7th Cir. 1995) (proper to count all cocaine as cocaine base, even though defendant supplied both forms to other conspirators, because only cocaine base was eventually sold and defendant "knew of or reasonably should have foreseen the conversion to crack form"); *U.S. v. McCaskey,* 9 F.3d 368, 377–79 (5th Cir. 1993) (although defendants were charged with and pled guilty to conspiracy to distribute cocaine hydrochloride, it was not plain error to calculate sentences based on cocaine base when tests later showed true nature of substance).

Conversion may also be appropriate under other circumstances and for other drugs. See, e.g., *U.S. v. Wilson,* 129 F.3d 949, 951 (7th Cir. 1997) (error to sentence defendant for powder cocaine that he "preferred" to buy and convert to crack himself rather than for the crack he ultimately bought from government informant); *U.S. v. Lopez,* 125 F.3d 597, 600 (8th Cir. 1997) (where negotiated drug sale that defendant aided and abetted was for methamphetamine, sentence would be based on that drug rather than amphetamine that was actually delivered); *U.S. v. McMillen,* 8 F.3d 1246, 1251–52 (7th Cir. 1993) (where it was foreseeable that "wholesale strength heroin" sold by defendant-supplier would be diluted for retail sale, it was proper to multiply wholesale amounts by three based on conservative estimate that heroin would have to be cut twice). But cf. *U.S. v. Palacio,* 4 F.3d 150, 153–54 (2d Cir. 1993) (affirmed: although government conceded the cocaine base dissolved in plastic flowerpots was likely to be converted into cocaine hydrochloride for sale, it was proper to use cocaine base for applicable offense level and statutory minimum).

b. Definition

The First and Ninth Circuits held that "cocaine base" in Title 21, U.S. Code, means "crack." *U.S. v. Lopez-Gil,* 965 F.2d 1124, 1130 (1st Cir. 1992); *U.S. v. Shaw,* 936 F.2d 412, 415–16 (9th Cir. 1991) (presence of hydroxyl ion does not define "cocaine base"—"crack" and "rock cocaine" that can be smoked is "cocaine base"). As amended Nov. 1993 and later, Guidelines §2D1.1(c), at Note D, also states that

"'Cocaine base,' for the purposes of this guideline, means 'crack.'" See also *U.S. v. Adams,* 125 F.3d 586, 592 (7th Cir. 1997) ("under the new definition of 'cocaine base' found in the guidelines only the form of 'cocaine base' which is 'crack' is eligible for the enhanced sentence. Thus the government must prove by a preponderance of the evidence that the defendant possessed 'crack'"); *U.S. v. James,* 78 F.3d 851, 858 (3d Cir. 1996) (remanded: government must prove that form of cocaine base defendant sold was "crack"); *U.S. v. Munoz-Realpe,* 21 F.3d 375, 377 (11th Cir. 1994) (affirmed: after amendment, "forms of cocaine base other than crack are treated as cocaine hydrochloride," so defendant guilty of importing six liquor bottles containing a liquid that tested positive for cocaine base must be sentenced under guideline for cocaine hydrochloride rather than that for cocaine base) [6#13].

Note that some circuits have held that the definition of cocaine base under the statute is broader than and has not been changed by the Guidelines' definition of cocaine base as crack. "[W]hile the term 'cocaine base' means only crack when a sentence is imposed under the Sentencing Guidelines, 'cocaine base' encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. §841(b)(1) are implicated." *U.S. v. Barbosa,* 271 F.3d 438, 467 (3d Cir. 2001). Accord *U.S. v. Palacio*, 4 F.3d 150, 154–55 (2d Cir. 1993). Contra *Munoz-Realpe,* 21 F.3d at 377–78 (disagreeing with *Palacio*: "By allowing the amendment to take effect, Congress has given its imprimatur to the new definition of 'cocaine base'; Congress indicated that it intends the term 'cocaine base' to include only crack cocaine.").

Although Note D's definition of crack states that it "is usually prepared by processing cocaine hydrochloride and sodium bicarbonate," several circuits have rejected claims by defendants that the government must show that sodium bicarbonate was used. *U.S. v. Diaz,* 176 F.3d 52, 119 (2d Cir. 1999) ("in proving a substance is crack, the government is not required to show that the cocaine was processed with sodium bicarbonate"); *U.S. v. Brooks,* 161 F.3d 1240, 1248 (10th Cir. 1998) (rejecting claim that only cocaine base containing sodium bicarbonate is crack under §2D1.1(c)); *U.S. v. Jones,* 159 F.3d 969, 982 (6th Cir. 1998) ("The definition, through the use of the word 'usually,' serves merely to illustrate a common method of conversion . . . [and] is an acknowledgment that other methods of crack preparation exist and that not all forms of 'cocaine base' need contain sodium bicarbonate to qualify as crack for sentencing purposes; the Commission's reference to sodium bicarbonate is merely illustrative."); *U.S. v. Abdul,* 122 F.3d 477, 479 (7th Cir. 1997) (rejecting claim that cocaine base *must* be processed with sodium bicarbonate to be "crack" under §2D1.1(c), Note (D)); *U.S. v. Stewart,* 122 F.3d 625, 628 (8th Cir. 1997) (rejecting argument that "there must be evidence that the cocaine base . . . contained cocaine hydrochloride and sodium bicarbonate before the district court may find that the cocaine base is crack cocaine").

The Eleventh Circuit held that the 1993 amendment is not merely clarifying and thus should not be applied retroactively. *U.S. v. Camacho,* 40 F.3d 349, 354 (11th Cir. 1994) (affirmed: for defendant sentenced in May 1992, non-crack cocaine base was properly treated as cocaine base under guidelines). Accord *U.S. v. Booker,* 70

F.3d 488, 490 (7th Cir. 1995) (affirmed: amendment is substantive and will not be given retroactive effect); *U.S. v. Kissick,* 69 F.3d 1048, 1053 (10th Cir. 1995) (same).

Previously, some circuits held that cocaine base includes, but is not limited to, "crack." See, e.g., *U.S. v. Rodriguez,* 980 F.2d 1375, 1378 (11th Cir. 1992); *U.S. v. Jackson,* 968 F.2d 158, 161–62 (2d Cir. 1992); *U.S. v. Williams,* 962 F.2d 1218, 1227 (6th Cir. 1992); *U.S. v. Pinto,* 905 F.2d 47, 49 (4th Cir. 1990); *U.S. v. Metcalf,* 898 F.2d 43, 46 (5th Cir. 1990). Cf. *U.S. v. Jones,* 979 F.2d 317, 319–20 (3d Cir. 1992) ("'crack' is a 'cocaine base' and . . . it is a chemical compound created from alkaloid cocaine, with a definable molecular structure different from cocaine salt"); *U.S. v. Levy,* 904 F.2d 1026, 1033 (6th Cir. 1990) ("cocaine base is not water soluble, is concentrated in rock-hard forms . . . and is generally smoked").

Although circuits differed in their definitions of "cocaine base," they have held that the statutes and guidelines are not unconstitutionally vague. See *Jones*, 979 F.2d at 319–20; *Jackson*, 968 F.2d at 161–64; *U.S. v. Thomas*, 932 F.2d 1085, 1090 (5th Cir. 1991); *U.S. v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991); *Levy*, 904 F.2d at 1032–33; *U.S. v. Van Hawkins*, 899 F.2d 852, 854 (9th Cir. 1990); *U.S. v. Reed*, 897 F.2d 351, 353 (8th Cir. 1990); *U.S. v. Barnes*, 890 F.2d 545, 552–53 (1st Cir. 1989); *U.S. v. Williams*, 876 F.2d 1521, 1525 (11th Cir. 1989); *U.S. v. Brown*, 859 F.2d 974, 975–76 (D.C. Cir. 1988). Other circuits have held that the sentencing provisions for cocaine and cocaine base are not ambiguous even though the terms have the same scientific meaning. See, e.g., *U.S. v. Booker*, 70 F.3d 488, 492–94 (7th Cir. 1995); *U.S. v. Jackson*, 64 F.3d 1213, 1219–20 (8th Cir. 1995); *U.S. v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995).

c. Challenges to 100:1 ratio

All circuits ruling on the issue have upheld against assorted constitutional challenges to the 100:1 ratio of cocaine to cocaine base in §2D1.1(c). See, e.g., *U.S. v. Moore,* 54 F.3d 92, 98–99 (2d Cir. 1995) (discriminatory purpose); *U.S. v. Clary,* 34 F.3d 709, 713–14 (8th Cir. 1994) (remanded: same); *U.S. v. Smith,* 34 F.3d 514, 525 (7th Cir. 1994) (cruel and unusual punishment); *U.S. v. Singleterry,* 29 F.3d 733, 740–41 (1st Cir. 1994) (equal protection, discriminatory classification); *U.S. v. Byse,* 28 F.3d 1165, 1169–71 (11th Cir. 1994) (discriminatory purpose); *U.S. v. Thompson,* 27 F.3d 671, 678 (D.C. Cir. 1994) (due process, equal protection); *U.S. v. Thurmond,* 7 F.3d 947, 950–53 (10th Cir. 1993) (same and discriminatory purpose); *U.S. v. Reece,* 994 F.2d 277, 278–79 (6th Cir. 1993) (equal protection); *U.S. v. Frazier,* 981 F.2d 92, 95 (3d Cir. 1992) (equal protection, cruel and unusual punishment, discriminatory purpose); *U.S. v. King,* 972 F.2d 1259, 1260 (11th Cir. 1992) (equal protection); *U.S. v. Harding,* 971 F.2d 410, 412–14 (9th Cir. 1992) (equal protection); *U.S. v. Simmons,* 964 F.2d 763 , 967 (8th Cir. 1992) (due process, equal protection, cruel and unusual punishment); *Williams,* 962 F.2d at 1227–28 (equal protection); *U.S. v. Watson,* 953 F.2d 895, 898 (5th Cir. 1992) (due process, equal protection); *U.S. v. Lawrence,* 951 F.2d 751, 755 (7th Cir. 1991) (equal protection); *U.S. v. Pickett,* 941 F.2d 411, 418 (6th Cir. 1991) (due process, cruel and unusual

punishment); *U.S. v. Thomas,* 900 F.2d 37, 39–40 (4th Cir. 1990) (equal protection); *U.S. v. Colbert,* 894 F.2d 373, 374–75 (10th Cir. 1990) (cruel and unusual punishment); *U.S. v. Cyrus,* 890 F.2d 1245, 1248 (D.C. Cir. 1989) (equal protection, cruel and unusual punishment) [2#18].

Some circuits have also rejected downward departure on the basis of disparate racial impact resulting from the 100:1 ratio. See *U.S. v. Fonts,* 95 F.3d 372, 374 (5th Cir. 1996); *U.S. v. Alton,* 60 F.3d 1065, 1070–71 (3d Cir. 1995) (remanded); *Thompson,* 27 F.3d at 679 (affirmed); *U.S. v. Maxwell,* 25 F.3d 1389, 1401 (8th Cir. 1994) (remanded); *U.S. v. Bynum,* 3 F.3d 769, 774–75 (4th Cir. 1993) (affirmed); *U.S. v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) (affirmed); *Pickett,* 941 F.2d at 417–18 (affirmed). Cf. *U.S. v. Gaines,* 122 F.3d 324, 330–31 (6th Cir. 1997) (remanded: may not depart on basis of Commission's 1995 report recommending lower ratio—Congress rejected that recommendation "and the courts must honor this policy choice").

4. Estimating Drug Quantity

In some situations courts have to estimate the amount of drugs in the offense. See USSG §2D1.1, comment. (n.12) ("Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.") Following are some methods courts have used to estimate quantity in cases involving attempts, conspiracies, manufacturing, and sales. Note that the Sixth Circuit has stated that "when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *U.S. v. Sims,* 975 F.2d 1225, 1243 (6th Cir. 1992). Accord *U.S. v. August,* 86 F.3d 151, 154 (9th Cir. 1996) (because "approximation is by definition imprecise, the district court must err on the side of caution in choosing between two equally plausible estimates"); *U.S. v. Paulino,* 996 F.2d 1541, 1545 (3d Cir. 1993) ("the need to estimate, however, is not a license to calculate drug amounts by guesswork"); *U.S. v. Sepulveda,* 15 F.3d 1161, 1198 (1st Cir. 1993) ("district courts must base their findings on 'reliable information' and, where uncertainty reigns, must 'err on the side of caution'"); *U.S. v. Ortiz*, 993 F.2d 204, 207–08 (10th Cir. 1993) (improper to base drug quantity on uncorroborated, out-of-court testimony of unidentified informant); *U.S. v. Walton,* 908 F.2d 1289, 1301–02 (6th Cir. 1990). See also *U.S. v. Davis*, 981 F.2d 906, 911 (6th Cir. 1992) (where unusual circumstances prevented any reasonable estimate of quantity of cocaine attributable to defendant, proper to use lowest offense level applicable to cocaine) [5#7]. Cf. *U.S. v. Zapata,* 139 F.3d 1355, 1359 (11th Cir. 1998) (remanded: where defendant was responsible for 44 pounds of marijuana, which equals 19.9584 kilograms, court could not "round up" to 20 kilograms and higher offense level).

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

a. Conspiracies and attempts

As of November 1, 1995, the third paragraph of Note 12 in §2D1.1 was significantly amended. It now states, in part:

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

(Emphasis added.)

The Ninth Circuit has held that amended Note 12 should be applied retroactively to set the offense level by the weight of drugs actually delivered, not a larger amount that was negotiated. "The prior version of Application Note 12 was silent as to the amount of cocaine to be considered in a completed transaction. . . . We therefore hold that by specifying the weight to consider in a completed transaction, the current version of Application Note 12 clarifies the Guidelines, and should be given retroactive effect." *U.S. v. Felix,* 87 F.3d 1057, 1059–60 (9th Cir. 1996) (remanded: although defendants negotiated to sell five kilograms, they actually delivered 4.643 kilograms and should be sentenced for that amount under Note 12, which was amended while their appeal was pending) [8#9]. Accord *U.S. v. Marmolejos,* 140 F.3d 488, 491–93 (3d Cir. 1998) (in §2255 case, holding that amended Note 12 should be applied retroactively to defendant who negotiated to sell five kilograms of cocaine but actually delivered only 4.96 kilograms: "we conclude that Amendment 518 to the Sentencing Guidelines represents a clarification of the previous application note"). See also *U.S. v. Podlog,* 35 F.3d 699, 708 (2d Cir. 1994) (following earlier version of Note 12, holding that "'the weight under negotiation in an uncompleted distribution' is not applicable" when the distribution is completed—"There is no ambiguity in [Note 12] and we can ascertain no reason why the plain language should not be followed"; although defendant originally inquired about purchasing 125 or 400 grams of heroin, district court could not use larger amount when defendant actually purchased 125 grams). But cf. *U.S. v. Dallas,* 229 F.3d 105, 109–11 (2d Cir. 2000) (affirmed: under Note 12, defendant responsible for six ounces of cocaine he agreed to sell even though he later tried to substitute flour when he had trouble getting the cocaine on time); *U.S. v. Ynfante,* 78 F.3d 677, 679–81 (D.C. Cir. 1996) (affirmed: where defendants agreed to sell two ounces of crack to police agent, but police then discovered they had only enough money to purchase one ounce and did so, it was proper under Note 12 to hold defendants responsible for two ounces).

However, the Ninth Circuit later distinguished *Felix* and held that the change in Note 12 regarding an uncompleted transaction and whether defendant intended to or could provide the agreed-upon quantity, was a substantive rather than clarifying

change that could not be applied retroactively on collateral review. "Here, where an amendment substitutes the word 'or' for the word 'and,' we conclude that there has been a substantive change in the commentary rather than a "clarification.'" *U.S. v. Cruz-Mendoza,* 147 F.3d 1069, 1073 (9th Cir. 1998), *as amended on denial of reh'g,* 163 F.3d 1149 (9th Cir. 1998).

The Third Circuit applied Note 12 to a situation where the seller wanted to sell a pound and a half of heroin to a confidential informant, but the CI consistently refused to buy more than one ounce, and eventually did buy only one ounce. Although the seller wanted to sell, and apparently had the means to sell, the larger amount, there was no "agreed-upon quantity" except for the one ounce that was actually delivered. Further, the one-ounce sale was the only sale to this buyer and there were no future sales planned. Note 12 requires that "once a delivery is made and there is insufficient evidence to show that that delivery was merely a prelude to a larger 'scheduled' or 'agreed-upon' deal, the amount delivered will control for sentencing purposes." *U.S. v. Sau Hung Yeung,* 241 F.3d 321, 325–27 (3d Cir. 2001).

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

[**Note:** Much of the following discussion of uncompleted transactions will be significantly affected by the 1995 change to Application Note 12. The language that caused the split in the circuits discussed below was revised in 1995 to exclude quantities that defendant "did not intend to provide *or* was not reasonably capable of providing." (Emphasis added.)]

The former note had stated that, for an "uncompleted distribution" where "the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing." Some courts have held that this language meant that the government need only show *either* capability or intent, but a defendant must show *both* lack of capability and lack of intent under Note 12. See *U.S. v. Tillman,* 8 F.3d 17, 19 (11th Cir. 1993) (and "district courts must make factual findings concerning the defendant's intent and capability"); *U.S. v. Barnes,* 993 F.2d 680, 682–84 & n.1 (9th Cir. 1993); *U.S. v. Brooks,* 957 F.2d 1138, 1151 (4th Cir. 1992). See also *U.S. v. Gessa,* 971 F.2d 1257, 1265 (6th Cir. 1992) (en banc) (same for former §2D1.4, comment. (n.1)). Cf. *U.S. v. Pion,* 25 F.3d 18, 24–25 (1st Cir. 1994) (despite district

court's finding that defendant was not "reasonably capable of producing" additional three kilograms he negotiated, that amount was properly included as relevant conduct under Note 12 because "he was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective. . . . [N]either conjunctive clause in note 12 can be ignored") [6#16].

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

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

Several appellate courts have reversed factual determinations that larger drug quantities were under negotiation. See *U.S. v. Naranjo,* 52 F.3d 245, 250–51 (9th Cir. 1995) (record suggests defendant did not have intent or ability to buy five kilograms of cocaine and court did not make adequate findings; also, under Note 12 any drugs that "flow from sentencing entrapment" are to be excluded) [7#10]; *U.S. v. Reyes*, 979 F.2d 1406, 1409–11 (10th Cir. 1992) (defendant agreed to a meeting but did not discuss details of additional sale—undercover agent's subjective belief

that sale was agreed to insufficient) [5#7]; *U.S. v. Ruiz,* 932 F.2d 1174, 1184 (7th Cir. 1991) (defendant mentioned he could get greater quantity but did not discuss price); *U.S. v. Moon*, 926 F.2d 204, 209–10 (2d Cir. 1991) (initial conversations concerning "one or two" kilograms where eventual agreement was for only one kilogram); *Foley*, 906 F.2d at 1265 (defendant mentioned price of greater quantity only in response to request to purchase greater quantity). See also *U.S. v. Hazut,* 140 F.3d 187, 191–92 (2d Cir. 1998) (under amended Note 12, burden on government to prove intent and ability and then on defendant to disprove one or other).

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

Note 12 states that "[t]ypes and quantities of drugs not specified in the count of conviction may be considered" under the relevant conduct guideline, and two circuits have held that the *type* of drug a defendant negotiated to sell is used under Note 12 even if a different drug is actually sold. See *U.S. v. Lopez,* 125 F.3d 597, 599–600 (8th Cir. 1997) (affirmed: where defendant negotiated sale of methamphetamine, sentence was properly based on methamphetamine rather than the amphetamine sold without his knowledge—"Where a defendant negotiated for or attempted to receive a specific substance but that substance was, unanticipated by and unbeknownst to the defendant, replaced with a different substance, the defendant's culpable conduct is most accurately evaluated by ascribing to the defendant the intended rather than the unintended substance.") [10#1]; *U.S. v. Steward,* 16 F.3d 317, 321 (9th Cir. 1994) (sentence following attempt conviction was correctly based on methamphetamine, even though substance defendant sold as methamphetamine was actually ephedrine he had been duped into purchasing earlier that day).

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

Some circuits held that a court must determine whether a buyer was capable of producing the money to buy the drugs before the negotiated amount could be used. Note that buyers may not have to produce all of the money "up front," but may sell on consignment or provide only a down payment. See, e.g., *U.S. v. Alaga,* 995 F.2d 380, 382–83 (2d Cir. 1993) (promissory note payable one week after delivery of heroin defendant planned to sell was sufficient—when defendant buyer "negotiates

for a particular quantity, he or she fully intends to commit the crime as planned"); *U.S. v. Fowler*, 990 F.2d 1005, 1006–07 (7th Cir. 1993) (negotiated drug quantity could be used even though defendant was unable to pay all of the seller's requested down payment—he had a demonstrated ability to resell large amounts and had sold on consignment); *U.S. v. Skinner,* 986 F.2d 1091, 1093–95 (7th Cir. 1993) (inability to pay irrelevant when defendant acts as middleman on consignment).

However, the Second Circuit concluded that under amended Note 12, the "did not intend to provide, or was not reasonably capable of providing" language does not apply to buyers: "The plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance, that is, where the defendant '*provid[es]* the agreed-upon quantity of the controlled substance' (emphasis added)." *U.S. v. Gomez,* 103 F.3d 249, 253–54 (2d Cir. 1997) (because Note 12 does not apply to buyers, rejecting defendant's claim that he was not capable of purchasing the agreed-upon amount of heroin) [9#5]. Accord *U.S. v. Brassard,* 212 F.3d 54, 58 (1st Cir. 2000) (citing *Gomez* in holding that "[t] he last sentence of application note 12, . . . which deals with a defendant selling drugs, clearly does not apply" to a defendant buyer). See also *U.S. v. Williams,* 109 F.3d 502, 512 (8th Cir. 1997) (affirmed: without deciding whether above language applies in reverse sting because defendant intended to and was reasonably capable of purchasing agreed-upon amount, "[t]he application note plainly states that in a reverse sting the agreed-upon quantity of cocaine determines the offense level").

Where defendants pled guilty to a single count of conspiracy to possess with intent to distribute marijuana, and had negotiated with a confidential informant for only a single delivery, it was error to include as relevant conduct an initial load of marijuana that was rejected as inferior by defendants before they later accepted another load. "[T]he commentary to U.S.S.G. §2D1.1 states that, 'in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant.' U.S.S.G. §2D1.1 comment. (n.12). . . . [T]his section is intended to ensure that unscrupulous law enforcement officials do not increase the amount delivered to the defendant and therefore increase the amount of the defendant's sentence. Although there is absolutely no evidence that such a motivation actually existed in this case, the facts demonstrate the danger. . . . It would have been possible for the confidential informant to supply low-grade marijuana in the expectation of its being rejected and in that way to increase the amount received, but never retained for distribution, by the defendants." *U.S. v. Mankiewicz,* 122 F.3d 399, 402 (7th Cir. 1997) [10#3].

b. Manufacturing

In a drug manufacturing case, the offense level may be set by estimating the amount of drugs the defendant was capable of producing if the amount actually seized was less. See §2D1.1, comment. (n.12) ("Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity

of the controlled substance."); *U.S. v. Putney,* 906 F.2d 477, 479–80 (9th Cir. 1990); *U.S. v. Evans,* 891 F.2d 686, 687–88 (8th Cir. 1989) [2#19]. The Eighth and Tenth Circuits followed this rule in "attempt to manufacture methamphetamine" cases even though one of the precursor chemicals was not present at the time of arrest. The district courts properly approximated the amount that could have been produced in light of the other ingredients. *U.S. v. Beshore,* 961 F.2d 1380, 1383–84 (8th Cir. 1992); *U.S. v. Havens,* 910 F.2d 703, 705 (10th Cir. 1990) [3#10].

In some cases, production capacity was used even though the laboratory was not operational at the time of arrest. See, e.g., *U.S. v. Bertrand,* 926 F.2d 838, 846–47 (9th Cir. 1991) (lab had been dismantled, necessary chemical not present); *U.S. v. Smallwood,* 920 F.2d 1231, 1236–37 (5th Cir. 1991) (lab not operational, some necessary precursors missing) [3#19]. The Ninth Circuit held that an actual laboratory is not required, so that where defendants "were in the process of gathering the necessary items together to produce methamphetamine" it was proper to extrapolate from the precursor chemicals that were seized. *U.S. v. Foster,* 57 F.3d 727, 732 (9th Cir. 1995) (affirmed: "Although the decisions which have approved extrapolation of drug quantity from the amount of precursor chemicals seized have also involved the discovery of labs, none of these decisions is premised upon the existence of a lab"). See also *U.S. v. Leopard,* 936 F.2d 1138, 1142 (10th Cir. 1991) (affirmed estimation based on chemicals and lab equipment in U-Haul trailer—"no requirement limiting the judge's authority [to estimate] to *only* those situations involving a working lab"). But cf. *U.S. v. Burks,* 934 F.2d 148, 152 (8th Cir. 1991) (improper to include capability of lab defendant offered to sell when no evidence lab actually existed).

The Sixth Circuit held that the government must prove the amount that defendant's laboratory was capable of producing by showing the capability of that particular lab or that of a lab of similar size and capability—an estimate of yields from other "clandestine laboratories" making the same drug is not sufficient. *U.S. v. Mahaffey,* 53 F.3d 128, 131–33 (6th Cir. 1995) (remanded: improper to use holding from different case of 50% yield in turning ephedrine into methcathinone—"it was incumbent upon the government to prove that laboratories of comparable size and capability were utilized if it sought to rely on the district court's finding in [that case]. We have never approved a finding on the quantity of drugs attributable to a defendant when the record contains no evidence concerning the manner in which a precursor was converted to a controlled substance or the details of the laboratories involved"). Cf. *U.S. v. Jennings,* 83 F.3d 145, 150 (6th Cir. 1996) (affirming use of "the government expert's lowest estimate for conversion percentages of clandestine laboratories" manufacturing methamphetamine where there was other evidence to support approximate yield of defendant's lab).

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

amine); *U.S. v. Paz,* 927 F.2d 176, 180 (4th Cir. 1991) (conspiracy to manufacture crack).

Chemical Quantity Table, §2D1.11: A November 1995 amendment to the Chemical Quantity Table at §2D1.11(d), and elsewhere as necessary, changed "Listed Precursor" and "Listed Essential" chemicals to "List I" and "List II" chemicals in response to statutory changes.

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

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

In a pre-§2D1.11 case, the Fifth Circuit held it was not plain error to use a DEA formula to convert 1348 grams of phenylacetic acid to 674 grams phenylacetone to 505.5 grams methamphetamine, arriving at a base offense level of 28, where the conversion of phenylacetone to methamphetamine using the Drug Equivalency Table would have resulted in a base offense level of 26—"the sentencing guidelines do not

explicitly provide any method of assigning a base offense level for possession of phenylacetic acid." *U.S. v. Surasky,* 974 F.2d 19, 21 (5th Cir. 1992).

c. Evidence from prior sales or records

Quantities of drugs already sold may be calculated from financial information, such as by converting money earned from prior sales into the estimated quantity sold. *U.S. v. Gerante,* 891 F.2d 364, 368–69 (1st Cir. 1989) [2#18]; §2D1.1, comment. (n.12). Accord *U.S. v. Watts,* 950 F.2d 508, 514–15 (8th Cir. 1991); *U.S. v. Hicks,* 948 F.2d 877, 881–83 (4th Cir. 1991) [4#13]; *U.S. v. Stephenson,* 924 F.2d 753, 764–65 (8th Cir. 1991). See also *U.S. v. Tokars,* 95 F.3d 1520, 1542 (11th Cir. 1996) (proper to convert amount of laundered money into amount of cocaine sold); *U.S. v. Townsend,* 73 F.3d 747, 753 (7th Cir. 1996) (records of Western Union money transfers supported inclusion of additional drug amounts as relevant conduct); *U.S. v. Ortiz-Martinez,* 1 F.3d 662, 675 (8th Cir. 1993) (proper to estimate cocaine quantity based on seized $545,552 in currency and checks and $400,000 in wire transfers divided by average cost of $23,000 per kilogram); *U.S. v. Duarte,* 950 F.2d 1255, 1265 (7th Cir. 1991) (dividing cash amount by price per kilogram to estimate quantity of cocaine "is perfectly acceptable under the Guidelines") [4#13]; *U.S. v. Mickens,* 926 F.2d 1323, 1331–32 (2d Cir. 1991) (proper to approximate cocaine distributed during conspiracy based on amount of unexplained income).

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

Quantities of drugs evidenced in conspiracy defendant's notebook entries and found to be part of related conduct were properly included in the base offense level. *U.S. v. Tabares,* 951 F.2d 405, 410 (1st Cir. 1991) [4#13]. Accord *U.S. v. Cagle,* 922 F.2d 404, 407 (7th Cir. 1991); *U.S. v. Ross,* 920 F.2d 1530, 1538 (10th Cir. 1990). See

also *U.S. v. Gil,* 58 F.3d 1414, 1424–25 (9th Cir. 1995) (proper to use 459 kilograms of cocaine listed in drug ledger instead of seventy-one kilograms actually seized); *U.S. v. Straughter,* 950 F.2d 1223, 1235–36 (6th Cir. 1991) (records of drug payments found in coconspirator's purse provided support for finding of larger amount of cocaine than that seized during arrests); *U.S. v. Carper,* 942 F.2d 1298, 1303 (8th Cir. 1991) (proper to use amount of methamphetamine sales reflected in drug records rather than smaller quantity seized at time of arrest); *U.S. v. Schaper,* 903 F.2d 891, 896–99 (2d Cir. 1990) (on remand, court should consider evidence of drug purchases in records seized from defendant).

d. Using averages to estimate

Courts may estimate quantity using averages (e.g., amounts, number of trips, time), but the averages should be supported by evidence in the record, not mere conjecture. The Seventh Circuit upheld a calculation based on averages estimated from known sales in a given time period. Defendant was a member of the conspiracy for eight weeks, there were thirty-four sales, and eleven of those sales were known to average thirty-nine grams of heroin. Because all the sales were similar in nature, it was reasonable to use the average of the known sales to obtain the heroin attributable to defendant for all sales. The appellate court noted that the district court acted cautiously and did not include other amounts that may have been foreseeable to defendant. *U.S. v. McMillen,* 8 F.3d 1246, 1250–51 (7th Cir. 1993). The appellate court also approved the use of a weekly average, based on several factors, to estimate the amount of "wholesale strength heroin" attributable to another defendant who was the sole supplier to the conspiracy for twenty-two weeks. In addition, it was proper to take into account the fact that the heroin sold would be diluted for retail sale. Based on the price a seller would have to get to make "a profit that would be reasonably foreseeable to a supplier," the district court conservatively estimated that the heroin would have to be cut twice, and thus multiplied the wholesale amounts sold by three for the total heroin attributable to defendant. *Id.* at 1252–53. See also *U.S. v. Edwards,* 77 F.3d 968, 976–77 (7th Cir. 1996) (affirmed: evidence supported estimate of heroin mixture quantity based on average purity of 5%). Cf. *Rogers v. U.S.,* 91 F.3d 1388, 1393–94 (10th Cir. 1996) (proper to multiply amount of pure heroin by seven to account for foreseeable later cuts in purity made by codefendants before street sales).

Other circuits have also affirmed the use of averages when supported by evidence. See, e.g., *U.S. v. Moore,* 54 F.3d 92, 102 (2d Cir. 1995) ("calculation of 800 vials twice per week for a year with reasonable deductions for losses and disruptions in the organization . . . was carefully considered, conservative, and based on the evidence presented"); *U.S. v. Oleson,* 44 F.3d 381, 385–86 (6th Cir. 1995) (reasonable to multiply 387 pounds seized from one trip times number of trips—trips were verified and there was evidence that vehicles used to transport marijuana could conceal 400–600 pounds); *U.S. v. Green,* 40 F.3d 1167, 1175 (11th Cir. 1994) (where 300 of approximately 8000 intercepted phone calls demonstrated that conspirators

handled 14,280 grams of cocaine base, district court could reasonably conclude that 720 grams more of cocaine base were involved in remaining 7700 calls to hold defendants responsible for at least fifteen kilograms); *U.S. v. Roach,* 28 F.3d 729, 735 (8th Cir. 1994) (proper to set quantity of ephedrine on basis of amount found in one of five identical jars); *U.S. v. Thomas,* 12 F.3d 1350, 1369 (5th Cir. 1994) (finding that conspiracy distributed more than 150 kilograms of cocaine was supported by ledgers showing distribution of 56 kilograms over approximately one-third of conspiracy, and other evidence and testimony supported extrapolation).

Courts have also held that the purity of drugs actually seized may be used to estimate either the purity of the total quantity of drugs the defendant agreed to deliver or the total quantity of drugs distributed. See, e.g., *U.S. v. Lopes-Montes,* 165 F.3d 730, 731–32 (9th Cir. 1999) (affirmed: where defendant agreed to sell 6.8 kilograms of methamphetamine, and delivered 3.2 kilograms of which 2.62 kilograms was pure methamphetamine, court could use percentage of pure methamphetamine in delivered amount to estimate total amount of methamphetamine(actual) in the 6.8 kilograms, which resulted in higher sentence under §2D1.1(c), Note B); *U.S. v. Jarrett,* 133 F.3d 519, 529–31 (7th Cir. 1998) (affirming use of "purity multipliers . . . based on heroin actually purchased from appellants" as part of estimation of total amount of heroin distributed by conspiracy); *U.S. v. Newton,* 31 F.3d 611, 614 (8th Cir. 1994) (evidence supported using purity level of two seized "eight-balls" of methamphetamine to estimate quantity of drug in unrecovered eight-balls) [7#1].

The Second Circuit has emphasized that the government must provide "specific evidence" that defendant is connected to amounts of drugs calculated by averaging. The court also held that "a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence." The court remanded a finding of drug quantity because the government had not provided sufficient "specific evidence" to connect defendant—convicted after importing heroin on one plane flight into the U.S.—to any particular quantity of drugs on other flights he had made. See *U.S. v. Shonubi,* 103 F.3d 1085, 1087–92 (2d Cir. 1997) [9#4]. Cf. *U.S. v. Eke,* 117 F.3d 19, 23 (1st Cir. 1997) (affirmed: where experienced government agent testified that couriers bringing heroin into eastern U.S. were paid an average of $1000 to $2500 per 100 grams, it was not unduly speculative to use higher figure to reach conservative estimate of amount of heroin attributable to defendants who paid or attempted to pay three couriers).

Courts have reversed estimates based on averaging when the evidence did not support the calculation. See, e.g., *U.S. v. Rodriguez,* 112 F.3d 374, 376–77 (8th Cir. 1997) (remanded: error to use estimate of average package weights that "amounts to little more than speculation"); *U.S. v. Acosta,* 85 F.3d 275, 282 (7th Cir. 1996) (remanded: error to base average size of cocaine sales on government informant's "plainly inconsistent estimates" of minimum amount he had purchased from defendant at any one time); *U.S. v. Butler,* 41 F.3d 1435, 1447 (11th Cir. 1995) (remanded: where total amount of cocaine base was expressly premised on average transactions per day and that average was based on videotape of one day, there

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

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

1. Burden of Proof

Application Note 3 to §2D1.1(b)(1) states: "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Several circuits have held that, once the government satisfies its initial burden of showing that the weapon was present during the offense, the burden of proof is then on defendant to show that the weapon was not connected to the offense. See, e.g., *U.S. v. Hall,* 46 F.3d 62, 63 (11th Cir. 1995); *U.S. v. Roberts*, 980 F.2d 645, 647 (10th Cir. 1992); *U.S. v. Corcimiglia,* 967 F.2d 724, 727–28 (1st Cir. 1992); *U.S. v. Durrive,* 902 F.2d 1221, 1222–23 (7th Cir. 1990); *U.S. v. Restrepo,* 884 F.2d 1294, 1296 (9th Cir. 1989) [2#13]; *U.S. v. McGhee,* 882 F.2d 1095, 1097–99 (6th Cir. 1989) [2#12].

The Eighth Circuit held that the burden is on the government to "establish a relationship between a defendant's possession of the firearm and the offense." *U.S. v. Khang,* 904 F.2d 1219, 1221–24 (8th Cir. 1990). See also *U.S. v. Lagasse,* 87 F.3d 18, 22–23 (1st Cir. 1996) (remanded: armed robbery of fellow coconspirators "was 'not in furtherance of the drug conspiracy' but, in effect, a theft from the conspiracy—an act quintessentially antithetical to the offense" and therefore lacking requisite nexus to offense); *U.S. v. Richmond,* 37 F.3d 418, 419 (8th Cir. 1994) ("Our cases have consistently held that in order for §2D1.1(b)(1) to apply, the government has

to prove by a preponderance of the evidence that it is not clearly improbable that the weapon had a nexus with the criminal activity"). Cf. *U.S. v. Shields,* 44 F.3d 673, 674 (8th Cir. 1995) (enhancement improper where government stipulated that weapons were unrelated to drug offense and presented no evidence that they were); *U.S. v. Zimmer,* 14 F.3d 286, 290–91 (6th Cir. 1994) (remanded: enhancement improper where defendant presented "unrefuted testimony that these rifles were for hunting and were unconnected with the marijuana") [6#10].

Because the government does have the burden to show "that the weapon was possessed during the relevant illegal drug activity," the enhancement should not be based on a presumption that defendant possessed a weapon during the offense because one was possessed at other times. *U.S. v. McAllister,* 272 F.3d 228, 233–34 (4th Cir. 2001) (remanded: error to give §2D1.1(b)(1) enhancement based on witness' statements that defendant was his narcotics customer and he had seen defendant with handguns many times but did not state that he saw defendant with a weapon during a drug transaction). See also *U.S. v. Siebe,* 58 F.3d 161, 163 (5th Cir. 1995) (enhancement could not be based on presumption that defendant possessed weapon during his drug offense because he worked as an armed police officer: "In the case at bar there is no evidence absent such a presumption that Siebe possessed a firearm during the commission of the offense," and government must prove that defendant actually possessed a weapon during the offense) [7#11]. Cf. *U.S. v. Pompey,* 264 F.3d 1176, 1181 (10th Cir. 2001) (affirmed: rejecting defendant's claim that gun must be seized from him directly—"[t]he gun itself need not be produced if adequate alternative evidence exists," as it did here, that defendant possessed firearm that was connected to offense).

The D.C. Circuit, relying on language in §1B1.3(a) that was deleted by a Nov. 1989 amendment, held that the enhancement could not be applied absent a showing by the prosecution that defendant possessed the weapon "intentionally, recklessly, or by criminal negligence." *U.S. v. Burke,* 888 F.2d 862, 865–68 (D.C. Cir. 1989) [2#16]. Accord *U.S. v. Underwood,* 938 F.2d 1086, 1089–90 (10th Cir. 1991); *U.S. v. Fiala,* 929 F.2d 285, 289 (7th Cir. 1991); *U.S. v. Suarez,* 911 F.2d 1016, 1020 (5th Cir. 1990) [3#12].

The Ninth Circuit held that the district court may refuse to apply §2D1.1(b)(1) if the defendant was entrapped into possessing the weapon. In a case where an informant made several drug purchases from defendant and once traded a gun for drugs, the court held that if the defendant "was entrapped into trading cocaine for a gun, then the doctrine of sentencing entrapment precludes application of the two-level gun enhancement under §2D1.1(b)(1). Our holding rests upon the basic principle that a defendant's sentence should reflect 'his predisposition, his capacity to commit the crime on his own, and the extent of his culpability.'" On remand, the defendant would bear the burden of proving sentencing entrapment by a preponderance of the evidence, and the sentencing court must make "express factual findings" as to whether defendant has met that burden. *U.S. v. Parrilla,* 114 F.3d 124, 127–28 (9th Cir. 1997) [9#8].

Absent entrapment, however, the enhancement may be proper when drugs are

traded for a weapon. See, e.g., *U.S. v. Rogers,* 150 F.3d 851, 858 (8th Cir. 1998) (affirmed for defendant who traded drugs for handgun: "obtaining a gun in exchange for drugs is sufficient to establish a nexus for a two-level enhancement pursuant to §2D1.1(b)(1)"); *U.S. v. Gibson,* 135 F.3d 1124, 1128–29 (6th Cir. 1998) (affirming §2D1.1(b)(1) enhancement for defendant who traded drugs for gun, rejecting downward departure request where there was no evidence undercover officer coerced defendant into taking gun). See also *U.S. v. Newton,* 184 F.3d 955, 957–58 (8th Cir. 1999) (affirmed where guns were used as collateral for cash loan that would be repaid with drugs: "because the guns directly facilitated the continuing drug transactions, we conclude that a sufficient nexus existed between Newton, the firearms, and the drug transactions to satisfy the requirements of section 2D1.1(b)(1)").

2. Possession by Codefendant

When the weapon was possessed by a codefendant the enhancement may be applied if the possession was reasonably foreseeable to defendant in connection with the jointly undertaken criminal activity. See USSG §1B1.3, comment. (n.2); *U.S. v. Nichols,* 979 F.2d 402, 412–13 (6th Cir. 1992); *U.S. v. Soto,* 959 F.2d 1181, 1186–87 (2d Cir. 1992) [4#20]; *U.S. v. McFarlane,* 933 F.2d 898, 899 (10th Cir. 1991); *U.S. v. Bianco,* 922 F.2d 910, 912 (1st Cir. 1991); *U.S. v. Barragan,* 915 F.2d 1174, 1177–79 (8th Cir. 1990); *U.S. v. Garcia,* 909 F.2d 1346, 1350 (9th Cir. 1990) [3#11]; *U.S. v. Aguilera-Zapata,* 901 F.2d 1209, 1215 (5th Cir. 1990) [3#8]; *U.S. v. White,* 875 F.2d 427, 433 (4th Cir. 1989). Cf. *U.S. v. Vold,* 66 F.3d 915, 920–21 (7th Cir. 1995) (remanded: although codefendant clearly possessed weapons while manufacturing drugs with others in first stage of conspiracy, there was no evidence that he possessed weapon later when manufacturing drugs with defendant at a different site or that such possession was reasonably foreseeable to defendant).

"The basis for holding defendants liable for firearms possession by co-conspirators is the same as the basis for holding defendants liable for drug transactions by co-conspirators: that the conduct was reasonably foreseeable and in furtherance of the conspiracy. Thus, to hold a defendant liable for possession of firearms by co-conspirators, the district court must make the same individualized findings as with respect to drug transactions: that the conduct was within the scope of that defendant's conspiratorial agreement and that it was reasonably foreseeable. Although in assigning the weapons enhancement, the district court made the requisite specific findings of reasonable foreseeability for several of the appellants, it failed in all cases to engage in the requisite analysis of the scope of their agreements." *U.S. v. Childress,* 58 F.3d 693, 724–25 (D.C. Cir. 1995). See also *U.S. v. Highsmith,* 268 F.3d 1141, 1142 (9th Cir. 2001) (remanded: although firearm was found in fellow drug dealer's bedroom, and defendant had access to room and dealt drugs from there, applying §2D1.1(b)(1) for "constructive possession" of weapon was error in absence of evidence that defendant was aware of weapon); *U.S. v. Cochran*, 14 F.3d 1128, 1133 (6th Cir. 1994) (remanded: "we require that there be objective evidence that the

defendant knew the weapon was present, or at least knew it was reasonably probable that his coconspirator would be armed," and there was no such evidence here that defendant knew gun was hidden under seat of coconspirator's car).

The D.C. Circuit also agreed with other decisions in concluding that "findings that a defendant handled . . . extensive quantities of drugs in the course of a conspiracy are adequate to support the conclusion that the use of guns by co-conspirators was reasonably foreseeable to him." *Id.* at 725. Accord *U.S. v. Pessefall,* 27 F.3d 511, 515 (11th Cir. 1994) ("It was reasonably foreseeable that [a coconspirator] would use a firearm to protect the 250 kilogram off-load" of cocaine); *U.S. v. Bianco,* 922 F.2d 910, 912 (1st Cir. 1991) ("Absent evidence of exceptional circumstances, we think it is fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash."); *U.S. v. Garcia,* 909 F.2d 1346, 1350 (9th Cir. 1990) ("the drug transaction involved approximately 17 kilograms of cocaine, and the negotiations leading up to the sale lasted nearly one month. Garcia should reasonably have foreseen that Soto would possess a gun during the execution of such a major drug sale."); *U.S. v. Aquilera-Zapata,* 901 F.2d 1209, 1215–16 (5th Cir. 1990) (court "may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon . . . [if the joint] criminal activity involv[ed] a quantity of narcotics sufficient to support an inference of intent to distribute"). Cf. *U.S. v. Bender,* 265 F.3d 464, 474–75 (6th Cir. 2001) (affirming enhancement for defendant who was in Florida at time of search that uncovered drugs and weapons in codefendant's Tennessee home because he had sent the drugs, lived part-time at the Tennessee residence, and owned one of the guns).

The Eleventh Circuit held that a coconspirator may be subject to §2D1.1(b)(1) if the possessor of the weapon was charged as a coconspirator, possessed the weapon in furtherance of the conspiracy, and the defendant who is to receive the enhancement was a member of the conspiracy at the time the weapon was possessed. *U.S. v. Otero,* 890 F.2d 366, 367 (11th Cir. 1989) [2#18] (a later case, *U.S. v. Martinez,* 924 F.2d 209, 210 n.1 (11th Cir. 1991), notes that the *Otero* test incorporates foreseeability and is thus compatible with other circuits). The court later specified that, in light of Note 2, whether " the co-conspirator possession was reasonably foreseeable by the defendant" must be added as a fourth part to the *Otero* test. *U.S. v. Gallo,* 195 F.3d 1278, 1282–84 (11th Cir. 1999). Cf. *U.S. v. Williams,* 894 F.2d 208, 212–13 (6th Cir. 1990) (coconspirators not present at scene of crime where weapon was possessed may receive enhancement if that possession was foreseeable, but abuse of discretion to give enhancement when coconspirator who actually possessed weapon was not given enhancement) [3#1].

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

by another who received immunity for cooperating with government). The Seventh Circuit followed *Nino* in affirming the enhancement where defendant supervised unindicted coconspirators who possessed weapons during a drug transaction. *U.S. v. Johnson,* 997 F.2d 248, 256–57 (7th Cir. 1993) ("*Nino* makes clear that the one possessing the weapon need not be an indicted co-conspirator. We think this is especially true when the weapon was in the possession of someone under the defendant's control and in close proximity to the defendant and the drugs."). But cf. *U.S. v. Cazares,* 121 F.3d 1241, 1245 (9th Cir. 1997) (remanded: although guns were found in one bedroom of apartment where drugs were stored, others who were not charged lived there and enhancement is improper where government "did not offer facts to support a finding that Parra Cazares knew of the guns' existence or was in any way connected with them").

The §2D1.1(b)(1) enhancement may not be imposed if the defendant is also sentenced under 18 U.S.C. §924(c) for using or carrying a firearm during a drug trafficking crime. See USSG §2K2.4(a), comment. (n.2). An amendment to Note 2 makes it clear that §2D1.1(b)(1) may not be applied for a different weapon possessed by a codefendant when the defendant is sentenced under 18 U.S.C. §924(c). "If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. . . . Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. §924(c) . . . ." (Amendment 599, eff. Nov. 1, 2000) This amendment was made retroactive under §1B1.10(c). See also *U.S. v. Aquino,* 242 F.3d 859, 864–65 (9th Cir. 2001) (applying amendment and stating that prior decisions to the contrary are "no longer good law").

Before the amendment, some circuits had held that §2D1.1(b)(1) could be applied when a codefendant possessed a different weapon. See *U.S. v. Rodriguez,* 65 F.3d 932, 933 (11th Cir. 1995) (affirmed: §2D1.1(b)(1) enhancement for §924(c) violator is not prohibited "for a separate weapons possession, such as that of a coconspirator"); *U.S. v. Washington,* 44 F.3d 1271, 1280–81 (5th Cir. 1995) (affirmed: for defendant convicted under §924(c) for the use of two specific guns, §2D1.1(b)(1) may be applied for codefendant's possession of third weapon supplied by defendant). Cf. *U.S. v. Willett,* 90 F.3d 404, 408 (9th Cir. 1996) (§2D1.1(b)(1) enhancement for possessing knife and silencer proper for defendant convicted under §924(c)(1) for carrying gun).

3. Relevant Conduct, Proximity of Weapon to Drugs

A Nov. 1991 amendment to §2D1.1(b)(1) deleted "during commission of the offense," and is intended to clarify that the relevant conduct provisions apply to this section. See USSG App. C, amendment 394. Thus, the weapon need not actually be possessed during the offense of conviction. See *David v. U.S.*, 134 F.3d 470, 475–76

(1st Cir. 1998) (amendment "makes it plain that the 'relevant conduct' provisions . . . apply to the adjustments in section D.1(b)(1)"); *U.S. v. Smith,* 127 F.3d 1388, 1389–90 (11th Cir. 1997) (noting amendment in affirming enhancement for gun carried during dismissed offense that occurred three months after related offense of conviction); *U.S. v. Mumford,* 25 F.3d 461, 468–69 (7th Cir. 1994) (affirmed: codefendant's possession of weapon during relevant conduct was reasonably foreseeable to defendant); *U.S. v. Roederer,* 11 F.3d 973, 982–83 (10th Cir. 1993) (affirmed: although gun was not present in car during offense of conviction, it was possessed at apartment where relevant conduct occurred); *U.S. v. Falesbork,* 5 F.3d 715, 719–20 (4th Cir. 1993) (affirmed enhancement for gun used by coconspirator in murder related to cocaine distribution offense); *U.S. v. Quintero,* 937 F.2d 95, 97–98 (2d Cir. 1991) (gun possessed during dismissed drug count may be used for §2D1.1(b)(1) enhancement on other drug count that was part *of same* course of conduct); *U.S. v. Willard*, 919 F.2d 606, 609–10 (9th Cir. 1990) (weapons found at different location were part of same course of conduct, may be used for §2D1.1(b)(1) enhancement) [3#16]; *U.S. v. Paulk,* 917 F.2d 879, 884 (5th Cir. 1990) (firearm possessed during related drug conspiracy may be considered) [3#16]. Cf. *U.S. v. Ortega,* 94 F.3d 764, 768 (2d Cir. 1996) (remanded: although firearm found in defendant's apartment might have been connected to drug conspiracy that was alleged to have begun two months later, court must make specific findings that the weapon was possessed during relevant conduct); *U.S. v. Baldwin,* 956 F.2d 643, 647 & n.4 (7th Cir. 1992) (reversed: enhancement not proper where defendant attacked agent with meat cleaver a month after the sale of drugs to which defendant pleaded guilty; court noted 1991 amendment would change result); *U.S. v. Garner,* 940 F.2d 172, 175–76 (6th Cir. 1991) (cumulative effect of factors made it clearly improbable that antique-style, single-shot, unloaded derringer, which was locked in a safe twelve feet from safe where drugs were found and is not the type of weapon "normally associated with drug activity," was connected to offense) [4#7].

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

house where drugs were packaged and sold was sufficient); *U.S. v. Stewart,* 926 F.2d 899, 901 (9th Cir. 1991) ("key is whether the gun was possessed during the course of criminal conduct, not whether it was 'present' at the site" of the offense of conviction); *U.S. v. Heldberg,* 907 F.2d 91, 92–94 (9th Cir. 1990) (enhancement applicable for unloaded firearm locked in briefcase in trunk of car where defendant arrested for drug importation); *U.S. v. Paulino,* 887 F.2d 358, 360 (1st Cir. 1989) (enhancement proper for guns in separate apartment in same building as apartment where drugs were sold).

However, some courts have reversed the enhancement where no connection between the weapon and the drugs or the offense of conviction was shown. See, e.g., *U.S. v. Cooper,* 111 F.3d 845, 847 (11th Cir. 1997) (remanded: where drugs found in warehouse were basis of defendant's guilty plea to possession with intent to distribute, enhancement could not be based on weapons found in his home, even though drugs and key to warehouse were found in home); *U.S. v. Siebe,* 58 F.3d 161, 163 (5th Cir. 1995) (remanded: error to presume weapons stored at home of armed police officer were possessed during drug offense—no evidence of drug trafficking was found in home and government must prove connection between drugs and weapon) [7#11]. See also *U.S. v. Hernandez,* 187 F.3d 806, 808 (8th Cir. 1999) (affirming finding that weapon was not possessed in connection with offense under §2D1.1.(b)(1) and §5C1.2—truck driver who transported marijuana in trailer explained that shotgun in cab's sleeping compartment had been previously purchased for protection on overnight trips after an attempted break-in, and government did not present any contrary evidence).

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

4. Miscellaneous

Most circuits have ruled that the enhancement may be given even if the defendant was acquitted of a charge of using or carrying a firearm during a drug offense under 28 U.S.C. §924(c)(1). See *U.S. v. Goggins,* 99 F.3d 116, 119 (3d Cir. 1996); *U.S. v. Buchanan,* 70 F.3d 818, 828 (5th Cir. 1996); *U.S. v. Romulus,* 949 F.2d 713, 716–17

(4th Cir. 1991); *U.S. v. Coleman,* 947 F.2d 1424, 1428–29 (10th Cir. 1991); *U.S. v. Welch*, 945 F.2d 1378, 1384–85 (7th Cir. 1991); *U.S. v. Duncan,* 918 F.2d 647, 652 (6th Cir. 1990); *U.S. v. Rodriguez-Gonzalez,* 899 F.2d 177, 179–82 (2d Cir. 1990) [3#6]; *U.S. v. Dawn,* 897 F.2d 1444, 1449–50 (8th Cir. 1990); *U.S. v. Mocciola,* 891 F.2d 13, 16–17 (1st Cir. 1989) [2#18]. The Ninth Circuit had held otherwise in *U.S. v. Watts,* 67 F.3d 790, 796–98 (9th Cir. 1996) (remanded: jury acquittal on §924(c) charge precluded §2D1.1(b)(1) enhancement) [8#4], but was reversed by the Supreme Court, 117 S. Ct. 633 (1997). See also the discussion of *U.S. v. Sherpa,* 110 F.3d 656 (9th Cir. 1996), in section I.A.3.

It was not clearly erroneous to give the enhancement to a county sheriff who carried a gun as part of his job since carrying the firearm "as a sheriff . . . does not mean . . . that the weapon could not be connected with the offense." *U.S. v. Sivils,* 960 F.2d 587, 596 (6th Cir. 1992) [4#20]. Accord *U.S. v. Marmolejo,* 106 F.3d 1213, 1216 (5th Cir. 1997) (remanded: district court should have applied enhancement to INS agent who was present during at least one drug shipment where he carried gun as part of job) [9#6]; *U.S. v. Ruiz,* 905 F.2d 499, 508 (1st Cir. 1990) (§2D1.1(b)(1) properly applied to police officer). The enhancement was also proper for a defendant who accepted two weapons as partial payment for cocaine. *U.S. v. Overstreet,* 5 F.3d 295, 297 (8th Cir. 1993). See also *Brown v. U.S.,* 169 F.3d 531, 533 (8th Cir. 1999) ("the use or intended use of firearms for one purpose, even if lawful, does not preclude the use of the firearm for the prohibited purpose of facilitating the drug trade, and therefore does not automatically remove the firearm from the purview of U.S.S.G. §2D1.1(b)(1)").

The §2D1.1(b)(1) enhancement has been allowed when the weapon was unloaded or otherwise inoperable. See, e.g., *U.S. v. Harris,* 128 F.3d 850, 853 (4th Cir. 1997) (unloaded firearms); *U.S. v. Mitchell,* 31 F.3d 271, 278 (5th Cir. 1994) (unloaded, possibly inoperable gun); *U.S. v. Ewing,* 979 F.2d 1234, 1238 (7th Cir. 1992) (unloaded pistol); *U.S. v. Paulk,* 917 F.2d 879, 882 (5th Cir. 1990) (inoperable and unloaded pistol); *U.S. v. Heldberg,* 907 F.2d 91, 94 (9th Cir. 1990) (unloaded); *U.S. v. Smith,* 905 F.2d 1296, 1300 (9th Cir. 1990) (inoperable); *U.S. v. Burke,* 888 F.2d 862, 869 (D.C. Cir. 1989) (gun need not be operable). See also *U.S. v. Luster,* 896 F.2d 1122, 1128–29 (8th Cir. 1990) ("We agree with the Burke court that the inoperability of the firearm should not bar a §2D1.1(b) adjustment, provided that the firearm at the time of the offense did not clearly appear inoperable."); USSG §1B1.1, comment. (n.1(d)) (Nov. 1, 1989) (amending commentary to add: "Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon").

Other devices that were found to be a "dangerous weapon" for purposes of §2D1.1(b)(1) include brass knuckles, *U.S. v. Guel,* 184 F.3d 918, 923–24 (8th Cir. 1999), and a "stun gun," *U.S. v. Agron,* 921 F.2d 25, 26 (2d Cir. 1990) [3#18].

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

D. Calculation of Loss

As of Nov. 1, 2001, the theft and fraud guidelines have been extensively amended. The former fraud guideline, §2F1.1, has been deleted and fraud offenses are now covered in the revised §2B1.1. The application notes have also been extensively amended and now contain more specific definitions and examples of "loss" in Note 2. "Loss" for guideline calculations is generally defined as "the greater of actual or intended loss," and the latter terms are now defined. Other changes that affect the discussion below will be noted at the appropriate points. Most of the cases in this section are pre-amendment decisions and some may no longer be valid for post-amendment offenses; however, because many of the concepts for calculating loss carry over into the revised §2B1.1, many cases will still provide useful guidance. For offenses committed before Nov. 1, 2001, ex post facto problems may preclude application of revised §2B1.1 and the cases interpreting former §2B1.1 and §2F1.1 will remain relevant.

1. Offenses Involving Property

Former Application Note 2 of original §2B1.1 stated that loss is ordinarily measured by the "fair market value" of the property at issue. Now, Note 2(C)(i) (effective Nov. 1, 2001) retains "fair market value of the property unlawfully taken or destroyed" as one of the factors to take into account in estimating loss.

"The general test for determining the market value of stolen property is the price a willing buyer would pay a willing seller at the time and place the property was stolen." *U.S. v. Williams,* 50 F.3d 863, 864 (10th Cir. 1995) (affirmed: proper to measure loss by retail price of stolen jewelry, not wholesale price, because it was stolen from retail store, not wholesaler). Alternatives to this approach may be used when market value is difficult to measure or inadequately reflects the harm to the victim. See, e.g., *U.S. v. Gottfried,* 58 F.3d 648, 651–52 (D.C. Cir. 1995) (affirmed: for Board of Veterans' Appeals attorney who destroyed government case documents, loss properly calculated as cost of reprocessing cases); *U.S. v. Thomas,* 973 F.2d 1152, 1159 (5th Cir. 1992) ("only where ascertaining market value is impractical, may a court measure loss in some other way"—error to consider incidental costs to victims of automobile fraud where retail value of cars easily determined); *U.S. v. Larracuente,* 952 F.2d 672, 674 (2d Cir. 1992) (proper to use retail, rather than "bootleg," value of counterfeit videotapes because high quality of tapes allowed their sale through normal retail outlets); *U.S. v. Wilson,* 900 F.2d 1350, 1356 (9th Cir. 1990) (upholding calculation of intended loss based on company's development costs versus amount at which defendant offered to sell stolen biotechnology information). Cf. *U.S. v. Kim,* 963 F.2d 65, 68–69 (5th Cir. 1992) (under §2B5.4, criminal infringement of trademark, "the retail value of the infringing items" means the retail value of the counterfeit goods, not value of genuine merchandise; however, retail value of genuine merchandise may be relevant evidence).

Previously, Application Note 3 stated that "loss need not be determined with

precision, and may be inferred from any reasonably reliable information available." Amended Note 2(C) (effective Nov. 1, 2001) is similar: "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." For cases interpreting the earlier Note 3, see *U.S. v. Pervaz,* 118 F.3d 1, 10 (1st Cir. 1997) (not unreasonable to use amount cellular phone company would have been paid if calls made with stolen access numbers had been made legitimately); *Kim,* 963 F.2d at 69–70 (not improper to use retail value of genuine merchandise where value of counterfeit items difficult to determine); *U.S. v. Hernandez,* 952 F.2d 1110, 1118 (9th Cir. 1991) (proper to multiply average market value of counterfeit cassette tapes by number of counterfeit insert cards discovered in warehouse to determine loss rather than calculate victim's lost profit); *Wilson,* 900 F.2d at 1356 ("where goods have no readily ascertainable market value, any reasonable method may be employed to ascribe an equivalent monetary value to the items"). However, there must be adequate evidence to support the final total. It was error to simply use "the middle value of the high and low [loss] estimates without assessing the reliability of the higher estimate. In addition, the District Court did not articulate an adequate evidentiary basis for selecting the middle value of the two estimates, as opposed to selecting the low end of the range." *U.S. v. Medford,* 194 F.3d 419, 424 (3d Cir. 1999) (also noting that "in cases in which the fair market value ranges between two estimates and either end of the range is equally plausible, courts generally should adopt the lower end of the estimated range").

Two courts, determining loss under the previous version of §2B1.1 for violations of 18 U.S.C. §659, theft from interstate shipments, relied on 18 U.S.C. §641's definition of value and measured loss by the retail value of the stolen goods. *U.S. v. Watson,* 966 F.2d 161, 162–63 (5th Cir. 1992) (retail value used even though goods were shipped wholesale); *U.S. v. Russell,* 913 F.2d 1288, 1292–93 (8th Cir. 1990). See also *U.S. v. Lopez,* 64 F.3d 1425, 1427 (9th Cir. 1995) (citing *Watson* and *Russell* in §659 case, affirmed use of retail value as reasonable estimate of fair market value for loss calculation); *U.S. v. Colletti,* 984 F.2d 1339, 1345 (3d Cir. 1992) (proper to use retail value of stolen diamonds rather than replacement cost or amount of insurance payment).

Application Note 2 of §2B1.1 was amended Nov. 1993 to state: "Loss does not include the interest that could have been earned had the funds not been stolen." The Nov. 1, 2001, amendment now makes clear in Note 2(D)(i) that "[l]oss shall not include . . . [i]nterest of any kind," including "amounts based on an agreed-upon return or rate of return." Before the 1993 amendment, the First Circuit held that the amount of interest that would have been earned on embezzled funds may be used in calculating loss. *U.S. v. Curran,* 967 F.2d 5, 5–6 (1st Cir. 1992) ($10,000 that would have been earned on embezzled $174,000 properly included) [5#1]. Accord *U.S. v. Bartsh,* 985 F.2d 930, 933 (8th Cir. 1993) [5#9]. Cf. *Pervaz,* 118 F.3d at 10 (affirmed: including lost profit margin for phone carriers victimized by defen-

dants is not improper inclusion of interest: "Profit is an ingredient of the fair market value of goods or services").

As before, loss is based on the amount taken or intended to be taken ("the greater of actual loss or intended loss," Note 2(A)(i) now). For cases before the 2001 amendments, see *U.S. v. Van Boom,* 961 F.2d 145, 147 (9th Cir. 1992) (loss from attempted bank robbery is amount defendant sought to take); *Hernandez,* 952 F.2d at 1118 (proper to base loss on number of cassette tape labels discovered in warehouse even though counterfeiting scheme had produced few finished tapes); *U.S. v. Westmoreland,* 911 F.2d 398, 399 (10th Cir. 1990) (total value of goods stolen, $691,311, properly used as loss under §2B1.1 even though all but $10,768 worth was recovered); *U.S. v. Parker,* 903 F.2d 91, 105 (2d Cir. 1990) (entire amount of cash in stolen payroll car must count as "loss" even though robbers did not transfer all cash from stolen car to their getaway car). See also *U.S. v. Lamb,* 207 F.3d 1006, 1007–08 (7th Cir. 2000) (remanded: if using intended loss, must go to §2X1.1 procedure, including decreasing offense level by three if had not completed or but for capture was about to complete all acts necessary for success) (Note: Current Note 13 now directs courts to use §2X1.1 "[i]n the case of a partially completed offense.") But see *U.S. v. Johnson*, 993 F.2d 1358, 1359 (8th Cir. 1993) (loss does not include misapplied funds never removed from the credit union—credit union was never at risk of losing funds). (Note: This decision may not be valid for offenses after Nov. 1, 2001. Current Note 2(A)(ii) states that "'Intended loss' . . . includes intended pecuniary harm that would have been impossible or unlikely to occur.")

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

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

2. Offenses Involving Fraud and Deceit

Fraud offenses, formerly sentenced under the now deleted §2F1.1, have been consolidated in §2B1.1 after Nov. 1, 2001. Previously, the guidelines stated that "the loss need not be determined with precision" and a court "need only make a reasonable estimate of the loss." See §2F1.1, comment. (n.9). The amended §2B1.1 states similarly in Application Note 2(C): "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference."

Under §2F1.1, the Third Circuit had recognized that different types of frauds require different methods to ascertain the loss. See *U.S. v. Shaffer,* 35 F.3d 110, 114 (3d Cir. 1994) (check kiting and secured loan frauds are both bank fraud but loss must be calculated differently). Cf. *U.S. v. Harper,* 32 F.3d 1387, 1392 (9th Cir. 1994) (requiring "use of a realistic, economic approach to determining what losses [defendant] truly caused or intended to cause, rather than the use of some approach which does not reflect the monetary loss"); *U.S. v. Deutsch*, 987 F.2d 878, 886 (2d Cir. 1993) (error to simply total face value of bogus checks used in credit card fraud—each one partially replaced previous ones, so actual or intended amount of fraud was much less). The following sections provide case law for fraud loss computation in general and for some specific situations.

Note: The cases that follow were decided under now deleted §2F1.1. Some of these cases may no longer be valid precedent, such as those that did not include losses that were unlikely or impossible. Note also that some of the application note numbers changed after the 1998 amendments and the same note may be cited in different cases by different numbers, especially Notes 7, 8, and 10, which later became 8, 9, and 11.

a. Actual versus intended or probable loss

Under Note 2(A) of §2B1.1 (effective Nov. 1, 2001), "loss is the greater of actual loss or intended loss." Former Note 8 of §2F1.1 included a similar definition that courts applied to a variety of factual scenarios. See, e.g., *U.S. v. Loayza,* 107 F.3d 257, 266 (4th Cir. 1997) (affirming use of intended loss instead of "net loss"—although defendant returned some money to early investors in Ponzi scheme, those payments were "vital to the longevity of the scheme"); *U.S. v. Hill,* 42 F.3d 914, 919 (5th Cir. 1995) (where defendant received $800,000 for phony securities worth $69 million, loss was properly set at $69 million because "the purpose of the rental scheme was to allow the victims to pledge the face value of the securities . . . as collateral for loans, or to allow them to increase the assets reflected on their balance sheets by that amount. . . . The 'intended loss that the defendant was attempting to inflict' was the face value of the securities."); *U.S. v. Mills*, 987 F.2d 1311, 1315–16 (8th Cir. 1993) (use entire $1.5 million fraudulently received from victims even though defendant returned $746,816 in response to threatened legal action); *U.S. v. Katora*, 981 F.2d 1398, 1406 (3d Cir. 1992) (use greater intended loss even though actual

loss is easily calculated); *U.S. v. Strozier*, 981 F.2d 281, 284 (7th Cir. 1992) (use $405,000 defendant fraudulently deposited into bank account even though he withdrew only $36,000—defendant intended to withdraw entire amount); *U.S. v. Wimbish*, 980 F.2d 312, 315–16 (5th Cir. 1992) (use as intended loss $100,944 face value of fraudulently deposited checks stolen from mail even though defendant withdrew only $14,731); *U.S. v. Haggert*, 980 F.2d 8, 12–13 (1st Cir. 1992) (use face amount of fraudulent sight drafts—defendant did not intend to pay loans); *U.S. v. Lghodaro*, 967 F.2d 1028, 1031 (5th Cir. 1992) (proper to use intended loss even though actual loss is easily calculated) [5#2]; *U.S. v. Lara,* 956 F.2d 994, 998 (10th Cir. 1992) (difference between altered and unaltered bid quotes was proper value of loss even though value of services rendered may have equaled altered bids—defendant intended to pocket the difference); *U.S. v. Smith*, 951 F.2d 1164, 1166 (10th Cir. 1991) ("Where there is no [actual] loss, or where actual loss is less than the loss the defendant intended to inflict, intended or probable loss may be considered"); *U.S. v. Davis*, 922 F.2d 1385, 1392 (9th Cir. 1991) (use value of jewels attempted to be obtained by fraud); *U.S. v. Johnson*, 908 F.2d 396, 398 (8th Cir. 1990) (entire amounts of car loans are "loss" even though banks repossessed cars—defendant did not intend repayment); *U.S. v. Wills*, 881 F.2d 823, 827 (9th Cir. 1989) (use entire $52,000 intended loss through credit card fraud scheme even though $25,000 was recovered).

"Before the district court may enhance a defendant's sentence based upon intended loss, there must be evidence sufficient to show that (1) the defendant intended the loss, (2) the defendant had the ability to inflict the loss, and (3) the defendant completed all acts necessary to cause the loss." *U.S. v. Fleming,* 128 F.3d 285, 287 (6th Cir. 1997). The Eighth Circuit rejected the government's claim that intended loss is measured by the possible or potential loss. Rather, "the crucial question for determining intended loss for sentencing purposes is the loss that the defendant actually intended to cause." *U.S. v. Wells,* 127 F.3d 739, 746–47 (8th Cir. 1997) (where district court concluded that defendants did not actually intend to cause any loss, proper to use actual loss of $40,000 even though possible loss was much greater). See also *U.S. v. Moored*, 38 F.3d 1419, 1427 (6th Cir. 1994) (defining "intended loss as the loss the defendant subjectively intended to inflict on the victim, e.g., the amount the defendant intended not to repay. . . . 'loss' under §2F1.1 is not the potential loss, but is the actual loss to the victim, or the intended loss to the victim, whichever is greater"). Note that the Fourth Circuit has limited the use of "probable and intended" loss to attempted crimes only. *U.S. v. Bailey*, 975 F.2d 1028, 1031 (4th Cir. 1992) (remanded: improper to include foregone projected profits in completed fraud scheme) [5#5].

The 2001 amendments resolved a circuit split over whether probable or intended loss should be limited to what the actual loss *could* have been. Note 2(A)(ii) now states: "'Intended loss' (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." For decisions that

had held otherwise, see, for example, *U.S. v. Dozie,* 27 F.3d 95, 99 (4th Cir. 1994) (affirmed: district court properly "discounted" false insurance claims to estimate realistic probable loss—"insurance claims are frequently inflated. Basing the probable loss on the claim, then, does not reflect economic reality"); *U.S. v. Santiago,* 977 F.2d 517, 524–26 (10th Cir. 1992) (remanded: loss in unsuccessful insurance fraud could not exceed $4,800 insurance company would have paid, even though defendant filed fraudulent claim for $11,000: "whatever a defendant's subjective belief, an intended loss under Guidelines §2F1.1 cannot exceed the loss a defendant in fact could have occasioned if his or her fraud had been entirely successful") [5#6]; *U.S. v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992) (court may not increase offense level by estimated loss where completed fraud could not have resulted in actual loss) [5#1].

Other circuits had already held that intended loss was not limited to what the actual loss could have been. The Ninth Circuit, for example, held that to prove intended loss, the government need only establish that the defendant attempted to inflict the loss. *U.S. v. Joetzki,* 952 F.2d 1090, 1096 (9th Cir. 1991) (check amount is intended loss even though the check was so fraudulent no one took it seriously—Application Note 11 to §2F1.1 allows downward departure in this circumstance). Furthermore, the calculation of intended loss is not limited by the "probable" loss, *U.S. v. Koenig,* 952 F.2d 267, 271 (9th Cir. 1991). The Eleventh Circuit held that "[i]t is not required that an intended loss be realistically possible. . . . Nothing in §2F1.1 n.7 requires that the defendant be capable of inflicting the loss he intends." Cases that hold otherwise "are inconsistent with the concept that the calculation can be based on the intended loss." *U.S. v. Wai-Keung,* 115 F.3d 874, 877 (11th Cir. 1997). See also *U.S. v. Geevers,* 226 F.3d 186, 195–96 (3d Cir. 2000) (agreeing with majority of circuits that "impossibility is not in and of itself a limit on the amount of intended loss").

Note 2(A)(ii) also resolved the circuit split by specifying that intended loss can be used in cases that involve a government sting operation where no actual loss is possible. Several circuits already held that it could. See, e.g., *U.S. v. Klissic,* 190 F.3d 34, 35–36 (2d Cir. 1999) ("impossibility of actual loss does not require use of a zero loss figure"); *U.S. v. Schlei,* 122 F.3d 944, 996 (11th Cir. 1997) ("the fact that the fraud occurs in connection with a sting operation does not affect the evidence of defendant's intent to defraud others"); *U.S. v. Studevent,* 116 F.3d 1559, 1562–64 (D.C. Cir. 1997) (affirming use of full value of stolen checks even though most were "fenced" by FBI agent in sting operation: "loss under application note 7 to Guidelines section 2F1.1 is not limited to an amount that was possible or likely"); *U.S. v. Robinson,* 94 F.3d 1325, 1328–29 (9th Cir. 1996) ("There is no reason why defendants caught as a result of a sting operation should be treated any differently than defendants caught participating in an ongoing fraud."). The Tenth Circuit reached the opposite conclusion. See *U.S. v. Galbraith,* 20 F.3d 1054, 1059 (10th Cir. 1994) (remanded: "Because this was an undercover sting operation which was structured to sell stock in a pension fund that did not exist, defendant could not have occasioned any loss [and] the intended or probable loss was zero"). In a later decision

the court affirmed an upward departure in a sting case because the calculated loss of zero "does not fully capture the harmfulness and seriousness of the conduct." USSG §2F1.1, comment. (n.11). See *U.S. v. Sneed,* 34 F.3d 1570, 1583–85 (10th Cir. 1994) (affirmed: departure warranted in government sting operation where "there could be neither actual loss to real victims nor true intended loss"; proper to use $147,000 defendant had negotiated as his share of fraud to set extent of departure).

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

b. Check kiting/bank fraud

The 2001 amendments retained former Note 10's directions for partially completed offenses. New Note 13 states: "In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both." Some cases, noted below, have directed courts to do so.

Before the 2001 amendments, the Sixth Circuit had set forth three requirements for use of intended loss in a bad check case: (1) the defendant must have intended the loss; (2) it must have been possible for the defendant to cause the loss; and (3) the defendant must have completed, or been about to complete but for interruption, all of the acts necessary to bring about the loss. For the last factor, courts should use §2X1.1(b)(1), which governs attempts, to determine whether the offense level should be reduced. If the offense was only partially completed, the offense level is the greater of the offense level of the intended offense minus three levels or the offense level for the part of the offense that was completed. *U.S. v. Watkins*, 994 F.2d 1192, 1195–96 & n.4 (6th Cir. 1993) [5#14]. See also *U.S. v. Mancuso,* 42 F.3d 836, 849–50 (4th Cir. 1994) (remanded: in complex bank fraud case where fraud was only partially completed, court should follow instruction in §2F1.1, comment. (n.10), to determine offense level in accordance with provisions of §2X1.1); *U.S. v. Aideyan,* 11 F.3d 74, 76–77 (6th Cir. 1993) (remanded: district court correctly calculated intended loss, but failed to then apply §2X1.1(b)(1) analysis; the offense here was only partially completed, so Note 4 of §2X1.1 should be followed to set offense level). Cf. *U.S. v. Oates,* 122 F.3d 222, 227–28 (5th Cir. 1997) (affirmed: "arguably, section 2X1.1 would apply to reduce the amount of loss where the requisite acts necessary to establish a completed offense had yet to be undertaken," but §2X1.1 "is inapplicable to reduce the base offense level of Oates' conduct, which indisputably constituted a 'complete' offense of bank fraud").

The 2001 amendments also codified a practice many courts had followed of measuring loss as of the time the offense was detected. Note 2(E) reads: "Loss shall be reduced by the following: (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected."

Previously, the Fifth Circuit held that the loss from check kiting is the amount of the overdraft, the bank's "out-of-pocket loss," at the time the offense was discovered. It would not be treated like fraudulently obtained loans, in which loss is reduced by whatever collateral may be recovered by the bank. Whatever amounts have been or may be repaid will not be used to reduce the offense level. *U.S. v. Freydenlund,* 990 F.2d 822, 825–26 (5th Cir. 1993). The Third Circuit agrees, holding that courts "must calculate the victim's actual loss as it exists at the time the offense is detected rather than as it exists at the time of sentencing." *U.S. v. Shaffer,* 35 F.3d 110, 113–14 (3d Cir. 1994) ("the gross amount of the kite at the time of detection, less any other collected funds the defendant has on deposit with the bank at that time and any other offsets that the bank can immediately apply against the overdraft (including immediate repayments), is the loss to the victim bank") [7#3]. Accord *U.S. v. Akbani,* 151 F.3d 774, 778 (8th Cir. 1998) (same, adding that loss may be increased by checks that have not been presented to bank at time offense is discovered); *U.S. v. Matt,* 116 F.3d 971, 975 (2d Cir. 1997) (affirmed: "it does not matter that Matt made restitution to the banks after the scheme was uncovered"); *U.S. v. Flowers,* 55 F.3d 218, 221–22 (6th Cir. 1995) (affirmed: "Check kiting is more akin to theft than to fraudulently obtaining a loan. . . . [T]he fact that a check kiter makes restitution to the bank [does not] alter the fact of loss. . . . Defendants in a check-kiting scheme are entitled to reduction of the loss by any funds actually available in the accounts on which the checks were drawn."); *U.S. v. Mau,* 45 F.3d 212, 216 (7th Cir. 1995) (affirmed: "fact that a check kiter enters into a repayment scheme after the loss has been discovered does not change the fact of the loss; such fact merely indicates some acceptance of responsibility"). Cf. *U.S. v. Carey,* 895 F.2d 318, 322–23 (7th Cir. 1990) (reversed downward departure based on defendant making restitution of all but $20,000 of $220,000 loss in check-kiting scheme—restitution did not alleviate seriousness of offense); *U.S. v. Bolden,* 889 F.2d 1336, 1341 (4th Cir. 1989) (remanded: fact that check-kiting defendant made some restitution to bank does not justify departure).

c. Fraudulent loan applications

The 2001 amendments continue the policy of earlier Note 8(b) and several court decisions by measuring loss as of the time of detection, as noted above, and specifying in Note 2(E)(ii): "In a case involving collateral pledged or otherwise provided by the defendant, [loss shall not include] the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."

In applying former Note 8(b), which had been amended in 1992, the First Circuit held that Note 8(b) is binding commentary that must be followed, and that because the amendment clarified, rather than changed, the definition of loss it may be applied to offenses completed before the amendment. *U.S. v. Bennett*, 37 F.3d 687, 695 (1st Cir. 1994) (remanded: error to reduce loss by amount repaid as part of civil

settlement after fraudulent loan scheme was discovered). See also *U.S. v. Downs,* 123 F.3d 637, 643 (7th Cir. 1997) (affirmed: loss is "the unsecured portion of a loan" at time offense is discovered—amounts paid back or pledged after that do not reduce loss under Note 8(b)); *U.S. v. Mummert*, 34 F.3d 201, 204 (3d Cir. 1994) (affirmed: where defendant arranged fraudulent unsecured loan to finance construction of house by third party, loss is not reduced by third party's offer to repay bank after sale of house or sign house over to bank if no sale—"A defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught"); *U.S. v. Jindra*, 7 F.3d 113, 113–14 (8th Cir. 1993) (affirmed: loss was amount of the loans outstanding at time of defendant's arrest for which no assets were pledged as security—amounts paid back between arrest and sentencing were properly not used to reduce loss); *U.S. v. Menichino*, 989 F.2d 438, 441–42 (11th Cir. 1993) (affirming $40,000 calculation of loss, which represented difference between value of collateral and value of intended loan; Note 8(b) "clarifies that, in a loan application case involving misrepresentation of assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lender could recover from collateral"). Cf. *U.S. v. Moored*, 38 F.3d 1419, 1427 (6th Cir. 1994) (defining "intended loss as the loss the defendant subjectively intended to inflict on the victim, e.g., the amount the defendant intended not to repay"); *U.S. v. Buckner*, 9 F.3d 452, 454 (6th Cir. 1993) (remanded: under 1991 version of Note 8(b), must reduce loss by amount defendant has repaid before offense discovered—use actual loss, not face value of loan); *U.S. v. Willis*, 997 F.2d 407, 417–18 (8th Cir. 1993) (under 1991 and 1992 versions of Note 8, proper to use intended loss where defendant intended to defraud bank of entire amount of loans, which were almost totally unsecured).

However, a downward departure may be appropriate when the intended loss is zero and there is little if any actual loss. See, e.g., *U.S. v. Oligmueller,* 198 F.3d 669, 671–72 (8th Cir. 1999) (departure under Note 8(b) (now Note 15(B) in revised §2B1.1) proper for defendant who did not intend to cause loss, had sufficient unpledged assets to support the loan amount, and paid back almost all of the loan by the time of sentencing).

New Note 2(E)(i) states that "[t]he time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency." Some circuits had held under former Note 8(b) that "the time the offense is discovered" is the time of "discovery by the victim or the proper authorities, whichever comes first." *U.S. v. Lucas,* 99 F.3d 1290, 1296 (6th Cir. 1996). Accord *U.S. v. Swanquist,* 161 F.3d 1064, 1077 (7th Cir. 1998) (agreeing with and following *Lucas* in rejecting defendant's argument that loss should be zero because fraudulent loans were repaid before lending institutions learned of fraud—loss properly calculated as of time employer and FBI learned of offenses).

Previously, several circuits had held that where a contract or loan is fraudulently obtained, the face value of the contract or loan is not the loss when the actual loss is different. See *U.S. v. Shaw,* 3 F.3d 311, 313 (9th Cir. 1993) (using 1989 guideline,

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

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

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

d. Calculation and sentencing

i. General loss calculation

After Nov. 1, 2001, the definition of loss is found in Application Note 2. As before, loss is generally "the greater of actual loss or intended loss." "Actual loss" is now defined as "the reasonably foreseeable pecuniary harm that resulted from the offense," and "intended loss" is "the pecuniary harm that was intended to result from the offense." The note goes on to define pecuniary harm as "harm that is monetary or that otherwise is readily measurable in money," and does not include "emotional distress, harm to reputation, or other non-economic harm." Note 2(C) retains the instruction from Note 9 of §2F1.1 that courts "need only make a reasonable estimate of the loss."

For pre-2001 amendment cases that dealt with calculating and estimating loss, see *U.S. v. Rothberg,* 954 F.2d 217, 219 (4th Cir. 1992) (improper to refuse to increase offense level on ground that actual loss was too speculative because victim might be able to recover damages in civil proceeding). See also *U.S. v. Watson,* 118 F.3d 1315, 1319 (9th Cir. 1997) (affirmed: where loss from 156 fraudulent cellular phone access combinations was shown to be $456,632, average loss of $3030 properly used for all 600 combinations involved in fraud); *U.S. v. Reese,* 33 F.3d 166, 174 (2d Cir. 1994) (in fraudulent loan case, reasonable to estimate loss based on potential losses of loans that were in foreclosure at time of sentencing); *U.S. v. Mount,* 966 F.2d 262, 266–67 (7th Cir. 1992) (where "scalped tickets" broker paid $30,000 for baseball tickets that had $12,000 face value, loss was at least $18,000, the bargain element the baseball club would have offered to its fans); *U.S. v. Gennuso,* 967 F.2d 1460, 1462–63 (10th Cir. 1992) (affirmed use of "out of pocket" method—amount paid by victims minus actual value of items purchased—to calculate loss in consumer fraud case). Cf. *U.S. v. Krenning,* 93 F.3d 1257, 1269 (5th Cir. 1996) ("The method used to calculate the loss . . . must bear some reasonable relation to the actual or intended harm of the offense. Whatever method is employed, the focus of the calculation should be on the harm caused to the victim of the fraud."). But cf. *U.S. v. Melton,* 131 F.3d 1400, 1406 (10th Cir. 1997) (unreasonable to attribute entire $30 million in counterfeit money to defendant who was arrested before any money was produced and did not know how much was to be made: "Courts must examine a conspirator's position within a conspiracy and whether that position gave him firsthand knowledge of the quantity of counterfeit money involved to determine whether the conduct of other conspirators is reasonably foreseeable to him.").

In a case where actual loss was difficult to estimate, the Third Circuit distinguished *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991) ("loss" is not face value of loan but "actual" loss to bank or loss defendant intended to inflict), and held that the face value of electrical contracts obtained by fraud constituted the loss. *U.S. v. Badaracco,* 954 F.2d 928, 936–38 (3d Cir. 1992). The court held it was appropriate to analogize to embezzlement, see Application Note 8, and that under Note 9 it was proper to use "the offender's gross gain" as an alternative to the actual loss. (Note 9 was amended

Nov. 1, 1991, to replace "the offender's gross gain" with "the offender's gain."). See also *U.S. v. Coyle,* 63 F.3d 1239, 1251 (3d Cir. 1995) (affirmed: "certain breaches of fiduciary duty comparable to embezzlement may justify estimating fraud loss by using the 'gross gain' alternative," and it was proper to do so for chief financial officer of corporation in insurance fraud).

ii. Gain

New Application Note 2(B) continues the idea that courts may "use the gain that resulted from the offense as an alternative measure of loss," but specifies that gain is to be used "only if there is a loss but it reasonably cannot be determined." Under former Note 9, most circuits had already concluded that, because the defendant's gain is an "alternative estimate" of the loss, "it may not support an enhancement on its own if there is no actual or intended loss to the victims. . . . If gain to the defendant does not correspond to any actual, intended, or probable loss, the defendant's gain is not a reasonable estimate of loss." *U.S. v. Haddock,* 12 F.3d 950, 960–64 (10th Cir. 1993) (remanded: district court overestimated gain to defendant—only gain that reasonably estimated actual or intended losses was same as actual loss). Accord *U.S. v. Robie,* 166 F.3d 444, 455–56 (2d Cir. 1999) (remanded: and adding that departure could be considered under §2B1.1, comment. (n.15) if loss "does not fully capture the harmfulness of the conduct"); *U.S. v. Chatterji,* 46 F.3d 1336, 1340–42 (4th Cir. 1995). See also *U.S. v. Parrish,* 84 F.3d 816, 819 (6th Cir. 1996) (after first ascertaining that there was a loss, affirming use of gain for fraud defendant who took "commission" from subcontractor that she recommended to her employer). Cf. *U.S. v. Van Brocklin,* 115 F.3d 587, 600 (8th Cir. 1997) (remanded: "determining loss according to a defendant's profit is [not] necessarily erroneous, so long as the evidence indicates that such a method provides a reasonable estimate of the actual loss," but here government never established reasonable estimate). But cf. *U.S. v. Haas,* 171 F.3d 259, 269–70 (5th Cir. 1999) (remanded: noting other circuits that require some actual loss, but "according to our precedent, if the loss is either incalculable or zero, the district court must determine the §2F1.1 sentence enhancement by estimating the gain to the defendant as a result of his fraud").

The 2001 amendments now provide guidance on cases that involve product substitution or procurement fraud, Note 2(A)(v)(I) and (II), and cases that involve goods that were falsely represented as approved by a governmental regulatory agency or for which regulatory approval by a government agency was required but not obtained, Note 2(E)(v). Previously, some courts had used the offender's gain in such cases. See, e.g., *U.S. v. Bhutani,* 266 F.3d 661, 670 (7th Cir. 2001) (affirmed: proper to use gain where consumers did suffer loss by not getting the FDA-approved drugs they sought); *Haas,* 171 F.3d at 270 (remanding for calculation of defendant's gain from defrauding FDA by selling nonapproved drugs); *U.S. v. Marcus,* 82 F.3d 606, 610 (4th Cir. 1996) (affirming use of defendant's gain for selling non-FDA approved drug); *U.S. v. Castner,* 50 F.3d 1267, 1274–76 (4th Cir. 1995) (affirmed: for contract fraud against U.S. Navy, proper to base loss estimate on defendants' gain from selling nonapproved parts instead of parts required by contract); *U.S. v.*

West, 2 F.3d 66, 71 (4th Cir. 1993) (affirming use of offender's gain as alternate loss estimate where actual loss did not adequately represent risk of loss created by defendant's conduct). The Seventh Circuit agreed with the proposition that there must be some loss before using defendant's gain, and noted that if upward departure is warranted under Note 11 because "the fraud caused or risked reasonably foreseeable, substantial non-monetary harm," it would be appropriate to consider defendant's net profits in determining the extent of departure. *U.S. v. Anderson,* 45 F.3d 217, 221–22 (7th Cir. 1995) (remanded: should not have used defendant's net gain where there was no quantifiable loss to any victims; court should consider whether upward departure is warranted for nonmonetary harm).

The Fourth Circuit later reasoned that "the relevant question is not whether the victim lost money on the transaction, but whether the victim was deprived of assets or services it would have possessed absent the fraud." Thus, defendant's profit was a reasonable measure of loss where the victim paid more for the services defendant supplied than it would have absent the fraud. *U.S. v. Vinyard,* 266 F.3d 320, 332 (4th Cir. 2001).

iii. Adjustments to loss

The current definition of loss specifies in Note 2(A)(iv) that "'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." This definition "deletes the previous rule that, by negative implication, excludes consequential damages (except in certain specified cases)." See USSG Supp. to App. C at p. 187 (Reason for Amendment).

Under the former guideline, some courts had held that loss should not be reduced to reflect causes beyond the defendant's control; rather, departure is warranted if the loss overstates or understates the seriousness of the offense. *Kopp*, 951 F.2d at 531, 536. See also *U.S. v. Sarno,* 73 F.3d 1470, 1500–01 (9th Cir. 1995) ("defendant may seek a downward departure to mitigate distortions occasioned by forces beyond the defendant's control"); *U.S. v. Miller,* 962 F.2d 739, 744 (7th Cir. 1992) (defendants may be held responsible for losses directly caused by others—here defendants purchased property after fraudulently obtaining loan from HUD and sold to another who defaulted on mortgage and let property deteriorate, causing loss to HUD at foreclosure sale; district court departed downward, government did not appeal); *U.S. v. Shattuck,* 961 F.2d 1012, 1016–17 (1st Cir. 1992) ("Any portion of the total loss sustained by the victim as a consequence of factors extraneous to the defendant's criminal conduct is *not* deducted" from loss calculation, but departure may be requested). Cf. *U.S. v. Ravoy,* 994 F.2d 1332, 1335 (8th Cir. 1993) (affirmed loss caused by another who defaulted on mortgage of house purchased from defendants because defendants had never intended to pay the mortgage—"loss the defendants intended to inflict . . . was the loss ultimately sustained") [5#15].

However, the Ninth Circuit found that intervening *criminal* conduct by a third party should not be used to increase loss. Defendant committed fraud to acquire properties. After his fraud was discovered, those properties were foreclosed on by

the victim lender and sold. Defendant claimed that the person hired to sell the properties engaged in criminal misconduct that resulted in unreasonably low selling prices, thereby inflating the amount of loss. The appellate court agreed that defendant should not be held responsible for the criminal conduct of another and remanded for findings on whether that is what happened. "For purposes of computing a fraud defendant's adjusted offense level under USSG §2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not 'result[] from' the defendant's crime and may not be considered." *U.S. v. Hicks,* 217 F.3d 1038, 1047–49 (9th Cir. 2000).

Courts had also held that loss under §2F1.1 should not be *increased* by "consequential and incidental damages" that may have occurred because of—but were not directly caused by—defendant's actions. See, e.g., *U.S. v. Izydore,* 167 F.3d 213, 223–24 (5th Cir. 1999) (remanded: bankruptcy expenses resulting from failure of business caused by defendants' fraud were consequential damages that should not be included in loss); *U.S. v. Daddona,* 34 F.3d 163, 170–72 (3d Cir. 1994) (remanded: although defendants' fraudulent actions on construction performance and payment bonds caused some loss, they cannot be held responsible for excess costs to complete project incurred by company that was not directly obligated under the bonds to complete project); *U.S. v. Marlatt,* 24 F.3d 1005, 1007–08 (7th Cir. 1994) (remanded: loss should not be increased by cost to title insurance company of purchasing condo units on which defendant sold fraudulent title insurance—company was only required to clear titles and optional act of buying units to avoid possible lawsuits is not part of loss); *U.S. v. Wilson,* 993 F.2d 214, 217 (11th Cir. 1993) (fraud loss calculation "does not allow for inclusion of incidental or consequential injury"). Nor should loss be increased by costs the victim would have incurred anyway. The Fifth Circuit held that various expenses involved with the government's foreclosure of defendant's properties, "such as brokers' fees, property management fees, advertising expenses, and taxes," were improperly included because they arose from the fact that defendant defaulted on her mortgages, not from her fraudulent bankruptcy filings. *U.S. v. Randall,* 157 F.3d 328, 331 (5th Cir. 1998). These cases may no longer be valid precedent under the current "reasonably foreseeable" standard.

For cases under former Note 11 affirming upward departure because the calculated loss "does not fully capture the harmfulness and seriousness of the conduct," see *U.S. v. Coon,* 187 F.3d 888, 900 (8th Cir. 1999) (affirming two-level departure based on fraud's effect on health insurance claimants whose bills were never paid and for company's debts caused by defendants that were not included in loss calculation); *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) (affirming one-level upward departure for volume of fraud and victim's distress over credit difficulties). For a case under former Note 8(c), which allowed "reasonably foreseeable consequential damages" in procurement fraud or product substitution cases, see *U.S. v. Roggy,* 76 F.3d 189, 193 (8th Cir. 1996) (affirmed: loss caused by illegal pesticide spraying was over $80 million expense of contaminated grain, cereal, and storage facilities, not much smaller amount charged for fraudulent spraying).

Should defendants' "cost of doing business" be deducted from their fraud loss

calculation? Two circuits have said no. The Ninth Circuit rejected such claims where the offense level was based on intended loss. In defrauding numerous victims, defendants occasionally provided refunds of "retainer fees," canceled sales, or otherwise returned some money to their victims. Because defendants "clearly intended to defraud every victim," such actions "do[] not affect the intended loss," and the district court properly found that, if defendants "did return some money to [their] victims, it was done for the sole purposes of deflecting serious disruption of their schemes and making the operation look legitimate, which in turn enabled [defendants] to defraud a greater number of victims." *U.S. v. Blitz,* 151 F.3d 1002, 1012 (9th Cir. 1998). The Eighth Circuit rejected defendant's claim "that the amount of loss should be reduced by allowances for a reasonable profit and the overhead of running their business, that is, the costs of salaries for employees, of handling of the prizes and [other] products, and of shipping those prizes and products. . . . [T]he district court found that the defendants' business was a conspiracy to commit wire fraud, and we are not inclined to allow the defendants a profit for defrauding people or a credit for money spent perpetuating a fraud." *U.S. v. Whatley,* 133 F.3d 601, 606 (8th Cir. 1998). The 2001 amendments do not address this issue with a general rule, but do specify in Note 2(F)(iv) and (v) that credit should not be given for some expenses in Ponzi schemes and fraudulent goods or services cases.

The latter change effectively nullifies several cases. Note 2(F)(iv) now specifies that when "services were fraudulently rendered to the victim by persons falsely posing as licensed professionals, . . . loss shall include the amount paid for the . . . services . . . rendered, or misrepresented, with no credit provided for the value of those . . . services." Previously, where a defendant fraudulently provided services—such as practicing medicine or law without a license—yet still performed satisfactorily, some circuits held that the loss calculation should only include the cost of the fraudulent acts that actually occasioned a loss; however, upward departure may be warranted under §2F1.1, comment. (n.11). See, e.g., *U.S. v. Barnes,* 125 F.3d 1287, 1290–91 (9th Cir. 1997) (remanded: where defendant, a pharmacist posing as a doctor, provided illegitimate but satisfactory medical services for employer, loss does not include value of service provided unless it caused actual loss; however, for another group of patients, it could not be shown that defendant's services were satisfactory and loss equaled full amount they were billed); *U.S. v. Sublett,* 124 F.3d 693, 695 (5th Cir. 1997) (remanded: loss in contract fraud was not face value of contract where defendant provided some legitimate service—district court "must deduct the value of the legitimate services actually provided . . . in its calculation of the loss under section 2F1.1(b)(1)"); *U.S. v. Maurello,* 76 F.3d 1304, 1311–12 (3d Cir. 1996) (remanded: "To the extent that the unauthorized services provided by defendant have not harmed their recipients, but to the contrary have benefitted them, we conclude that defendant's base offense level should not be enhanced"). Cf. *U.S. v. Vinyard,* 266 F.3d 320, 332 (4th Cir. 2001) (affirming use of gain where defendant's profit was calculated as how much victim paid for fraudulent services minus what it would have paid absent fraud).

The Fourth Circuit held that loss should not be reduced by the amount a victim may recover from other assets of the defendant in civil restitution proceedings,

Rothberg, 954 F.2d at 218–19, nor should it be reduced by the amount the victim recovered from a third-party guarantor, *U.S. v. Wilson*, 980 F.2d 259, 261–62 (4th Cir. 1992) (include loss to guarantor as relevant conduct). See also *U.S. v. Burridge,* 191 F.3d 1297, 1301–02 (10th Cir. 1999) (affirmed: "district court did not err in finding the $42,000 recovered by the [victims] in their civil suit cognizable as intended loss, because that money was not returned through [defendant]'s voluntary actions, but rather through action by the victims subsequent to the discovery of the fraud"). Cf. *U.S. v. Alegria,* 192 F.3d 179, 191 (1st Cir. 1999) (proper to refuse to reduce loss by amount victim may recover from insurance—"insurance simply shifts the loss to another victim (the insurance company), so it is irrelevant in calculating the amount of loss for sentencing purposes"); *U.S. v. Daniels,* 148 F.3d 1260, 1262 (11th Cir. 1998) (affirmed: "partial reimbursement to [victim] does not change the amount Daniels embezzled, it only substitutes Daniels' insurance company as another victim").

Similarly, the amount of loss should not be reduced to account for any tax benefits that fraud victims may accrue. *U.S. v. McAlpine,* 32 F.3d 484, 489 (10th Cir. 1994) (affirmed: "had the Sentencing Commission desired to allow for tax savings to a victim as an element to be considered in reducing loss, it could have provided for such in the Guidelines") [7#3]. Accord *U.S. v. Harris,* 38 F.3d 95, 99 (2d Cir. 1994) ("we reject credit for any tax deductions that could be taken by the victims"). The Sixth Circuit reached the same conclusion for assets that may be recovered by a bankruptcy trustee. See *U.S. v. Wolfe,* 71 F.3d 611, 618–19 (6th Cir. 1995) ("The amounts recoverable by the bankruptcy trustee should not be allowed to reduce the amount of loss Wolfe inflicted because recovery of these monies depends on the agencies of another, because Wolfe's Ponzi scheme was insubstantial and unsustainable, because setoff of such monies would create a rule difficult to administer, and because the amounts that might be recovered by the bankruptcy trustee are wholly speculative."). Cf. *U.S. v. Lopez,* 71 F.3d 954, 965 (1st Cir. 1995) (amount that defendant improperly withdrew from partnership account that he managed would not be offset in loss calculation by larger amount that partnership allegedly owed defendant at same time).

iv. Interest

The 2001 amendments to §2B1.1 include new Note 2(D)(i), which specifies that "[l]oss shall not include . . . [i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs." Previously, Note 8 of §2F1.1 had stated loss does not include "interest the victim could have earned on such funds had the offense not occurred." However, interest may be considered for departure. If the loss calculation "substantially understates the seriousness of the offense," new Note 15(A)(iii) lists as a factor to consider for upward departure whether the offense "involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1)."

The 2001 amendment was a response to some circuits' holding that Note 8 did not prevent inclusion of interest that had been guaranteed. The Tenth Circuit, for example, affirmed the inclusion of interest that could have been earned on fraudulently obtained funds where the defendant had guaranteed investors a 12% rate of return. The court reasoned that defendant "induced their investment by essentially contracting for a specific rate of return," which the court held was "analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss." *U.S. v. Lowder,* 5 F.3d 467, 471 (10th Cir. 1993) [6#5]. Accord *U.S. v. Davoudi,* 172 F.3d 1130, 1136 & n.3 (9th Cir. 1999) (affirmed: "unpaid interest in fraudulent loan cases is considered an actual loss to the victims. District Courts may choose to include unpaid interest still due on the loan in the calculation of the victim's actual loss"); *U.S. v. Sharma,* 190 F.3d 220, 227–28 (3d Cir. 1999) ("we hold that in determining the amount of the actual loss sustained by the victim in a criminally fraudulent loan the sentencing court may include the contractually bargained-for interest"); *U.S. v. Porter,* 145 F.3d 897, 900–01 (7th Cir. 1998) (agreeing with *Lowder* reasoning and affirming inclusion of "accrued interest or appreciation that the investor was told he had earned"); *U.S. v. Nolan,* 136 F.3d 265, 273 (2d Cir. 1998) (affirming inclusion of "agreed-upon interest" in pension fraud scheme); *U.S. v. Allender,* 62 F.3d 909, 917 (7th Cir. 1995) (affirmed: interest defendant agreed to pay on fraudulent loan may be included because Note 8 "refers to speculative 'opportunity cost' interest—the time value of money stolen from the victims. . . . It does not refer to a guaranteed, specific rate of return that a defendant contracts or promises to pay") [8#1]; *U.S. v. Henderson,* 19 F.3d 917, 928–29 (5th Cir. 1994) (interest on fraudulently obtained loans properly included: "Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction"; Note 8 "sweeps too broadly and, if applied in this case would be inconsistent with the purpose of §2F1.1").

Similarly, the First Circuit held that Note 8 does not prohibit inclusion of late fees and finance charges in credit card fraud loss. Such costs should not be considered "interest," but rather "part of the price of using credit cards" that the credit company "has a right to expect . . . will be paid." *U.S. v. Goodchild,* 25 F.3d 55, 65–66 (1st Cir. 1994) [6#17]. Accord *U.S. v. Jones,* 933 F.2d 353, 354 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers). See also *U.S. v. Gilberg,* 75 F.3d 15, 19 (1st Cir. 1996) (affirmed: following *Goodchild*, proper to include accrued mortgage loan interest in loan fraud case). Cf. *U.S. v. Pervaz,* 118 F.3d 1, 10 (1st Cir. 1997) (affirmed: including lost profit margin for phone carriers victimized by defendants is not improper inclusion of interest: "Profit is an ingredient of the fair market value of goods or services").

It has also been held that Note 8's exclusion of interest in the loss calculation does not prohibit inclusion of interest in restitution. See *U.S. v. Hoyle,* 33 F.3d 415, 420 (4th Cir. 1994) (remanding loss calculation because interest was included, but affirming restitution order that included interest).

v. Pre-guidelines conduct

The Ninth Circuit had held that if a defendant is sentenced for pre-guidelines and guidelines conduct, the court may aggregate all losses if it imposes a concurrent sentence for the two time periods, or it must make express findings as to the loss for each period and calculate the guideline sentence solely with reference to losses not considered in imposing the non-guideline sentence. *U.S. v. Niven*, 952 F.2d. 289, 294 (9th Cir. 1991). However, the court later recognized that *Niven* was effectively overruled by *Witte v. U.S.*, 115 S. Ct. 2199 (1995). See *U.S. v. Scarano,* 76 F.3d 1471, 1477–80 (9th Cir. 1996) (may add pre-guidelines offense loss as relevant conduct to guidelines offense and impose consecutive sentences). Cf. *U.S. v. Haddock,* 956 F.2d 1534, 1553–54 (10th Cir. 1992) ("enhancement of a [guideline] sentence . . . based on losses associated with [pre-guidelines offenses] does not violate the Ex Post Facto Clause"; losses from pre-guidelines offenses were properly grouped as relevant conduct).

3. Bribery and Extortion

Bribes that were paid as part of the relevant conduct are included in calculating the value of the bribes. See *U.S. v. Williams,* 216 F.3d 1099, 1104 (D.C. Cir. 2000) ("When calculating the number and amount of bribes involved, the sentencing court may consider all relevant conduct attributable to the defendant."); *U.S. v. Sapoznik,* 161 F.3d 1117, 1120 (7th Cir. 1998) (affirming inclusion of bribes paid in previous job that was immediately before instant offense job, and which were paid by the same person for the same purpose); *U.S. v. Tejada-Beltran,* 50 F.3d 105, 110 (1st Cir. 1995) (affirmed: "sentencing court, in fashioning the three-level enhancement under section 2C1.1(b)(2)(A), could appropriately aggregate all bribes offered or given by appellant as part of the same course of conduct as the offense of conviction, whether or not charged in the indictment and whether or not encompassed by his guilty plea"); *U.S. v. Kahlon,* 38 F.3d 467, 470 (9th Cir. 1994) (affirmed: "Bribes paid by others not in the presence of the defendant, but in furtherance of the conspiracy, can be 'reasonably foreseeable'").

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

Also interpreting §2C1.1(b)(2)(A), the Seventh Circuit held that where a juror solicited a bribe from the defendant company in a civil case in return for trying to persuade the jury to return a verdict in the company's favor, the plaintiff's jury award of $933,000 in the civil case was the proper measure of "the benefit . . . to be received in return for the payment," not the much smaller $2500 bribe. *U.S. v. Muhammad,* 120 F.3d 688, 700–01 (7th Cir. 1997). Accord *U.S. v. Kinter,* 235 F.3d

192, 195–97 (4th Cir. 2000) (affirmed: "when a middleman defendant acts on behalf of a third-party payer of the bribe, the district court may consider the payer's bribe-generated benefits when calculating the 'benefit received' . . . as long as those profits were reasonably foreseeable or the result of acts aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant"); *U.S. v. Gillam,* 167 F.3d 1273, 1279 (9th Cir. 1999) (affirmed: "the measure of the crime is the greater of the benefit to the payer [of the bribe] or the recipient"); *U.S. v. Falcioni,* 45 F.3d 24, 28 (2d Cir. 1995) (affirmed: benefit calculated to be amount of defendant's friend's tax liability, which defendant sought to reduce by bribing an IRS agent); *U.S. v. Ziglin,* 964 F.2d 756, 758 & n.3 (8th Cir. 1992) (same: value of bribe "the $1,432,425.58 that he stipulated was the amount of taxes that were to be 'wiped off the books' as a result of the bribery scheme," not the $20,000 bribe).

Application Note 2 specifies that "the value of the bribe" is not deducted from "the value of the benefit received or to be received." See also *U.S. v. Montani,* 204 F.3d 761, 771–72 (7th Cir. 2000) (following Note 2 in sentencing under §2B4.1(b)(1)); *U.S. v. Schweitzer,* 5 F.3d 44, 47 (3d Cir. 1993) (under §2C1.1, the "benefit received in return for" bribe is not reduced by amount of bribe). Cf. *U.S. v. Landers,* 68 F.3d 882, 885–86 (5th Cir. 1995) (affirmed: following reasoning of *Schweitzer*, holding that under §2B4.1, comment. (n.2), "the 'value of the improper benefit to be conferred' is measured by deducting direct costs from the gross value received"; indirect costs, such as overhead, are not deducted).

4. Relevant Conduct

The 2001 amendments to §2B1.1 do not directly address relevant conduct. The definition of loss at Note 2(A)(i), however, defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," which in turn is defined in subsection (iv) as "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."

Offenses under revised §2B1.1 are still subject to §1B1.3(a), and courts have previously found that relevant conduct under §1B1.3(a) must be considered for offenses that would be grouped under §3D1.2(d). See, e.g., *U.S. v. Brown,* 66 F.3d 124, 128–29 (6th Cir. 1995) (affirmed: defendant with "central role in the embezzlement scheme" properly held accountable for entire loss under §1B1.3(a)(1)(B), not just amount she actually received); *U.S. v. Bennett,* 37 F.3d 687, 694 (1st Cir. 1994) (remanded: "court shall include in the loss calculation the dollar amount of any and all uncharged loans that constitute relevant conduct"); *U.S. v. Colello,* 16 F.3d 193, 197 (7th Cir. 1994) (affirmed: although leader of insurance fraud scheme only gained $266,000, proper under §1B1.3(a) to attribute to him entire loss of $668,000 caused by scheme); *U.S. v. Fine,* 975 F.2d 596, 599–600 (9th Cir. 1992) (en banc) (guidelines and commentary "are unambiguous" on this point) [5#2]; *U.S. v. Lghodaro,* 967 F.2d 1028, 1030 (5th Cir. 1992) (where codefendant's conduct is "part of the joint scheme or plan which [defendant] aided and abetted," amount of loss attributable to codefendant is also attributable to defendant) [5#2]; *U.S. v. Morton,* 957

F.2d 577, 579–80 (8th Cir. 1992) (loss caused by defendant who pled guilty to mail fraud involving altered odometers on three cars may be based on larger number of cars in dismissed count) [4#18]; *U.S. v. Cockerham,* 919 F.2d 286, 289 (5th Cir. 1990) (fraudulent transactions underlying dismissed counts were "relevant conduct" and court therefore properly considered loss caused by those acts).

See also former USSG §2F1.1, comment. (n.7) ("The cumulative loss caused by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction."); *U.S. v. Kunzman,* 54 F.3d 1522, 1532–33 (10th Cir. 1995) (affirmed: proper to include loss from related money laundering conduct that was not charged); *U.S. v. Martinson,* 37 F.3d 353, 357 (7th Cir. 1994) (proper to include loss from dropped count that was part of relevant conduct); *U.S. v. Smith,* 29 F.3d 914, 918 (4th Cir. 1994) (proper to include losses from other related fraudulent loans on which defendant not convicted); *U.S. v. Scarano,* 975 F.2d 580, 584 (9th Cir. 1992) (court required to include all losses that arose from common scheme or plan); *U.S. v. LaFraugh,* 893 F.2d 314, 317–18 (11th Cir. 1990) (wire fraud defendant's sentence properly based on losses caused by all conspirators). Cf. *U.S. v. Fox,* 889 F.2d 357, 360–61 (1st Cir. 1989) (proper to include as relevant conduct four prior uncharged acts of embezzlement for defendant convicted on only one count).

Note that to hold defendant accountable for the conduct of others, that conduct must be within the scope of defendant's agreement *and* reasonably foreseeable. See, e.g., *U.S. v. Melton,* 131 F.3d 1400, 1406 (10th Cir. 1997) (unreasonable to attribute entire $30 million in counterfeit money to defendant who was arrested before any money was produced and did not know how much was to be made: "Courts must examine a conspirator's position within a conspiracy and whether that position gave him firsthand knowledge of the quantity of counterfeit money involved to determine whether the conduct of other conspirators is reasonably foreseeable to him."); *U.S. v. Evbuomwan,* 992 F.2d 70, 74 (5th Cir. 1993) (remanded: court must find that conduct was within scope of defendant's agreement relating to credit card fraud—"mere knowledge that criminal activity is taking place is not enough") [5#15]; *U.S. v. Fuentes,* 991 F.2d 700, 701 (11th Cir. 1993) (remanded: defendant should not have been sentenced on basis of coconspirator acts committed in furtherance of fraud conspiracy that were not reasonably foreseeable).

May losses that occurred before a defendant joined a conspiracy, or after defendant left, be included in relevant conduct? A Nov. 1995 addition to Note 2 of §1B1.3 states that "relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct." However, departure may be warranted for an "unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability." See also *U.S. v. Oseby,* 148 F.3d 1016, 1026 (8th Cir. 1998) (remanded: "We have held that a person cannot be held liable for the losses caused by other conspirators in the scheme prior to the time the person entered the conspiracy. See *U.S. v. Cain,* 134 F.3d 1345, 1349 (8th Cir. 1998). It seems logical that a person should also not be held responsible for the losses that occur after he exits the

conspiracy. This is especially true in a case where that person is a minor participant in the conspiracy, as the district court found Oseby was in this conspiracy.").

E. More Than Minimal Planning

Several guideline sections have required a two-level increase in the offense level if the offense involved "more than minimal planning." However, the increase in former §§2B1.1 and 2F1.1 has been eliminated in favor of a "sophisticated means" enhancement at new §2B1.1(b)(8)(C), effective Nov. 1, 2001. Other sections, however, retain the enhancement for more than minimal planning, but the definition at former Application Note 1(f) in §1B1.1 has been dropped. Now, each section that applies the enhancement contains a definition. See, e.g., §2A2.2(b)(1) & comment. (n.3); §2B2.1(b)(1) & comment. (n.4).

Under the old definition in Application Note 1(f) to §1B1.1, more than minimal planning "means more planning than is typical for commission of the offense in simple form," "exists if significant affirmative steps were taken to conceal the offense," and "is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Generally, a finding of more than minimal planning is fact-specific and will only be reversed if clearly erroneous. See, e.g., *U.S. v. Phath,* 144 F.3d 146, 150–51 (1st Cir. 1998) (remanding §2F1.1(b)(2) enhancement for bank fraud defendant, who deposited two counterfeit checks, recruited two others to deposit four other checks, and withdrew the money within a span of forty-eight hours: "Almost all crimes involve some degree of planning. We do not find the amount of planning here sufficient to justify the enhancement."); *U.S. v. Cropper,* 42 F.3d 755, 758–59 (2d Cir. 1994) (enhancement under §2B1.1(b)(5) was clearly erroneous—facts show that theft did not involve more than minimal planning but was more likely "a spontaneous, reckless caper"). However, the guidelines and case law provide some rules of thumb to guide district courts. For example, the Second Circuit noted that "it is safe to say that fraudulent loans in any substantial amount seldom result from minimal planning." *U.S. v. Brach,* 942 F.2d 141, 145 (2d Cir. 1991). See also *U.S. v. Fox,* 889 F.2d 357, 361 (1st Cir. 1989) ("We cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning.").

The cases in the following sections were all decided before the 2001 amendments.

1. More Planning Than Typical

"'More than minimal planning' means more planning than is typical for commission of the offense in a simple form." USSG §1B1.1, comment. (n.1(f)). The Eighth Circuit relied on this note to affirm the enhancement where defendant did more than simply write a check on a closed account: defendant opened two bank accounts under different aliases, involved a third party, and coordinated the closing of accounts to avoid making good on the check. *U.S. v. Starr*, 986 F.2d 281, 282 (8th Cir. 1993). See also *U.S. v. Walsh,* 119 F.3d 115, 120 (2d Cir. 1997) (affirmed: con-

cocting fraudulent lease involved more planning than typical loan application fraud); *U.S. v. Harrison,* 42 F.3d 427, 432–33 (7th Cir. 1994) (affirmed in food stamp theft by custodial worker in post office because he "formed an intent to commit the crime in advance" and "took the time prior to the thefts to discover where [the valuable] items were kept"); *U.S. v. Barndt,* 913 F.2d 201, 204–05 (5th Cir. 1990) (affirmed: defendant "formed an intent to commit the crime in advance" and ensured that telephone cables—from which he stole copper wire—were not in service). But cf. *U.S. v. Tapia,* 59 F.3d 1137, 1144 (11th Cir. 1995) (remanded: error to impose enhancement on defendant who led assault in prison on government informant—he "did not formulate a sophisticated plan or an elaborate scheme" or take any other steps warranting enhancement, but only made phone call immediately before attack to ascertain that informant planned to testify against friend of defendant).

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

2. Steps to Conceal Offense

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

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

3. Repeated Acts

Note 1(f) to §1B1.1 provides that "'[m]ore than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Similarly, the Eighth Circuit stated that "[a]lmost any crime that consists of a pattern of activity over a long period of time would qualify as an offense involving more than minimal planning." *U.S. v. West,* 942 F.2d 528, 531 (8th Cir. 1991). See also *U.S. v. Wilson,* 955 F.2d 547, 550 (8th Cir. 1992) ("the repetitive nature of the criminal conduct by itself may warrant [the] adjustment; we reject appellants' contention that it may not be imposed unless the defendant engaged in extensive planning, complex criminal activity, or concealment").

Other courts have also relied on repeated acts as an independent ground for the enhancement. See, e.g., *U.S. v. McCoy,* 242 F.3d 399, 405–07 (D.C. Cir. 2001) (affirmed: "because §1B1.1's third prong is independent of its first, the guideline contemplates that an act may not entail more planning than is typical of the offense in its simple form, and yet still warrant enhancement if it is part of a series of repeated acts that are not purely opportune"); *U.S. v. Bush,* 126 F.3d 1298, 1300 (11th Cir. 1997) (remanded: three instances of embezzlement occurring over several months required enhancement); *U.S. v. Rust,* 976 F.2d 55, 58 (1st Cir. 1992) (remanded: submitting twenty-three intricately altered vouchers totaling over $15,000 over four-year period warranted enhancement); *U.S. v. Doherty*, 969 F.2d 425, 430 (7th Cir. 1992) (remanded: drafting forty overdue checks in single month warranted enhancement) [5#2]; *U.S. v. Williams,* 966 F.2d 555, 558–59 (10th Cir. 1992) (for embezzlements occurring over six months and involving numerous computer entries) [4#24]; *U.S. v. Gregorio,* 956 F.2d 341, 343 (1st Cir. 1992) (repeatedly preparing and submitting false loan statements); *U.S. v. Callaway,* 943 F.2d 29, 31 (8th Cir. 1991) (fraudulently accepting Social Security benefits over period of time); *U.S. v. Ojo,* 916 F.2d 388, 391–92 (7th Cir. 1990) (obtaining and using multiple forms of false identification); *U.S. v. Sanchez,* 914 F.2d 206, 207 (10th Cir. 1990) (using stolen credit card fifteen times in a month); *U.S. v. Bakhtiari,* 913 F.2d 1053, 1063 (2d Cir. 1990) (providing false information over several weeks); *U.S. v. Scroggins,* 880 F.2d 1204, 1215 (11th Cir. 1989) (nineteen postal thefts).

Some circuits have held that "repeated acts" requires more than two acts. See *U.S. v. Bridges,* 50 F.3d 789, 792–93 (10th Cir. 1994) (remanded: may not impose enhancement solely for planning two burglaries—"repeated" means "more than two") [6#12]; *U.S. v. Kim,* 23 F.3d 513, 515 (D.C. Cir. 1994) (enhancement could not be applied to defendant's two acts of obtaining blank power of attorney forms—"'repeated acts' in the description of more than minimal planning contemplates at least three acts") [6#17]; *U.S. v. Maciaga,* 965 F.2d 404, 407 (7th Cir. 1992) (indicating same, holding "that two acts—one planned and one unplanned—are not the sort of repeated acts the drafters sought to address"). See also *U.S. v. Phath,* 144 F.3d 146, 150–51 (1st Cir. 1998) (remanding §2F1.1(b)(2) enhancement for bank fraud defendant—depositing two checks one day and then withdrawing funds the next day cannot be deemed "repeated acts over a period of time"). Cf. *U.S. v. Walsh,*

119 F.3d 115, 120–21 (2d Cir. 1997) (affirmed: in finding "repeated acts over a period of time," court properly considered other false loan applications even though defendant was not convicted on those counts).

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

4. Procedural Issues

Relevant conduct: Some circuits have held that a defendant need not have personally engaged in the more than minimal planning to receive the enhancement—the planning may be attributable to defendant as relevant conduct if done by others in a jointly undertaken criminal activity. See *U.S. v. Levinson,* 56 F.3d 780, 781–82 (7th Cir. 1995) (affirmed: defendant responsible via relevant conduct for planning by hired accomplice); *U.S. v. Ivery,* 999 F.2d 1043, 1045–46 (6th Cir. 1993) (reversed: error to refuse to apply §2F1.1(b)(2) to defendant where offense clearly involved more than minimal planning by codefendants—"'more than minimal planning' is determined on the basis of the overall *offense*, not on the role of an individual *offender*"); *U.S. v. Wilson,* 955 F.2d 547, 551 (8th Cir. 1992) (affirmed: conspiracy clearly involved more than minimal planning, and "each conspirator is responsible for all acts in furtherance of the conspiracy" that qualify as relevant conduct). Cf. *U.S. v. Walsh,* 119 F.3d 115, 120–21 (2d Cir. 1997) (affirmed: other false loan applications may be counted as repeated acts, even though defendant was not convicted on those counts)

With Chapter Three enhancements: "More than minimal planning" and Chapter Three enhancements can apply to the same conduct if each enhancement addresses a different concern. For cases involving "more than minimal planning" with (1) "abuse of trust," see *U.S. v. Gottfried,* 58 F.3d 648, 653 (D.C. Cir. 1995) (proper to apply both to government attorney who destroyed government case documents); *U.S. v. Reetz,* 18 F.3d 595, 600 (8th Cir. 1994) (not double counting because concerns behind enhancements differ); *U.S. v. Christiansen,* 958 F.2d 285, 288 (9th Cir. 1992) (more than minimal planning stemmed from repeated acts while abuse of trust stemmed from concealment of crime facilitated by defendant's bank job) [4#19]; *U.S. v. Marsh,* 955 F.2d 170, 171 (2d Cir. 1992) (proper to apply both enhancements); *U.S. v. Georgiadis,* 933 F.2d 1219, 1225–27 (3d Cir. 1991); (2) "special skill," see *U.S. v. Sloman,* 909 F.2d 176, 181 (6th Cir. 1990); (3) aggravating role, see *U.S. v. Stevenson,* 68 F.3d 1292, 1294–95 (11th Cir. 1995) (§3B1.1(b)); *U.S. v. Godfrey,* 25 F.3d 263, 264 (5th Cir. 1994) (§3B1.1(a)); *U.S. v. Smith,* 13 F.3d 1421, 1429 (10th Cir. 1994) (§3B1.1(a)); *U.S. v. Wong,* 3 F.3d 667, 671–72 (3d Cir. 1993) (§3B1.1(c)) [6#3]; *U.S. v. Rappaport,* 999 F.2d 57, 60–61 (2d Cir. 1993) (§3B1.1(a)); *U.S. v. Willis,* 997 F.2d 407, 418–19 (8th Cir. 1993) (§3B1.1(a)); *U.S. v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993) (§3B1.1(a)); *U.S. v. Balogun,* 989 F.2d 20, 23–24 (1st

Cir. 1993) (§3B1.1(c)); *U.S. v. Curtis,* 934 F.2d 553, 556 (4th Cir. 1991) (§3B1.1(c)); *U.S. v. Boula*, 932 F.2d 651, 654–55 (7th Cir. 1991) (§3B1.1(a)); and (4) mitigating role, see *U.S. v. Schluneger,* 184 F.3d 1154, 1160 (10th Cir. 1999) (§3B1.2(a)).

The Sixth Circuit originally disagreed with the last, holding that leadership role and more than minimal planning enhancements cannot both be given because a leadership role necessarily involves more than minimal planning. See *U.S. v. Chichy,* 1 F.3d 1501, 1506 (6th Cir. 1993) (§3B1.1(c)) [6#3]; *U.S. v. Romano*, 970 F.2d 164, 166–67 (6th Cir. 1992) ("§3B1.1(a) already takes into account the conduct penalized in §2F1.1(b)(2)") [5#2]. But cf. *U.S. v. Aideyan,* 11 F.3d 74, 76 (6th Cir. 1993) (*Romano* prohibition does not apply to enhancement under §2F1.1(b)(2)(B) for "a scheme to defraud more than one victim"). However, the guidelines were amended to clarify that, unless otherwise specified, "the adjustments from different guideline sections are applied cumulatively . . . . For example, the adjustments from §2F1.1(b)(2) . . . and §3B1.1 . . . are applied cumulatively." §1B1.1, comment. (n.4) (Nov. 1993). The Sixth Circuit later held that the amendment "abrogated the holdings of *Romano* and *Chichy*" and both enhancements may be applied. See *U.S. v. Cobleigh,* 75 F.3d 242, 251 (6th Cir. 1996) (affirming application of §§2F1.1(b)(2) and 3B1.1(b)).

Note also that, before §2F1.1 was eliminated, the Eleventh Circuit held that enhancements under subsection b(2)(A) for more than minimal planning and subsection b(6)(C) for "sophisticated means" could be given at the same time. *U.S. v. Humber,* 255 F.3d 1308, 1311–14 (11th Cir. 2001).

III. Adjustments

A. Victim-Related Adjustments

Note: A Nov. 1995 amendment significantly altered §3A1.1 by adding an adjustment for "Hate Crime Motivation" in §3A1.1(a). The adjustment for vulnerable victim in the original §3A1.1(a) was moved to new subsection (b). Any references to §3A1.1(a) in subsection 1 below refer to the original §3A1.1(a); references are made to new or amended Application Notes as appropriate.

1. Vulnerable Victim (§3A1.1(b))

a. Application and definition

Section 3A1.1 states the adjustment should be given if the defendant "knew or should have known that a victim of the offense was unusually vulnerable . . . ." The original Application Note 1 stated the adjustment applied "where an unusually vulnerable victim is made a target" of the offense, and some courts had read this to mean that defendants must intentionally select their victims because of their vulnerability. See, e.g., *U.S. v. Smith,* 39 F.3d 119, 124 (6th Cir. 1994) (remanded: "evidence must show that the defendant knew his victim was unusually vulnerable and that he perpetrated a crime on him because he was vulnerable"); *U.S. v. Sutherland,* 955 F.2d 25, 28 (7th Cir. 1992) (reversed: no evidence that defendant specifically targeted elderly) [4#18]; *U.S. v. Callaway,* 943 F.2d 29, 31 (8th Cir. 1991) (reversed: although defendant misappropriated disabled infant's Social Security benefits, she did not target infant because of youth and disability); *U.S. v. Cree,* 915 F.2d 352, 353–54 (8th Cir. 1990) (reversed: no evidence that defendant knew extent of victim's vulnerability or intended to exploit it) [3#14]; *U.S. v. Wilson,* 913 F.2d 136, 138 (4th Cir. 1990) (randomly selected targets for phone fraud not vulnerable) [3#14]. See also *U.S. v. Singh,* 54 F.3d 1182, 1191 (4th Cir. 1995) ("At the very least, the victim's vulnerability must play a role in the defendant's decision to select that victim as the target of the crime"); *U.S. v. Yount,* 960 F.2d 955, 957 (11th Cir. 1992) (Nov. 1, 1990 amendments "appear[ ] to require that the victim of the offense must have been unusually vulnerable and specifically targeted in the offense").

Other courts held that it was sufficient for defendant to target a victim that defendant "knew or should have known" was unusually vulnerable. The Ninth Circuit held that language in the Commentary that "suggests that the defendant must have an actual intent to 'target' a vulnerable victim before §3A1.1 can apply . . . is inconsistent with the plain language of §3A1.1, which only requires that the defendant 'should have known' that the victim was vulnerable." The court reconciled the commentary 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.'" *U.S. v. O'Brien,* 50 F.3d 751, 754–56 (9th Cir. 1995) (affirmed: defendants "knew, or at the very least 'should have known,'" that victims of the fraud were vulnerable) [7#10]. See also *U.S. v. Cruz,* 106 F.3d 1134, 1136–37 (3d Cir. 1997)

("find[ing] the cases holding that there was no targeting requirement under the 1994 guideline to be more persuasive"); *U.S. v. Hardesty,* 105 F.3d 558, 560 (10th Cir. 1997) ("We believe that the 'targeting language' in the first sentence of Application Note 1 is at odds with U.S.S.G. §3A1.1."); *U.S. v. Gill,* 99 F.3d 484, 488 (1st Cir. 1996) (that victims "were unusually vulnerable and were foreseeably so . . . is enough under the guideline, pre- and post-amendment"); *U.S. v. Hershkowitz,* 968 F.2d 1503, 1506 (2d Cir. 1992) (affirmed: "By its own terms, §3A1.1 governs cases where the defendant 'knew or should have known' of the victim's unusual vulnerability. It is of no consequence therefore whether Hershkowitz actually was conscious of Campbell's increased vulnerability when he assaulted him" because it "should have been apparent"); *U.S. v. Caterino,* 957 F.2d 681, 683–84 (9th Cir. 1992) (affirmed: defendants knew or should have known of vulnerability of elderly victims to phone fraud scheme) [4#19]. Cf. *U.S. v. White,* 974 F.2d 1135, 1140 (9th Cir. 1992) (adjustment not limited to intentional crimes—properly applied to defendant convicted of involuntary manslaughter of two-year-old).

A November 1995 amendment to former Note 1, now Note 2, removed the "target" language and states that the enhancement "applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." The Commission's "Reason for Amendment" notes that there has been "some inconsistency in the application of §3A1.1 regarding whether this adjustment required proof that the defendant had 'targeted the victim on account of the victim's vulnerability.' This amendment revises the Commentary of §3A1.1 to clarify application with respect to this issue." The Eighth Circuit, which had previously required a showing that defendant targeted the victims, held that the amendment should not be applied to defendants who were sentenced before Nov. 1995. "[N]otwithstanding the Sentencing Commission's description of Amendment 521 as a 'clarification,' we hold that applying the new language . . . would in this case violate the Constitution's prohibition against ex post facto laws because: the application would be retrospective; it would, if anything, increase defendants' sentences; it would not merely involve a procedural change; and it would not be offset by other ameliorative provisions." *U.S. v. Stover,* 93 F.3d 1379, 1384–88 (8th Cir. 1996). Cf. *U.S. v. Burgos,* 137 F.3d 841, 844 (5th Cir. 1998) (affirming retroactive application of amendment—"the amendment does not implicate the Ex Post Facto Clause because there is no authority requiring targeting in this circuit").

Because the enhancement is applied if defendant "should have known" the victim was vulnerable, some courts have rejected arguments that a defendant was too drunk or otherwise impaired to realize the victim was vulnerable. See, e.g., *U.S. v. Checora,* 175 F.3d 782, 789 (10th Cir. 1999) (affirmed: "Whether the defendants actually knew [the victim] was [vulnerable] is not necessarily dispositive. The vulnerable-victim enhancement is also appropriate if the defendant '*should have known* that a victim of the offense was unusually vulnerable,'" and the evidence showed that defendants "were not so completely inebriated that they had no ability to comprehend [the victim's] condition."); *U.S. v. Luscier,* 983 F.2d 1507, 1514 (9th Cir.

1993) (affirmed: rejecting argument that court "should not have applied the vulnerable victim adjustment because at the time of the murder Luscier was too intoxicated to know that [victim] was vulnerable"—district court properly found that defendant was responsible for his level of intoxication and should have known victim was vulnerable"). Cf. *U.S. v. Salemi,* 26 F.3d 1084, 1087–88 (11th Cir. 1994) (remanded: error to deny enhancement on court's belief that defendant's "mental and emotional condition clouded his ability to perceive the baby's peculiar vulnerability. . . . [T]he district court erroneously relied more on Salemi's characteristics rather than the characteristics of the baby.").

In any event, a court should make an "analysis of the victim's personal or individual vulnerability" to the defendant's criminal conduct. *U.S. v. Smith,* 930 F.2d 1450, 1455–56 (10th Cir. 1991) (elderly woman not per se vulnerable) [4#2]. "Under the guidelines, a vulnerable victim enhancement must stem from a personal trait or condition of the victim, rather than the position he occupies or his method of doing business." *U.S. v. Robinson,* 119 F.3d 1205, 1219 (5th Cir. 1997) (remanding enhancement based on finding that Asian-American merchants who dealt in high volume of cash were unusually vulnerable to robber: "vulnerable victim enhancement based upon the victim's race, employment, and business habits, without more, cannot stand"). See also *U.S. v. Feldman,* 83 F.3d 9, 15 (1st Cir. 1996) ("there must be some evidence, above and beyond mere membership in a large class, that the victim possessed a special weakness that the defendant exploited"); *U.S. v. Brown,* 7 F.3d 1155, 1160–61 & n.3 (5th Cir. 1993) (affirmed: reasonable to conclude that lonely, elderly widows specifically targeted in "lonely hearts" fraud scheme were vulnerable; also noted that "as a group, lonely, elderly widows could legitimately be considered unusually susceptible" to this type of fraud); *Sutherland,* 955 F.2d at 26–27 (World War I and II veterans and families were not "unusually vulnerable" as a group) [4#18]; *U.S. v. Paige,* 923 F.2d 112, 113–14 (8th Cir. 1991) (reversed: defendant targeted stores with young clerks for passing falsified money orders, but no evidence that clerks actually were unusually vulnerable). Cf. *U.S. v. Thomas,* 62 F.3d 1332, 1345 (11th Cir. 1995) (affirmed: "in cases where the 'thrust of the wrongdoing' was continuing in nature, the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim").

The Third Circuit stressed that there must also be a finding that the defendant exploited a victim's particular vulnerability or susceptibility in committing the crime. "[T]he use of the words 'susceptible' and 'vulnerable' in §3A1.1 indicates that the enhancement is to be applied when the defendant has taken advantage of the victim's weakness. . . . Regardless of whether the defendant deliberately targeted the victims for their vulnerability, that vulnerability must to some degree contribute to the success of the defendant's scheme." *U.S. v. Monostra,* 125 F.3d 183, 190–91 (3d Cir. 1997) (remanded: enhancement improper where there was no showing that defendant took advantage of boss's blindeness to commit fraud).

Several circuits have held in fraud cases that targeting a victim repeatedly (sometimes called "reloading") is evidence that a defendant knows the victim is particu-

larly susceptible to the fraud scheme. See, e.g., *U.S. v. Brawner,* 173 F.3d 966, 973 (6th Cir. 1999) (for defendant who purchased "leads lists" of people who were "identified as willing to send in money in the hope of winning a valuable prize, . . . [t]he susceptibility of the victims here was a known quantity from the start") [10#7]; *U.S. v. Randall,* 162 F.3d 557, 560 (9th Cir. 1998) (individuals who are defrauded again in the "reloading" process have shown themselves to be "particularly susceptible" to the fraud) [10#7]; *U.S. v. Robinson,* 152 F.3d 507, 511–12 (6th Cir. 1998) (even if defendant did not target victims initially, when he later targeted some of those victims for further fraud, as many as four or five more times, "this amounted to targeting an individual who can be deemed 'particularly susceptible'"); *U.S. v. O'Neil,* 118 F.3d 65, 75–76 (2d Cir. 1997) (susceptibility of victims shown by "the reloading process, whereby individuals who already had been victimized by the scheme were contacted up to two more times and defrauded into sending more money to [defendants]") [10#7]; *U.S. v. Jackson,* 95 F.3d 500, 508 (7th Cir. 1996) (victims' "readiness to fall for the telemarketing rip-off, not once but *twice* . . . demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population") [10#7]. See also *U.S. v. Pearce,* 967 F.2d 434, 435 (10th Cir. 1992) (although victim's vulnerability may not have contributed to initial offense, defendant targeted her for further criminal activity because of her vulnerability and enhancement was proper).

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

Application Note 1 (now Note 2) of §3A1.1 was amended Nov. 1, 1992, to state that "a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank." Partly as a result of this change, the Eleventh Circuit overruled *U.S. v. Jones,* 899 F.2d 1097 (11th Cir. 1990) [3#8], and held that "bank tellers, *as a class,* are not vulnerable victims within the meaning of section 3A1.1." Enhancement may be proper, however, "when a particular teller-victim possesses unique characteristics which make him or her more vulnerable or susceptible to robbery than ordinary bank robbery victims." *U.S. v. Morrill,* 984 F.2d 1136, 1137–38 (11th Cir. 1993) (en banc) (emphasis in original) [5#9]. See also *U.S. v. James,* 139 F.3d 709, 714–15 (9th Cir. 1998) (affirmed: visibly pregnant bank teller was vulnerable victim where defendant specifically threatened to "come back and kill you and the baby" if she did not cooperate).

One court held that a specific victim need not have been actually chosen to apply

the enhancement—it was proper where defendant had taken sufficient steps to be convicted of conspiracy to kidnap, sexually abuse, torture, and kill a young boy for a "snuff-sex" film. *U.S. v. DePew,* 932 F.2d 324, 330 (4th Cir. 1991). Similarly, the Eleventh Circuit upheld the enhancement when the victim did not actually exist. See *U.S. v. Shenberg,* 89 F.3d 1461, 1475 (11th Cir. 1996) (enhancement warranted for defendant who intended harm to fictitious informant created by government agents). Cf. *U.S. v. Davis,* 967 F.2d 516, 523 & n.8 (11th Cir. 1992) (although enhancement was improper under facts of case, could be considered even though victim was government informant—"it is the perpetrator's perception, not actual vulnerability, that triggers enhancement"), *rev'd on other grounds,* 30 F.3d 108 (11th Cir. 1994).

The Ninth Circuit held it was error to apply two "vulnerable victim" enhancements under §3A1.1 for victims in two separate fraud counts arising under the same fraud scheme. *U.S. v. Caterino,* 957 at 684 (offense characteristics apply to overall scheme, not individual victims or counts). See also USSG §3D1.3, comment. (n.3): "[d]etermine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole."

With abuse of trust enhancement: Several courts have allowed enhancements for both vulnerable victim and abuse of trust, §3B1.3, when each enhancement has a separate factual basis. See, e.g., *U.S. v. Dobish,* 102 F.3d 760, 762 (6th Cir. 1996) (affirmed: no double counting to apply both enhancements to defendant who defrauded relatives and others in ten-year investment scam); *U.S. v. Stewart,* 33 F.3d 764, 769–71 (7th Cir. 1994) (remanded: court should have applied both enhancements where some victims were vulnerable and defendant abused trust of other victims of same fraud); *U.S. v. Haines,* 32 F.3d 290, 293–94 (7th Cir. 1994) (affirmed: facts show both enhancements properly applied to home care provider who defrauded an eighty-seven-year-old woman who was incapable of caring for herself or her finances and had given defendant power of attorney—"even if there is some overlap in the factual basis for two or more sentencing adjustments, so long as there is sufficient factual basis for each they may both be applied"); *U.S. v. Shyllon,* 10 F.3d 1, 5–6 (D.C. Cir. 1993) (affirmed: defendant abused position of public trust while defrauding vulnerable victims).

b. Relevant conduct

A Nov. 1997 amendment to Application Note 2 specifies that under §3A1.1(b) a "'victim' includes any person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct)." As seen from the cases cited below, most circuits had already included some forms of related conduct in applying the vulnerable victim adjustment.

Several circuits already held that vulnerable victims do not need to have been direct victims of the offense of conviction—they may be victims of related criminal conduct, otherwise suffer harm from the offense, or be exploited by defendant dur-

ing the commission of the offense. See, e.g., *U.S. v. Gonzalez,* 183 F.3d 1315, 1327 (11th Cir. 1999) (applicable to drug conspirators who were trying to get information, drugs, or money during home invasion and threatened 72-year-old woman and 11-year-old boy); *U.S. v. Burgos,* 137 F.3d 841, 844 (5th Cir. 1998) (patients of psychiatrist convicted of insurance fraud properly found to be victims—they were hospitalized unnecessarily and some had their treatment benefits exhausted); *U.S. v. Rutgard,* 116 F.3d 1270, 1293 (9th Cir. 1997) (patients of eye doctor convicted of insurance fraud were vulnerable victims); *U.S. v. Cruz,* 106 F.3d 1134, 1136–37 (3d Cir. 1997) (defendant convicted of carjacking properly received enhancement for raping twelve-year-old passenger); *U.S. v. Kuban,* 94 F.3d 971, 974 (9th Cir. 1996) (defendant who threatened victim with gun properly received enhancement even though he was convicted only of felon-in-possession offense); *U.S. v. Blake,* 81 F.3d 498, 504–05 (4th Cir. 1996) (affirmed: §3A1.1 applies to those whose credit cards defendant stole to defraud the card issuers); *U.S. v. Haggard,* 41 F.3d 1320, 1325–26 (9th Cir. 1994) (affirmed for persons affected by defendant's false statements to FBI and grand jury: "courts may look beyond the four corners of the charge to the defendant's underlying conduct") [7#5]; *U.S. v. Echevarria,* 33 F.3d 175, 180–81 (2d Cir. 1994) (affirmed: patients were vulnerable victims of defendant who posed as doctor to fraudulently obtain medical payments from government and insurers—defendant "directly targeted those seeking medical attention" and "exploit[ed] their impaired condition"); *U.S. v. Stewart,* 33 F.3d 764, 771 (7th Cir. 1994) (remanded: defendant used vulnerable elderly clients in scheme that defrauded funeral homes) [7#2]; *U.S. v. Yount,* 960 F.2d 955, 958 (11th Cir. 1992) (although bank was victim of money laundering offense, enhancement proper where defendant misappropriated funds of elderly accountholders); *U.S. v. Bachynsky,* 949 F.2d 722, 735 (5th Cir. 1991) (affirmed: patients of doctor who submitted false diagnoses to defraud insurance companies and government were vulnerable victims—apart from possible actual harm patients may have suffered from ineffective treatment, they were deceived and were unwitting instrumentalities of the fraud); *U.S. v. Smith,* 930 F.2d 1450, 1455–56 (10th Cir. 1991) (proper for bank robbery defendant who stole car from elderly woman beforehand to use in robbery); *U.S. v. Roberson,* 872 F.2d 597, 603 (5th Cir. 1989) (need not be victim of offense of conviction). Cf. *U.S. v. Gieger,* 190 F.3d 661, 664–65 (5th Cir. 1999) (error to consider patients transported in ambulances during Medicare fraud scheme—they "suffered no medical harm and no financial harm" and received the service requested); *U.S. v. Lee,* 973 F.2d 832, 833–34 (10th Cir. 1992) (although accountholders would not have suffered loss because bank would have reimbursed embezzled funds, they were victims; however, enhancement reversed because victims were not shown to be vulnerable).

The Sixth Circuit, however, had held that §3A1.1 must be read more restrictively and "may be applied only when a victim is harmed by a defendant's conduct that serves as the basis of the offense of conviction. . . . [A] court cannot apply the adjustment based upon 'relevant conduct' that is not an element of the offense of conviction. Section 1B1.3 has no application in a section 3A1.1 adjustment." *U.S. v. Wright,* 12 F.3d 70, 72–74 (6th Cir. 1993) (remanded: individuals duped by defen-

dant into aiding tax fraud against IRS may have been vulnerable and victimized by defendant, but they were not vulnerable victims of offense of conviction) [6#9]. See also *U.S. v. Rowe,* 999 F.2d 14, 17 (1st Cir. 1993) (remanded: individual claimants victimized by insurance fraud were not directly harmed by offense of conviction, which involved "the initial fraudulent solicitations and the mismanagement or looting of the [insurance] 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."). Cf. *U.S. v. Cherry,* 10 F.3d 1003, 1011 (3d Cir. 1993) ("victim" of unlawful flight offense was government, which does not warrant §3A1.2 increase—may not use official victims of underlying offense for departure by analogy to §3A1.2). See also cases in section III.A.2.

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

c. Age, physical or mental condition

Generally, age and physical or mental condition is not, standing alone, sufficient evidence of unusual vulnerability. Rather, there must be some showing that the particular victim was vulnerable. See, e.g., *U.S. v. Checora,* 175 F.3d 782, 789–90 (10th Cir. 1999) (affirmed: fact that victim of assault was small properly considered as one of several factors using "totality of circumstances" test to determine vulnerability); *U.S. v. Fosher,* 124 F.3d 52, 56 (1st Cir. 1997) (remanding vulnerable victim finding, based on victim's age (sixty-two) and home invasion robbers' decision that guns were unnecessary, because district court "failed to address the 'individual characteristics' required to support a finding that a particular victim was unusually vulnerable"); *U.S. v. Tissnolthos*, 115 F.3d 759, 761–62 (10th Cir. 1997) (remanded: fact that assault victim was seventy-one insufficient—court must make "particular findings of the actual victim's unusual vulnerability"). However, "[i]n some cases the inference to be drawn from the class characteristics may be so powerful that there can be little doubt about unusual vulnerability of class members within the meaning of section 3A1.1." *U.S. v. Gill*, 99 F.3d 484, 487 (1st Cir. 1996) (patients at mental health clinics defrauded by defendant). See also *U.S. v. Billingsley*, 115 F.3d 458, 463–64 (7th Cir. 1997) (affirmed: stealing car by force and intimidation from eighty-two-year-old man); *U.S. v. Drapeau*, 110 F.3d 618, 620 (8th Cir. 1997) (one-year-old abuse victim who could not talk and had no ability to identify attacker is obviously vulnerable); *U.S. v. Salemi*, 26 F.3d 1084, 1088 (11th Cir. 1994) (remanded: kidnapped six-month-old baby was vulnerable victim irrespective of defendant's mental and emotional condition); *U.S. v. Boise*, 916 F.2d 497, 506 (9th Cir. 1990) (six-week-old infant "unusually vulnerable" due to age) [3#14].

Other examples of when an enhancement under §3A1 has been held appropriate include *U.S. v. Wetchie,* 207 F.3d 632, 634–36 (9th Cir. 2000) (affirmed: sleeping eleven-year-old girl was unusually vulnerable or particularly susceptible to abusive sexual contact offense); *U.S. v. Gonzalez,* 183 F.3d 1315, 1327 (11th Cir. 1999) (confidential informant's 72-year-old aunt and 11-year-old son were vulnerable to armed drug conspirators who invaded home looking for information, drugs, or money); *U.S. v. Hernandez-Orozco,* 151 F.3d 866, 871 (8th Cir. 1998) (proper to find fifteen-year-old kidnap victim was vulnerable where defendant, who was her brother-in-law, used his physical advantage to kidnap her and take her to Nebraska, she had never traveled very far from her rural Mexican village, and she did not speak English); *U.S. v. O'Neil*, 118 F.3d 65, 75–76 (2d Cir. 1997) (in addition to fact that other courts "frequently have found elderly individuals to be unusually vulnerable to telemarketing fraud schemes very similar to the one involved here," defendant's scheme targeted individuals who had already been victimized and thus shown themselves to be particularly susceptible); *U.S. v. Blake*, 81 F.3d 498, 504–05 (4th Cir. 1996) (targeting elderly for robbery); *U.S. v. Janis*, 71 F.3d 308, 311 (8th Cir. 1995) (sexually abused minor was vulnerable because of mental problems, including fetal alcohol syndrome, low I.Q., and learning disabilities); *U.S. v. Leonard*, 61 F.3d 1181, 1188 (5th Cir. 1995) (elderly were specifically targeted for phone fraud); *U.S. v. O'Brien*, 50 F.3d 751, 756–57 (9th Cir. 1995) ("individuals who developed medical problems and then could not get their claims paid" because of defendants' insurance fraud) [7#10]; *U.S. v. Stewart*, 33 F.3d 764, 771 (7th Cir. 1994) (targeting elderly in prepaid funeral expenses fraud) [7#2]; *U.S. v. Haines*, 32 F.3d 290, 293 (7th Cir. 1994) ("helpless elderly woman" dependent on fraud defendant for care); *U.S. v. Brown*, 7 F.3d 1155, 1160–61 (5th Cir. 1993) (lonely, elderly widows specifically targeted in "lonely hearts" fraud scheme); *U.S. v. Coates*, 996 F.2d 939, 941–42 (8th Cir. 1993) (kidnapping defendant selected victims partly for young age and small size); *U.S. v. Rocha*, 916 F.2d 219, 244–45 (5th Cir. 1990) (seventeen-year-old kidnap victim) [3#16]; *U.S. v. Boult*, 905 F.2d 1137, 1139 (8th Cir. 1990) (victim deliberately chosen because of age and size disadvantage compared with defendant); *U.S. v. White*, 903 F.2d 457, 463 (7th Cir. 1990) (elderly man with health problems taken hostage during an escape attempt) [3#9].

Cf. *U.S. v. White*, 979 F.2d 539, 544 (7th Cir. 1992) (affirmed: although transportation of a minor for prostitution incorporates age into offense, victim was also "emotionally disturbed" and "particularly susceptible" to the crime); *U.S. v. Altman*, 901 F.2d 1161, 1165 (2d Cir. 1990) (affirmed: although sexual exploitation of minors incorporates age in offense, defendant also drugged victims, making them physically and mentally more vulnerable).

d. Susceptibility to the offense

Three courts have held that black families were "particularly susceptible" under §3A1.1 to a conspiracy to interfere with civil rights by burning a cross on their lawn. *U.S. v. Long*, 935 F.2d 1207, 1211–12 (11th Cir. 1991); *U.S. v. Skillman*, 922 F.2d

1370, 1377–78 (9th Cir. 1990); *U.S. v. Salyer*, 893 F.2d 113, 115–17 (6th Cir. 1989) [2#19]. See also *U.S. v. McDermott*, 29 F.3d 404, 411 (8th Cir. 1994) (affirmed enhancement for defendants convicted of civil rights violations for using violence to keep black persons out of city park). But cf. *U.S. v. Greer*, 939 F.2d 1076, 1100 (5th Cir. 1991) (affirmed enhancement against defendants, members of white "skinhead" group, who targeted minorities, but cautioned against overuse of this section when victims are minorities but not necessarily targeted because of that status).

Section 3A1.1(a), added Nov. 1, 1995, provides an enhancement for "hate crimes" that will probably cover most cases such as those above. However, Application Note 3 states that "subsections (a) and (b) are to be applied cumulatively," so a vulnerable victim enhancement can be applied with a hate crimes enhancement as long as the victim was vulnerable "for reasons unrelated to race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation." The Eighth Circuit applied both enhancements to a case where a family was targeted on account of their race/ethnicity, and the sentencing court found that the family's young children were also vulnerable due to their age and recent move to town. *U.S. v. Pospisil,* 186 F.3d 1023, 1029–30 (8th Cir. 1999).

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

In attempting to give some definition to "particularly susceptible," the Ninth Circuit stated that "it is not enough to support a finding of particular susceptibility under §3A1.1 that the victims are more likely than other members of the general population to become a victim to the particular crime at issue. The reason for this is that criminals will always tend to target their victims with an eye toward success in the criminal endeavor. Thus, the chosen victims are usually more susceptible than the general population to the criminal conduct. The appellate courts have consistently refused to find a class of victims to be particularly susceptible to criminal conduct simply because they were statistically more likely to fall prey to the defendant's crime. . . . Instead, the victims to whom §3A1.1 applies are those who are in need of greater societal protection. . . . They are the persons who, when targeted by a defendant, render the defendant's conduct more criminally depraved." *U.S. v. Castellanos*, 81 F.3d 108, 110–11 (9th Cir. 1996). Accord *U.S. v. Stover*, 93 F.3d 1379, 1387 (8th Cir. 1996). Cf. *U.S. v. Mendoza,* 262 F.3d 957, 960–62 (9th Cir. 2001) (distinguishing *Castellanos* in affirming adjustment for defendant who sold fraudulent immigration papers to illegal aliens who were uneducated, unfamiliar with the law, and could not speak or read English); *U.S. v. Gill*, 99 F.3d 484, 486–87 (1st Cir. 1996) (district court could reasonably conclude that patients at mental health clinics were unusually vulnerable to defendant's fraud—"In some cases the inference to be drawn from the class characteristics may be so powerful that there can be little doubt about unusual vulnerability of class members within the meaning of section 3A1.1.").

The Third Circuit concluded that a business might qualify as a vulnerable victim.

"[T]he Sentencing Guidelines do not preclude the application of the vulnerable victim enhancement in instances when the victim was an entity rather than a natural person. The text of §3A1.1(b) allows the enhancement '[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct.' While the first clause refers to the characteristics of natural persons, the second clause can encompass a broader range of circumstances, including those pertinent to business organizations. . . . [C]ourts may apply §3A1.1(b) in instances where the defendant has exploited the particular susceptibility of a business or entity." *U.S. v. Monostra,* 125 F.3d 183, 189 (3d Cir. 1997) (remanded for determination of whether small business was particularly susceptible to defendant's fraud).

Other examples of when a victim is "particularly susceptible" to the crime include *U.S. v. Bragg,* 207 F.3d 394, 399–400 (7th Cir. 2000) (homeless men recruited for improper asbestos removal who "were absolutely destitute, who might very well have drug, alcohol and psychiatric problems" and would be less likely than others to complain about improper work and living conditions); *U.S. v. Weischedel,* 201 F.3d 1250, 1253–55 (9th Cir. 2000) (car salesman driven to remote spot during test-drive and shot); *U.S. v. Iannone,* 184 F.3d 214, 221 (3d Cir. 1999) (Viet Nam veteran who had strong belief that "people who share combat are brothers-in-arms and can be believed" was susceptible to being cheated by fraud defendant who claimed to be "brother-in-arms"); *U.S. v. Checora,* 175 F.3d 782, 789–90 (10th Cir. 1999) (victim was "intoxicated, outnumbered, and much smaller in stature than his assailants, and thus less able to defendant himself or escape from assault); *U.S. v. Malone*, 78 F.3d 518, 521–23 (11th Cir. 1996) ("where carjackers have specifically targeted a dispatched cab driver, knowing that the cab driver had the unique obligation to drive to a pick-up point of the carjackers' choice and then to let them into his cab, the cabdriver was especially vulnerable to robbery and to carjacking"); *U.S. v. Tapia*, 59 F.3d 1137, 1143 (11th Cir. 1995) (government informant, who was assaulted by other inmates because he was to testify against friend of defendants, "was particularly vulnerable by virtue of his incarceration with Appellants and his inability to escape"); *U.S. v. O'Brien*, 50 F.3d 751, 756–57 (9th Cir. 1995) (insurance fraud victims who "had serious physical or mental conditions that required follow-up care [and] realistically could not have switched insurance companies") [7#10]; *U.S. v. Harris*, 38 F.3d 95, 99 (2d Cir. 1994) ("By virtue of their ages and difficulties in providing for themselves," fraud defendant's victims were "particularly susceptible to alluring promises of financial security"); *U.S. v. Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993) (recent immigrants unfamiliar with U.S. business customs and law were particularly susceptible to extortion); *U.S. v. Brown*, 7 F.3d 1155, 1160–61 & n.3 (5th Cir. 1993) (affirmed enhancement because defendant targeted lonely, elderly widows in "lonely hearts" fraud scheme, and noted that "as a group, lonely, elderly widows could legitimately be considered unusually susceptible" to this type of fraud); *U.S. v. Lallemand*, 989 F.2d 936, 939–40 (7th Cir. 1993) (married homosexuals specifically targeted by extortionist may be considered "a par-

ticularly susceptible subgroup of blackmail victims") [5#11]; *U.S. v. Newman*, 965 F.2d 206, 211–12 (7th Cir. 1992) (defendant should have known that twenty-year-old woman who had been raped at age fifteen was susceptible to intimidation, deceit, and abuse); *U.S. v. Peters*, 962 F.2d 1410, 1418 (9th Cir. 1992) (foreseeable that targeted victims with bad credit ratings would be particularly susceptible to credit card mail fraud); *U.S. v. Astorri*, 923 F.2d 1052, 1055 (3d Cir. 1991) (victims of fraudulent scheme vulnerable because defendant used relationship with their daughter to induce them to invest) [3#20].

For instances of financial difficulties that made a victim particularly susceptible, see *U.S. v. Grimes,* 173 F.3d 634, 637 (7th Cir. 1999) (victims with bad credit targeted for loan fraud); *U.S. v. Page,* 69 F.3d 482, 489 (11th Cir. 1995) (same); *U.S. v. Borst,* 62 F.3d 43, 46 (2d Cir. 1995) (couples who needed homes but had serious financial and health problems were particularly susceptible to defendant's loan fraud scheme); *U.S. v. Holmes,* 60 F.3d 1134, 1136–37 (4th Cir. 1995) (victims who "had bad credit and had been unable to obtain mortgage loans elsewhere" were unusually vulnerable to defendant's mortgage loan fraud). See also *U.S. v. Shyllon,* 10 F.3d 1, 6 (D.C. Cir. 1993) (without specifying victims were particularly susceptible, affirmed enhancement for tax auditor who threatened audits and fines in extorting money from foreign-born businessmen who may have had limited knowledge of tax laws and English language).

Examples of victims who were *not* particularly susceptible include *U.S. v. Stover,* 93 F.3d 1379, 1387 (8th Cir. 1996) (remanded: cannot be applied to defendants who defrauded couples seeking to adopt children because a "strong desire to adopt" is not "the type of particular susceptibility contemplated by §3A1.1") [9#1]; *U.S. v. Castellanos,* 81 F.3d 108, 112 (9th Cir. 1996) (remanded: §3A1.1 not applicable to defendant who targeted Spanish-speaking population for investment fraud—"Nothing in the record supports a finding that the Spanish-speaking population of Southern California as a whole shares some unique susceptibility to fraud that warrants the law's protection"); *U.S. v. Box,* 50 F.3d 345, 358–59 (5th Cir. 1995) (remanded: out-of-town victims' reluctance to fight "a stigmatizing 'morals' charge" did not make them particularly susceptible under §3A1.1—rather, it made possible the extortion by deputies that had arrested them).

2. Official Victim (§3A1.2)

[Note: Effective Nov. 1, 2002, unless rejected by Congress an amendment to §3A1.2(b) replaces "corrections officer" with "prison official." Application Note 4, as amended, will define "prison official" to include "any individual (including a director, officer, employee, independent contractor, or volunteer, but not including an inmate) authorized to act on behalf of a prison or correctional facility." The amendment is in response to *U.S. v. Walker,* 202 F.3d 181, 185–90 (3d Cir. 2000), which held that a food service supervisor was not a "corrections officer" under §3A1.2(b).]

Law enforcement officers who were shot at while attempting to serve an arrest

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

However, a government official was not an "official victim" where he received a threat directed at others but was not the target of the threat, *U.S. v. Schroeder,* 902 F.2d 1469, 1471 (10th Cir. 1990) [3#9]. Cf. *U.S. v. McCaleb,* 908 F.2d 176, 178–79 (7th Cir. 1990) (affirmed: President was "official victim" of threat to kill him mailed to Secret Service; victim need not be aware of threat). For defendant convicted of unlawful flight to avoid prosecution, the victims of the underlying offense could not be used to depart upward by analogy to §3A1.2(a). *U.S. v. Cherry,* 10 F.3d 1003, 1011 (3d Cir. 1993) ("victim" of instant offense was government, which does not warrant §3A1.2 increase). Cf. *U.S. v. Drapeau,* 121 F.3d 344, 348–49 (8th Cir. 1997) (remanded: under §3A1.2, government official must be victim of defendant's "offense of conviction," not relevant conduct).

The Ninth Circuit held that there does not have to be a victim of the offense of conviction to apply §3A1.2(b) for assault during the offense or flight. Although Application Note 1 limits application of the enhancement to "when specific individuals are victims of the offense," it conflicts with the plain language of subsection (b) and Note 5, which were added later. Thus, §3A1.2(b) takes precedence and was properly applied to a defendant who assaulted an officer during the course of unlawful possession of a weapon by a felon, which is a victimless crime. *U.S. v. Powell*, 6 F.3d 611, 613–14 (9th Cir. 1993). Accord *U.S. v. Ortiz-Granados*, 12 F.3d 39, 42–43 (5th Cir. 1994) [6#10]. See also *U.S. v. Fleming*, 8 F.3d 1264, 1267 (8th Cir. 1993) (§3A1.2(b) increase "is appropriate in a prosecution for being a felon in possession of a firearm when an assault on a police officer is involved"); *U.S. v. Gonzales*, 996 F.2d 88, 92–93 (5th Cir. 1993) (for defendant convicted of unlawful possession, affirmed enhancement for murder of police officer by other offender in related conduct). Cf. *U.S. v. Levario-Quiroz,* 161 F.3d 903, 908 (5th Cir. 1998) (remanded: could not use defendant's "pre-offense assault of foreign officers in immediate flight from foreign crimes prior to the commission of a domestic offense" for §3A1.2(b) enhancement; before that ruling, court concluded that §3A1.2(b) could apply to assaults on foreign law enforcement officers).

The Eighth Circuit held that, in order for conduct of others to be attributable to a defendant, within the meaning of §3A1.2(b), there must be some evidence of causation on the part of the defendant: that is, that the defendant expressly or impliedly ordered, encouraged, or in some way assisted in the assailant's conduct. *U.S. v. Iron Cloud*, 75 F.3d 386, 390 (8th Cir. 1996) (remanded: evidence "clearly does not support a finding of a causal link between defendant and [driver's] impulsive

behavior in attempting to flee" that resulted in injury to officer). Cf. *U.S. v. Harrison,* 272 F.3d 220, 223 (4th Cir. 2001) (affirmed: although defendant was unarmed, he "could reasonably foresee that one of his armed co-defendants might fire a weapon so as to create a risk of serious bodily injury").

Note that whether the statute of conviction accounts for the victim's official status is not determinative—it is whether the guideline that sets the offense level does. If it does not, then using §3A1.2 is not double counting. See, e.g., *U.S. v. Green*, 25 F.3d 206, 211 (3d Cir. 1994) (affirmed: although 18 U.S.C. §115(a) covered victim's status as federal law enforcement officer, Guideline §2A6.1 does not); *U.S. v. Pacione*, 950 F.2d 1348, 1356 (7th Cir. 1992) (same); *U.S. v. Smith,* 196 F.3d 676, 683–84 (6th Cir. 1999) (assault on federal officer, 18 U.S.C. §111, covers victim's official status, but §2A2.2 does not); *U.S. v. Valdez-Torres*, 108 F.3d 385, 390 (D.C. Cir. 1997) (same); *U.S. v. Woody*, 55 F.3d 1257, 1274 (7th Cir. 1995) (same); *U.S. v. Park*, 988 F.2d 107, 110 (11th Cir. 1993) (same); *U.S. v. Kleinebreil*, 966 F.2d 945, 955 (5th Cir. 1992) (same); *U.S. v. Padilla*, 961 F.2d 322, 327 (2d Cir. 1992) (same); *U.S. v. Sanchez*, 914 F.2d 1355, 1362–63 (9th Cir. 1990) (same). See also *U.S. v. Jackson,* 276 F.3d 1231, 1235–36 (11th Cir. 2001) (affirmed: not improper double-counting to apply §3A1.2(b) and §2K2.1(b)(5) (possessing firearm in connection with another felony offense), even though the other felony offense was assault on officers used for §3A1.2(b)); *Harrison,* 272 F.3d at 223 (affirmed: §3A1.2 and §3C1.2 enhancements could both be applied where different conduct supported each one); *U.S. v. Matos-Rodriguez,* 188 F.3d 1300, 1310–12 (11th Cir. 1999) (same) (and see other cases at end of section III.C.3); *U.S. v. Jones,* 145 F.3d 736, 737 (5th Cir. 1998) (may apply both §3A1.2 and enhancement for bodily injury to victim under §2B3.1(b)(3)(a)); *U.S. v. Swoape,* 31 F.3d 482, 483 (7th Cir. 1994) (same); *U.S. v. Muhammad,* 948 F.2d 1449, 1458 (6th Cir. 1991) (same).

An undercover policeman who was forced to "snort" cocaine at gunpoint during undercover drug deal was not "assaulted" within the meaning of §3A1.2(b)—that defendants believed the officer *might* be a policeman is not sufficient, and there was testimony that the "snort test" has become standard operating procedure in drug deals. *U.S. v. Castillo,* 924 F.2d 1227, 1235–36 (2d Cir. 1991). Accord *U.S. v. Gonzalez,* 65 F.3d 814, 818 (10th Cir. 1995) (remanded: fact that defendants expressed some suspicion that undercover officers were police insufficient for §3A1.2(b)—"mere suspicion based on speculation alone does not equate to 'reasonable cause to believe'").

3. Restraint of Victim (§3A1.3)

Some circuits have held that the definition of "physically restrained" in Application Note 1(i) of §1B1.1 is not all-inclusive and that the enhancement may be warranted for other forms of restraint. See, e.g. *U.S. v. Gonzalez,* 183 F.3d 1315, 1327 (11th Cir. 1999) ("the illustrations of physical restraint [in §1B1.1, comment. (n.1(i))] are listed by way of example rather than limitation," and it was proper to find that "defendant physically restrained the victims by forcibly holding them at gunpoint" during home invasion that was in furtherance of offense of conviction); *U.S. v.*

Thompson, 109 F.3d 639, 641–42 (9th Cir. 1997) (forcing someone to move at gunpoint "certainly checked her free activity and otherwise controlled her actions" and thus constituted "physical restraint" under §2B3.1(b)(4)(B)); *Arcoren v. U.S.*, 929 F.2d 1235, 1248 (8th Cir. 1991) (defendant repeatedly pushed and grabbed victims of sexual abuse to prevent them from leaving room); *U.S. v. Roberts*, 898 F.2d 1465, 1470 (10th Cir. 1990) (warranted for a robber who put arm around victim and held a knife to her face while demanding money). Cf. *U.S. v. Drew,* 200 F.3d 871, 880 (D.C. Cir. 2000) (remanded: agreeing that definition of "physically restrained" is not limited to examples in Note 1, but concluding that "physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way"; thus, a victim forced to move at gunpoint was not "physically restrained," disagreeing with *Thompson,* supra); *U.S. v. Checora,* 175 F.3d 782, 790–91 (10th Cir. 1999) (finding that §3A1.3 and Note 1(I) of §1B1.1 in combination "require that there be a forcible restraint of a victim which occurs during commission of the offense," that "forcible" means that "the defendant must use physical force or another form of compulsion to achieve the restraint," and "restraint" means that "the defendant's conduct must hold the victim back from some action, procedure, or course, prevent the victim from doing something, or otherwise keep the victim within bounds or under control")..

The enhancement should only be applied if the restraint is an element of the offense or otherwise accounted for in the offense guideline. §3A1.2, comment. (n.2). See, e.g., *U.S. v. Checora,* 175 F.3d 782, 791–92 (10th Cir. 1999) (affirmed: distinguishing *Mikalajunas* below in holding that restraint was not necessary element of voluntary manslaughter and that tackling and restraining victim who tried to escape before beating him further and then stabbing him qualified for enhancement); *U.S. v. Tholl*, 895 F.2d 1178, 1184–85 (7th Cir. 1990) (physical restraint is not element of impersonating a DEA agent, §3A1.3 properly applied to defendant who "arrested" and robbed drug dealers); *U.S. v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) (affirmed: defendant pushed victim back into room with bomb when she tried to escape). But cf. *U.S. v. Johnson*, 46 F.3d 636, 639 (7th Cir. 1995) (remanded: where defendant received enhancements for use of weapon and inflicting bodily injury for lengthy beating of extortion victim, he could not also receive §3A1.3 enhancement without specific finding of "additional conduct that would constitute physical restraint" as defined in §1B1.1, comment. (n.1(i))); *U.S. v. Mikalajunas*, 936 F.2d 153, 155–56 (4th Cir. 1991) (reversed: holding murder victim in order to stab him was "part and parcel" of the offense, did not warrant enhancement).

The D.C. Circuit held that the enhancement may be given for conduct related to the offense. *U.S. v. Harris,* 959 F.2d 246, 265 (D.C. Cir. 1992) (affirmed: where other members of drug conspiracy assaulted and restrained seller who owed them money, enhancement proper because restraint was in furtherance of conspiracy and reasonably foreseeable to defendant). See also *U.S. v. Johnson,* 187 F.3d 1129, 1133–34 (9th Cir. 1999) (affirmed: agreeing with *Cross* below that "whether an act of restraint occurred 'in the course of the offense' under §3A1.3 should be analyzed by looking to whether the act of restraint could be considered 'relevant conduct'

under U.S.S.G. §1B1.3," and holding that unarmed act of restraint that occurred during time defendant illegally possessed machine gun occurred "in the course of" defendant's offense of illegal weapon possession). *U.S. v. Wright,* 119 F.3d 390, 392 (6th Cir. 1997) (affirmed: "the enhancement may be applied regardless of whether the person restrained was the victim of the offense of conviction"). But cf. *U.S. v. Cross,* 121 F.3d 234, 237–38 (6th Cir. 1997) (affirming §3A1.3 enhancement for coconspirator who did not directly restrain victim but guarded exit and threatened victim; however, other defendant who participated in torture but was not charged in drug conspiracy and was only convicted of earlier, separate distribution offense, could not receive enhancement because "none of the provisions of §1B1.3 apply, [so] the torture was not 'relevant conduct' as to *Cross's* offense of conviction") [10#2]; *U.S. v. Gonzalez,* 65 F.3d 814, 822–23 (10th Cir. 1995) (remanded: enhancement based on coconspirators' restraint of and attempt to rob undercover officer was not foreseeable to defendant and "substantially altered the agreed-upon plan without his knowledge or acquiescence").

The Ninth Circuit held that a coconspirator can be a victim under §3A1.3 and affirmed the enhancement for a defendant who forcibly restrained a coconspirator who tried to leave the conspiracy. *U.S. v. Vought,* 69 F.3d 1498, 1502 (9th Cir. 1995). Accord *U.S. v. Hidalgo,* 197 F.3d 1108, 1109 (11th Cir. 1999) (affirmed: "guideline provision allowing enhancement for restraint of a victim contemplates the restraint of any victim, co-conspirator or otherwise"); *U.S. v. Gaytan,* 74 F.3d 545, 560 (5th Cir. 1996) (affirmed: "The plain language of §3A1.3 refers only to 'victims' . . . and we believe this means any 'victim' of restraint."). Cf. *U.S. v. Kime,* 99 F.3d 870, 885–86 (8th Cir. 1996) (affirmed: drug supplier who, until he was restrained, beaten, and robbed by defendants, was member of conspiracy, was "victim" under §3A1.3).

The fact that a victim may have been lawfully restrained was found irrelevant by the Fifth Circuit. It reversed the failure to give the enhancement to a sheriff convicted of a civil rights violation for kicking a handcuffed defendant during a legitimate arrest. "[T]he lawfulness of the defendant's restraint of the victim at the time the unreasonable or excessive force occurs is not a concern implicated by U.S.S.G. §3A1.3." *U.S. v. Clayton,* 172 F.3d 347, 353 (5th Cir. 1999).

B. Role in the Offense (§3B1)

Generally, the same principles apply to aggravating and mitigating role adjustments. Note that under each guideline the findings are fact-intensive and reviewed under the clearly erroneous standard. Once the sentencing court finds that defendant had an aggravating role in the offense, enhancement is mandatory. See *U.S. v. Jimenez,* 68 F.3d 49, 52 (2d Cir. 1995) (remanded: error for court to explicitly determine defendant was manager or supervisor and not give §3B1.1 enhancement).

Note also that one circuit has held that "[n]othing in the Guidelines or . . . the Sentencing Reform Act" would preclude giving a defendant adjustments for both aggravating and mitigating roles. *U.S. v. Tsai,* 954 F.2d 155, 167 (3d Cir. 1992) (remanded: court should consider whether defendant, who received enhancement

under §3B1.1(c) for aggravating role, should also receive mitigating role adjustment under §3B1.2(b)). See also *U.S. v. Jackson,* 207 F.3d 910, 921–22 (7th Cir. 2000) (although remanding imposition of both aggravating and mitigating roles because evidence of mitigating role was insufficient, court cited *Tsai* and stated that "the government goes too far in arguing that there can never be a situation in which a defendant could receive both a punishment bonus for being a manager or supervisor and a punishment discount for being a minor participant. Section 3B1.2 does not say that a manager or supervisor cannot be a minor participant; all that is required is that he be less culpable than most of the other participants."). But see §3B1, intro. comment. ("When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply."). Cf. *U.S. v. Greenfield,* 44 F.3d 1141, 1146 (2d Cir. 1995) ("adjustment would have been inapplicable were [two codefendants], as equal partners, the only participants in their schemes"); *U.S. v. Katora*, 981 F.2d 1398, 1403–05 (3d Cir. 1992) (remanded: enhancement improper for equally culpable codefendants who did not organize any other culpable participants). [**Note:** The Commentary to §3B1.4 originally stated: "Many offenses are committed . . . by individuals of roughly equal culpability so that none of them will receive an adjustment under this Part"). However, a Nov. 1995 amendment deleted that version of §3B1.4 and replaced it with an enhancement for using a minor to commit a crime.]

1. Base on Relevant Conduct

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

elements of the specific charged offense.'" *U.S. v. Colletti*, 984 F.2d 1339, 1346 (3d Cir. 1992) (citation omitted) [5#5].

Courts have generally held that relevant conduct should be used for a mitigating role adjustment only if it was also used to set the offense level. See, e.g., *U.S. v. Lampkins,* 47 F.3d 175, 180–81 (7th Cir. 1995) (proper to deny adjustment for minor role in conspiracy where defendant was sentenced only for drugs with which he was directly involved); *U.S. v. Neal,* 36 F.3d 1190, 1211 (1st Cir. 1994) (affirmed: defendant did not have minor role in offenses of conviction on which sentence was based); *U.S. v. Gomez,* 31 F.3d 28, 31 (2d Cir. 1994) (affirmed: reduction properly denied for alleged minor role in related conduct not used in sentencing) *U.S. v. Marino,* 29 F.3d 76, 78 (2d Cir. 1994) (affirmed: same); *U.S. v. Olibrices*, 979 F.2d 1557, 1559–60 (D.C. Cir. 1992) (affirmed: defendant could not receive reduction for mitigating role in overall conspiracy when offense level was not based on that conspiracy) [5#6]. See also *U.S. v. James,* 157 F.3d 1218, 1220 (10th Cir. 1998) ("when the relevant conduct of the larger conspiracy is not taken into account in establishing a defendant's base offense level, a reduction pursuant to U.S.S.G. §3B1.2 is not warranted"); *U.S. v. Burnett,* 66 F.3d 137, 140 (7th Cir. 1995) ("When a [drug] courier is held accountable for only the amounts he carries, he plays a significant rather than a minor role in *that* offense.").

Application Note 4 of §3B1.2 states: "If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense." The Eleventh Circuit followed the logic of Application Note 4 in affirming the denial of a reduction to a defendant who was convicted of a conspiracy involving 308 kilograms of cocaine but sentenced on the basis of the 25 kilograms he was responsible for. Because Note 4 specifically refers to offenses, it does not apply in a case like this where the offense of conviction is conspiracy but defendant is sentenced on the basis of a smaller conspiracy within the overall offense. The court concluded that "the conspiracy on which a defendant's base offense level is founded is the relevant conspiracy for determining role in the offense," and rejected defendant's claim that he should receive a §3B1.2(b) adjustment for his small role in the larger conspiracy. *U.S. v. Fernandez,* 92 F.3d 1121, 1122–23 (11th Cir. 1996). See also *James,* 157 F.3d at 1220 (same, for RICO defendant sentenced on basis of drugs he personally handled rather than for whole conspiracy: "when the relevant conduct of the larger conspiracy is not taken into account in establishing a defendant's base offense level, a reduction pursuant to U.S.S.G. §3B1.2 is not warranted"); *Burnett,* 66 F.3d at 140 (affirmed: "§3B1.2 does not ask whether the defendant was minor in relation to the organization, . . . [but] whether he was minor in relation to the crime of which he was convicted . . . and in relation to the conduct for which he has been held accountable); *U.S. v. Atanda,* 60 F.3d 196, 199 (5th Cir. 1995) (affirmed: "when a sentence is based on an activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the base offense level even though the defendant's

activity in a larger conspiracy may have been minor or minimal"); *U.S. v. Lucht,* 18 F.3d 541, 555–56 (8th Cir. 1994) (court properly denied reduction for minor role in larger conspiracy where defendants pled guilty to less serious offense). Cf. *U.S. v. Godbolt,* 54 F.3d 232, 234 (5th Cir. 1995) (when defendant is convicted of misprision of a felony, any adjustment for role in offense must be based on that offense, not underlying crime—"Because §2X4.1 presupposes a defendant's lack of involvement in the underlying offense, any adjustment based on reduced culpability (U.S.S.G. §3B1.2) must be based on a mitigating role in the misprision offense. *See* U.S.S.G. §2X4.1, comment. (n.2) ('[t]he adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level')").

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

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

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

2. Requirement for Other Participants

a. Number of participants

When counting the "five or more participants" required under §3B1.1(a), the defendant may be counted as one of the five. *U.S. v. Paccione,* 202 F.3d 622, 625 (2d Cir. 2000); *U.S. v. Colletti*, 984 F.2d 1339, 1346 (3d Cir. 1992) [5#5]; *U.S. v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993); *U.S. v. Schweihs*, 971 F.2d 1302, 1318 (7th Cir. 1992); *U.S. v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990); *U.S. v. Reid*, 911 F.2d 1456, 1464 (10th Cir. 1990); *U.S. v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990) [3#11]; *U.S. v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990) [3#9].

The Second Circuit held that the enhancement for manager or supervisor under §3B1.1(b) requires a specific finding of the identities of the "five or more participants" or that the criminal activity was "otherwise extensive." *U.S. v. Lanese,* 890 F.2d 1284, 1293–94 (2d Cir. 1989) [2#18]. The Fifth Circuit came to the same conclusion for a finding of "organizer or leader" under §3B1.1(a), while also cautioning that the "five or more participants" must have been involved in the offense of conviction, not just related criminal activity. *Barbontin,* 907 F.2d at 1498. Accord *Schweihs,* 971 at 1318 (remanded: "district court must identify five participants in this offense" for §3B1.1(a)).

In the same vein, a defendant must be a manager of the criminal activity itself—the enhancement was improper for a defendant who only managed a business that was used in the offense. *U.S. v. Mares-Molina,* 913 F.2d 770, 773–74 (9th Cir. 1990) [3#14]. Similarly, the Third Circuit held that a defendant could not be considered a supervisor under §3B1.1(c) where he did not actually supervise any aspect of the criminal activity itself. Defendant was a police sergeant with supervisory authority over other members of the police force. Many of those members engaged in criminal activity, and defendant admittedly benefited from that activity; however, he did not supervise the others in any of their criminal actions. The court held it was error to apply the §3B1.1(c) enhancement. "The Guidelines (in each of its three subsections) call for a determination of whether the defendant was a supervisor *in the criminal activity*. . . . Although the defendants used their official positions as cover for the illegal acts, the mere fact that DeGovanni was their workplace supervisor, is not enough to render him more culpable *for purposes of the conspiracy* than the other 'rank and file' participants. We find that the enhancement contained in U.S.S.G. §3B1.1(c) does not apply absent such heightened culpability, and that one must therefore have an active supervisory role *in the actual criminal conduct* of others to justify the enhancements contained in this section of the Guidelines." *U.S. v. DeGovanni,* 104 F.3d 43, 46 (3d Cir. 1997).

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

does not apply to real property, . . . then it cannot apply to intangible corporate entities").

b. Must be "criminally responsible"

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

Some circuits have concluded that the participants must be "criminally responsible" for the offense committed by defendant. See *U.S. v. Egge,* 223 F.3d 1128, 1133–34 (9th Cir. 2000) ("customers who are solely end users of controlled substances are not participants for the purposes of USSG §3B1.1(b)"—they were not "criminally responsible" for defendant's distribution offense); *U.S. v. Maloof,* 205 F.3d 819, 830 (5th Cir. 2000) (remanded: although three other employees were somehow involved in fraud scheme, error to find they "were participants without first determining that each of them was criminally responsible for commission of an offense"); *U.S. v. Melendez,* 41 F.3d 797, 800 (2d Cir. 1994) (remanded: three persons who received proceeds of defendant's mail theft were not "participants" under §3B1.1(a)—"None of these three individuals is alleged to have been involved with the [actual theft]; rather, they were convicted of receiving stolen property. There is no evidence that the three individuals had advance knowledge of the theft, much less participated in its planning or execution. Nor does the record indicate that they expected to receive the proceeds of the theft"); *U.S. v. Colletti,* 984 F.2d 1339, 1346 (3d Cir. 1992) (remanded: fifth person assisted robbery defendant by briefly storing stolen goods and was charged for that crime, but was not "criminally responsible" for robbery—he was not and could not properly have been charged with robbery, did not facilitate it, and did not know of it in advance or profit from it); *Jarrett,* 956 F.2d at 868 (reversed: prostitutes that defendant transported were not "responsible" for transportation offense). Application Note 1 to §3B1.1 was amended Nov. 1991 to specify that one who is not criminally responsible, such as an undercover agent, is not a "participant."

However, the other participants need not have been *convicted* of the same offense as defendant or convicted at all. See USSG §3B1.1, comment. (n.1) ("A 'participant' . . . need not have been convicted"); *U.S. v. Haun,* 90 F.3d 1096, 1103 (6th Cir. 1996) (defendants who were acquitted or not charged may be "participants"); *U.S. v. Allemand,* 34 F.3d 923, 931 (10th Cir. 1994) (affirmed: "other defendants were participants even though they were convicted of lesser offenses"); *U.S. v. Freeman,* 30 F.3d 1040, 1042 (8th Cir. 1994) (affirmed: although other persons were neither indicted nor tried, they were criminally responsible for offense); *U.S. v. Belletiere,*

971 F.2d 961, 969 (3d Cir. 1992) ("participants need not each be criminally culpable of the charged offense, but must be criminally culpable of 'the underlying activities'"); *U.S. v. Manthei,* 913 F.2d 1130, 1136 (5th Cir. 1990) ("Guidelines do not require that a 'participant' be charged in the offense of conviction").

The Sixth Circuit noted that the "offense" in question must be a criminal offense. Those who assist in an offense to which only civil penalties apply cannot be counted as "participants." *U.S. v. Anthony,* 280 F.3d 694, 698 (6th Cir. 2002) (remanded: number of participants could only include those who were part of false statements offense, not underlying civil offense of removing safety devices from cigarette lighters).

c. Control of persons or property

Persons: "The key determinants of section 3B1.1 are control and organization." *U.S. v. Rowley*, 975 F.2d 1357, 1364 (8th Cir. 1992). Some circuits have held that §3B1.1(a) and (b) do not require that the defendant personally or directly control all of the five or more participants. See *U.S. v. Johnson,* 4 F.3d 904, 917–18 (10th Cir. 1993) (§3B1.1(b)); *U.S. v. Barnes,* 993 F.2d 680, 685 (9th Cir. 1993) (§3B1.1(a)); *U.S. v. Adipietro,* 983 F.2d 1468, 1473 (8th Cir. 1993) (§3B1.1(b)); *U.S. v. McGuire,* 957 F.2d 310, 315–17 (7th Cir. 1992) (§3B1.1(b)); *U.S. v. Smith,* 924 F.2d 889, 893–95 (9th Cir. 1991) (§3B1.1(a)). Cf. *U.S. v. Young,* 34 F.3d 500, 506 (7th Cir. 1994) (despite "little support to show that Mr. Young exercised control over others," affirmed §3B1.1(b) enhancement because defendant had major role as distributor of marijuana operation's product and recruited buyers); *U.S. v. Johnson,* 906 F.2d 1285, 1291–92 (8th Cir. 1990) (affirmed §3B1.1(b) finding where defendant recruited codefendant and instructed him on techniques of drug dealing, supplied other codefendants, and directed deliveries).

A Nov. 1993 amendment to §3B1.1, comment. (n.2), states: "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." The Fifth Circuit followed this amendment to hold that a defendant need not personally lead five or more participants to receive a §3B1.1(a) enhancement; leading at least one of the five is sufficient. See *U.S. v. Okoli,* 20 F.3d 615, 616 (5th Cir. 1994) [6#17]. Accord *U.S. v. Payne,* 63 F.3d 1200, 1212 (2d Cir. 1995) (affirmed: "requirements of §3B1.1(b) are met if the defendant was a manager or supervisor and the criminal activity itself involved at least five participants; the defendant need not be the manager of more than one other person").

Before the amendment, the Tenth Circuit held that the defendant must control the five or more participants to be a §3B1.1(a) organizer or leader, but noted that the control may be indirect. *U.S. v. Reid,* 911 F.2d 1456, 1464–65 & n.8 (10th Cir. 1990) (drug suppliers and customers were not "participants" because they were neither answerable to nor interdependent with defendant). Cf. *U.S. v. Guyton,* 36 F.3d 655, 662 (7th Cir. 1994) (remanded: "fronting drugs" to sellers does not allow §3B1.1(a) enhancement—"without evidence of actual control, evidence of a front

arrangement was by itself insufficient to demonstrate the level of control necessary to support a determination that a defendant played a leadership role in the offense"); *U.S. v. Belletiere*, 971 F.2d 961, 969–72 (3d Cir. 1992) (remanded: defendant was not an organizer or leader, §3B1.1(a), where he "made a series of unrelated drug sales" to six people, none of whom were "'led' or 'organized' by, nor 'answerable' to, the defendant") [5#2]. See also *U.S. v. Barrie,* 267 F.3d 220, 223–25 (3d Cir. 2001) (remanded: persons who purchased or received illegally generated Social Security cards were similar to drug customers and were not organized or led by defendant, making §3B1.1(a) enhancement improper).

Note, however, that the First Circuit has determined that while control over others is necessary to be a "leader," "the term 'organizer' has a different connotation. One may be classified as an organizer, though perhaps not as a leader, if he coordinates others so as to facilitate the commission of criminal activity. . . . The key to determining whether a defendant qualifies as an organizer is not direct control but relative responsibility. . . . When, as now, the organizer stages an extensive activity in such a way as to evince an increased degree of relative responsibility, the four-level enhancement applies whether or not he retains supervisory control over the other participants." *U.S. v. Tejada-Beltran,* 50 F.3d 105, 112–13 (1st Cir. 1995) (even if defendant did not retain control over others, §3B1.1(a) enhancement affirmed because he organized large illegal immigration scheme: "retention of control over other participants, although sometimes relevant to an inquiry into the status of a putative organizer, is not an essential attribute of organizer status").

The Tenth Circuit later reached the same conclusion: "While control over others is required for a finding that a defendant was a leader, supervisor, or manager, we hold that no such finding is necessary to support an enhancement for acting as an organizer under §3B1.1(c). A defendant can organize an illegal activity without exercising control over the other participants in the activity." *U.S. v. Valdez-Arieta,* 127 F.3d 1267, 1270–71 (10th Cir. 1997). See also *U.S. v. Reissig,* 186 F.3d 617, 620 (5th Cir. 1999) (affirming §3B1.1(b) enhancement for defendant who "was part owner of the [fraudulent telemarketing] business, which entitled him to a larger share of the fruits of the crime, . . . [and] exercised a degree of control and authority over the venture," despite his argument that "he never controlled or supervised anyone"); *U.S. v. Schultz,* 14 F.3d 1093, 1099 (6th Cir. 1994) (affirmed: although defendant did not directly control others, "[o]rganizing and coordinating an interstate [or] international [drug distribution scheme] on a continuing basis should be sufficient to qualify a single individual as an 'organizer'" for §3B1.1(c)); *U.S. v. Guyton,* 36 F.3d 655, 662 (7th Cir. 1994) ("Organizing or enlisting others for the purpose of executing the crime can constitute sufficient control of another under sec. 3B1.1(a)").

Property: A departure, rather than an aggravating role enhancement, may be appropriate for a defendant who managed or supervised property, rather than people. As of Nov. 1993, new Application Note 2 in §3B1.1 was added to clarify that "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the

case of a defendant who . . . exercised management responsibility over the property, assets, or activities of a criminal organization." See, e.g., *U.S. v. Glover*, 179 F.3d 1300, 1302–03 (11th Cir. 1999) (remanded: after Note 2 amendment, "a section 3B1.1 enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy. A finding involving just asset management may support only an upward departure."); *U.S. v. Gort-DiDonato,* 109 F.3d 318, 321 (6th Cir. 1997) (remanded: "as of November 1, 1993, a defendant must have exerted control over at least one individual within a criminal organization for the enhancement of §3B1.1 to be warranted," so §3B1.1(c) enhancement was improper without finding that defendant directed at least one other person); *U.S. v. Jobe,* 101 F.3d 1046, 1068 (5th Cir. 1996) (when district court does not order upward departure, asset management exception "is unavailable to sustain [§3B1.1(c)] enhancement on appeal"); *U.S. v. Cali,* 87 F.3d 571, 577 (1st Cir. 1996) (after 1993 amendment, management of property or other assets may warrant departure but cannot be basis for §3B1.1(b) enhancement); *U.S. v. Fones,* 51 F.3d 663, 668–70 (7th Cir. 1995) (remanded: §3B1.1(b) could not be applied to defendant who did not control others, but because he "had management responsibility over the assets, property and, to some extent, the activity of the criminal organization," departure under Note 2 would be proper); *U.S. v. Greenfield,* 44 F.3d 1141, 1146 (2d Cir. 1995) ("by negative implication, the Application Note seems clearly to preclude management responsibility over property, assets, or activities as the basis for an *enhancement* under §3B1.1(c)"). The Fifth Circuit noted that this exception, by definition, cannot be used to impose a four-level enhancement under §3B1.1(a)—one cannot "organize" or "lead" property, only people. *U.S. v. Ronning,* 47 F.3d 710, 712 (5th Cir. 1995) (remanded).

The Eighth Circuit stressed that if the facts support departure under Note 2, the district court "is possessed of a certain degree of discretion regarding" whether to depart, whereas the normal enhancement is mandatory if the court concludes that defendant had an aggravating role. The court also noted that such a departure "is not . . . tied to the tripartite adjustment scheme detailed in §§3B1.1(a)–(c). . . . In other words, after concluding that an upward departure is warranted under [Note 2], the district court is then required to determine a reasonable increase—an increase which may be higher or lower than the increase authorized under §§3B1.1(a)–(c), depending upon the facts of the individual situation. The number of participants involved in the criminal activity is but one factor in this analysis." *U.S. v. McFarlane,* 64 F.3d 1235, 1239–40 & n.7 (8th Cir. 1995).

Before new Note 2, the Fourth Circuit held that a defendant who manages or supervises property rather than people may be a manager or supervisor under §3B1.1(b). See *U.S. v. Chambers*, 985 F.2d 1263, 1267–69 (4th Cir. 1993). The Seventh Circuit, again before Note 2, agreed. *U.S. v. Carson,* 9 F.3d 576, 592 (7th Cir. 1993) (although defendant's control over others was uncertain, he clearly distributed large amounts of cocaine and had supervisory duties in conspiracy involving at least five participants). See also *U.S. v. Grady,* 972 F.2d 889, 889 (8th Cir. 1992) (affirmed §3B1.1(a) enhancement—defendant's sole control over access to stolen postal money orders "made him the person most responsible for the crime, [which]

was sufficient to make him an organizer or leader"). Contra *U.S. v. Fuentes,* 954 F.2d 151, 153–54 (3d Cir. 1992); *U.S. v. Mares-Molina*, 913 F.2d 770, 776 (9th Cir. 1990); *U.S. v. Fuller*, 897 F.2d 1217, 1220–21 (1st Cir. 1990).

The Fourth Circuit later held that the amendment to Note 2 "is not a mere clarification because it works a substantive change in the operation of the guideline in this circuit"; therefore, "we will not consider its retroactive application." *U.S. v. Capers,* 61 F.3d 1100, 1110 (4th Cir. 1995). See also *U.S. v. Patasnick,* 89 F.3d 63, 70–72 (2d Cir. 1996) (remanded: Note 2 is not merely clarifying and should not have been applied to defendant whose offense ended in 1992). But see *Fones,* 51 F.3d at 669 (amended Note 2 "constitutes a clarification of the appropriate application of §3B1.1 rather than a substantive change to the guidelines" and should have been applied retroactively).

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

See also cases in section III.B.4

d. Mitigating role for sole "participant"?

Because role adjustments are to be determined on the basis of all relevant conduct, a defendant who is the sole participant in the offense of conviction may qualify for a reduction under §3B1.2. The D.C. Circuit held that the evidence "must, at a minimum, show (i) that the 'relevant conduct' for which the defendant would . . . be otherwise accountable involved more than one participant (as defined in section 3B1.1, comment. (n.1)) and (ii) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s)." *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991). Accord *U.S. v. Snoddy,* 139 F.3d 1224, 1231–32 (8th Cir. 1998); *U.S. v. Webster,* 996 F.2d 209, 212 (9th Cir. 1993) [6#1]. See also §3B1.2, comment. (n.2) (as amended Nov. 1, 2001) ("This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addi-

tion to the defendant and the defendant otherwise qualifies for such an adjustment."). See also cases in III.B.5.

When the only other participants are government agents, acting undercover or in a sting operation, the adjustment may not be given, but the circuits are split on whether a departure by analogy to §3B1.2 is permissible. The Second and Third Circuits held that departure may be appropriate. See *U.S. v. Speenburgh*, 990 F.2d 72, 74–76 (2d Cir. 1993) (mitigating role adjustment under §3B1.2 requires other criminally responsible participants; however, departure may be appropriate); *U.S. v. Bierley,* 922 F.2d 1061, 1065 (3d Cir. 1990) (same) [3#18]. Cf. *U.S. v. Romualdi,* 101 F.3d 971, 975 (3d Cir. 1996) (distinguishing *Bierley*—improper to depart for defendant convicted of *possession* of child pornography because that offense does not involve other participants and guideline distinguishes it from *receipt* offense). The Eleventh Circuit held departure was prohibited. *U.S. v. Costales,* 5 F.3d 480, 486 (11th Cir. 1993) (may not depart by analogy to §3B1.2 where only other participants in child pornography offense were government agents).

The Ninth Circuit originally followed *Bierley* to depart for a drug courier. See *U.S. v. Valdez-Gonzalez,* 957 F.2d 643, 648–50 (9th Cir. 1992) (if a drug-smuggling "mule" is the only "participant" in the offense of conviction and thus cannot qualify for the mitigating role adjustment, downward departure may be appropriate) [4#18]. However, the court later held that the Nov. 1, 1990, amendment that states role in offense adjustments are based on relevant conduct effectively overturned the reasoning of *Valdez-Gonzalez*: "In light of [the amendment] it can no longer be said that the Commission has not taken into account the extent of a defendant's participation in unlawful conduct, and a downward departure on this ground alone is no longer appropriate." *Webster,* 996 F.2d at 210–11 (district court should consider whether defendant courier qualifies for §3B1.2 reduction based on all relevant conduct) [6#1]. See also summaries of *Olibrices, Lucht,* and *Demers* in section III.B.1.

3. "Otherwise Extensive"

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

Note, however, that for any role in the offense adjustment it appears that at least

two participants are required. See USSG Ch.3, Pt.B, intro. comment. ("When an offense is committed by more than one participant, §3B1.1 or §3B1.2 . . . may apply."); §3B1.1, comment. (n.2) (Nov. 1993) ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants"). See also *U.S. v. Gross,* 26 F.3d 552, 554–55 (5th Cir. 1994) (remanded: following commentary, §3B1.1 "only applies if an offense was committed by more than one criminally responsible person"); *U.S. v. Rodgers,* 951 F.2d 1220, 1222 (11th Cir. 1992) (§3B1.1 inapplicable to offense that, "by its nature, involves no more than one participant").

The Seventh Circuit stated that "[a]t the very least, Section 3B1.1's 'otherwise extensive' prong demands a showing that an activity is the *functional equivalent* of an activity involving five or more participants." The court then held that, "[i]f a district court intends to rely solely upon the involvement of a given number of individuals to support a determination that criminal activity is 'otherwise extensive,' 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 (7th Cir. 1994) (remanded: §3B1.1(a) enhancement for being organizer of an "otherwise extensive" criminal activity could not be based solely on fact that five persons—defendant, two other criminally responsible participants, and two "outsiders"—were involved in extortion scheme) [7#6].

The Second Circuit agreed with the idea of a "functional equivalent" of five participants, and adopted it as the basis for analyzing whether a criminal activity is "otherwise extensive." "In determining whether a criminal activity is 'otherwise extensive' as the functional equivalent of one involving five or more knowing participants, we believe that the following must be determined by the sentencing court:

> (i) the number of knowing participants;
>
> (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent;
>
> (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme."

The court also held that district courts should not consider "many characteristics that might ordinarily be considered evidence of 'extensive' activity are dealt with elsewhere in the Guidelines. For example, in fraud cases, the base offense level can be raised according to the amount of loss, the extent of planning, and the number of victims. Guidelines §2F1.1." *U.S. v. Carrozzella,* 105 F.3d 796, 802–05 (2d Cir. 1997) (remanded: district court "took into account impermissible factors" and did not adequately analyze "the quantity and quality of the services of unknowing participants" in deciding defendant's fraud scheme was "otherwise extensive"). See also *U.S. v. Napoli,* 179 F.3d 1, 14 (2d Cir. 1999) (further explaining that "unknowing participants must . . . do more than facilitate the defendant's conduct; they must perform conduct that is 'peculiar and necessary' to the criminal scheme," citing *Carrozzella*'s example that a taxi driver who happens to drive a leader of a fraud scheme to the scene of the fraudulent transaction would not be counted).

Some circuits have adopted the analysis laid out in *Carrozzella* for determining whether there is the "functional equivalent" of five participants. See *U.S. v. Anthony,* 280 F.3d 694, 699–701 (6th Cir. 2002) ("We believe [the *Carrozzella*] test best carries out the intent of the Sentencing Commission, and therefore we subscribe to it."); *U.S. v. Wilson,* 240 F.3d 39, 47–51 (D.C. Cir. 2001) (adopting *Carrozzella* test and analysis); *U.S. v. Helbling,* 209 F.3d 226, 244–48 (3d Cir. 2000) ("We will subscribe to the analysis . . . described in *Carrozzella*."). See also *U.S. v. Antico,* 275 F.3d 245, 270 (3d Cir. 2001) (in following *Carrozzella*, adding caution that "language of §3B1.1 requires the court to consider the defendants leadership role *with respect* to the *particular offense* charged. . . . The actions or services of nonparticipants must all relate to the common criminal activity or scheme—and to the offense charged. A sentencing court should take particular care in situations where like offenses have been grouped together for sentencing purposes, as was done in this case.").

Other circuits have used a somewhat broader analysis that goes beyond the number of persons involved, similar to one originally set out by the First Circuit: "the extensiveness of a criminal activity is not necessarily a function of the precise number of persons, criminally culpable or otherwise, engaged in the activity. Rather, an inquiring court must examine the totality of the circumstances, including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme." *U.S. v. Dietz,* 950 F.2d 50, 53 (1st Cir. 1991). Accord *U.S. v. Yarnell,* 129 F.3d 1127, 1139 (10th Cir. 1997) ("agree[ing] with the First Circuit's interpretation of the phrase 'otherwise extensive'" but not deciding whether at least five individuals must be involved in some way). See also *U.S. v. Brockman,* 183 F.3d 891, 900 (8th Cir. 1999) ("While extensiveness is generally determined based upon the number of persons involved in the commission of an offense, courts also consider the amount of loss caused by the offense," citing earlier case finding that "an enterprise generating a 'take' of over a quarter million dollars can properly be regarded as 'extensive'" whether or not five persons were involved); *U.S. v. Holland,* 22 F.3d 1040, 1046 (11th Cir. 1994) ("there are a number of factors relevant to the extensiveness determination, including the length and scope of the criminal activity as well as the number of persons involved"); *U.S. v. Rose,* 20 F.3d 367, 374 (9th Cir. 1994) ("Whether criminal activity is 'otherwise extensive' depends on such factors as (i) the number of knowing participants and unwitting outsiders; . . . (ii) the number of victims; . . . and (iii) the amount of money fraudulently obtained or laundered."); *U.S. v. Mergerson,* 4 F.3d 337, 348 (5th Cir. 1993) (although court did not specify five or more person involved in offense, "the totality of the evidence"—including "extremely large" amount and street value of negotiated heroin and distribution of high-purity heroin—showed criminal activity was otherwise extensive).

A criminal activity that involved four conspirators, two drug suppliers, and hundreds of customers was "otherwise extensive" under §3B1.1(a). *U.S. v. Reid,* 911 F.2d 1456, 1466 (10th Cir. 1990) [3#13]. A criminal enterprise that brought in over $250,000 was "otherwise extensive," and the value of the operation was not limited

to money personally taken in by defendant. *U.S. v. Morphew,* 909 F.2d 1143, 1145 (8th Cir. 1990). See also *U.S. v. Bennett,* 161 F.3d 171, 194 (3d Cir. 1998) (affirmed: multi-year, multi-million dollar fraud scheme that involved one other criminally responsible participant and "at least 13 innocent individuals" was "otherwise extensive"); *U.S. v. Rose,* 20 F.3d 367, 374 (9th Cir. 1994) (affirmed: fraud scheme "involved approximately $3 million, sixty knowing or unwitting employees . . . , an untold but no doubt considerable number of bank employees and other outsiders, and scores of duped investors"); *U.S. v. Roberts,* 5 F.3d 365, 371 (9th Cir. 1993) (fraud involving three participants along with four individual and two corporate outsiders was extensive); *U.S. v. Stouffer,* 986 F.2d 916, 927 (5th Cir. 1993) (affirmed: fraud involved over 2000 investors and $11 million); *West,* 942 F.2d at 531 (affirmed: fraud scheme involving two "participants" and "at least eight employees").

The Eleventh Circuit held that "section 3B1.1(a)'s plain language requires *both* a leadership role *and* an extensive operation. Without proof of the defendant's leadership role, evidence of the [drug] operation's extensiveness is insufficient as a matter of law to warrant the adjustment." *U.S. v. Yates*, 990 F.2d 1179, 1181–82 (11th Cir. 1993) (reversed: no evidence that drug supplier was leader or organizer).

4. Drug "Steerers," Middlemen, Distributors

Drug "steerers" have been defined as persons who "direct buyers to sellers in circumstances in which the sellers attempt to conceal themselves from casual observation." *U.S. v. Colon,* 884 F.2d 1550, 1552 (2d Cir. 1989). Whether a steerer may qualify for an aggravating role adjustment depends on the specific facts. For example, the First Circuit reversed a finding that a steerer was a "manager or supervisor" under §3B1.1(b). *U.S. v. Sostre,* 967 F.2d 728, 733 (1st Cir. 1992) (although defendant brought buyers to sellers and controlled a lookout, he did not control the drugs, was not the principal in the drug transaction, and had to contact the sellers before making representations to buyers) [5#1]. See also *U.S. v. Graham,* 162 F.3d 1180, 1183–84 (D.C. Cir. 1998) (remanded: "the mere act of directing buyers to sellers does not constitute management or supervision"). But cf. *U.S. v. Cochran,* 955 F.2d 1116, 1124–26 (7th Cir. 1992) (affirmed: defendant who coordinated five defendants in drug transactions, linked supplier with purchaser, attended all planning meetings and drug sales, and allowed his home to be purchase site was an "organizer" under §3B1.1(c)). See also cases in section III.B.6.

On the other hand, courts have generally held that a steerer does not qualify for a mitigating role adjustment. The Seventh Circuit held that "[a] person who directs a buyer to a seller cannot be considered a minor participant [under §3B1.2(b)] because that person also plays an important role in the distribution of the drugs." *U.S. v. Brick,* 905 F.2d 1092, 1095 (7th Cir. 1990) (affirmed: defendant received minimal profits compared with drug supplier, but arranged two drug transactions by telephone, conducted first transaction, was contact person in second and third transactions, and brought government agents to drug supplier twice). See also *U.S. v. Tremelling,* 43 F.3d 148, 153 (5th Cir. 1995) (affirmed: "role as a go-between does

not warrant a finding of minor participation"); *U.S. v. Boyer,* 931 F.2d 1201, 1205 (7th Cir. 1991) (affirmed: drug coconspirator who pursued initial contact with buyer, introduced buyer to seller, and set up the drug transaction "played an indispensable role" and was not a minor participant); *U.S. v. Foley,* 906 F.2d 1261, 1263 (8th Cir. 1990) (rejecting defendant's contention that she was "minimal" rather than just "minor" participant—even though remuneration was slight, she arranged three drug sales and accepted purchase price in two sales).

Similarly, the Second Circuit concluded that a "steerer" in a typical heroin distribution scheme could not be a "minimal participant," §3B1.2(a). The court explained that "'[s]teerers' play an important role in street-level drug transactions . . . . Without 'steerers,' buyers would either find it difficult to locate sellers or sellers would have to risk exposure to public view." *Colon,* 884 F.2d at 1551–52 (affirmed: defendant handled neither money nor drugs, but he directed buyer to drug seller and knew about others' activities). However, in a later case the court stated that "we did not hold that a steerer or a facilitator never receive a reduction pursuant to section 3B1.2," and remanded for "a factual determination as to whether LaValley's role as a steerer or facilitator was that of a minor participant." *U.S. v. LaValley,* 999 F.2d 663, 666 (2d Cir. 1993). Cf. *U.S. v. Cataldo,* 171 F.3d 1316, 1319–20 (11th Cir. 1999) (affirming rejection of defendant's claim that, as a "mere broker" in a drug deal he should receive §3B1.2 reduction).

Being a drug middleman or distributor does not by itself support an aggravating role enhancement. Buying and selling drugs, even as part of a conspiracy, does not necessarily indicate control over the activities of other participants. See, e.g., *U.S. v. Anderson,* 189 F.3d 1201, 1211–12 & n.6 (10th Cir. 1999) ("distribution of drugs as a middleman and cooking cocaine into crack do not support enhancement" under §3B1.1(c) without evidence of supervision or control over others); *U.S. v. Avila,* 95 F.3d 887, 890–92 (9th Cir. 1996) (remanded: although defendant "was the sole contact between buyer and seller, he did not independently negotiate the key element of the transaction: the price of the cocaine, [and] . . . there is no evidence in the record that Avila exercised any control or organizational authority over others"); *U.S. v. Miller,* 91 F.3d 1160, 1164 (8th Cir. 1996) (remanded: "no evidence that [distributor] controlled his buyers in their resale of the methamphetamine" so as to be organizer or leader); *U.S. v. Mustread,* 42 F.3d 1097, 1103–05 (7th Cir. 1994) (remanded: although defendant was large-scale marijuana distributor and worked closely with others in conspiracy, he acted independently and did not exercise control over others required by §3B1.1(a)) [7#6]; *U.S. v. Yates,* 990 F.2d 1179, 1182 (11th Cir. 1993) (remanded: while dilaudid seller may have been involved in organization that was "otherwise extensive," there was "no evidence that Yates was an organizer or leader of the dilaudid distribution network controlled by" his buyer); *U.S. v. Brown,* 944 F.2d 1377, 1380–82 (7th Cir. 1991) (remanded: "status as a distributor, standing alone, does not warrant an enhancement under §3B1.1"; defendant purchased drugs from larger distributors and sold to smaller distributors and users, but there was no evidence that he supervised or controlled others); *U.S. v. Fuller,* 897 F.2d 1217, 1221 (1st Cir. 1990) (remanded: fact that defendant may have

distributed large amounts of marijuana to several buyers did not support §3B1.1(c) enhancement—these were "private drug distributions, in which he essentially did all the work himself" and there was no evidence that he "exercised control or was otherwise responsible for organizing others").

Also, merely supplying drugs on credit, or "fronting," does not, without more, warrant an aggravating role enhancement. See, e.g., *U.S. v. Alred,* 144 F.3d 1405, 1421–22 (11th Cir. 1998) (remanded: without proof of leadership role, selling and fronting drugs insufficient for §3B1.1(a)); *U.S. v. Del Toro-Aguilera,* 138 F.3d 340, 343 (8th Cir. 1998) (reversing §3B1.1(b) enhancement because "evidence of fronting alone was not 'enough to sustain a finding that [defendant] was a manager or supervisor'"); *U.S. v. Owens,* 70 F.3d 1118, 1129 (10th Cir. 1995) (reversing §3B1.1(a) enhancement because "the record show[s] only [that defendant] supplied cocaine to his nephews on credit and derived profit from the transactions, which . . . is not enough"). See also *U.S. v. Anderson,* 189 F.3d 1201, 1212 (10th Cir. 1999) (remanded: fact that defendant supplied drugs, converted cocaine into crack, and received profits, does not prove aggravating role without evidence of control, supervision, or organization of others).

However, if a middleman's role includes managerial or supervisory duties it may warrant enhancement. See, e.g., *U.S. v. Flores,* 73 F.3d 826, 836 (8th Cir. 1996) (affirming §3B1.1(b) increase for middleman who "solicited a substantial buyer," helped finance long distance trip to place of sale, "played an integral and extensive role in planning the transaction," determined sale price of marijuana, and "personally managed and ensured that the $200,000 deal got done"); *U.S. v. Young,* 34 F.3d 500, 507–08 (7th Cir. 1994) (although "a very close call," §3B1.1(b) enhancement affirmed for middleman distributor where three of seven factors listed in §3B1.1, comment. (n.3), were present).

5. Drug Couriers

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

Rather, "the issue is whether the defendant is 'substantially less culpable' than his co-conspirators." *Rossy,* 953 F.2d at 326. Accord *Cacho,* 951 F.2d at 310; *U.S. v.*

Headley, 923 F.2d 1079, 1084 (3d Cir. 1991); *Garcia,* 920 F.2d at 155; *Zweber,* 913 F.2d at 710; *Williams,* 890 F.2d at 104; *White,* 875 F.2d at 434; *Buenrosto,* 868 F.2d at 138. The Second Circuit explained "[t]he culpability of a defendant courier must depend necessarily on such factors as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *Garcia,* 920 F.2d at 155. Accord *U.S. v. Carr,* 25 F.3d 1194, 1208 (3d Cir. 1994). See also *Calderon-Porras,* 911 F.2d at 423–24 ("the commentary directs us to focus upon the defendant's knowledge *and* the activities of others"). Cf. *U.S. v. Ayers,* 84 F.3d 382, 384 (10th Cir. 1996) (affirmed: following reasoning of courier cases, holding that individuals who knowingly allow others to use their residences for drug trafficking are not entitled to downward adjustment).

Courts have differed on whether, and how much, relevant conduct can be taken into account when a courier has been charged with only the amount of drugs actually carried and not convicted of a conspiracy or other group offense. Effective Nov. 1, 2001, the Commentary to §3B1.2 has been completely revised. Former Note 2 has been replaced by new Note 3, which is meant to to resolve the circuit split by stating, "A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline."

Before the 2001 amendment, the Third Circuit concluded that a courier who is not charged with conspiracy and is convicted only of importing drugs into the United States can still play a minor role in the charged importation if other participants were involved in the relevant conduct, which "is broader than merely the conduct required by the elements of the offense of conviction. Even if a courier is charged with importing only the quantity of drugs that he actually carried, there may still be other participants involved in the conduct relevant to that small amount or that one transaction. . . . Accordingly, although the amount of drugs with which the defendant is charged may be an important factor which weighs heavily in the court's view of the defendant's relative culpability, it does not necessarily preclude a minor role adjustment with one exception," that being where a defendant "received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct." See USSG §3B1.2, comment. (n.4). *U.S. v. Isaza-Zapata,* 148 F.3d 236, 238–42 (3d Cir. 1998) [10#6]. See also *U.S. v. Demers,* 13 F.3d 1381, 1383 (9th Cir. 1993) ("we decline to restrict the scope of relevant conduct on which a downward adjustment may be based to the relevant conduct that is included in the defendant's base offense level. If the Sentencing Commission had intended to so limit the availability of a downward adjustment, it could have stated that for purposes of a downward adjustment, a defendant's role in the of-

fense is confined to the relevant conduct used to determine the base offense level. We find no such limiting language or principle in the Guidelines or its commentary."). Cf. *U.S. v. Harfst,* 168 F.3d 398, 403–04 (10th Cir. 1999) (in §2255 action, remanding for hearing on ineffectiveness of counsel for failing to argue for §3B1.2 reduction for defendant courier who was only individual charged and convicted and was sentenced only for drugs he carried, citing *Isaza-Zapata* and *Demers*, inter alia, for proposition that "fact-based inquiry" into "the contours of the underlying scheme" are necessary to determine whether courier may receive §3B1.2 adjustment).

The Eleventh Circuit disagreed in a similar courier importation case, holding that relevant conduct is limited to that "attributed to the defendant in calculating her base offense level. . . . [T]he district court may consider only those participants who were involved in the relevant conduct attributed to the defendant. The conduct of participants in any larger criminal conspiracy is irrelevant." The court also held that "when a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs. . . . We further note, in the drug courier context, that the amount of drugs imported is a material consideration in assessing a defendant's role in her relevant conduct. . . . Indeed, because the amount of drugs in a courier's possession—whether very large or very small—may be the best indication of the magnitude of the courier's participation in the criminal enterprise, we do not foreclose the possibility that amount of drugs may be dispositive—in and of itself—in the extreme case." *U.S. v. De Varon,* 175 F.3d 930, 939–47 (11th Cir. 1999) (en banc) [10#6]. See also *U.S. v. Burnett,* 66 F.3d 137, 140 (7th Cir. 1995) ("When a [drug] courier is held accountable for only the amounts he carries, he plays a significant rather than a minor role in *that* offense.").

See also section III.B.1 and 2.d

6. Other Aggravating Role Issues

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

The First Circuit held that a sentencing court may, but is not required to, compare defendant's role to an "average" participant in that type of offense. *U.S. v. Rotolo,* 950 F.2d 70, 71 (1st Cir. 1991) [4#13]. Cf. *U.S. v. Daughtrey,* 874 F.2d 213, 216 (4th Cir. 1989) and other cases at III.B.7.

Being "essential" or "necessary" to a criminal enterprise does not, without more, qualify a defendant for §3B1.1 enhancement. See, e.g., *U.S. v. Vandeberg,* 201 F.3d

805, 811–12 (6th Cir. 2000) (remanded: "Merely playing an essential role in the offense is not equivalent to exercising managerial control over other participants and/or the assets of a criminal enterprise."); *U.S. v. Lopez-Sandoval,* 146 F.3d 712, 716–17 (9th Cir. 1998) (remanded: use of "but for" test improper—although translater was essential to making drug deals happen, §3C1.1(c) increase error without evidence of actual leadership role); *U.S. v. Sostre,* 967 F.2d 728, 733 (1st Cir. 1992) (reversed §3B1.1(b) enhancement for a drug "steerer"; although he played "essential role" in drug deal he did not act as manager or supervisor) [5#1]; *U.S. v. Sherrod,* 964 F.2d 1501, 1505–06 (5th Cir. 1992) (chemist or "cook" in methamphetamine conspiracy may have been "necessary" member, but district court properly held he had no managerial role); *U.S. v. Litchfield,* 959 F.2d 1514, 1523 (10th Cir. 1992) (reversed §3B1.1(a) enhancement: "Section 3B1.1(a) is an enhancement for organizers or leaders, not for important or essential figures"). See also *U.S. v. Parmelee,* 42 F.3d 387, 395 (7th Cir. 1994) (remanded §3B1.1(a) enhancement: although pilot "certainly was an important player in the smuggling ring," there was no evidence "that shows he controlled or coordinated any of his codefendants' activities"). Cf. *U.S. v. Hoac,* 990 F.2d 1099, 1111 (9th Cir. 1993) (that defendant may be one of more culpable defendants insufficient for §3B1.1(c)). Note, however, that the Sixth Circuit reversed a *mitigating* role adjustment after finding that defendant's actions were "essential" and "indispensable" to the conspiracy. *U.S. v. Sabino,* 274 F.3d 1053, 1074 (6th Cir. 2001).

Courts should be careful to distinguish a familial or other intimate relationship between participants from a true leadership role. See, e.g., *U.S. v. Lanzotti,* 205 F.3d 951, 958 (7th Cir. 2000) (remanded: fact that defendant was girlfriend of key player in illegal gambling operation "and a participant in the collection does not render her a manager or a supervisor" where she was "not an employee of [the front business], she never received a paycheck, and only went to the office occasionally on her own"); *U.S. v. McGregor,* 11 F.3d 1133, 1138–39 (2d Cir. 1993) (remanded: defendant should not have received §3B1.1(c) increase for the one occasion he asked his wife to give two packages of drugs to men who would come to their home—"[o]ne isolated instance of a drug dealer husband asking his wife to assist him in a drug transaction is not the type of situation that section 3B1.1 was designed to reach"); *U.S. v. Roberts,* 14 F.3d 502, 524 (10th Cir. 1993) (remanded: fact that defendant was in intimate relationship with leader of conspiracy did not support §3B1.1(b) enhancement without further "evidence defendant acted in a supervisory or managerial capacity *independent* of any intimate connection to the major player in the criminal activity").

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

When §3B1.1(b) applies, the court may not increase the base offense level by two points rather than three points. *U.S. v. Cotto,* 979 F.2d 921, 923 (2d Cir. 1992) [5#6].

Accord *U.S. v. Rostoff,* 53 F.3d 398, 413–14 (1st Cir. 1995) (remanded: enhancement under §3B1.1(c) improper when criminal activity involved five or more participants or was otherwise extensive—only §3B1.1(a) or (b) may be applied); *U.S. v. Kirkeby,* 11 F.3d 777, 778–79 (8th Cir. 1993) (if criminal activity involves five or more participants, "trial court's only options" under §3B1.1 are enhancements of four, three, or zero levels—court has no discretion to impose two-level enhancement). See also *U.S. v. Smith,* 49 F.3d 362, 367 (8th Cir. 1995) (remanded: upon defendant's appeal of two-level enhancement under §3B1.1(c) for being "organizer," court held that because "the overall conspiracy involved more than five participants . . . 'the ordinary rules of issue preclusion' dictate that the district court apply the [§3B1.1(a)] four-level enhancement," even though government did not argue for that higher penalty).

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

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

7. Other Mitigating Role Issues

The Background Commentary to §3B1.2 states that the adjustment may be awarded if the defendant is "substantially less culpable than the average participant." Some circuits have held that mitigating role should be determined in comparison to the role of both other defendants and an "average participant" in such a crime. *U.S. v. Snoddy,* 139 F.3d 1224, 1228 (8th Cir. 1998); *U.S. v. Lopez*, 937 F.2d 716, 728 (2d Cir. 1991); *U.S. v. Caruth*, 930 F.2d 811, 815 (10th Cir. 1991) [4#2]; *U.S. v. Ocasio*, 914 F.2d 330, 333 (1st Cir. 1990); *U.S. v. Daughtrey*, 874 F.2d 213, 216 (4th Cir. 1989). As the Fourth Circuit explained: "Whether a role in the offense adjustment is warranted 'is to be determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable, . . . but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction.' [*Daughtrey*, 874 F.2d] at 216. The critical inquiry is thus not just whether the defendant has done fewer 'bad acts' than his codefendants, but whether the defendant's conduct is material or essential to committing the offense." *U.S. v. Palinkas*, 938 F.2d 456, 460 (4th Cir. 1991), vacated on other grounds, 112 S. Ct. 1464 (1992). See also *U.S. v. Thomas*, 932 F.2d 1085, 1092 (5th Cir. 1991) ("It is improper for a court to award a minor participation adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity.").

The Ninth Circuit temporarily followed *Daughtrey*, but in an amended opinion decided it did not have to resolve the issue because the adjustment was proper under either test. See *U.S. v. Andrus*, 925 F.2d 335, 338 (9th Cir. 1991) [3#20 and 4#4]. The Ninth Circuit later stated that "while comparison to the conduct of a hypothetical average participant may be appropriate in determining whether downward departure . . . is warranted, the relevant comparison in determining whether a four-level adjustment [under §3B1.2(a)] is appropriate is to the conduct of co-participants in the case at hand." *U.S. v. Petti*, 973 F.2d 1441, 1447 (9th Cir. 1992). See also *U.S. v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) (same for minor participant, §3B1.2(b)). Cf. *U.S. v. Hunte,* 196 F.3d 687, 693–95 (7th Cir. 1996) (remanded: error to refuse to give minor or minimal role reduction to defendant who clearly participated in conspiracy in "a minor or minimal way"—case law and guideline commentary state that minor participant is "less culpable than most" in "the conduct of a group," and minimal participant is "plainly among the least culpable").

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

Other circuits have held that the reduction is not warranted solely because other codefendants are more culpable. See, e.g., *U.S. v. Thomas*, 963 F.2d 63, 65 (5th Cir. 1992) ("[e]ach participant must be separately assessed"); *U.S. v. West*, 942 F.2d 528, 531 (8th Cir. 1991) ("mere fact that defendant was less culpable than his codefendants does not entitle the defendant to 'minor participant' status"); *Lopez*, 937 F.2d at 728 ("intent of the Guidelines is not to 'reward' a guilty defendant with an adjustment merely because his coconspirators were even more culpable"); *Andrus*, 925 F.2d at 337–38 (stipulation in plea agreement that defendant was "less culpable" than other codefendants did not preclude government from arguing against minor participant status at sentencing—"being less culpable than one's co-participants does not automatically result in minor status"); *U.S. v. Zaccardi*, 924 F.2d 201, 203 (11th Cir. 1991) ("fact that a particular defendant may be least culpable among those who are actually named as defendants does not establish that he performed a minor role in the conspiracy"). The Third Circuit held that "the application of sections 3B1.1 and 3B1.2 has two prerequisites: multiple participants and some differentiation in their relative culpabilities." *U.S. v. Katora,* 981 F.2d 1398, 1405 (3d Cir. 1992) [5#7]. See also *U.S. v. Sabino,* 274 F.3d 1053, 1074 (6th Cir. 2001) (error to give minor role reduction to defendant whose actions were "essential" and "indispensable" to conspiracy).

A reduction is not ordinarily warranted if the defendant is convicted of and given an offense level for an offense significantly less serious than the actual conduct warrants. See §3B1.2, comment n.4 (Nov. 1, 1992). The D.C. Circuit cited this note approvingly when it held that a defendant who played a major role in the offense of conviction cannot receive a reduction for minor role in the larger offense that was

not taken into account in setting the base offense level. *U.S. v. Olibrices*, 979 F.2d 1557, 1560 (D.C. Cir. 1992) [5#6]. See also other cases cited in sections III.B.1 and 5.

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

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

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

a. Generally

i. Definition and test

The definition of "public or private trust" in §3B1.1, comment. (n.1), was amended Nov. 1993. In addition to the factors listed in the guideline itself, courts should look for "professional or managerial discretion" and "significantly less supervision" than other employees. See, e.g., *U.S. v. Ragland*, 72 F.3d 500, 502–03 (6th Cir. 1995) (remanded: "[t]he element of professional or managerial discretion is said to be the key," and under that test bank customer service representative who embezzled money given to her to pay for certificates of deposit did not have position of trust); *U.S. v. West*, 56 F.3d 216, 220 (D.C. Cir. 1995) ("the commentary's focus on positions characterized by professional or managerial discretion places a significant limit on the types of positions subject to the abuse-of-trust enhancement"); *U.S. v. Viola*, 35 F.3d 37, 45 (2d Cir. 1994) (remanded: amended Note 1 is clarifying, shows defendant sentenced before amendment did not occupy position of trust—defendant abused his position, but it "did not involve a substantial amount of discretionary judgment, and he was not subject to relaxed supervision because of the position"); *U.S. v. Smaw*, 22 F.3d 330, 332–34 (D.C. Cir. 1994) (remanded: although "time and attendance clerk" clearly abused her position, it was not "a position of public or private trust characterized by professional or managerial discretion" and she was not "subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature"; amendment is clarifying, rather than substantive, and should be applied even though defendant was sentenced before Nov. 1, 1993) [6#16]. See also *U.S. v. Gordon*, 61 F.3d 262, 269 (4th Cir. 1995) (factors to consider include "whether the defendant had special duties or 'special access to information not available to other employees,' . . . defendant's level of supervision or 'degree of managerial discretion,' [and] an examination of 'the acts committed to determine whether this defendant is "more culpable" than others' who hold similar positions and who may commit crimes"; here, "head teller" who

had "special access" to bank's security codes abused position of trust by giving security information to armed bank robbers).

Some circuits previously set forth two prerequisites for imposition of the abuse of trust enhancement under §3B1.3. The offender must have occupied a position of public or private trust and must have abused that position in a way that "significantly facilitated the commission or concealment of the crime." See, e.g., *West,* 56 F.3d at 219; *U.S. v. Brelsford*, 982 F.2d 269, 271 (8th Cir. 1992); *U.S. v. Brown,* 941 F.2d 1300, 1304 (5th Cir. 1991); *U.S. v. Rehal*, 940 F.2d 1, 5 (1st Cir. 1991) (police officer subject to enhancement because he used his position of public trust to conceal his illegal narcotic dealings). The Third Circuit announced a similar standard: "(1) whether the authority conferred and the absence of controls indicated that the employer relied on the integrity of the defendant to protect against the loss occasioned by the crime; and (2) whether the trust aspect of the job made the commission or concealment of the crime significantly easier." *U.S. v. Craddock*, 993 F.2d 338, 343 (3d Cir. 1993).

Other circuits have, in practice, used such a two-level analysis in applying this enhancement. See, e.g., *U.S. v. Stewart,* 33 F.3d 764, 768–70 (7th Cir. 1994) (remanded: licensed insurance broker held position of trust and that position facilitated fraudulent funeral expenses annuity scheme) [7#2]; *U.S. v. Castagnet,* 936 F.2d 57, 59–62 (2d Cir. 1991) (airline employee used code to access computers to get tickets during and after employment); *U.S. v. Young*, 932 F.2d 1035, 1036–37 (2d Cir. 1991) (informant obtained Customs Service identification card and used it without authorization to facilitate his impersonation of a federal officer); *U.S. v. Foreman*, 926 F.2d 792, 796 (9th Cir. 1991) (police officer showed police badge and identification in attempt to avoid investigation and arrest) (amending 905 F.2d 1335 [3#10]); *U.S. v. McMillen*, 917 F.2d 773, 776 (3d Cir. 1990) (bank manager used his position of trust to substantially facilitate and conceal offense of misapplication of funds) [3#15]; *U.S. v. Hill*, 915 F.2d 502, 507–08 (9th Cir. 1990) (moving company driver was in "superior position" to steal shipments entrusted to him) [3#15]; *U.S. v. Parker,* 903 F.2d 91, 104 (2d Cir. 1990) (security guard used knowledge of payroll car route to facilitate robbery).

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

The Third Circuit later developed a three-step test for position of trust: "(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in the defendant vis-à-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity

of the person occupying the position." *U.S. v. Pardo,* 25 F.3d 1187, 1192 (3d Cir. 1994). See also *U.S. v. Iannone,* 184 F.3d 214, 223–24 (3d Cir. 1999) (using *Pardo* test to affirm enhancement for fraud defendant whose "position as head of the company in which the victims invested made his fraud difficult to detect, vested him with significant authority over the victims' investment monies, and encouraged his victims to rely on his perceived integrity").

The Eighth Circuit held that a position of trust is determined by the nature of the defendant's position, not community attitude toward that position. *U.S. v. Claymore*, 978 F.2d 421, 423 (8th Cir. 1992) (rejecting police officer's claim that because public opinion of police was so poor, no one trusted police). And the fact that an employee may hold a "low-level" position does not preclude holding a position of trust. See, e.g., *U.S. v. Allen,* 201 F.3d 163, 166 (2d Cir. 2000) (rejecting claim that employment responsibilities that were merely "'secretarial' or 'ministerial,' and . . . devoid of the 'professional or managerial discretion' necessary to constitute a position of trust" precluded enhancement—"employee need not have a fancy title or be a 'big shot' in an organization to qualify"); *U.S. v. Oplinger,* 150 F.3d 1061, 1069 (9th Cir. 1998) (affirmed for supply coordinator at bank who returned supplies bought with cash and kept refunds—"A 'low-level employee' analysis would add a factor to §3B1.3—special level of responsibility or seniority—that has no basis in the language of the guidelines."); *U.S. v. Lamb,* 6 F.3d 415, 418–19 (7th Cir. 1993) (remanded: "It would be contrary to logic and common sense to hold that just because a person has a 'low-level' job, he cannot be considered to occupy a position of trust," and letter carrier was in position of trust).

ii. Victim's perspective

It has been held that the position of trust is viewed in relation to the victim of the offense. The Second Circuit, for example, stated that case law and the commentary indicate that "the discretion must be entrusted to the defendant by the victim." *U.S. v. Broderson,* 67 F.3d 452, 456 (2d Cir. 1995) (remanded: vice president of defense contractor who was convicted of fraudulent contract scheme had position of trust in his company but had not been granted any discretion by government agency that was victim of fraud). See also *U.S. v. Garrison,* 133 F.3d 831, 837 (11th Cir. 1998) (remanded: position of trust viewed from perspective of victim, and Medicare fraud defendant had no such position with Medicare program); *U.S. v. Hathcoat,* 30 F.3d 913, 919 (7th Cir. 1994) ("analyze the situation from the perspective of the victim" whether defendant held position of trust); *U.S. v. Moore,* 29 F.3d 175, 179–80 (4th Cir. 1994) (remanded: defendants had position of trust only in their own company, had ordinary commercial relationship with victim) [7#1]; *U.S. v. Pardo,* 25 F.3d 1187, 1192 (3d Cir. 1994) (defendant's friendship with manager of bank he defrauded may have made crime easier, but was not sufficient for abuse of trust—defendant "had no authority over anyone or anything necessary to the commission of his crimes" and "he was not placed by the bank in any position that gave him the wherewithal to commit the fraud"); *U.S. v. Moored,* 997 F.2d 139, 144–45 (6th Cir. 1993) ("the evidence must show that the defendant's position [of trust] with the

victim of the offense significantly facilitated the commission of the offense"); *U.S. v. Castagnet,* 936 F.2d 57, 62 (2d Cir. 1991) ("whether the defendant was in a position of trust must be viewed from the perspective of the victim").

In cases where the government was the victim, several courts have held that there was a position of trust where the government either gave discretion to the defendant or was not in a position to monitor compliance with their agreement. See, e.g., *U.S. v. Nathan,* 188 F.3d 190, 206–07 (3d Cir. 1999) (affirmed: defendant whose company violated Arms Export Control Act had position of trust with government because of "a formal understanding with the government that he would perform certain services in a certain way, and it was difficult for the government to monitor compliance with that understanding"); *U.S. v. Velez,* 185 F.3d 1048, 1051 (9th Cir. 1999) (affirmed for defendant who operated a private immigration consulting firm because his group had been given statutory authority to assist aliens in preparing legalization applications and thus had "special status with the INS" whereby his false documents "could not be discovered as a matter of routine and his activities were not easily observable"); *U.S. v. Glymph,* 96 F.3d 722, 727–28 (4th Cir. 1996) (affirmed for defense contractor who was allowed to certify his own compliance with his contract with the Department of Defense). See also the health care fraud cases in section III.B.8.b.iv.

The Seventh Circuit held that, while the position of trust is viewed from the victim's perspective, the victim need not make "an individual or personal repose of trust" to support enhancement. Although defendant had no direct contact with the victims of her fraud scheme that used personal data collected by her employer, the victims "who turned over personal biographical and financial information to [the loan company] did so with the expectation that the information would be used only for purposes necessary for the processing of their loan applications and that the files would be handled in a manner that ensured their confidentiality." *U.S. v. Zaragoza,* 123 F.3d 472, 482 (7th Cir. 1997). Cf. *U.S. v. Stewart,* 33 F.3d 764, 768–70 (7th Cir. 1994) (remanded: defendant's position as licensed insurance broker facilitated fraudulent funeral expenses annuity scheme that targeted elderly; although annuities were sold through funeral directors, they acted as defendant's agents) [7#2]. See also *U.S. v. White,* 270 F.3d 356, 372–73 (6th Cir. 2001) ("obvious that customers of the Water District placed a high degree of trust in the District to provide them with potable drinking water . . . [and] we believe that the quasi-fiduciary trust relationship between the District and its customers should be imputed to White, and thus that the abuse-of-trust enhancement was appropriate" where defendant falsified water-quality reports in his position as general superintendent of treatment plant); *U.S. v. Akinkoye,* 185 F.3d 192, 203–05 (4th Cir. 1999) (affirmed: same for real estate agent who used personal information provided by clients to agency to fraudulently obtain credit cards in clients' names).

A Nov. 1998 amendment to §3B1.3 added new Application Note 2 specifying that §3B1.3 "also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public

trust when, in fact, the defendant does not." Previously, courts had split on whether an imposter can be considered to occupy a position of trust. Compare *U.S. v. Barnes,* 125 F.3d 1287, 1292 (9th Cir. 1997) (affirmed: "an imposter may abuse his assumed position of trust"), *U.S. v. Gill,* 99 F.3d 484, 489 (1st Cir. 1996) (affirmed: defendant who posed as psychologist held position of trust with victim patients), and *U.S. v. Queen,* 4 F.3d 925, 929–30 (10th Cir. 1993) (affirmed: defendant created position of trust with victims of offense by posing as investment advisor/broker—"defendant's victims were led objectively to believe that the defendant occupied a formal position of trust with regard to them") with *U.S. v. Echevarria,* 33 F.3d 175, 181 (2d Cir. 1994) (remanded: defendant who posed as doctor could not "hold" position of trust within meaning of commentary—§3B1.3 applies to persons "who *legitimately* occupy positions of public or private trust"). But cf. *U.S. v. Hussey,* 254 F.3d 428, 431–32 (2d Cir. 2001) (affirmed: distinguishing *Echevarria* in case where unregistered brokers passed themselves off as licensed stockbrokers because they led victims to believe they were acting as their fiduciaries and actually created position of trust which provided them with "freedom to commit a difficult-to-detect wrong"; also, unlike *Echevarria*, the enhancement did not duplicate the punishment for the offense of conviction).

iii. Relevant conduct

There is a split in the circuits over whether relevant conduct may be included in determining whether there was an abuse of trust, with some circuits looking beyond the specific offense of conviction. See, e.g., *U.S. v. Cianci,* 154 F.3d 106, 112–13 (3d Cir. 1998) (affirmed: business executive properly received enhancement for embezzling money from employer even though he was only convicted of tax evasion); *U.S. v. Bhagavan,* 116 F.3d 189, 193 (7th Cir. 1997) (affirmed: treating shareholders of small company as victims of "overall scheme" of company president who diverted corporate funds to himself and was convicted of income tax evasion); *U.S. v. Camuti,* 78 F.3d 738, 745–46 (1st Cir. 1996) (affirming enhancement based on abuse of trust in conduct that was "part of the same overall scheme" as offense of conviction); *U.S. v. Duran,* 15 F.3d 131, 133–34 (9th Cir. 1994) (affirmed: although jury failed to reach verdict on count charging sheriff's deputy with stealing money seized from arrested drug dealers, which admittedly involved abuse of trust, enhancement could be applied to conviction for structuring financial transactions to avoid reporting requirements that involved the stolen funds).

Other circuits hold that the position of trust must be directly related to the offense of conviction. The Eleventh Circuit, for example, noted that §3B1.3 states "that the defendant's abuse of trust must 'significantly facilitate the commission or concealment of the offense.' U.S.S.G. §3B1.3. In this context, 'offense' must be read as 'offense of conviction' in order to maintain consistency with the definition of relevant conduct in U.S.S.G. §1B1.3(a)." Therefore, a defendant who was only convicted of tax evasion could not receive the enhancement for abusing a position of trust in getting the money he evaded taxes on. *U.S. v. Barakat,* 130 F.3d 1448, 1455 (11th Cir. 1997) (remanded: "Barakat did not use his particular position of trust to

give him an advantage in the commission or concealment of the offense of tax evasion."). Accord *U.S. v. Guidry,* 199 F.3d 1150, 1159–60 & n.6 (10th Cir. 1999) (remanded: although defendant clearly abused position of trust by embezzling from employer, she was only convicted of tax evasion and had no position of trust with the victim of that offense, the government; also citing as support cases that hold position of trust must be viewed from perspective of victim of offense).

The Fourth Circuit held that the defendant must personally hold and abuse the position of trust—the enhancement cannot be based on the actions of a coconspirator. "By its own terms, §1B1.3 holds a defendant responsible only for reasonably foreseeable 'acts and omissions' of his co-conspirators . . . . [T]he abuse of trust enhancement is premised on the defendant's *status* of having a relationship of trust with the victim. . . . A co-conspirator's status cannot be attributed to other members of the conspiracy under §1B1.3." *U.S. v. Moore,* 29 F.3d 175, 178–79 (4th Cir. 1994) (remanded: defendants could not receive enhancement because third conspirator violated his position of trust in victim company) [7#1]. Cf. *U.S. v. Gormley,* 201 F.3d 290, 295 (7th Cir. 2000) (remanded: citing *Moore* in holding it was improper to consider special skills possessed by defendant's coconspirators).

iv. Departure

Application of the abuse of trust enhancement does not necessarily foreclose departure when further harm is caused by defendant's conduct. See, e.g., *U.S. v. Gunby,* 112 F.3d 1493, 1500–01 (11th Cir. 1997) (affirmed: "Because an abuse of public trust and the disruption of a governmental function are analytically distinct, a sentencing court can apply sections 3B1.3 and 5K2.7 simultaneously."); *U.S. v. Barr,* 963 F.2d 641, 654–55 (3d Cir. 1992) (upward departure proper on ground that criminal activity by high-ranking public official eroded public confidence in government even though defendant also received abuse of trust enhancement); *U.S. v. Hatch,* 926 F.2d 387, 397 (5th Cir. 1991) (affirming application of §3B1.3 and §5K2.7). Cf. *U.S. v. Khan,* 53 F.3d 507, 518–19 (2d Cir. 1995) (affirming departure partly based on defendant's inducing others to abuse positions of trust). But cf. *U.S. v. Zamarripa*, 905 F.2d 337, 340 (10th Cir. 1990) (improper to depart under §5K2.0 because baby-sitter sexually abused children entrusted to his care—court should have applied §3B1.3 enhancement).

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

b. Specific examples

i. Postal employees, couriers and messengers

A Nov. 1993 amendment to Application Note 1 of §3B1.3 now provides that the abuse of position of trust adjustment "will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail." See, e.g., *U.S. v. Hun Viet Ma,* 240 F.3d 895, 898 (10th Cir. 2001) (following Note 1 in affirming enhancement for post office window clerk convicted of mail theft, and specifically "disagree[ing] with the views expressed in" *Tribble* and *Cuff* below). See also *U.S. v. Lamb*, 6 F.3d 415, 420–21 (7th Cir. 1993) (in pre-amendment case, held it was error to refuse to give adjustment to letter carrier who embezzled U.S. mail) [6#5]. Previously, some circuits had applied §3B1.3 to some postal employees. See, e.g., *U.S. v. Melendez*, 41 F.3d 797, 799 (2d Cir. 1994) (affirmed: defendant who stole mail bags from locked room was entrusted with access and lack of accounting that postal employees in general did not have); *U.S. v. Ajiboye*, 961 F.2d 892, 895 (9th Cir. 1992) ("it is evident that a postal carrier who delivers ordinary mail is in a position of trust"); *U.S. v. Milligan*, 958 F.2d 345, 347 (11th Cir. 1992) (affirmed enhancement: post office window clerk embezzler, who had access to computerized accounting system and was audited quarterly, was given more trust than ordinary bank teller); *U.S. v. Lange*, 918 F.2d 707, 710 (8th Cir. 1990) (reversed failure to give enhancement: unlike ordinary bank tellers and other postal employees, defendant had direct access to express and certified mail). But cf. *U.S. v. Tribble,* 206 F.3d 634, 637 (6th Cir. 2000) (remanded: embezzlement by postal window worker was "[no] more advanced than one that would have been employed by a typical bank teller with access to a bank's computer system, nor does the position require more trust than that reposed in a bank teller or hotel clerk"); *U.S. v. Cuff*, 999 F.2d 1396, 1398 (9th Cir. 1993) (error to apply enhancement to employee who simply unloaded mail at post office loading dock and moved it into workroom for other employees—"we fail to see any significant distinction between the bank teller who embezzles funds and Cuff").

Note that the D.C. Circuit stated that the specific inclusion of postal employees "within the scope of section 3B1.3 is a special exception to the requirement of professional or managerial discretion, and that other positions comparable to an employee of the Postal Service (and not involving professional or managerial discretion) are not subject to the enhancement." The court found that "the duties of a courier like West closely resemble in nature those of a mail carrier for the Postal Service," and thus do not fall within §3B1.1 absent a showing of professional or managerial discretion. *U.S. v. West*, 56 F.3d 216, 220 (D.C. Cir. 1995) (remanded: "that a simple courier should be subject to an abuse-of-trust enhancement under section 3B1.3 merely because he or she is entrusted with valuable things and has little or no supervision while performing his or her duties—would stretch the abuse-of-trust enhancement to cover endless numbers of jobs involving absolutely no professional or managerial discretion, in clear contravention of the plain language of the commentary to section 3B1.3"). Accord *U.S. v. Jankowski,* 194 F.3d 878, 884–85

(8th Cir. 1999) (remanded: error to give enhancement by finding armored car messenger analogous to postal employee—"the enhancement for postal employees was not meant to carve out a general exception for all those who abuse positions that involve tasks similar to the delivery of mail"). See also *U.S. v. Ward,* 222 F.3d 909, 912–13 (11th Cir. 2000) (affirmed: agreeing with reasoning of *Jankowski* and *West* and finding "that it fits the position of armored car guard as well"—"An armored car guard position is comparable to 'an ordinary bank teller or hotel clerk'").

ii. Embezzlement

Section 3B1.3 does not apply if "an abuse of trust . . . is included in the base offense level or specific offense characteristic." The Ninth Circuit distinguished "abuse" and "breach" of trust, holding that while "breach of trust is essential to an embezzlement conviction," §3B1.3 may be "applied to embezzlers when the breach of trust was particularly egregious" and could be termed an "abuse." *U.S. v. Christiansen*, 958 F.2d 285, 287 (9th Cir. 1992) (affirmed: manager of credit union abused position of trust to substantially facilitate embezzlement in manner not accounted for in underlying offense) [4#19]. See also *U.S. v. Georgiadis,* 933 F.2d 1219, 1225 (3d Cir. 1990) (affirmed: abuse of position of trust is neither element of statutory offense nor incorporated into §2B1.1—enhancement proper for embezzler who abused, rather than breached, position of trust).

Other circuits have agreed that abuse of trust is not an element of embezzlement or misapplication of banks funds and the enhancement may be applicable. See *U.S. v. Broumas,* 69 F.3d 1178, 1182 (D.C. Cir. 1995); *U.S. v. Dion,* 32 F.3d 1147, 1149–50 (7th Cir. 1994); *U.S. v. Hathcoat,* 30 F.3d 913, 915–18 (7th Cir. 1994); *U.S. v. Fisher,* 7 F.3d 69, 70 (5th Cir. 1993); *U.S. v. Milligan,* 958 F.2d 345, 347 (11th Cir. 1992) (conceded by defendant); *U.S. v. McElroy,* 910 F.2d 1016, 1027 (2d Cir. 1990). Cf. *U.S. v. Sonsalla,* 241 F.3d 904, 909 (7th Cir. 2001) (same for similar offense of falsifying bank records). See also *U.S. v. Chimal,* 976 F.2d 608, 613 (10th Cir. 1992) (affirmed: "Although embezzlement by definition involves an abuse of trust, embezzlement by someone in a significant position of trust warrants the enhancement when the position of trust substantially facilitated the commission or concealment of the crime.").

Similarly, the Eighth Circuit rejected a district court's reason for not giving the enhancement—that in all postal theft cases trust is built into the guidelines—because while trust is built into the statute under which the defendant was convicted, the *guideline* for the offense did not account for abuse of trust. *U.S. v. Lange,* 918 F.2d 707, 709–10 (8th Cir. 1990).

iii. Law enforcement personnel

"While [a police] officer's status as an officer does not, *ipso facto*, trigger the application of §3B1.3, . . . case law on this point recognizes that §3B1.3 is applicable when an officer uses special knowledge, access, or both, that has been obtained by virtue of his or her status as an officer to facilitate substantially the offenses in question." *U.S. v. Williamson,* 53 F.3d 1500, 1525 (10th Cir. 1995) (affirming enhance-

ment for police officer who "used his special access to warrant information and his potential knowledge of undercover officers in a conscious and concerted attempt to conceal and protect the illegal activities of [drug] organization"); *U.S. v. Baker,* 82 F.3d 273, 278 (8th Cir. 1996) (remanding for reconsideration but following *Williamson*—"Because police officers clearly occupy positions of public trust, the inquiry in most cases is whether defendant used a police officer's special knowledge or access to facilitate or conceal the offense."). See also *U.S. v. Sierra,* 188 F.3d 798, 802–03 (7th Cir. 1999) (affirmed: policeman abused his position of trust when he used badge to facilitate entry into store that he robbed); *U.S. v. Terry,* 60 F.3d 1541, 1545 (11th Cir. 1995) (affirmed: "by being at the scene in his patrol car and by monitoring the radio, Terry was able to monitor police traffic and ensure that no other officers interrupted the [drug] transaction, [and thus] facilitated both the commission and concealment of the crime"); *U.S. v. Parker,* 25 F.3d 442, 450 (7th Cir. 1994) (affirmed: state trooper used position to facilitate robberies); *U.S. v. Pedersen,* 3 F.3d 1468, 1471–72 (11th Cir. 1993) (affirmed: police officer used position of trust to illegally acquire and disseminate confidential information); *U.S. v. Claymore,* 978 F.2d 421, 423 (8th Cir. 1992) (affirmed for tribal police officer who stopped minor for violating curfew and raped her in patrol car); *U.S. v. Rehal,* 940 F.2d 1, 5–6 (1st Cir. 1991) (affirmed: "fact that [defendant] was a police officer in and of itself could not trigger the application of §3B1.3," but defendant used position to conceal offense); *U.S. v. Foreman,* 926 F.2d 792, 796 (9th Cir. 1990) (affirmed: police officer used position in attempt to conceal crime). Cf. *U.S. v. Turner,* 272 F.3d 380, 390 (6th Cir. 2001) (affirming special skill adjustment for policeman who "intended to use his police training and planned to show his badge [during planned robbery] in order to control the situation"); *U.S. v. Bailey,* 227 F.3d 792, 802 (7th Cir. 2000) (affirmed: although police cadet was not a sworn officer, while attempting to rob drug dealer with other officers he wore police uniform, arrived in police car, and otherwise gave "sufficient indicia of authority" to convince victim he was officer); *U.S. v. Scurlock,* 52 F.3d 531, 541 (5th Cir. 1995) (affirmed: correctional officer used position as jail guard to assist inmate's fraud scheme).

Note that lawyers have been treated similarly, with an assumption that they occupy a position of trust and with the inquiry focused on whether they used that position to facilitate or conceal the offense. See, e.g., *U.S. v. Harrington,* 114 F.3d 517, 519 (5th Cir. 1997) (affirmed: "it cannot be gainsaid that lawyers occupy a position of public trust," and defendant abused that position here); *U.S. v. Post,* 25 F.3d 599, 600 (8th Cir. 1994) (defendant's "status as a licensed Arkansas attorney placed him in a position of public trust" and he abused it by filing false insurance claims). Cf. *U.S. v. Polland,* 994 F.2d 1262, 1270–71 (7th Cir. 1993) (affirming enhancement for defense attorney who abused position of trust by making deals with and then destroying cocaine jailed client had asked him to retrieve).

The Eleventh Circuit rejected the government's claim that a prison employee who smuggled drugs into a prison abused a position of trust. Although defendant could enter the prison without being searched, "[t]he prison extended this same level of trust to all prison employees" and there was no showing that defendant had any

"professional or managerial discretion" greater than an average employee. *U.S. v. Long,* 122 F.3d 1360, 1366 (11th Cir. 1997). Cf. *U.S. v. Reccko,* 151 F.3d 29, 32–33 (1st Cir. 1998) (remanded: city employee working as receptionist/swithboard operator, who warned drug-dealer friend of gathering of DEA agents at station, did not hold position of trust where her job was closely supervised and "reposed in her no discernible discretion"; although police officer may be deemed to hold position of trust, "we see no principled basis for extending the enhancement to civilian employees of a municipality, assigned to work at police headquarters or comparable venues, whose jobs do not possess the requisite accouterments of positions of trust," citing *Long*). The Seventh Circuit reached the opposite conclusion for a prison factory foreman who supervised inmates in a Bureau of Prisons job training program. Defendant conceded that he held a position of trust at the prison, and the court concluded that "there can be no doubt that Belwood's position on the prison staff made it substantially easier to smuggle marijuana into the prison. Because of his position, neither Belwood nor his belongings were searched when he entered the prison." *U.S. v. Belwood,* 222 F.3d 403, 406 (7th Cir. 2000).

iv. Medical personnel

May the enhancement be given to physicians who commit health care fraud? Several courts have said yes, on the ground that the trust of either patients or the government was abused. For example, the Fifth Circuit affirmed the enhancement for a psychiatrist convicted of mail fraud for overbilling insurers. Because he overprescribed morphine as part of the fraud, the court ruled that "compromising his patients' trust was a necessary component of Gifford's lucrative scheme to maximize his earnings . . . [and] 'significantly facilitated the commission' of the offense." *U.S. v. Sidhu,* 130 F.3d 644, 656 (5th Cir. 1997). See also *U.S. v. Hoogenboom,* 209 F.3d 665, 671 (7th Cir. 2000) (affirmed for psychiatrist who fraudulently billed Medicare for services that were not provided: "Medicare providers such as Dr. Hoogenboom enjoy significant discretion and consequently a lack of supervision in determining the type and quality of services that are necessary and appropriate for their patients"); *U.S. v. Ntshona,* 156 F.3d 318, 321 (2d Cir. 1998) (affirmed: "a *doctor* convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under §3B1.3").

The Fifth Circuit later upheld the enhancement for "abuse of a position of trust on the basis of the physician's relationship with an insurance company." In that case, a chiropractor conspired with his patients to submit insurance bills for treatments that were never given. "The district court was entitled to conclude that insurance companies usually rely on the honesty and integrity of physicians in their medical findings, diagnoses, and prescriptions for treatment or medication. Furthermore, the district court was entitled to conclude that insurance companies must rely on physicians' representations that the treatments for which the companies are billed were in fact performed." *U.S. v. Iloani,* 143 F.3d 921, 923 (5th Cir. 1998). See also *U.S. v. Hodge,* 259 F.3d 549, 556 (6th Cir. 2001) (affirming enhancement for

manager of substance abuse facility who fraudulently billed insurers; also holding that §3B1.3 is not limited in these circumstances to health care providers who hold medical degrees); *U.S. v. Sherman,* 160 F.3d 967, 970–71 (3d Cir. 1998) (affirming that physician "did in fact occupy a position of trust" with respect to insurance companies and abused that trust in committing insurance fraud"); *Ntshona,* 156 F.3d at 320–21 (affirmed for doctor convicted of medicare fraud, rejecting claim that "an abuse of trust is the essence of the crime and therefore is already accounted for in the base level offense" and holding that "a doctor convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under §3B1.3"); *U.S. v. Rutgard,* 116 F.3d 1270, 1293 (9th Cir. 1997) (sentence of ophthalmologist properly enhanced under §3B1.3 for submitting false claims to Medicare: "the government as insurer depends upon the honesty of the doctor and is easily taken advantage of if the doctor is not honest").

The enhancement has also been upheld when a physician was not the one directly billing Medicare but received illegal "kickbacks" from referrals, even though the referrals themselves were legitimate. See *U.S. v. Adam,* 70 F.3d 776, 782 (4th Cir. 1995) (affirmed for physician convicted in welfare fraud "kickback" scheme: "position that Appellant enjoyed as a physician making claims for welfare funds is an example of the kind of position that the Official Commentary [to §3B1.3] . . . describe[s]. . . . The 'victims' are the American taxpayers, who must pay the added costs that such fraud imposes."); *U.S. v. Liss,* 265 F.3d 1220, 1229–30 (11th Cir. 2001) (agreeing with *Adam* that, because of "the special position that physicians hold within the Medicare system," a physician abuses that position of trust "when the physician receives kickbacks for patient referrals, [even] where the referrals were medically necessary and the physician does not falsify patient records or submit fraudulent claims to Medicare").

The enhancement was held to be improper when the government was not the direct victim of a defendant's action. The owner and manager of a home healthcare provider, who was also a registered nurse, submitted falsified medical claims and was convicted of Medicare fraud. However, she submitted the claims to an insurance company which was a "fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. . . . While Medicare may have been the victim in this case, the section 3B1.3 enhancement is unavailable because Garrison did not occupy a sufficiently proximate position of trust relative to Medicare." And because defendant had "an arm's-length business relationship" with the insurance company, she did not occupy a position of trust there, either. *U.S. v. Garrison,* 133 F.3d 831, 839–42 (11th Cir. 1998) (also finding enhancement improper because "the offense to which she pled guilty, perpetrating a fraud on Medicare through false cost reports, is the same as the basis for the enhancement"). Cf. *U.S. v. Wright,* 160 F.3d 905, 911 (2d Cir. 1998) (affirmed for defendants who embezzled Medicare money that was to be used for residence facility for mentally retarded adults: "Whether viewed from the standpoint of the governmental agencies that entrusted the funds . . . or from the

standpoint of the mentally retarded residents who depended on the Wrights for their care, we think it plain that the Wrights occupied positions of trust within the meaning of §3B1.3.").

v. Other examples or issues

"While generally a bank teller engaged in the activity of taking cash from the till and putting it in is not utilizing a position of trust," see §3B1.3, comment. (n.1), "the same teller certainly may engage in other activities in the course of her job that do involve aspects of trust which may be exploited to facilitate a crime." The Fifth Circuit affirmed the enhancement for a teller who organized a robbery of her bank because "the bank's entrusting Smith by making her privy to its internal operating and security procedures, as those procedures relate to robberies, and her use of such private information to facilitate a bank robbery, is . . . an exploitation of the trust given a teller by her employer bank." *U.S. v. Smith,* 203 F.3d 884, 893 (5th Cir. 2000). See also *U.S. v. Isaacson,* 155 F.3d 1083, 1085–86 (9th Cir. 1998) (affirmed: special duties of "head vault teller" beyond duties of ordinary teller warranted enhancement; fact that supervision of her activities may have been deficient and contributed to offense does not offset her abuse of position of trust).

The lack of a fiduciary relationship between a buyer and seller may indicate a simple commercial relationship rather than one based on trust. See, e.g., *U.S. v. Garrison,* 133 F.3d 831, 839 (11th Cir. 1998) ("arm's-length business relationships are not available for the application of this enhancement"); *U.S. v. Brown*, 47 F.3d 198, 205–06 (7th Cir. 1995) (remanded: fraudulent sellers of real estate "simply maintained a commercial relationship with the victims rather than a fiduciary one," and that relationship "merely provided the defendants with an opportunity that could as easily have been afforded to persons other than the defendants"); *U.S. v. Kosth*, 943 F.2d 798, 800 (7th Cir. 1991) (reversing enhancement given to businessman who used his merchant account with bank to commit credit card fraud—§3B1.3 enhancement requires a "special element of private trust" not found in the standard commercial relationship between a bank and its ordinary merchant customer) [4#11]. Note that a defendant may create a position of trust in an otherwise arms-length commercial relationship. The Tenth Circuit affirmed the enhancement for a fraud defendant who leased equipment—by assuring his customers that he would pay off old leases when they leased new equipment, "he gained a position of trust with respect to the customers that enabled him to conceal his fraud for long periods of time." *U.S. v. Pappert*, 112 F.3d 1073, 1080 (10th Cir. 1997). See also *U.S. v. Baker,* 200 F.3d 558, 563–64 (8th Cir. 2000) (affirmed for insurance agent who persuaded elderly clients to give her personal control over their premium payments and then stole them—while ordinary commercial relationship generally does not constitute relationship of trust under §3B1.3, "the issue is fact intensive because it turns on the precise relationship between the defendant and her victims").

Three circuits have held that it is not double-counting to impose the abuse of trust enhancement on an embezzler who also received enhancement for more than minimal planning under §2B1.1(b)(5) (current designation). *U.S. v. Christiansen*,

958 F.2d 285, 287 (9th Cir. 1992); *U.S. v. Marsh,* 955 F.2d 170, 171 (2d Cir. 1992); *U.S. v. Georgiadis,* 933 F.2d 1219, 1225–27 (3d Cir. 1990). Cf. *U.S. v. Young,* 266 F.3d 468, 475–78 (6th Cir. 2001) (affirmed: because abuse of trust enhancement applied to embezzlement, and money laundering was closely related relevant conduct, §3B1.3 could also be applied to money laundering count, which had the highest adjusted offense level after all counts were grouped under §3D1.2(b)). The Seventh Circuit upheld an abuse of trust enhancement and vulnerable victim enhancement for a defendant who abused her position of trust (power of attorney in financial matters) to defraud an elderly woman in defendant's care. *U.S. v. Haines,* 32 F.3d 290, 293 (7th Cir. 1994) (may apply both §3A1.1 and §3B1.3 "even if there is some overlap in the factual basis . . . so long as there is sufficient factual basis for each"). See also section III.A.1.a (With abuse of trust enhancement).

The First Circuit held that the base offense level for RICO offenses, §2E1.1(a)(1), includes no particular offense characteristic and therefore applying an abuse of trust enhancement is not double-counting. *U.S. v. McDonough,* 959 F.2d 1137, 1142 (1st Cir. 1992). Cf. *U.S. v. Brenson,* 104 F.3d 1267, 1287–88 (11th Cir. 1997) (affirmed: abuse of trust is not inherent in obstruction of justice offense, and §3B1.3 enhancement was properly given to grand juror who gave information to target of investigation).

9. Use of Special Skill (§3B1.3)

The D.C. Circuit held that "the 'special skill' necessary to justify the §3B1.3 enhancement must be more than the mere ability to commit the offense; it must constitute an additional, pre-existing skill that the defendant uses to facilitate the commission or concealment of the offense." *U.S. v. Young*, 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant had learned how to manufacture PCP insufficient to justify enhancement for use of special skill). Accord *U.S. v. Godman,* 223 F.3d 320, 322–23 (6th Cir. 2000) (remanded: "common and ordinary computer skills" that defendant learned during a job and used to make "fair" counterfeit money were not "special"); *U.S. v. Burt,* 134 F.3d 997, 999 (10th Cir. 1998) (remanded: usual "tricks of the trade" learned by drug dealer do not qualify: "Drug-dealing skills that exhibit no specialized knowledge beyond that typically possessed by any individual involved in drug dealing will not support a section 3B1.3 enhancement"); *U.S. v. Mainard*, 5 F.3d 404, 406–07 (9th Cir. 1993) (remanded: defendant had no preexisting legitimate skill or training, and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under §3B1.3) [6#3]; *U.S. v. Green*, 962 F.2d 938, 944–45 (9th Cir. 1992) (remanded: mere fact that negatives for counterfeit bills were skillfully produced does not warrant enhancement—defendant was not professional photographer and record did not indicate he possessed greater photography skills than most individuals).

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

establish trust in a victim upon whom the defendant then perpetrates a garden variety fraud." *U.S. v. Hickman*, 991 F.2d 1110, 1113 (3d Cir. 1993) (reversed: licensed general contractor did not use special skill to dupe clients into believing he was building their house). See also *U.S. v. Hemmingson,* 157 F.3d 347, 359 (5th Cir. 1998) (affirming refusal to give enhancement because attorney did not use his legal skills in committing offenses); *U.S. v. Weinstock,* 153 F.3d 272, 281 (6th Cir. 1998) (affirmed: doctor "did not use his podiatric skills to facilitate the crime. Although performing unnecessary medical procedures requires a special skill, refraining from providing such services and falsely billing therefore does not."); *U.S. v. Gandy*, 36 F.3d 912, 915–16 (10th Cir. 1994) (remanded because district court opinion "does not specifically explain how Defendant used his podiatric skill" in falsifying health insurance claim forms—"If the government does not show that the defendant employed his skill to facilitate the commission of his offense, then the court may not properly enhance the defendant's sentence under 3B1.3"); *U.S. v. Garfinkel*, 29 F.3d 1253, 1261 (8th Cir. 1994) (court properly refused to enhance defendant's sentence—defendant used his managerial skills, not special skill as psychiatrist, in submitting false statements to government); *U.S. v. Foster*, 876 F.2d 377, 378 (5th Cir. 1989) (reversed: defendant convicted on counterfeiting charge did have special printing skills but did not use those skills where he only photographed federal reserve notes).

The Sixth Circuit distinguished its decision in *Weinstock, supra,* to affirm application of §3B1.3 to a dentist who "did not merely bill for services he did not perform. Rather, . . . [he] performed procedures on patients and then exaggerated the nature of the procedures in his billings to Medicaid. Unlike simply billing for a procedure that has not been performed, exaggerating the nature of a medical procedure does require the use of special medical knowledge." *U.S. v. Lewis,* 156 F.3d 656, 659 (6th Cir. 1998).

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

"'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." USSG §3B1.3, comment. (n.2). See, e.g., *U.S. v. Carlson*, 87 F.3d 440, 446 (11th Cir. 1996) (chemist who used skill to develop lab to produce MDMA); *U.S. v. Mendoza*, 78 F.3d 460, 465 (9th Cir. 1996) ("the driving of an 18-wheeler without any reported mishap over several years is a skill well beyond that possessed by the general public"); *U.S. v. Lewis*, 41 F.3d 1209, 1214–15 (7th Cir. 1994) (affirmed for licensed, long-time eighteen-wheel truck driver); *U.S. v. Muzingo*, 999 F.2d 361, 362–63 (8th Cir. 1993) (defendant used special skill "acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys" to break into safe-deposit boxes) [6#3]; *U.S. v. Aubin*, 961 F.2d 980, 984 (1st Cir. 1992) (defendant's

training in operation of automatic teller machines facilitated bank robbery); *U.S. v. Hubbard*, 929 F.2d 307, 309–10 (7th Cir. 1991) (affirming special skill enhancement for defendant whose electrical and engineering background provided expertise to construct bombs); *U.S. v. Sharpsteen*, 913 F.2d 59, 62 (2d Cir. 1990) (expertise as printer was special skill that facilitated counterfeiting). See also *U.S. v. Turner,* 272 F.3d 380, 390 (6th Cir. 2001) (affirming special skill adjustment for policeman who "intended to use his police training and planned to show his badge [during planned robbery] in order to control the situation").

Note that the "special skill" does not have to be obtained through formal education or training. See, e.g., *U.S. v. Foster,* 155 F.3d 1329, 1332 (11th Cir. 1998) (affirmed for counterfeiter with printing skills—"[a]lthough printing does not require licensing or formal education, it is a unique technical skill that clearly requires special training"); *U.S. v. Urban,* 140 F.3d 229, 235–36 (3d Cir. 1998) (applicable to defendant who used other skills in teaching himself to make bombs: "§3B1.3 is applicable to a person who has developed a special skill through self education and his or her work experience"); *U.S. v. Noah,* 130 F.3d 490, 499–500 (1st Cir. 1997) (applicable to professional tax preparer for skill in preparing and filing electronic tax returns: "neither formal education nor professional stature is a necessary concommitant for a special skill adjustment . . . , a special skill can be derived from experience or from self-tutelage"); *U.S. v. Petersen*, 98 F.3d 502, 506–07 (9th Cir. 1996) (computer skills used in fraud offenses); *U.S. v. Spencer*, 4 F.3d 115, 120 (2d Cir. 1993) (self-taught chemist convicted of methamphetamine offenses "presents the unusual case where factors other than formal education, training, or licensing persuade us that he had special skills in the area of chemistry") [6#3]; *U.S. v. Malgoza*, 2 F.3d 1107, 1110–11 (11th Cir. 1993) (expertise in two-way radio operation developed through experience); *U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor, who had obtained patents for inventions, had acquired "special skill" through his experience that was not possessed by general public and that facilitated the offense). See also *U.S. v. Fairchild*, 940 F.2d 261, 266 (7th Cir. 1991) (affirmed for defendant whose self-taught knowledge of chemistry enabled him to manufacture methamphetamine—although defendant was not a chemist, he had degree in biology and had worked as chief lab technician in hospital).

Similarly, an argument that a special skill enhancement should not have been applied to a pilot because he flew airplanes only as a "hobby" was rejected by the Eleventh Circuit. "Neither the plain language of §3B1.3, nor anything in the Commentary suggests a distinction between 'professional' and 'amateur.' . . . To exclude non-professionals possessed with the same skills and, therefore, the same ability to 'facilitate' the commission of crimes would be to attribute an element of arbitrariness and irrationality to the Federal Sentencing Guidelines." *U.S. v. Chastain,* 198 F.3d 1338, 1352–53 (11th Cir. 1999).

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

1992) (affirmed enhancement for accountant who filed false payroll tax returns with IRS). See also *Noah,* 130 F.3d at 500 ("a skill can be special even though the activity to which the skill is applied is mundane. The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public").

"This adjustment may not be employed if [use of a special] skill is included in the base offense level or specific offense characteristic." The First Circuit affirmed that the specialized knowledge required of a stockbroker, combined with the ability to access financial markets directly, can qualify as a special skill when they are not elements of the offense. *U.S. v. Connell*, 960 F.2d 191, 198–99 (1st Cir. 1992) [4#19]. Accord *U.S. v. Johnson*, 71 F.3d 539, 544 (6th Cir. 1995) (remanded: court should have considered whether doctor used special skill to illegally distribute pharmaceuticals by writing invalid prescriptions—use of special skill is not already taken into account in §2D1.1); *U.S. v. Ashman*, 979 F.2d 469, 490 (7th Cir. 1992). See also *U.S. v. Harris*, 38 F.3d 95, 99 (2d Cir. 1994) (not double counting to give §3B1.3 enhancement to disbarred attorney who "used lawyering skills instrumental to his [fraud] schemes"—status as attorney was not included in offense level and was not basis of enhancement).

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

10. Using a minor to commit a crime (§3B1.4)

> If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels. USSG §3B1.4.

a. Applicability to defendants under age twenty-one

Although the legislation directing the Sentencing Commission to promulgate §3B1.4 referred to "a defendant 21 years of age or older," neither the guideline nor the commentary limits application of §3B1.4 to that age. The Fourth Circuit rejected a claim by an eighteen-year-old defendant that the Commission exceeded its authority under the legislation in making §3B1.4 applicable to all defendants. The court reasoned that, "because Congress did not direct that *only* defendants over age 21 receive the enhancement, it actually did *not* require the Commission to limit the application of §3B1.4 to defendants of a certain age." *U.S. v. Murphy,* 254 F.3d 511, 513 (4th Cir. 2001) [11#5]. Accord *U.S. v. Ramsey,* 237 F.3d 853, 855–58 (7th Cir. 2001).

The Sixth Circuit disagreed, finding that "the Sentencing Commission failed to comport with a clear Congressional directive when it eliminated the requirement that the defendant be at least twenty-one years old to be subject to" §3B1.4. The

court also found that the defendant was not shown to "use" the minor and thus §3B1.4 did not apply. *U.S. v. Butler,* 207 F.3d 839, 849–52 (6th Cir. 2000).

b. "Use"

The circuits have disagreed on whether defendant must engage in some affirmative action beyond merely partnering with a minor in committing the offense. The Sixth Circuit determined that "the definitions of 'use' support[] the notion that §3B1.4 would require more affirmative action." Thus, §3B1.4 did not apply where a defendant committed a bank robbery with a minor but there was no evidence that it was not a simple partnership. Placement of §3B1.4 in the "Adjustments" section, and the legislation's use of the term "solicitation of a minor" implies that a defendant must "play a particular role in the offense" and "do more than simply participate in crime with a minor. . . . Congress likely imagined an offender who actually exercised some control or took some affirmative role in involving the minor." *U.S. v. Butler,* 207 F.3d 839, 847–49 (6th Cir. 2000) (remanded because court did not find that defendant "directed, commanded, intimidated, counseled, trained, procured, recruited, or solicited" the minor) [11#5]. Accord *U.S. v. Parker,* 241 F.3d 1114, 1120–21 (9th Cir. 2001) (remanded: agreeing with *Butler* that "a defendant's participation in an armed bank robbery with a minor does not warrant a sentence enhancement under §3B1.4 in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery . . . . The fact that Defendant was the minor's partner and profited from his participation in the crime does not show that he acted affirmatively to involve" the minor). See also *U.S. v. Suitor,* 253 F.3d 1206, 1210 (10th Cir. 2001) (although evidence supported finding that defendant in fact "used" minors in his offense, court cited *Parker* for proposition that evidence "must demonstrate more than the simple fact that Suitor was involved in a conspiracy with the minors").

However, the Seventh Circuit disagreed, concluding that the "affirmative action" test "can be met when the minor is a partner in the criminal offense. . . . By forming a partnership with a minor, a criminal defendant is undeniably encouraging that minor to commit a crime. The fact that the minor is a voluntary participant and equal does not make the act socially acceptable. . . . Thus, regardless of whether the minor is a partner or a subordinate, the enhancement will be applied where the defendant affirmatively involved the minor in the commission of a crime." The court held that defendant not only encouraged the minor, but also directed and commanded him during the offense. *U.S. v. Ramsey,* 237 F.3d 853, 859–62 (7th Cir. 2001) [11#5].

Some circuits have held that using a minor as a decoy to reduce the chance of detection satisfies the meaning of "used" in §3B1.4. The Ninth Circuit rejected a defendant's argument that "'active involvement or employment of the minor person in the offense' is required." Although the enabling statute directs the Sentencing Commission to enhance the sentences of defendants who use a minor "with the intent that the minor would commit a Federal offense," other wording that calls for

enhancement "'if the defendant involved a minor in the commission of the offense,' is broad enough to cover intentionally using a minor as an innocent decoy. . . . [A] minor's own participation in a federal crime is not a prerequisite to the application of §3B1.4. It is sufficient that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense." *U.S. v. Castro-Hernandez,* 258 F.3d 1057, 1059–60 (9th Cir. 2001) (affirmed: evidence supported the finding that defendant "used" his three-year-old son—by having child in his truck as he tried to bring load of marijuana from Mexico into the United States—to "assist in avoiding detection of, or apprehension for, the offense.") [11#5]. Accord *U.S. v. Alarcon,* 261 F.3d 416, 423 (5th Cir. 2001) (affirmed: using children as decoys while attempting to drive marijuana into United States warranted §3B1.4 enhancement). Cf. *U.S. v. Warner,* 204 F.3d 799, 800–01 & n.2 (8th Cir. 2000) (finding enhancement appropriate for defendant who brought his eight-year-old daughter to drug deal with undercover officers and, when they balked at paying him before he went to get drugs, offered to leave his daughter with undercover agents as guarantee he would return).

c. Scienter requirement, for defendant or for minor

Does §3B1.4 require that a defendant know that the minor is, in fact, under age eighteen? The Eleventh Circuit said no after looking at the similarly worded 21 U.S.C. §861(a), which has been held to not contain a scienter requirement. "We see no reason why section 3B1.4 of the Sentencing Guidelines should be interpreted to give less protection to minors than similarly worded federal statutes, absent a showing of Congress's contrary intent. . . . We find no qualifying language in section 3B1.4 reserving the enhancement for defendants who knew that the person drawn into their criminal activity was a minor." *U.S. v. McClain,* 252 F.3d 1279, 1285–88 (11th Cir. 2001) [11#5]. Accord *U.S. v. Gonzalez,* 262 F.3d 867, 870 (9th Cir. 2001) (affirmed: "plain language of the guideline does not require that a defendant have knowledge that the individual is under eighteen years of age for the enhancement to apply").

Along similar lines, some courts have held that the minor need not have knowledge that he or she is participating in a crime for §3B1.4 to apply. The Tenth Circuit affirmed the enhancement for a defendant who, without explaining why, paid a sixteen-year-old to pick him up at the airport and drive him and others around town to cash counterfeit checks. The court relied on the "clear and unambiguous" language of §3B1.4 to reject the argument that "defendant must inform the minor of the criminal purpose for which the minor's services are wanted and induce, or try to induce, the minor to commit the federal offense in question." *U.S. v. Tran,* 285 F.3d 934, 937–38 (10th Cir. 2002). See also *U.S. v. Anderson,* 259 F.3d 853, 864 (7th Cir. 2001) (affirmed for embezzler who directed seventeen-year-old bank teller to unknowingly make improper withdrawals—§3B1.4 "focuses on whether the defendant used a minor in the commission of a crime, not whether the minor knew

that he was being used to commit a crime"). See also cases about using child as decoy in preceding section.

d. Relevant conduct

May a defendant be held responsible for another's use of a minor in the offense? The Eleventh Circuit held that the defendant need not be the one to actually involve the minor in the offense. "Any defendants who could have reasonably foreseen the use of a minor . . . are culpable under the plain language of sections 3B1.4 and 1B1.3(a)(1)(B)." The court affirmed a §3B1.4 enhancement because defendant was a leader of the conspiracy and the recruitment of minors by an underling was reasonably foreseeable to defendant. *U.S. v. McClain,* 252 F.3d 1279, 1285–88 (11th Cir. 2001) [11#5]. Accord *U.S. v. Patrick,* 248 F.3d 11, 27–28 (1st Cir. 2001) (affirmed: "because [defendant] was convicted of conspiracy, his sentence could be enhanced based on his co-conspirators' reasonably foreseeable use of juveniles to further the [conspiracy's] activities").

C. Obstruction of Justice (§3C1)

Note: The Nov. 1998 amendments to §3C1.1 added new Application Note 1, which changed the numbering of the existing notes. Except for quotes, this section will use the amended application note numbers.

1. Willfulness and Materiality

In general, evidence, facts, statements, or information must be "material" for the enhancement to apply. See Application Notes 4(d), (f), (g), and (h); 5(c); 6. See also *U.S. v. Cardona-Rivera*, 64 F.3d 361, 365 (8th Cir. 1995) (reversed: false statements to pretrial services officer "could not be considered material" because they were recanted the next day and did not impede investigation or prosecution); *U.S. v. Savard*, 964 F.2d 1075, 1078–79 (11th Cir. 1992) (reversed: secreting boarding slip at time of arrest did not materially hinder investigation because Coast Guard already possessed information on slip); *U.S. v. Gardiner*, 955 F.2d 1492, 1499 (11th Cir. 1992) (reversed: as a matter of law, enhancement may not be based on presentence assertions that contradict the jury verdict because probation officer would have to ignore verdict and believe assertions for sentencing to be affected) [4#21]; *U.S. v. Tabares*, 951 F.2d 405, 410 (1st Cir. 1991) (reversed: no evidence that giving false Social Security number to probation officer materially impeded presentence investigation) [4#13]; *U.S. v. De Felippis*, 950 F.2d 444, 447 (7th Cir. 1991) (reversed: improper for defendant who lied to probation officer about employment history because misstatements were not "material" and could not have influenced sentence) [4#13]; *U.S. v. Howard*, 923 F.2d 1500, 1504 (11th Cir. 1991) (reversed: failure to reveal prior drug convictions at presentence interview was not material falsehood where defendant had already informed DEA agents).

Cf. *U.S. v. Smaw*, 993 F.2d 902, 904 (D.C. Cir. 1993) (affirmed: although court

ultimately determined defendant had no equity in a house, she originally lied about real estate interest—"material in this context means relevant—not outcome determinative"); *U.S. v. St. Cyr*, 977 F.2d 698, 705–06 (1st Cir. 1992) (affirmed: concealment of criminal history delayed completion of PSR); *U.S. v. Dedeker*, 961 F.2d 164, 166–68 (11th Cir. 1992) (affirmed: enhancement proper where defendant failed to disclose prior uncounseled misdemeanor even though it was not used to calculate criminal history—it was material to sentencing within guidelines range); *U.S. v. Baker*, 894 F.2d 1083, 1084 (9th Cir. 1990) (affirmed: misstating number of prior convictions was material even though probation officer could have secured defendant's "rap sheet"—misstatements caused delay and possibility of inaccurate sentence). But cf. *U.S. v. Gormley,* 201 F.3d 290, 294–95 (7th Cir. 2000) (affirmed: disagreeing with *Gardiner, supra,* because false claim of innocence to probation officer "was material because, if believed, it could have affected the sentence ultimately imposed within the guideline range").

Note that not all forms of obstruction have a separate materiality requirement. See Application Notes 4(a)–(c), (e), and (i). See also *U.S. v. Draper*, 996 F.2d 982, 986 n.2 (9th Cir. 1993) (simple attempt to "abscond from pretrial release" sufficient under Note 4(e)); *U.S. v. Cox*, 985 F.2d 427, 433 (8th Cir. 1993) ("Application Note 3(b) is not limited to 'material' perjury [because] materiality is an essential element of perjury"); *U.S. v. Snider*, 976 F.2d 1249, 1251–52 (9th Cir. 1992) (threatening witness warrants enhancement regardless of whether threat results in material hindrance). But cf. *U.S. v. Parker*, 25 F.3d 442, 448 (7th Cir. 1994) ("the law is clear that perjury requires proof that the witness's false testimony concerned a material matter"); *U.S. v. Crousore*, 1 F.3d 382, 385 (6th Cir. 1993) (indicating that perjury must be material and nontrivial).

False statements to law enforcement officers not made under oath must be material and significantly obstruct or impede the official investigation or prosecution of the instant offense. USSG §3C1.1, comment. (nn. 4(g), 5(a) and (b)). See also *U.S. v. Alpert*, 28 F.3d 1104, 1107–08 (11th Cir. 1994) (en banc) (remanded: "district court applying the enhancement because a defendant gave a false name at arrest must explain how that conduct significantly hindered the prosecution or investigation of the offense," may not simply infer that false name "slowed down the criminal process") (superseding opinion at 989 F.2d 454) [7#2]; *U.S. v. Robinson*, 978 F.2d 1554, 1566 (10th Cir. 1992) (remanded: not clear from record that use of aliases actually hindered investigation); *U.S. v. Manning*, 955 F.2d 770, 774–75 (1st Cir. 1992) (reversed: arresting officers knew defendant's true identity at time of arrest or shortly after); *U.S. v. Williams*, 952 F.2d 1504, 1515–16 (6th Cir. 1991) (reversed: "Application Note 4(b) specifically permits lies to investigating agents provided they do not significantly obstruct or impede the investigation"; held it was clearly erroneous to find defendant's false statements did so) [4#15]; *U.S. v. Moreno*, 947 F.2d 7, 9–10 (1st Cir. 1991) (reversed: no showing defendant's use of different versions of his name actually impeded investigation) [4#15]. Cf. *U.S. v. Bell*, 953 F.2d 6, 8–9 (1st Cir. 1992) (reversed: use of alias to obtain post office box while avoiding arrest did not actually hinder investigation) [4#15].

Because a defendant must "willfully" obstruct justice, the enhancement "is appropriate only upon a finding that the defendant had the 'specific intent to obstruct justice, i.e., that the defendant consciously acted with the purpose of obstructing justice.'" *U.S. v. Defeo*, 36 F.3d 272, 276 (2d Cir. 1994). See also *U.S. v. Gage,* 183 F.3d 711, 717 (7th Cir. 1999) (remanded: although court found defendant lied about whether bank robbery note said he had a gun, it must find that he "told the lie intending to obstruct justice" before imposing §3C1.1 enhancement); *U.S. v. Reed*, 49 F.3d 895, 900 (2d Cir. 1995) ("the term 'willfully' implies a mens rea requirement"); *U.S. v. Greer,* 158 F.3d 228, 239 (5th Cir. 1998) (agreeing with Second Circuit definition).

Without a finding of willfulness the enhancement is improper. See, e.g., *Reed*, 49 F.3d at 901–02 (remanded: district court did not make required finding that obstructive conduct was willful); *U.S. v. Monroe*, 990 F.2d 1370, 1375–76 (D.C. Cir. 1993) (reversed: defendant missed arraignment because notification letter arrived a day late, and she failed to appear afterwards because she received confusing information); *U.S. v. Gardner*, 988 F.2d 82, 83–84 (9th Cir. 1993) (remanded: "section 3C1.1 enhancement must be premised on willful conduct that has the purpose of obstructing justice"); *U.S. v. Belletiere*, 971 F.2d 961, 965–66 (3d Cir. 1992) (reversed: no indication defendant transferred property to estranged wife to avoid forfeiture) [5#2]; *Tabares*, 951 F.2d at 411 (reversed: no evidence that defendant's giving false Social Security number to probation officer was willful) [4#13]; *U.S. v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991) (district court did not make specific finding as to defendant's intent in giving false information to magistrate judge, but remand unnecessary where defendant admitted intent to obstruct on the record); *U.S. v. Altman*, 901 F.2d 1161, 1164–65 (2d Cir. 1990) (error not to allow medical testimony bearing on a defendant's mental state) [3#8]; *U.S. v. Stroud*, 893 F.2d 504, 507–08 (2d Cir. 1990) (remanded: §3C1.1 requires intent, and "mere flight [from arrest] in the immediate aftermath of a crime, without more, is insufficient") [2#20]. However, some conduct, "such as intentionally failing to appear as required at judicial proceedings, is so inherently obstructive of the administration of justice that it is sufficient that the defendant willfully engaged in the underlying conduct, regardless of his specific purpose." *Reed*, 49 F.3d at 900.

Note that *attempts* to obstruct justice may also be covered under §3C1.1. See, e.g., *Jackson*, 974 F.2d at 106 ("it is irrelevant to a finding of attempted obstruction that [the witness] testified in spite of Jackson's threats"); *U.S. v. Keats*, 937 F.2d 58, 67 (2d Cir. 1991) (affirmed for attempt to flee before trial); *U.S. v. Osborne*, 931 F.2d 1139, 1151–54 (7th Cir. 1991) (affirmed for attempts to hire persons to kill potential government witnesses); *U.S. v. Gaddy*, 909 F.2d 196, 199 (7th Cir. 1990) (affirmed for giving false name after arrest and lying about arrest and fingerprint records for two days even though impact on investigation was minimal) [3#11]; *U.S. v. Blackman*, 904 F.2d 1250, 1259 (8th Cir. 1990) (affirmed for use of alias even though police knew real name) [3#11]; *U.S. v. Baker*, 894 F.2d 1083, 1084 (9th Cir. 1990) (enhancement proper where defendant misstated number of prior convictions even though probation officer could have secured his "rap sheet"). Cf. *U.S. v. Hicks*, 948

F.2d 877, 885 (4th Cir. 1991) (not inconsistent to apply §3C1.1 to defendant, who threw cocaine out of car during high-speed chase but later helped recover cocaine, and then grant §3E1.1 reduction for cooperation) [4#13].

However, some attempts to obstruct justice do not trigger the enhancement if §3C1.1 requires that the particular conduct actually hinder, impede, or obstruct the investigation or prosecution. See, e.g., §3C1.1, comment. (nn. 4(d) & (g), 5(a) & (b) (regarding destroying or concealing evidence contemporaneously with an arrest, providing a materially false statement to a law enforcement officer, and providing a false name or identification document at arrest). See also *U.S. v. McNally,* 159 F.3d 1215, 1217 (9th Cir. 1998) (affirmed: under Note 4(g), "when a defendant makes a materially false, unsworn statement to a police officer, the false statement must constitute an actual impediment, rather than a mere attempt to impede the investigation," and defendant's conduct here did actually impede the investigation).

The Tenth Circuit rejected an impossibility defense from a defendant who claimed that he could not have attempted to obstruct justice by removing evidence from a storage locker because the police had already seized the evidence. "Factual impossibility is generally not a defense to criminal attempt because success is not an essential element of attempt crimes. . . . Likewise, factual impossibility is generally not a defense to an attempted obstruction enhancement because success is also not an essential element of attempt under §3C1.1." *U.S. v. Hankins,* 127 F.3d 932, 934–35 (10th Cir. 1997). See also *U.S. v. Cotts*, 14 F.3d 300, 307 (7th Cir. 1994) (affirmed: "That [defendant] and his coplotters ultimately could not have murdered the fictitious informant does not diminish the sincerity of any efforts to accomplish that end. Futile attempts because of factual impossibility are attempts still the same.") [6#10].

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

2. Examples

A variety of actions constitute obstruction of justice under §3C1.1, including testifying untruthfully, lying to authorities, fleeing arrest, disposing of evidence, and influencing witnesses. Following are citations to several varieties of obstructive conduct. Note that some of these cases were decided before the materiality requirements outlined in the preceding subsection went into effect. See §3C1.1, comment. (nn. 4(d), (f), (g), (h), and 5(a), (b), (c)).

a. False testimony during a judicial proceeding

Application Notes 4(b) and (f) state that an obstruction enhancement is warranted for "committing, suborning, or attempting to suborn perjury" and for "providing materially false information to a judge or magistrate." See, e.g., *U.S. v. Hernandez-Ramirez,* 254 F.3d 841, 843–44 (9th Cir. 2001) (false statement to magistrate judge on financial affidavit in request for court-appointed counsel); *U.S. v. Ruff*, 79 F.3d

123, 125 (11th Cir. 1996) (lying to magistrate judge about financial situation at hearing to request court-appointed attorney); *U.S. v. Soto-Lopez*, 995 F.2d 694, 699–700 (7th Cir. 1993) (false testimony at suppression hearing); *U.S. v. Ransom*, 990 F.2d 1011, 1014 (8th Cir. 1993) (lying to grand jury, but remanded for specific findings); *U.S. v. Bennett*, 975 F.2d 305, 308 (6th Cir. 1992) (false testimony during trial); *U.S. v. Johnson*, 968 F.2d 208, 215–16 (2d Cir. 1992) (suborning perjury); *U.S. v. McDonald*, 964 F.2d 390, 392–93 (5th Cir. 1992) (use of alias while under oath before magistrate judge and in filing affidavit); *U.S. v. Thompson*, 962 F.2d 1069, 1071–72 (D.C. Cir. 1992) (false testimony at trial) [4#22]; *U.S. v. McDonough*, 959 F.2d 1137, 1141 (1st Cir. 1992) (same); *U.S. v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991) (same); *U.S. v. Fu Chin Chung*, 931 F.2d 43, 45 (11th Cir. 1991) (same); *U.S. v. Hassan*, 927 F.2d 303, 309 (7th Cir. 1991) (lying repeatedly at detention hearing and sentencing); *U.S. v. Matos*, 907 F.2d 274, 276 (2d Cir. 1990) (false testimony at suppression hearing) [3#10]. See also *U.S. v. Acuna*, 9 F.3d 1442, 1445–46 (9th Cir. 1993) (false testimony at trial of another where plea agreement required defendant to testify truthfully) [6#9]. But cf. *U.S. v. Strang*, 80 F.3d 1214, 1218 (7th Cir. 1996) (remanded: error to give enhancement for false testimony at codefendant's trial).

Application Note 2 to §3C1.1 formerly stated that a defendant's alleged false testimony or statements should be evaluated "in a light most favorable to the defendant." That language was changed in Nov. 1997 to "the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice." The reason for the amendment was to address some conflict in the circuits, shown in the cases below, as to whether the former language in Note 2 required a higher standard of proof than preponderance of evidence. The new language is intended to "no longer suggest[] the use of a heightened standard of proof."

The D.C. Circuit had held that the language of the original note "raises the standard of proof—above the 'preponderance of the evidence' . . . —but it does not require proof of something more than ordinary perjury." *Thompson*, 962 F.2d at 1071 ("sentencing court must determine whether the defendant testified (1) falsely, (2) as to a material fact, and (3) willfully in order to obstruct justice, not merely inaccurately as the result of confusion or a faulty memory") [4#22]. The court later specified "that when a district court judge makes a finding of perjury under section 3C1.1, he or she must make independent findings based on clear and convincing evidence. The nature of the findings necessarily depends on the nature of the case. Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more." *U.S. v. Montague*, 40 F.3d 1251, 1253–56 (D.C. Cir. 1994) [7#5]. See also *U.S. v. Arnold*, 106 F.3d 37, 44 (3d Cir. 1997) (under Note 2, district court must be "clearly convinced that it is more likely than not that the defendant has been untruthful"); *U.S. v. Onumonu*, 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 2 "'is obviously different—and more favorable to the defendant—than the prepon-

derance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard"). Cf. *U.S. v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) ("No enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true.").

Other courts had not required a heightened standard. See, e.g., *U.S. v. Zajac*, 62 F.3d 145, 150 (6th Cir. 1995) (preponderance of evidence standard applies for finding of perjury and neither *U.S. v. Dunnigan*, 113 S. Ct. 1111 (1993), nor guidelines require more); *McDonough*, 959 F.2d at 1141 ("due process is not violated where perjury is established by a preponderance of the evidence"). Cf. *U.S. v. Cabbell*, 35 F.3d 1255, 1261 (8th Cir. 1994) (remanded: "district court did not evaluate Cabbell's testimony in a light most favorable to him as required by" Note 2); *U.S. v. Hilliard*, 31 F.3d 1509, 1520 (10th Cir. 1994) (enhancement may not be imposed for alleged perjury that "would not tend to influence or affect the issue" even if believed); *U.S. v. Parker*, 25 F.3d 442, 449 (7th Cir. 1994) (remanded: defendant's "false swearing at his plea hearing did not amount to perjury because [the subject matter] was not 'material' within the meaning of the federal perjury statute").

The First Circuit read Note 2 "to mean that if the defendant is alleged to have obstructed justice by means of false testimony or statements, and if such testimony or statements encompass genuine ambiguities that plausibly suggest that the testimony or statements were innocent as opposed to obstructive, then those ambiguities may have to be resolved in favor of the innocent reading. . . . It does not require the district court to avoid a finding of obstruction by contriving doubt as to the defendant's conduct where the evidence is otherwise clear, merely because the defendant denies he did anything obstructive." The note thus did not apply to a defendant's attempts to suborn perjury or to his unambiguous false statements to a probation officer. See *U.S. v. Clark*, 84 F.3d 506, 510–11 (1st Cir. 1996).

See also cases in section III.C.5

b. False name

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

However, the "significant hindrance" requirement does not apply to giving a false name in other circumstances, such as when under oath or to a probation or pretrial services officer preparing for a detention hearing. See §3C1.1, comment. (n. 4(f) & (h)). See also *U.S. v. Tran,* 285 F.3d 934, 939–40 (10th Cir. 2002) (affirmed for giving false name and Social Security number at arraignment and two other hearings before magistrate judges); *U.S. v. Restrepo*, 53 F.3d 396, 397 (1st Cir. 1995) (affirmed for giving false name to pretrial services officer conducting bail investigation); *U.S. v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994) (affirmed for using false identity on sworn financial affidavit in court before magistrate judge even though true identity discovered before detention hearing).

The Ninth Circuit held that Note 4(c), regarding production of false documents "during an official investigation or judicial proceeding," applies to "lack of candor toward the *court*—including lack of candor in respect to a[n] . . . investigation for the court." Note 5(a), "providing a false name or identifying document at arrest," which requires that the conduct significantly hindered the investigation or prosecution, "anticipates lack of candor toward law enforcement officers." Thus, it was improper to use Note 4(c) to impose a §3C1.1 enhancement on a defendant who presented false identification documents to INS agents. Note 5(a) should have been used and, because the investigation was not substantially hindered, no enhancement was warranted. *U.S. v. Solano-Godines,* 120 F.3d 957, 962–65 (9th Cir. 1997) (also finding that defendant had made false statements about his identity that could fall under Note 4(g), but again there was no significant hindrance to the investigation) [10#2].

c. False statements and failure to disclose

Under Application Note 4(h), enhancement is warranted for "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." See, e.g., *U.S. v. Magana-Guerrero*, 80 F.3d 398, 400–01 (9th Cir. 1996) (falsely telling pretrial services officer during bail interview that he had no prior convictions); *U.S. v. Anderson*, 68 F.3d 1050, 1055–56 (8th Cir. 1995) (providing incomplete, misleading, and false financial information to probation officer in attempt to conceal assets); *U.S. v. Nelson*, 54 F.3d 1540, 1543–44 (10th Cir. 1995) (lying to probation officer about bank account); *U.S. v. St. James*, 38 F.3d 987, 988 (8th Cir. 1994) (providing materially false information to pretrial services officer investigating defendant's pretrial release); *U.S. v. Benitez*, 34 F.3d 1489, 1497 (9th Cir. 1994) (attempts to conceal an outstanding escape warrant, not discovered until after the plea was entered—knowledge of warrant would have affected government's handling of plea agreement and bail); *U.S. v. Thomas*, 11 F.3d 1392, 1399–1401 (7th Cir. 1993) (giving false information concerning prior arrests to probation officer); *U.S. v. Thompson*, 944 F.2d 1331, 1347–48 (7th Cir. 1991) (lied to probation officer about violation of condition of release while awaiting sentencing) [4#10]; *U.S. v. Duke*, 935 F.2d 161, 162 (8th Cir. 1991) (did not provide truthful information as required by plea agreement); *U.S. v. Edwards*, 911 F.2d 1031, 1033–34 (5th Cir.

1990) (failure to disclose location of coconspirator after instructed to do so) [3#14]; *U.S. v. Lofton*, 905 F.2d 1315, 1316–17 (9th Cir. 1990) (lied to probation officer by claiming to have accepted responsibility for crimes but continued criminal activity while in jail awaiting sentencing) [3#10]; *U.S. v. Dillon*, 905 F.2d 1034, 1039 (7th Cir. 1990) (gave false name for source of drugs) [3#10]; *U.S. v. Baker*, 894 F.2d 1083, 1084 (9th Cir. 1990) (misstatements to probation officer regarding criminal history) [3#2]; *U.S. v. Penson*, 893 F.2d 996, 998 (8th Cir. 1990) (provided false information) [3#2].

But cf. *U.S. v. Cardona-Rivera*, 64 F.3d 361, 365 (8th Cir. 1995) (reversed: false statements to pretrial services officer "could not be considered material" because they were recanted the next day and did not impede investigation or prosecution); *U.S. v. Yell*, 18 F.3d 581, 583 (8th Cir. 1994) (remanded: in light of prior and subsequent truthful disclosures of amount of cocaine distributed, one false statement to probation officer was not material and enhancement was error).

A Nov. 1998 amendment added new Application Note 5(e) to provide that a §3C1.1 enhancement is not ordinarily warranted for "lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility)."

However, a "refusal to admit guilt or provide information to a probation officer" is not a basis for the obstruction enhancement. See USSG §3C1.1, comment. (n.1) (Nov. 1990); *U.S. v. Pelliere*, 57 F.3d 936, 939 (10th Cir. 1995) (remanded: "denials of guilt or refusals to talk cannot serve as the basis for an obstruction of justice enhancement"); *U.S. v. Stites*, 56 F.3d 1020, 1026 (9th Cir. 1995) (refusal to provide current financial data to probation officer); *U.S. v. Surasky*, 976 F.2d 242, 245 (5th Cir. 1992); *Thompson*, 944 F.2d at 1347–48 (improper to give enhancement to defendants who falsely denied, during presentence investigations, drug use while on bail; contrary holding in *U.S. v. Jordan*, 890 F.2d 968, 973 (7th Cir. 1989), is now invalid) [4#10]. See also *U.S. v. Johns*, 27 F.3d 31, 35 (2d Cir. 1994) (error to apply §3C1.1 to defendant who during presentence interview falsely denied involvement in any drug transactions other than those charged in indictment—"There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. . . . [A]bsent perjury, a defendant may not suffer an increase in his sentence solely for refusing to implicate himself in illegal activity, irrespective of whether that refusal takes the form of silence or some affirmative statement denying his guilt") [6#17]. But see *U.S. v. Rodriguez-Razo*, 962 F.2d 1418, 1420–21 (9th Cir. 1992) (upheld for failure to volunteer three prior convictions during presentence interviews, (n. 5(c))). See also section 1. Willfulness and Materiality, above.

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

d. Refusal to testify

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

e. Flight and failure to appear

Under Application Note 4 (e), enhancement is warranted for "escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding." See, e.g., *U.S. v. Billingsley*, 160 F.3d 502, 507 (8th Cir. 1998) (post-arrest, pre-indictment flight by defendant who had agreed to cooperate with police, knew he should not leave jurisdiction, and was only apprehended after separate arrest in different jurisdiction three months later); *U.S. v. Shinder*, 8 F.3d 633, 635 (8th Cir. 1993) (flight before sentencing); *U.S. v. McCarthy*, 961 F.2d 972, 979–80 (1st Cir. 1992) (same); *U.S. v. Lyon*, 959 F.2d 701, 707 (8th Cir. 1992) (used false driver's license and alias while fugitive for about a year; violated probation); *U.S. v. Sanchez*, 928 F.2d 1450, 1458–59 (6th Cir. 1991) (fleeing apartment to avoid arrest before warrant issued after learning coconspirator was arrested); *U.S. v. Mondello*, 927 F.2d 1463, 1465–67 (9th Cir. 1991) (defendant hid for two weeks and then fled to avoid capture after he had been arrested three weeks earlier and was expected to turn himself in); *U.S. v. St. Julian*, 922 F.2d 563, 571 (10th Cir. 1990) (failure to appear for sentencing) [3#19]; *U.S. v. Teta*, 918 F.2d 1329, 1333–34 (7th Cir. 1990) (intentional failure to appear for arraignment) [3#17]; *U.S. v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990) (jumping bond and thereby delaying sentencing for eight months) [3#11]; *U.S. v. Pierce*, 893 F.2d 669, 677 (5th Cir. 1990) (attempting to flee arrest) [2#19]; *U.S. v. Galvan-Garcia*, 872 F.2d 638, 641 (5th Cir. 1989) (throwing marijuana out of car during flight, high-speed chase) [2#7]. See also *U.S. v. Alexander*, 53 F.3d 888, 891 (8th Cir. 1995) (affirmed for defendant who financed confederate's flight to avoid prosecution—because confederate could have testified against defendant, court properly viewed this as an attempt to put confederate "out of the government's reach as a witness [and] analogous to asking a witness not to cooperate").

The Eleventh Circuit held that failure to enter a drug treatment program or report to pretrial services—both conditions of being released on bail after arrest—obstructed justice under §3C1.1. Defendant's actions caused extra work for the U.S. Marshal's Service and two magistrate judges, preventing them "from attending to other judicial business and therefore imped[ing] the administration of justice." *U.S. v. Witherell,* 186 F.3d 1343, 1345 (11th Cir. 1999).

Note that since Nov. 1990 amendments, flight from a law enforcement officer

warrants enhancement under §3C1.2 only if defendant "recklessly created a substantial risk of death or serious bodily injury to another person." See *Outline* at section III.C.3. Otherwise, Note 5(d) of §3C1.1 states that "avoiding or fleeing from arrest" does not warrant an obstruction enhancement.

In factually similar situations, circuits have disagreed on whether a defendant had attempted to escape from "arrest" or from "custody." The Seventh Circuit held that a defendant's attempt to run away after being arrested and placed in a police car while police went to look for an accomplice, was reasonably termed a Note 5(d) situation rather than an "escape from custody" that would call for enhancement under Note 4(e). "[W]hen a defendant runs from arresting officers, we believe the proper yardstick for a §3C1.1 enhancement is whether defendant's departure from the scene of arrest was spontaneous or calculated. . . . We see no reason why the same reasoning would not apply merely because Draves' arrest process was a bit further along. . . . We defer to the district court's factual finding that the arrest process was not complete, and agree that Draves' conduct . . . is properly characterized as spontaneous, instinctive flight from the arresting officers, void of the willfulness required for an obstruction of justice enhancement." *U.S. v. Draves*, 103 F.3d 1328, 1337–38 (7th Cir. 1997).

Other circuits have declined to follow *Draves*, including the Fourth Circuit in a case where defendant, after being arrested, handcuffed, and placed in a police car, managed to escape while police searched his nearby car; he was reapprehended the next morning. "To the extent that the *Draves* opinion counsels against applying the enhancement where the escape occurs contemporaneously with the arrest episode, we respectfully disagree. . . . [T]he language of Application Note [4](e) clearly states that the enhancement applies to escape or attempts to escape 'from custody.' On the other hand, Application Note [5](d) provides that it is not intended to apply to avoidance or flight 'from arrest.' . . . We read the commentaries as recognizing a clear dichotomy between the state of being arrested and that of being in custody. . . . The problem is only to determine . . . whether at the critical time an arrest had been accomplished and a state of legal custody had begun. . . . Here, there was no legal error in the district court's conclusion that on the undisputed facts Williams's escape was 'from custody,' not 'from arrest.'" *U.S. v. Williams,* 152 F.3d 294, 303–04 (4th Cir. 1998). Accord *U.S. v. McDonald,* 165 F.3d 1032, 1035 (6th Cir. 1999) (also declining to follow *Draves* in affirming enhancement under Note 4(e) for defendant who escaped after he "had been handcuffed, read his *Miranda* rights, and placed in a patrol car"). See also *U.S. v. Huerta,* 182 F.3d 361, 365 (5th Cir. 1999) (in affirming enhancement for defendant who tried to flee after being arrested, placed in police car, and taken to police station, agreeing with reasoning of *Williams* and *McDonald* in holding "that flight from law enforcement officers who, pursuant to a lawful arrest, have exercised custody over the defendant may constitute obstruction of justice under section 3C1.1, even if such flight closely follows the defendant's arrest").

Following Note 5(d), the Eleventh Circuit reversed an enhancement for two defendants who disappeared during plea negotiations but before indictment. "We

conclude that the §3C1.1 enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more. Such persons do not face a two-level enhancement for failing to remain within the jurisdiction or for failing to keep the Government apprised of their whereabouts during its pre-indictment investigation." *U.S. v. Alpert*, 28 F.3d 1104, 1106–07 (11th Cir. 1994) (en banc) (superseding opinion at 989 F.2d 454) [7#2]. Accord *U.S. v. Stites*, 56 F.3d 1020, 1026 (9th Cir. 1995) (remanded: flight from jurisdiction during investigation but before indictment, remaining away during trials of codefendants, and use of aliases while in hiding did not amount to obstruction). But cf. *U.S. v. Rudisill,* 187 F.3d 1260, 1264–65 (11th Cir. 1999) (distinguishing *Alpert* in affirming enhancement for defendant who encouraged and assisted flight of codefendant who had been ordered to provide fingerprints, photographs, and handwriting samples for government investigation).

On the other hand, the Eighth Circuit affirmed the enhancement where, after defendant had been told to turn himself in, he "changed his residence, employed the use of an additional alias, and attempted to change his appearance. Not insignificantly, when authorities finally caught up with him [seventeen months later], Walcott refused to surrender and was only removed from the house [after several hours] following the use of tear gas and flash bombs. Significant time and resources were required to effectuate his capture. The present facts do not present a situation of instinctive fleeing from the scene of a crime. . . . Rather, it is clear Walcott willfully and deliberately engaged in conduct over a considerable amount of time calculated to mislead and deceive authorities." Such conduct "constituted more than merely avoiding or fleeing from arrest." *U.S. v. Walcott*, 61 F.3d 635, 639 (8th Cir. 1995). Similarly, the Seventh Circuit affirmed the enhancement for a defendant who knew he was under investigation and that an indictment was imminent, but moved to a different state, assumed a false identity, changed his hair color, and generally engaged in "a calculated and deliberate plan to evade the authorities." *U.S. v. Porter,* 145 F.3d 897, 903–04 (7th Cir. 1998). See also discussion in section III.C.3 on flight from arrest and §3C1.1, comment. (n. 5(d)).

The Tenth Circuit rejected a claim that imposing a §3C1.1 enhancement for failure to appear for arraignment violated double jeopardy because defendant was already punished for the same conduct by forfeiture of his $50,000 appearance bond. Forfeiture of the bond is not considered a criminal punishment for double jeopardy purposes because it was a civil action that served a remedial purpose and was reasonably related to the government's damages. Furthermore, following *Witte v. U.S.*, 115 S. Ct. 2199 (1995), "we are compelled to conclude that the enhancement for obstruction of justice . . . was punishment for the underlying offense to which he pleaded guilty, not punishment for failing to appear." *U.S. v. Hawley*, 93 F.3d 682, 687–88 (10th Cir. 1996).

f. Destroying or concealing evidence

Application Note 4(d) states that destroying or concealing material evidence "contemporaneously with arrest" warrants enhancement only if it also "resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender." See, e.g., *U.S. v. Curtis*, 37 F.3d 301, 308 (7th Cir. 1994) (affirmed: defendant received approximately $225,000 in drug proceeds from other conspirators who were evading police, temporarily concealed the money, and later released funds to courier); *U.S. v. Garcia*, 34 F.3d 6, 12 (1st Cir. 1994) (drugs defendant threw out car window were never recovered, hindering prosecution's ability to pursue conviction on drug count); *U.S. v. Kenyon*, 7 F.3d 783, 786 (8th Cir. 1993) (affirmed: flushing cocaine down toilet during arrest caused four-month delay in investigation and prosecution); *U.S. v. Sykes*, 4 F.3d 697, 699 (8th Cir. 1993) (attempting to destroy stolen checks by tearing them up warranted enhancement "because investigators were forced to send the check pieces to a government crime laboratory to be reassembled"); *U.S. v. Brown*, 944 F.2d 1377, 1383 (7th Cir. 1991) (defendant turned over proceeds of marijuana sales to another person "for safekeeping" after he became aware he was subject of criminal investigation); *U.S. v. Galvan-Garcia*, 872 F.2d 638, 641 (5th Cir. 1989) (throwing marijuana out of car during flight, high-speed chase) [2#7]. Cf. *U.S. v. Perry*, 991 F.2d 304, 311–12 (6th Cir. 1993) (remanded: attempt to hide robbery proceeds "was not, in any way, 'a material hindrance' to the investigation or prosecution"); *U.S. v. Savard*, 964 F.2d 1075, 1078–79 (11th Cir. 1992) (reversed: secreting boarding slip at time of arrest did not materially hinder investigation because Coast Guard already possessed information on slip).

Willfully disguising or refusing to provide a handwriting exemplar that is material to the case warrants enhancement as concealing evidence. See, e.g., *U.S. v. Maccado,* 225 F.3d 766, 771–72 (D.C. Cir. 2000) ("we hold that a §3C1.1 enhancement can be based on a defendant's failure to comply with a court order to provide a handwriting exemplar in connection with the underlying pending charges regardless of whether the failure has a substantial effect on the investigation or prosecution"); *U.S. v. Flores,* 172 F.3d 695, 701–02 (9th Cir. 1999) (affirmed for defendant who "willfully disguised his handwriting exemplar to mislead expert analysis"); *U.S. v. Taylor*, 88 F.3d 938, 944 (11th Cir. 1996) (affirmed: "repeated refusals to supply handwriting exemplars, and his effort to disguise his handwriting when he did supply them, constitute an attempt to impede the prosecution of this case"); *U.S. v. Ruth*, 65 F.3d 599, 608 (7th Cir. 1995) (affirmed for repeated failure to provide handwriting exemplars ordered by court; court could properly choose §3C1.1 instead of separate punishment for contempt); *U.S. v. Yusufu*, 63 F.3d 505, 515 (7th Cir. 1995) (affirmed: defendant "altered his handwriting so that it would not match other specimens"); *U.S. v. Valdez*, 16 F.3d 1324, 1335 (2d Cir. 1994) (affirmed for defendant's "ultimately unsuccessful attempt to disguise his handwriting"); *U.S. v. Reyes*, 908 F.2d 281, 290 (8th Cir. 1990) (affirmed for refusal to provide handwriting exemplar ordered by district judge, "thereby attempting to conceal his handwriting style," which was material evidence). See also *U.S. v. Porat*, 17 F.3d 660, 665

(3d Cir. 1994) (§3C1.1 would apply to handwriting exemplar supplied by defendant with intent to mislead handwriting expert, but affirming district court's conclusion that defendant did not willfully attempt to obstruct justice because he admitted his signature at trial). Cf. *U.S. v. Ashers*, 968 F.2d 411, 413 (4th Cir. 1992) (affirmed for providing false voice exemplar).

The handwriting sample cases were cited by the Fifth Circuit as support for affirming the obstruction enhancement for a defendant who was found to have feigned mental illness in an attempt to avoid trial and punishment. "A defendant who feigns incompetency essentially provides a false 'sample,' lying about his psychiatric condition in order to convince the court that he cannot be found guilty—or, for that matter, even put on trial." *U.S. v. Greer,* 158 F.3d 228, 236 (5th Cir. 1998).

g. Threatening or influencing witnesses

Enhancement is warranted under Application Note 4(a) for "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." See, e.g., *U.S. v. Pofahl*, 990 F.2d 1456, 1481–82 (5th Cir. 1993) (asked husband not to incriminate her, as prohibited by 18 U.S.C. §1512(b), Application Note 4(i)); *U.S. v. Larson*, 978 F.2d 1021, 1026 (8th Cir. 1992) (post-arrest letter from jail asking friend to manufacture testimony); *U.S. v. Woods*, 976 F.2d 1096, 1103 (7th Cir. 1992) (threatened witness during presentence investigation); *U.S. v. Snider*, 976 F.2d 1249, 1251–52 (9th Cir. 1992) (pre-arrest attempt to intimidate possible witness into staying quiet); *U.S. v. Ashers*, 968 F.2d 411, 413 (4th Cir. 1992) (providing falsified voice exemplar to expert witness to influence testimony) [5#2]; *U.S. v. Hershberger*, 956 F.2d 954, 957 (10th Cir. 1992); *U.S. v. Sabatino*, 943 F.2d 94, 100 (1st Cir. 1991); *U.S. v. McCann*, 940 F.2d 1352, 1360 (10th Cir. 1991); *U.S. v. Shoulberg*, 895 F.2d 882, 885–86 (2d Cir. 1990); *U.S. v. Penson*, 893 F.2d 996, 998 (8th Cir. 1990) [3#2]; *U.S. v. Pierce*, 893 F.2d 669, 677 (5th Cir. 1990) [2#19]. See also *U.S. v. Blair*, 54 F.3d 639, 645 (10th Cir. 1995) (affirmed for defendant who entered into "sham" marriage with witness so that witness would not have to testify against him before grand jury); *U.S. v. Alexander*, 53 F.3d 888, 891 (8th Cir. 1995) (affirmed for defendant who financed confederate's flight to avoid prosecution—because confederate could have testified against defendant, court properly viewed this as an attempt to put confederate "out of the government's reach as a witness [and] analogous to asking a witness not to cooperate").

There is some disagreement as to when indirect threats, such as those made to third parties, constitute obstruction. The Fourth Circuit reversed an enhancement based on a threat made to a third party but not heard by the target of the threat. *U.S. v. Brooks*, 957 F.2d 1138, 1149–50 (4th Cir. 1992) (defendant must threaten target in her presence or issue threat with likelihood that target will learn of it) [4#19]. Other circuits have affirmed the enhancement in similar circumstances, often reasoning that "since the adjustment applies to attempts . . . it is not essential that the threat was communicated to [the target]." *U.S. v. Capps*, 952 F.2d 1026, 1028–29

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

It has been held that the defendant need not know that the person threatened is in fact a government witness. "A threat to a potential witness is sufficient to warrant an enhancement under section 3C1.1, as long as the statement was intended to threaten, intimidate or unlawfully influence that person." *U.S. v. Johnson*, 46 F.3d 636, 638 (7th Cir. 1995) (affirmed: rejecting claim that enhancement improper because defendant did not know target of threat was government witness). Accord *U.S. v. Sanchez*, 35 F.3d 673, 680 (2d Cir. 1994) (affirmed: same—"threat to a potential witness warrants a §3C1.1 enhancement").

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

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

3. Attempting to Escape Arrest, Reckless Endangerment

Because of the willfulness requirement, there was some question as to whether an attempt to escape arrest, without more, warranted enhancement. Five circuits held that it did not. See *U.S. v. John*, 935 F.2d 644, 648 (4th Cir. 1991); *U.S. v. Burton*, 933 F.2d 916, 917–18 (11th Cir. 1991) ("mere flight," without more, does not war-

rant enhancement); *U.S. v. Hagan*, 913 F.2d 1278, 1284–85 (7th Cir. 1990) ("instinctive flight" from arrest not obstruction) [3#14]; *U.S. v. Garcia*, 909 F.2d 389, 392 (9th Cir. 1990) (reversing enhancement based on brief attempt to evade arresting officers) [3#11]; *U.S. v. Stroud*, 893 F.2d 504, 507–08 (2d Cir. 1990) (§3C1.1 requires intent, and "mere flight [from arrest] in the immediate aftermath of a crime, without more, is insufficient") [2#20]. See also *U.S. v. Alpert*, 28 F.3d 1104, 1106–07 (11th Cir. 1994) (en banc) ("enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more") (superseding opinion at 989 F.2d 454) [7#2]; *U.S. v. Madera-Gallegos*, 945 F.2d 264, 266–68 (9th Cir. 1991) (reversing enhancement given to defendants who fled country to avoid arrest when they suspected something went wrong with drug deal) [4#8]. But cf. *U.S. v. Alexander*, 53 F.3d 888, 891 (8th Cir. 1995) (affirmed: financing flight from arrest of confederate who could testify against defendant, i.e., helping to put that confederate "out of the government's reach as a witness," warrants enhancement as "analogous to asking a witness not to cooperate"); *U.S. v. White*, 903 F.2d 457, 461–62 (7th Cir. 1990) ("mere flight . . . might not constitute" obstruction, but enhancement was proper where lengthy high-speed chase while fleeing arrest clearly endangered police and innocent bystanders) [3#8].

Two changes to the guidelines, effective Nov. 1, 1990, effectively codified the distinction made in these cases. Application Note 5(d) to §3C1.1 excludes "avoiding or fleeing from arrest," but new §3C1.2 requires a two-level increase for "reckless endangerment during flight." For examples, see *U.S. v. Conley,* 131 F.3d 1387, 1389–90 (10th Cir. 1997) (affirmed for high-speed chase up to 100 mph on icy and wet roads, passing two rolling roadblocks, threat to ram pursuing police car); *U.S. v. Gonzalez*, 71 F.3d 819, 836–37 (11th Cir. 1996) (affirmed: "in attempting to escape from the arresting officers, appellant operated his vehicle, in reverse, at a high rate of speed on a residential street," and thus "exhibited a reckless disregard for the safety of the various persons who resided on that street, as well as for the safety of those who might otherwise be present"); *U.S. v. Bell*, 28 F.3d 615, 618 (7th Cir. 1994) (affirmed: firing shot at detective during escape attempt "falls squarely within" §3C1.2); *U.S. v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994) (affirmed: defendant "drove in a fast and reckless manner through a series of neighborhood alleys and ended up flipping his car") [6#10]; *U.S. v. Chandler*, 12 F.3d 1427, 1433–34 (7th Cir. 1994) (affirmed for leading police on chase along two-lane highway through residential areas, at thirty-five to fifty-five mph, swerving to prevent police from passing him); *U.S. v. Luna*, 21 F.3d 874, 885 (9th Cir. 1994) (affirmed: ran three stop signs in getaway car, abandoned still-running car in residential area); *U.S. v. Sykes*, 4 F.3d 697, 700 (8th Cir. 1993) (affirmed: defendant sped away from officer and had to be forced off road); *U.S. v. Mills*, 1 F.3d 414, 423 (6th Cir. 1993) (affirmed finding that "driving recklessly at speeds up to 100 miles per hour on mountain roads . . . evinced a 'wanton disregard for the safety of other motorists'"); *U.S. v. Frazier*, 981 F.2d 92, 96 (3d Cir. 1992) (affirmed: defendant fled from DEA agents at high speed, swerved around DEA cars attempting to block him and struck one).

Although most §3C1.2 enhancements involve high-speed or otherwise dangerous vehicle pursuits, it may also apply in non-vehicle situations, such as flight on foot or dangerous confrontations. See, e.g., *U.S. v. Reyes-Oseguera*, 106 F.3d 1481, 1483–84 (9th Cir. 1997) (fleeing on foot from van across three lanes of traffic on busy street at night recklessly created substantial risk of collisions and injury; however, other defendant who fled from van onto adjacent sidewalk and had to be subdued by armed agent did not, without more, warrant enhancement); *U.S. v. Campbell*, 42 F.3d 1199, 1205–06 (9th Cir. 1994) (enhancement warranted for twelve-hour standoff involving up to seventy law enforcement officers and violent threats—"We do not hesitate to characterize this pre-arrest showdown as a "course of resisting arrest," §3C1.2, comment. (n.3)).

The First Circuit held that an armed defendant who briefly hesitated before obeying arresting officers' orders to freeze and get down did not, without more, qualify for enhancement under §3C1.2. *U.S. v. Bell*, 953 F.2d 6, 10 (1st Cir. 1992) (reversed) [4#15]. However, the Eighth Circuit affirmed the enhancement for a defendant who "came into the living room from a hallway carrying a loaded semiautomatic rifle that he began to level at the officers" who were searching his house in uniform and with a warrant, while telling them to "[g]et out of my house." His actions recklessly endangered the lives of the officers "in the course of resisting arrest," §3C1.2, comment. (n.3). *U.S. v. Rice,* 184 F.3d 740, 742 (8th Cir. 1999).

The Ninth Circuit has held that defendants who did not drive the getaway car during a high-speed chase may be given the enhancement, but only if it is shown that they "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the reckless conduct. See §3C1.2, comment. (n.5). The government "must establish that the defendants did more than just willfully participate in the getaway chase." *U.S. v. Young*, 33 F.3d 31, 32–33 (9th Cir. 1994) (remanded: "Such conduct may be inferred from the circumstances of the getaway, . . . and the enhancement may be based on conduct occurring before, during, or after the high-speed chase"; district court must engage in fact-specific inquiry and specify reasons for holding passengers responsible for driver's conduct) [6#16]. See also *U.S. v. Cook,* 181 F.3d 1232, 1235–36 (11th Cir. 1999) (Note 5 limits relevant conduct, and government must show that defendant "directly engaged in, or actively 'aided or abetted, counseled, commanded, induced, procured, or willfully caused' another to engage in" reckless conduct); *U.S. v. Conley,* 131 F.3d 1387, 1389–90 (10th Cir. 1997) (citing *Young*, holding that fact that defendants' bank robbery plan made escape from police pursuit likely justified applying §3C1.2 to passengers in fleeing car; other evidence also supported enhancement); *U.S. v. Lugman*, 130 F.3d 113, 116–17 (5th Cir. 1997) (enhancement properly applied to passenger because evidence showed that he possessed drugs, which he threw from car during chase, and encouraged driver to evade police). Cf. *U.S. v. Valdez,* 146 F.3d 547, 554 (8th Cir. 1998) (fact that defendant passenger waved shotgun from auto to discourage pursuers warranted application of §3C1.2); *U.S. v. Jones*, 32 F.3d 1512, 1520 (11th Cir. 1994) (affirmed §3C1.2 enhancement: defendant recklessly drove getaway car in high-speed chase during which codefendant aimed gun at police—facts indicated defen-

dant "reasonably could have foreseen that a weapon might be brandished to facilitate their escape").

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

The Sixth Circuit held that "a §3C1.2 enhancement is inapplicable if the defendant did not know it was a law enforcement officer from whom he was fleeing." *U.S. v. Hayes*, 49 F.3d 178, 183–84 (6th Cir. 1995) (remanded: district court must make specific finding whether defendant knew detectives in unmarked police van who tried to stop his car were law enforcement officers before applying enhancement) [7#9]. In a similar vein, the Eleventh Circuit held that it was error to apply §3C1.2 when defendant was fleeing from customers of the bank he had robbed. Section 3C1.2 "expressly states that the increase is to be applied when a defendant 'recklessly create[s] a substantial risk of death or serious bodily injury to another person *in the course of fleeing from a law enforcement officer*.' U.S.S.G. §3C1.2 (emphasis added). An individual's ability to make a citizen's arrest does not render that person a 'law enforcement officer.' Thus, we hold that this section of the Guidelines does not apply unless the defendant is actually fleeing from a law enforcement officer." *U.S. v. Sawyer*, 115 F.3d 857, 859 (11th Cir. 1997).

Note that an upward departure beyond the two-level enhancement may be warranted "where a higher degree of culpability [than recklessness] was involved" or where "death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person." §3C1.2 comment. (nn.2 & 6). See cases in section VI.B.1.b.

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

The §3C1.2 enhancement should not be applied "where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct." USSG §3C1.2, comment. (n.1). Thus, the Sixth Circuit held that it was improper to give the enhancement for endangering a child passenger and a three-level §3A1.2(b) enhancement for injuring a police officer during an escape attempt when both were based on a "single, uninterrupted act"—defendant's rapidly accelerating his car from a stop, almost immediately sideswiping one unmarked police car and then slamming into another. *U.S. v. Hayes,* 135 F.3d 435, 437–38 (6th Cir. 1998).

However, enhancements under both §3C1.1 and §3A1.2 have been held appropriate when supported by separate conduct. See, e.g., *U.S. v. Harrison,* 272 F.3d 220, 223 (4th Cir. 2001) (affirmed: "decision to make adjustments under both §3A1.2(b) and §3C1.2 was not error because each adjustment was based on separate conduct"); *U.S. v. Gillyard,* 261 F.3d 506, 511–12 (5th Cir. 2001) (affirmed: defendant's "acts of assault against a policeman and reckless endangerment of others," although they all occurred while defendant was driving car during thirty-two-mile high-speed chase, "involved two temporally and geographically separate acts aimed at different victims"); *U.S. v. Alicea,* 205 F.3d 480, 486 (1st Cir. 2000) (affirmed both §3A1.2 and §3C1.1 enhancements where separate acts supported each); *U.S. v. Matos-Rodriguez,* 188 F.3d 1300, 1310–12 (11th Cir. 1999) (same: defendant's assault on officer "was separated temporally and spatially from his subsequent, reckless conduct in leading police officers on a high speed chase"); *U.S. v. Miner,* 108 F.3d 967, 970 (8th Cir. 1997) (without discussing double-counting issue, holding sentence properly enhanced under §3A1.2(b) for assaulting police officer while slamming into a police roadblock and under §3C1.2 for endangering others vehicles during chase); *U.S. v. Alexander,* 48 F.3d 1477, 1493 (9th Cir. 1995) (no double-counting under §3A1.2(b) and §3C1.2 where defendants fled in van following bank robbery, shot at police officers in pursuit, and engaged in chase at speeds up to 110 miles per hour that endangered other motorists); *U.S. v. Swoape,* 31 F.3d 482, 483 (7th Cir. 1994) (no double counting where defendant, following bank robbery, shot at officer, engaged police in high speed chase through populated area, and shot at two more officers in parking lot).

4. Procedural Issues

a. "Instant offense"

"The obstructive conduct must occur during the investigation, prosecution, or sentencing of the "instant offense." A Nov. 1997 amendment to Note 1(l) of §1B1.1(b) instructs that "'instant' is used in connection with 'offense' . . . to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct)." See also *U.S. v. Self*, 132 F.3d 1039, 1043–44 (4th Cir. 1997) (concluding that amendment "made plain" that "the term 'instant offense' in §3C1.1 refers to the offense of conviction including relevant con-

duct"; thus, defendant convicted of unlawful weapon possession properly received enhancement for attempted obstruction in robbery case in which that weapon was used).

A Nov. 1998 amendment to §3C1.1, which also added new Note 1, clarifies that obstructive conduct connected with the "instant offense" includes conduct "related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense," such as that of a codefendant. See, e.g., *U.S. v. Hernandez-Ramirez,* 254 F.3d 841, 843–44 (9th Cir. 2001) (affirmed: false statement to magistrate judge on financial statement in request for court-appointed counsel was related to prosecution of offense).

Most circuits previously interpreted "the instant offense" to mean the offense of conviction. See *U.S. v. Horry*, 49 F.3d 1178, 1180–81 (6th Cir. 1995); *U.S. v. Bagwell*, 30 F.3d 1454, 1458–59 (11th Cir. 1994); *U.S. v. Polland*, 994 F.2d 1262, 1269 (7th Cir. 1993); *U.S. v. Levy*, 992 F.2d 1081, 1083–84 (10th Cir. 1993); *U.S. v. Ford*, 989 F.2d 347, 352 (9th Cir. 1993); *U.S. v. Yates*, 973 F.2d 1, 4–5 (1st Cir. 1992) [5#2]; *U.S. v. Belletiere*, 971 F.2d 961, 967–68 (3d Cir. 1992) [5#2]; *U.S. v. Barry*, 938 F.2d 1327, 1332–35 (D.C. Cir. 1991) [4#7]; *U.S. v. Perdomo*, 927 F.2d 111, 118 (2d Cir. 1991); *U.S. v. Dortch*, 923 F.2d 629, 632 (8th Cir. 1991); *U.S. v. Roberson*, 872 F.2d 597, 609 (5th Cir. 1989).

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

However, some circuits have held that the obstructive conduct does not have to be *directly* connected to the offense of conviction as long as it is related to and occurred during the investigation, prosecution, or sentencing of the instant offense. See, e.g., *U.S. v. Kirk*, 70 F.3d 791, 797–98 (5th Cir. 1995) (affirmed for defendant who tried to get witness to conceal knowledge of illegal firearms sale that defendant was not convicted of because witness's knowledge of that sale was "material to the investigation and prosecution of the firearms offenses on which Kirk was ultimately indicted. The 'instant offense' was one of those offenses"; §3C1.1 enhancement "is proper anytime the defendant has concealed or attempted to conceal information

material to the investigation, prosecution, or sentencing of the instant offense. Although this guideline clearly contemplates a relationship between the information concealed and the offense conduct, it does not require that it be related directly to a particular offense to which the defendant pleads guilty."); *U.S. v. Brown*, 47 F.3d 198, 204 (7th Cir. 1995) (although obstructive conduct was directly charged in counts that were dismissed, it hindered investigation of offense of conviction); *U.S. v. Crousore*, 1 F.3d 382, 384–85 (6th Cir. 1993) (whether or not defendant's lie was about offense of conviction, it occurred during detention and sentencing hearings for instant offense and enhancement was proper—"the test is not whether the false statement was about the actual crime charged, but whether it was made during the investigation, prosecution, or sentencing of the 'instant offense'"); *Dortch*, 923 F.2d at 632 (although defendant threw bag of cocaine out car window during stop for traffic violation, throwing bag was "the very act that precipitated the investigation of the 'instant offense'" and warranted enhancement for attempt to destroy or conceal evidence). But cf. *U.S. v. Koeberlein,* 161 F.3d 946, 951 (6th Cir. 1998) (remanded: plain error to give enhancement to defendant who failed to appear in state court after arrests for conduct related to federal offense—"he did not fail to appear for any proceedings related to the instant offense, which is what the Sentencing Guideline's language contemplates").

The Tenth Circuit held that "'offense' may include the concerted criminal activity of multiple defendants. See U.S.S.G. Ch. 3, Pt. B, Intro. comment. Consequently, the section 3C1.1 enhancement applies . . . in a case closely related to [defendant's] own, such as that of a codefendant." *U.S. v. Bernaugh*, 969 F.2d 858, 860–62 (10th Cir. 1992) (affirming adjustment where district court found defendant extensively perjured himself under oath at his guilty plea hearing regarding the participation of codefendants, who were proceeding to trial, in drug transaction) [5#1]. Similarly, the Second Circuit held that "the obstruction-of-justice enhancement may properly be imposed on a defendant convicted of conspiracy who has attempted to obstruct justice on behalf of his partners in the conspiracy." *U.S. v. Fernandez,* 127 F.3d 277, 284 (2d Cir. 1997) (affirming enhancement for defendant who attempted to bribe judge in coconspirator's separate case). See also *U.S. v. Acuna*, 9 F.3d 1442, 1445–46 (9th Cir. 1993) (false testimony at trial of another where plea agreement required defendant to testify truthfully) [6#9]; *U.S. v. Walker*, 119 F.3d 403, 406–07 (6th Cir. 1997) (affirmed: following reasoning of *Bernaugh* and *Acuna* for defendant who pled guilty and then testified falsely at coconspirator's trial); *U.S. v. Powell*, 113 F.3d 464, 469 (3d Cir. 1997) (affirmed: same—when defendant "testified that his brother had not conspired with him to distribute cocaine, he was attempting to impede the prosecution of the same offenses for which he was convicted"). But cf. *U.S. v. Partee*, 31 F.3d 529, 531–33 (7th Cir. 1994) (remanded: refusal to testify under immunity at coconspirator's trial was not part of defendant's "instant offense" and thus §3C1.1 enhancement was improper; however, conduct may be punished as contempt) [7#2]; *U.S. v. Strang*, 80 F.3d 1214, 1218 (7th Cir. 1996) (remanded: following *Partee*, error to give enhancement for false testimony at codefendant's trial).

b. "Investigation or prosecution"

The Fifth Circuit has held that because the language of §3C1.1 requires that the obstruction occur "during the investigation or prosecution of the instant offense," the enhancement may not be based on a defendant's attempts to conceal the crime prior to the investigation or prosecution. See *U.S. v. Luna*, 909 F.2d 119, 120 (5th Cir. 1990) (concealing weapon used in assault before crime reported and investigation begun) [3#11]; *U.S. v. Wilson*, 904 F.2d 234, 235–36 (5th Cir. 1990) (use of alias when illegally shipping firearms) [3#11]; *U.S. v. Clayton,* 172 F.3d 347, 354–56 (5th Cir. 1999) (affirmed: in holding that sheriff who, right after he kicked handcuffed defendant, threatened other officers with firing if they revealed his actions, did not commit obstruction "during" investigation, court reaffirmed *Luna* and *Wilson* in light of later amendments to §3C1.1's commentary). See also *U.S. v. Fiala*, 929 F.2d 285, 289–90 (7th Cir. 1991) (false statement to trooper when stopped on highway that defendant had nothing illegal in car was "no more than a denial of guilt" and thus fell within exception in §3C1.1, comment. (n.2)). The commentary to §3C1.1, notes 4(d) and 5(a), has been revised along these same lines, stating that if such conduct occurred at the time of arrest it shall not warrant an adjustment for obstruction unless it actually hindered the investigation or prosecution of the instant offense. But cf. *U.S. v. Polland*, 994 F.2d 1262, 1269 (7th Cir. 1993) (affirmed for defendant who concealed contraband prior to investigation—"focus is not on timing but on materiality"); *U.S. v. Stout*, 936 F.2d 433, 435 (9th Cir. 1991) (enhancement proper for defendant who attempted to flush counterfeit bill down toilet at police station after arrest because "substantial period of time had passed" after arrest and attempt was willful). See also section III.C.2.f.

The Eleventh Circuit held that, under §3C1.1, comment. (n. 4(d)), the obstructive conduct must occur during an "official investigation." Thus, defendant's attempt to hide embezzlement during investigation by bank investigators, prior to any law enforcement activity, did not qualify. *U.S. v. Kirkland*, 985 F.2d 535, 537–38 (11th Cir. 1993) [5#10].

There is some disagreement among the circuits as to whether a defendant must know that an investigation is under way. The Eighth Circuit held that the enhancement was properly refused for a defendant who made a threat when he was under investigation but did not know it. "We believe that the term 'willfully' should be reserved for the more serious case, where misconduct occurs with knowledge of an investigation, or at least with a correct belief that an investigation is probably underway." *U.S. v. Oppedahl*, 998 F.2d 584, 585–86 (8th Cir. 1993).

The Fifth Circuit followed the reasoning of *Oppedahl* in concluding that §3C1.1 may apply when the obstruction occurs "with the defendant's correct belief that an investigation is probably underway." The enhancement was affirmed for a defendant who suspected that an informant making a drug buy was actually a police officer and threatened to have her killed if he was later arrested. *U.S. v. Lister*, 53 F.3d 66, 71 (5th Cir. 1995). Accord *U.S. v. Brown,* 237 F.3d 625, 628 (6th Cir. 2001) (affirmed: it was clear that defendant knew "that he probably was under investiga-

tion" when he threatened potential witness—"obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the 'correct belief' that an investigation of the defendant is 'probably underway'").

On the other hand, the Seventh Circuit has affirmed the enhancement based on conduct that affected an investigation even though it occurred before the investigation. Where a defendant threatened his victim during the offense, "the threat continued to deter [the victim's] cooperation after the investigation began. . . . Snyder did not withdraw his threat after the investigation began, and so obstructed justice during the course of the investigation." *U.S. v. Snyder,* 189 F.3d 640, 648–49 (7th Cir. 1999) (also stating that "a defendant need not know that he is under investigation at the time of the obstructive conduct"). Accord *U.S. v. Jenkins,* 275 F.3d 283, 288–89 (3d Cir. 2001) (in case concerning obstruction in state proceedings, following *Snyder* and rejecting above cases, reasoning that Sentencing Commission "decided not to require 'awareness of the federal proceeding' in U.S.S.G. §3C1.1 . . . [and] we will not write in a requirement that the defendant be aware of the federal investigation").

The Tenth Circuit emphasized that defendant must know there is an investigation of the offense of conviction, not merely of other criminal conduct. "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) . . . [T]he 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." *U.S. v. Gacnik*, 50 F.3d 848, 852–53 (10th Cir. 1995) (remanded: although defendant tried to cover up weapons offense, she only knew that there might be an investigation into an unrelated weapons charge against coconspirator) [7#9]. Cf. *U.S. v. Mills,* 194 F.3d 1108, 1115 (10th Cir. 1999) (affirmed: although defendant erased incriminating videotape before investigation began, he "knew that an investigation would be conducted, and he understood the importance of the tape in that investigation," and "such awareness of an impending investigation is sufficient to satisfy the nexus requirement so as to warrant enhancement").

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

c. State offenses

The Ninth Circuit affirmed the enhancement in a federal fraud conviction where, prior to federal action, defendant had attempted to obstruct an earlier state investigation into the same scheme, holding that "there is no state-federal distinction for obstruction of justice" and enhancement is not limited to acts aimed at federal authorities. *U.S. v. Lato*, 934 F.2d 1080, 1082–83 (9th Cir. 1991) [4#7]. Accord *U.S. v. Imenec,* 193 F.3d 206, 208–09 (3d Cir. 1999) (affirming enhancement for failing to appear at state hearing and remaining at large for over three years, thus delaying federal action on same conduct: "enhancement is appropriate where the defendant has obstructed an investigation of the criminal conduct underlying the offense of conviction, even where the investigation was being conducted by state authorities at the time"); *U.S. v Self,* 132 F.3d 1039, 1042–43 (4th Cir. 1997) (agreeing with *Lato* and cases following that obstructing state investigation qualifies); *U.S. v. Smart*, 41 F.3d 263, 265–66 (6th Cir. 1994) (affirmed: defendant obstructed justice by twice using false name to make bail and flee after arrests by state authorities on charges later prosecuted in federal court); *U.S. v. Adediran*, 26 F.3d 61, 64–65 (8th Cir. 1994) (affirmed for failure to appear in state court after originally being charged under state law for conduct underlying federal offense—"this circuit does not prohibit obstruction enhancements in federal prosecutions merely because state entities were involved"); *U.S. v. Emery*, 991 F.2d 907, 911–12 (1st Cir. 1993) (agreeing with *Lato* and affirming obstruction enhancement for attempted escape from state authorities prior to federal investigation: "so long as some official investigation is underway at the time of the obstructive conduct, the absence of a federal investigation is not an absolute bar to" enhancement) [5#13].

The Seventh Circuit agreed that obstructive conduct that occurred during a prior state investigation may warrant enhancement for a related federal offense, but only if the state conduct actually obstructs the later federal investigation or prosecution. "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) (remanded: although defendant's flight from state authorities obstructed state investigation, there was no evidence that it obstructed later federal investigation, prosecution, or sentencing) [7#9]. Accord *U.S. v. Jackson,* 275 F.3d 283, 289–90 (3d Cir. 2001) (remanded: defendant who failed to appear for three state court hearings, the last of which was one day after federal investigation began, should not have received enhancement where government failed to show his conduct obstructed federal investigation in any way—"where the obstructive conduct relates only to an ongoing state prosecution, with no discernable effect on the federal proceedings, enhancement under U.S.S.G. §3C1.1 is improper").

In a similar vein, the Second Circuit held that an enhancement may be warranted

for perjury committed during a related state investigation, but only if the perjury was material to the federal offense. The court concluded that "[W]hen false testimony in a related but separate judicial proceeding is raised as the basis for a §3C1.1 obstruction of justice enhancement, a sentencing court may only apply the enhancement upon making specific findings that the defendant intentionally gave false testimony which was material to the proceeding in which it was given, that the testimony was made willfully, i.e., with the specific purpose of obstructing justice, and that the testimony was material to the instant offense." The court remanded because "[t]he sentencing court did not make findings with respect to either aspect of materiality. Although [it] found that the false state deposition was motivated by the instant federal offense, motivation alone does not equate to materiality." *U.S. v. Zagari*, 111 F.3d 307, 328–29 (2d Cir. 1997) [9#7]. Accord *U.S. v. Luca,* 183 F.3d 1018, 1022–23 (9th Cir. 1999) (affirming enhancement for submitting materially false or misleading documents during state investigation that preceded federal action on same offense, agreeing with *Zagari* that "so long as the district court found that the defendant 'willfully and materially impeded the search for justice in the *instant offense*,' the enhancement should apply, even if the obstruction occurred before state rather than federal law enforcement officials" (emphasis added by court)).

d. If obstruction is an element of the offense

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

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

e. Other

Once the court finds facts sufficient to constitute obstruction of justice, the enhancement is mandatory, regardless of other mitigating behavior. *U.S. v. Williamson,* 154 F.3d 504, 505–06 (3d Cir. 1998) (joining "broad consensus" that "enhancement is mandatory once a district court determines that a defendant has obstructed justice"); *U.S. v. Zaragoza,* 123 F.3d 472, 486 (7th Cir. 1997) (remanded: "we now expressly hold that once the government has proved by a preponderance of the evidence that a defendant has willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice, the sentencing court has no discretion but to impose the two-level enhancement provided for by §3C1.3"); *Hall v. U.S.,* 46 F.3d 855, 859 (8th Cir. 1995) (remanded: if defendant "threatened the witness, the district court had no choice but to impose the sentence enhancement"); *U.S. v. Ancheta*, 38 F.3d 1114, 1118 (9th Cir. 1994) ("enhancement is mandatory, not discretionary, once a district court determines that a defendant has obstructed justice"); *U.S. v. Shonubi*, 998 F.2d 84, 87–88 (2d Cir. 1993) (remanded: once trial court found "defendant clearly lied willfully" during sworn trial testimony, enhancement required); *U.S. v. Ashers*, 968 F.2d 411, 414 (4th Cir. 1992) (when facts support enhancement it must be applied); *U.S. v. Austin*, 948 F.2d 783, 788–89 (1st Cir. 1991) (reversing failure to impose enhancement although district court found defendant committed perjury) [4#12]; *U.S. v. Alvarez*, 927 F.2d 300, 303 (6th Cir. 1991) (if court finds defendant testified untruthfully as to a material fact, no discretion in applying enhancement); *U.S. v. Avila*, 905 F.2d 295, 297 (9th Cir. 1990) (mandatory, but subsequent mitigating actions may be accounted for in making other adjustments and sentencing within range); *U.S. v. Roberson*, 872 F.2d 597, 609 (5th Cir. 1989) (enhancement is mandatory). Cf. *U.S. v. Dupre,* 117 F.3d 810, 825 (5th Cir. 1997) (remanded: because enhancement is not discretionary, it was error for district court to refuse to consider evidence that defendant misrepresented nature and extent of assets in possible attempt to reduce restitution award).

The Second Circuit held that it was error to grant a two-level departure for aberrant behavior that effectively offset a §3C1.1 enhancement for perjury. "Nothing in USSG §3C1.1 remotely suggests that its mandatory upward adjustment is inapplicable to 'aberrant' perjury or can otherwise be offset or conditioned in this way. . . . [T]he upward adjustment for obstruction of justice is unique, in that it is addressed not to the underlying criminal conduct but to attempts to interfere with the integrity of the truth-finding process regarding that conduct, a context far removed from any of the cases that gave rise to the 'aberrant behavior' departure." *U.S. v. Ortiz,* 251 F.3d 305, 306–07 (2d Cir. 2001).

Application Note 9, added Nov. 1, 1992, provides that "the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." See also section III.C.2.g. Threatening or influencing witnesses.

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

5. Constitutional Issues

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

The Court also held that, if defendant objects, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same. . . . [I]t is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." *Dunnigan*, 113 S. Ct. at 1117. Several circuits have held that a finding of guilt by the jury alone is insufficient, that the district court must make a specific, independent finding that the defendant willfully lied about a material matter. See, e.g., *U.S. v. Robinson*, 63 F.3d 889, 892 (9th Cir. 1995); *U.S. v. Markum*, 4 F.3d 891, 897 (10th Cir. 1993); *U.S. v. Burnette*, 981 F.2d 874, 879 (6th Cir. 1992); *U.S. v. Lawrence*, 972 F.2d 1580, 1583 (11th Cir. 1992); *U.S. v. Cunavelis*, 969 F.2d 1419, 1423 (2d Cir. 1992); *U.S. v. Benson*, 961 F.2d 707, 709 (8th Cir. 1992) [4#21]; *U.S. v. Lozoya-Morales*, 931 F.2d 1216, 1218–19 (7th Cir. 1991). See also *U.S. v. Sassanelli,* 118 F.3d 495, 501 (6th Cir. 1997) (remanded: district court "must identify those particular portions of the defendant's testimony that it considers to be perjurious"); *U.S. v. Copus*, 110 F.3d 1529, 1536–37 (10th Cir. 1997) (remanded: district court should identify specific testimony it found perjurious); *U.S. v. Boggi*, 74 F.3d 470, 479 (3d Cir. 1996) (affirmed: "it is preferable for a district court to specifically state its findings as to the elements of perjury on the record . . . . However, where, as here, the record establishes that the district court's application of the enhancement necessarily included a finding as to the elements of perjury, and those findings are supported by the record, we will not remand merely because the district court failed to engage in a ritualistic exercise and state the obvious for the record."). Cf. *U.S. v. Ransom*, 990 F.2d 1011, 1013–14 (8th Cir. 1993) (remanded: although district court found that defendant lied before grand jury, it merely relied on presentence report without making findings on any specific instances of perjury).

The D.C. Circuit stated that "[t]he admonition in Application Note [2 to §3C1.1] to evaluate the defendant's testimony 'in a light most favorable to the defendant' apparently raises the standard of proof—above the 'preponderance of the evidence' . . . —but it does not require proof of something more than ordinary perjury." *U.S. v. Thompson*, 962 F.2d 1069, 1071 (D.C. Cir. 1992) ("the sentencing court must determine whether the defendant testified (1) falsely, (2) as to a material fact, and (3) willfully in order to obstruct justice, not merely inaccurately as the result of confusion or a faulty memory") [4#22]. The court later specified that Note 2 re-

quires clear and convincing evidence of perjury to apply the enhancement. *U.S. v. Montague*, 40 F.3d 1251, 1253–56 (D.C. Cir. 1994) [7#5]. See also *U.S. v. Onumonu*, 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 2 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard"). Cf. *U.S. v. Hilliard*, 31 F.3d 1509, 1519 (10th Cir. 1994) ("Perjury provisions are not to be construed broadly," and §3C1.1 enhancement for perjury "should not rest upon vague or ambiguous questions, rather precise questioning is required"); *U.S. v. Crousore*, 1 F.3d 382, 385 n.3 (6th Cir. 1993) (under Note 2, "if the meaning of the defendant's statement is ambiguous, the ambiguity should be resolved in his favor to prevent a finding of perjury when the defendant's statement, taken another way, would not have been perjurious"); *U.S. v. Rojo-Alvarez*, 944 F.2d 959, 969 (1st Cir. 1991) (Note 2 "'does not mandate the resolution of every conflict in testimony in favor of the defendant'; rather, it 'simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction'"); *U.S. v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) ("No enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true."). But cf. *U.S. v. Zajac*, 62 F.3d 145, 150 (6th Cir. 1995) (preponderance of evidence standard applies for finding of perjury and neither *U.S. v. Dunnigan*, 113 S. Ct. 1111 (1993), nor guidelines require more); *U.S. v. McDonough*, 959 F.2d 1137, 1141 (1st Cir. 1992) ("due process is not violated where perjury is established by a preponderance of the evidence"). See also cases in section III.C.2.a.

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

Before *Dunnigan*, the Third Circuit stated that "the perjury of the defendant must not only be clearly established, and supported by evidence other than the jury's having disbelieved him, but also must be sufficiently far-reaching as to impose some incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury." *U.S. v. Colletti*, 984 F.2d 1339, 1348 (3d Cir. 1992) [5#5]. Without specifically referring to *Colletti*, the Sixth Circuit rejected an "incremental burden" claim, holding that *Dunnigan* "unanimously

rejected this view." *U.S. v. Seymour*, 38 F.3d 261, 263–64 (6th Cir. 1994) (affirmed enhancement for defendant who "committed simple perjury by denying involvement in all aspects of the crime and offering innocent explanations for certain actions"). Accord *U.S. v. Fitzherbert,* 13 F.3d 340, 344–45 (10th Cir. 1993) (affirmed: declining to follow *Colletti* and noting that *Dunnigan* "appears to have rejected th[at] approach"). The Third Circuit later called *Colletti*'s "incremental burden" language "dicta," and stated that "even if [it] had not been dicta, its vitality would not have survived *Dunnigan*." See *U.S. v. Fiorelli,* 133 F.3d 218, 223 (3d Cir. 1998).

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

D. Multiple Counts—Grouping (§3D1)

1. Decision to Group

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

Counts that "involve the same victim and . . . acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan" are considered to involve the same harm. USSG §3D1.2(b). See also *U.S. v. Sneezer*, 983 F.2d 920, 925 (9th Cir. 1992) (reversed: two rapes of same victim within minutes of each other should have been grouped—"decision of whether to group independent offenses . . . turns on timing") [5#8]; *U.S. v. Norman*, 951 F.2d 1182, 1185 (10th Cir. 1991) (reversed: group two counts of giving false information regarding firearms and explosives to airline on different days where defendant's motive was to harm wife's boyfriend, not the airline); *U.S. v. Wilson*, 920 F.2d 1290, 1294 (6th Cir. 1991) (reversed: five counts involving telephone discussions and one count of mailing a letter, all related to an attempt to kill one person, should be grouped) [3#19]. But cf. *U.S. v. Hibbler,* 159 F.3d 233, 237 (6th Cir. 1998) (remanded: child pornography offenses should not have been grouped as involving only one victim, namely society

in general—each image depicted different child, and "[o]nly in those instances where there is no identifiable victim should a court deem the primary victim to be society"); *U.S. v. O'Kane,* 155 F.3d 969, 972–73 (8th Cir. 1998) (remanded: do not group fraud and money laundering counts under §3D1.2(b) because different victims are involved—the defrauded and society in general).

However, separate acts should not be grouped if each act caused a separate harm to a single victim, rather than simply contributing to one overall harm. See, e.g., *U.S. v. Bonner*, 85 F.3d 522, 526 (11th Cir. 1996) (affirmed: proper not to group twenty threatening phone calls: "each separate threatening communication, a crime in itself, had a single purpose or objective and inflicted one composite harm: to harass the victim. . . . Therefore, although the threatening communications were arguably part of a common overall scheme of harassment, the victim in this case suffered separate and distinct instances of fear and psychological harm with each separate threatening communication"); *U.S. v. Miller*, 993 F.2d 16, 21 (2d Cir. 1993) (affirmed: three mailings of threatening letters need not be grouped: "Although these letters were arguably part of a common scheme of harassment, we see no error in the court's finding that each letter inflicted separate psychological harm."). See also USSG §3D1.1(b), comment. (n.4) ("This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm.").

Application Note 4 also states that counts should be grouped under §3D1.2(b) if they "are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim." The Fourth Circuit analyzed whether multiple offenses constitute a "single course of conduct" in an espionage case that involved two separate periods of passing secrets to Soviet/Russian agents, with a three-year gap. Courts should consider "the duration of the defendant's conduct and whether the conduct of conviction overlaps in time, the locations in which the conduct occurs, the persons involved, the means used to accomplish the criminal purpose, and the separateness of the fear and risks of harm created by the defendant's multiple acts. . . . Whether or not offenses are connected by a common criminal objective is also a critical determination. . . . Where the criminal conduct of the defendant constitutes ongoing behavior toward a single goal that is in fact accomplished only by the entirety of the defendant's conduct, and where the behavior is ended upon the completion of that single goal, then the district court must group the offenses. . . . Where, however, the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual—albeit identical—goal, then the district court does not group the offenses." The court concluded that the separate episodes of espionage were properly not grouped because of the three-year time gap, the information was provided to different sets of people in different locations, and involved different categories of information that caused distinct harms. Also, there was no "common criminal objective" in the different acts because defendant simply wanted to provide as much

information as he could for payment and "[e]ach act of espionage satisfied that goal to a degree unrelated to and independent of every other act of espionage." *U.S. v. Pitts,* 176 F.3d 239, 244–45 (4th Cir. 1999). See also *U.S. v. Young,* 266 F.3d 468, 481–84 (6th Cir. 2001) (affirmed: embezzlement and money laundering counts properly grouped under §3D1.2(b) because they "involved the same victim . . . and several transactions which were connected by a common scheme or plan," and all money laundered came from the embezzlement scheme).

Courts should avoid "bootstrapping" dissimilar counts that may arise from the same transaction. See, e.g., *U.S. v. Lombardi*, 5 F.3d 568, 570–71 (1st Cir. 1993) (proper not to group three mail fraud counts with two money laundering counts even though same funds were involved—the different offenses involved distinct acts and different victims, and the frauds did not "embod[y] conduct that is treated as a specific offense characteristic" of money laundering) [6#6]; *U.S. v. Patterson*, 962 F.2d 409, 415–17 (5th Cir. 1992) (remanded: offenses involving receipt or possession of stolen vehicles are one group, offenses involving alteration of VINs are another, but the two groups do not involve "substantially the same harm" and cannot be combined; also, related offense of obtaining money by false pretenses cannot be grouped with others); *U.S. v. Astorri*, 923 F.2d 1052, 1056–57 (3d Cir. 1991) (proper not to group fraud count with tax evasion count that involved proceeds from fraud scheme); *U.S. v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (offenses arising from same transaction not grouped because not "closely related"); *U.S. v. Porter*, 909 F.2d 789, 792–93 (4th Cir. 1990) (same) [3#13]; *U.S. v. Egson*, 897 F.2d 353, 354 (8th Cir. 1990) (same) [3#4]; *U.S. v. Pope*, 871 F.2d 506, 509–10 (5th Cir. 1989) (possession of pistol by felon need not be grouped with unlawful possession of silencer, §3D1.2(d)) [2#5]. Cf. *U.S. v. Beard*, 960 F.2d 965, 967–69 (11th Cir. 1992) (proper not to group two obstruction of justice convictions for acts that arose out of same scheme but occurred two years apart and involved different harms—one involved interfering with proper sentencing of another defendant in district court and the other involved attempt to suborn perjury before grand jury).

Several circuits have held that the offenses of illegally entering the U.S. after deportation and possession of a firearm by an illegal alien involve different harms and should not be grouped. See *U.S. v. Herrera,* 265 F.3d 349, 352–53 (6th Cir. 2001); *U.S. v. Salgado-Ocampo,* 159 F.3d 322, 328 (7th Cir. 1998) (affirmed: agreeing with *Barron-Rivera* below that "illegally reentering the country after deportation and illegally possessing a firearm share no common offense characteristics" and were properly not grouped); *U.S. v. Baeza-Suchil*, 52 F.3d 898, 900 (10th Cir. 1995) (affirmed: aggravated illegal reentry after deportation and felon in possession of firearm not grouped); *U.S. v. Barron-Rivera*, 922 F.2d 549, 554–55 (9th Cir. 1991) (do not group count of illegal alien in possession of firearm with count of being unlawful alien—harms are different) [3#19].

Whether and how to group firearms offenses may require an analysis of several factors, such as timing, purpose, place, and type of weapons. See, e.g., *U.S. v. Bush*, 56 F.3d 536, 539–42 (3d Cir. 1995) (affirmed dividing five illegal possession counts into three groups—purchases occurred at three different times, involved three dif-

ferent calibers of handgun, and district court reasonably concluded defendant had at least three different motives); *U.S. v. Cousins*, 942 F.2d 800, 807–08 (1st Cir. 1991) (affirmed putting eight weapons counts into three groups because of differences in time, sellers, sources of money, and purpose). See also *U.S. v. Griswold*, 57 F.3d 291, 296 (3d Cir. 1995) (illegal possession and purchases of different weapons over two years properly not grouped).

The Sixth Circuit has held that multiple counts that were charged in different indictments may be grouped. "Even though Part D of Chapter Three contains no explicit language applying §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) [7#8]. 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").

Money laundering: Effective Nov. 1, 2001, the money laundering guidelines were substantially amended. Among other things, the revised §2S1.1 more closely ties the offense level of a money laundering count to the underlying offense, and new Application Note 6 states that when a defendant "is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2."

The 2001 amendments to §2S1.1 have not been listed as retroactive in §1B1.10(c), and the circuits to decide the issue have held that the amendments are not merely clarifying but imposed substantive changes that are not to be applied retroactively. See, e.g., *U.S. v. Descent,* 292 F.3d 703, 707–09 (11th Cir. 2002) [11#5]; *U.S. v. King,* 280 F.3d 886, 891 (8th Cir. 2002); *U.S. v. McIntosh,* 280 F.3d 479, 485 (5th Cir. 2002); *U.S. v. Sabbeth,* 277 F.3d 94, 96–99 (2d Cir. 2002). *Cf. U.S. v. Martin,* 278 F.3d 988, 1003–04 (9th Cir. 2002) (where defendant's sentence is remanded for other reasons, decision whether to group money laundering and mail fraud offenses on resentencing should be determined under amended §2S1.1).

Before the 2001 amendments settled the issue, the circuits had split over whether, or under what circumstances, money laundering and underlying conduct offenses should be grouped. Some circuits have held that if fraud and money laundering offenses are closely related they should be grouped under §3D1.2(d), which states

that offenses "involve substantially the same harm" if the offense level is largely determined by "the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm." See, e.g., *U.S. v. Walker,* 112 F.3d 163, 167 (4th Cir. 1997) (closely related fraud and money laundering offenses properly grouped); *U.S. v. Wilson,* 98 F.3d 281, 283–84 (7th Cir. 1996) (should have grouped fraud and money laundering counts where the laundering was to perpetuate the fraud); *U.S. v. Mullens,* 65 F.3d 1560, 1564 (11th Cir. 1995) (affirmed: proper to group closely related fraud and money laundering counts under §3D1.2(d)); *U.S. v. Leonard,* 61 F.3d 1181, 1186 (5th Cir. 1995) (same, because money laundering activities "advanced the mail and wire fraud scheme that victimized nearly 500 people [and] the group of targeted victims became the victim of the money laundering activity as well as the fraud scheme"); *U.S. v. Cusumano,* 943 F.2d 305, 312–13 (3d Cir. 1991) (same, because money laundering and fraud were "part of one overall scheme to obtain money from the Fund and convert it to" defendant's use and the victim of both offenses was the same).

However, other circuits have held that grouping fraud and money laundering counts under this subsection was improper because the offense guidelines measure harm differently. See *U.S. v. Napoli,* 179 F.3d 1, 10–13 (2d Cir. 1999) (affirmed: also finding that grouping could actually result in higher sentence in some circumstances, and that grouping is not appropriate under §3D1.2(b) because different victims are involved); *U.S. v. Kneeland,* 148 F.3d 6, 15–16 (1st Cir. 1998) (affirmed: unlike fraud guideline, "in this case at least, the offense level for money laundering was not based on aggregate harm and thus does not fall within the purview of subsection (d)"); *U.S. v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (reversed: guidelines for wire fraud and money laundering measure harm differently) [5#9]; *U.S. v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (same). See also *U.S. v. McClendon,* 195 F.3d 598, 601–02 (11th Cir. 1999) (affirmed: where "main connection between the laundered funds and the fraud scheme in this case is that the money represented the proceeds of the fraud, grouping properly declined); *U.S. v. Hildebrand,* 152 F.3d 756, 763 (8th Cir. 1998) (affirmed: "we agree with decisions holding that fraud and money laundering counts are not so closely related *as to permit loss and value grouping under §3D1.2(d)*," citing *Taylor* and *Johnson*, rejecting government contention that value of money laundered should be equated with total fraud loss). Cf. *U.S. v. Hetherington,* 256 F.3d 788, 797–98 (8th Cir. 2001) (affirmed: mail fraud counts and money laundering count embodied different conduct and were properly not grouped under §3D1.2(c)); *U.S. v. Lombardi,* 5 F.3d 568, 570–71 (1st Cir. 1993) (proper not to group three mail fraud counts with two money laundering counts even though same funds were involved—the different offenses involved distinct acts and different victims, and the frauds did not "embod[y] conduct that is treated as a specific offense characteristic" of money laundering) [6#6].

The circuits also disagreed over whether drug and money laundering offenses should be grouped. Compare *U.S. v. Harper,* 972 F.2d 321, 322 (11th Cir. 1992) (proper not to group drug trafficking and money laundering offenses—they are

neither crimes "of the general same type," §3D1.2, comment. (n.6), nor closely related) and *U.S. v. Gallo,* 927 F.2d 815, 823–24 (5th Cir. 1991) (do not group money laundering and drug offenses) with *U.S. v. Lopez,* 104 F.3d 1149, 1150–51 (9th Cir. 1997) (disagreeing with above cases and finding grouping appropriate under §3D1.2(b) & comment. (n.2)). In a later case, the Fifth Circuit distinguished *Gallo* and held that grouping was necessary to prevent double counting where defendant's drug offenses were used to increase his money laundering offense level under §2S1.1(b)(1) because he knew the money he laundered came from drug proceeds. The court found that grouping was required under §3D1.2(c) because the drug counts "embodie[d] conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to" the money laundering count. *U.S. v. Rice,* 185 F.3d 326, 328–29 (5th Cir. 1999). Accord *U.S. v. Bartley,* 230 F.3d 667, 670–73 (4th Cir. 2000).

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

2. Application of Adjustments

Note that when counts are grouped, courts should apply most adjustments to each count before grouping. See §3D1.3, comment. (n.1) ("The 'offense level' for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of chapter Three"); §1B1.1(c) and (d) (indicating that adjustments from Chapter Three, parts A, B, and C should be applied to individual counts). However, when counts are grouped under §3D1.2(d), "[d]etermine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole." USSG §3D1.3, comment. (n.3). For example, the Ninth Circuit held that it was error to apply two "vulnerable victim" enhancements under §3A1.1 for two separate fraud counts that were grouped under §3D1.2(d). *U.S. v. Caterino*, 957 F.2d 681, 684 (9th Cir. 1992) (offense characteristics apply to overall scheme, not individual victims or counts) [4#19]. See also *U.S. v. Nicolau,* 180 F.3d 565, 573–74 (4th Cir. 1999) ("the law in this circuit is clear that a role in the offense adjustment is applied *after* related offenses are grouped," and §3B1.1(a) enhancement was properly applied to total offense level of grouped money laundering and gambling offenses where defendant had leadership role in latter); *U.S. v. Savage,* 67 F.3d 1435, 1443 (9th Cir. 1995) (affirming four-level adjustment on sentence for money laundering on the basis of defendant's leadership role in underlying mail and wire fraud convictions that was relevant conduct); *U.S. v. Mizrachi*, 48 F.3d 651, 656 (2d Cir. 1995) (affirmed: court properly applied enhancements under §§3B1.1(a) and 2F1.1(b)(6) based on defendant's conduct in all five counts that were grouped under §3D1.2(d)).

Note that an adjustment may be applied to the one count—or aggregation of counts—that gives the highest offense level, even if the adjustment cannot be applied to other counts in the group. See, e.g., *U.S. v. Smith,* 196 F.3d 1034, 1036–37 (9th Cir. 1996) (affirmed: after determining base offense level under §3D1.3(b),

court properly applied §3B1.3 abuse of trust enhancement to highest level count—money laundering—even though abuse of trust occurred in other count); *U.S. v. Eng*, 14 F.3d 165, 170–71 (2d Cir. 1994) (affirmed: proper to apply four-level increase under §3B1.1(a) to base offense level of twelve aggregated drug counts to get highest offense level for group even though such an adjustment could not be applied to CCE count in same group because CCE offense includes leadership role). Cf. *U.S. v. Kleinebreil*, 966 F.2d 945, 954–55 (5th Cir. 1992) (enhancement for assault on official victim, §3A1.2 added to offense level for assault count should not also be added to offense level of marijuana counts that were related to, but not grouped with, assault; similarly, leadership role enhancement applicable to marijuana counts should not be added to offense level for assault).

However, the acceptance of responsibility reduction in §3E1.1 is applied after multiple counts are combined, not to each offense or each group. Thus, responsibility must be accepted for all counts to get a two-level reduction to the combined offense level. See *U.S. v. Thomas,* 242 F.3d 1028, 1034 (11th Cir. 2001); *U.S. v. Chambers,* 195 F.3d 274, 278–79 (6th Cir. 1999); *U.S. v. Ginn*, 87 F.3d 367, 370–71 (9th Cir. 1996); *Kleinebreil*, 966 F.2d at 953; *U.S. v. McDowell*, 888 F.2d 285, 293 (3d Cir. 1989). This also applies to the additional one-point reduction under §3E1.1(b). *U.S. v. Bourne,* 130 F.3d 1444, 1447 (11th Cir. 1997).

When a defendant is convicted of an offense involving obstruction of justice and the underlying offense, the guidelines direct that the counts be grouped under §3D1.2(c). The offense level for that group is "the offense level for the underlying offense increased by the 2–level adjustment specified by [§3C1.1], or the offense level for the obstruction offense, whichever is greater." USSG §3C1.1, comment. (n.8). See also *U.S. v. Maggi*, 44 F.3d 478, 482 (7th Cir. 1995) (affirming application of Note 8 to defendant convicted of money laundering and three counts of obstruction of justice).

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

1. Examples of Denials

District courts have broad discretion to grant or deny the reduction for acceptance of responsibility. See USSG §3E1.1, comment. (n.5); *U.S. v. Lghodaro*, 967 F.2d 1028, 1031–32 (5th Cir. 1992) (review is more deferential than clearly erroneous standard). It is most frequently denied for failure to cooperate with authorities or simply a failure, in the sentencing court's view, to accept responsibility for the criminal conduct.

It has also been properly denied where a defendant continued a course of unlawful conduct after arrest. See, e.g., *U.S. v. Hromada*, 49 F.3d 685, 691 (11th Cir. 1995) (continued use of drugs while on pretrial release); *U.S. v. Olvera*, 954 F.2d 788, 793 (2d Cir. 1992) (smuggling marijuana into jail while awaiting sentencing); *U.S. v. Reed*, 951 F.2d 97, 99–100 (6th Cir. 1991) (continued credit card fraud while in jail awaiting sentencing) [4#13]; *U.S. v. Snyder*, 913 F.2d 300, 305 (6th Cir. 1990) (used

jail phone to continue drug dealing during pretrial detention); *U.S. v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990) (continued course of fraudulent activity); *U.S. v. Sanchez*, 893 F.2d 679, 681 (5th Cir. 1990) (firearms offense and drug use while on pretrial release) [3#1]; *U.S. v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990) (continued drug activity after indictment); *U.S. v. Jordan*, 890 F.2d 968, 974 (7th Cir. 1989) (continued drug dealing and use). See also *U.S. v. Jessup*, 966 F.2d 1354, 1356–57 (10th Cir. 1992) (properly denied for defendant who continued similar criminal activity, even though evidence of that activity was obtained in violation of state law) [4#24].

Note that the Sixth Circuit held that additional criminal conduct "committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced," may not be used as the basis for denial of a §3E1.1 reduction. The criminal conduct must be related or similar to the offense of conviction. *U.S. v. Morrison*, 983 F.2d 730, 733–35 (6th Cir. 1993) (noting that most other cases affirming denials involved such related or similar conduct) [5#8]. If the criminal activity is related to the offense, however, denial of the adjustment is proper. See, e.g., *U.S. v. Walker,* 182 F.3d 485, 488–90 (6th Cir. 1999) (affirming denial for cocaine conspiracy defendant because testing positive for cocaine use "while free on bond awaiting sentencing demonstrates his failure to accept responsibility for his criminal conduct"); *U.S. v. Zimmer,* 14 F.3d 286, 289 (6th Cir. 1994) (same, for marijuana trafficking defendant who used marijuana while on bond awaiting sentencing). The Sixth Circuit has also held that continuing criminal activity that is used to deny the adjustment must occur *after* defendant is indicted or otherwise made aware of pending federal charges. See *U.S. v. Jeter,* 191 F.3d 637, 639–41 (6th Cir. 1999) (remanded: although defendant continued similar criminal conduct after his arrest on state charges for fraud, all of that conduct occurred before his indictment on or any knowledge of federal fraud charges).

However, other circuits have affirmed denials based on unrelated criminal conduct. See, e.g., *U.S. v. Prince,* 204 F.3d 1021, 1023–24 (10th Cir. 2000) (affirmed: "guidelines do not prohibit a sentencing court from considering . . . criminal conduct unrelated to the offense of conviction" in making §3E1.1 determination); *U.S. v. Ceccarani*, 98 F.3d 126, 130–31 (3d Cir. 1996) (drug use by theft defendant; disagreeing with *Morrison*); *U.S. v. Byrd*, 76 F.3d 194, 197 (8th Cir. 1996) (drug use by assault defendant); *U.S. v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (drug use by counterfeiting defendant—"the broad language of Note 1(b) indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally"); *U.S. v. Pace*, 17 F.3d 341, 343 (11th Cir. 1994) (marijuana use by false claims defendant; disagreed with *Morrison*); *U.S. v. O'Neil*, 936 F.2d 599, 600–01 (1st Cir. 1991) (affirmed denial based on defendant's drug use before sentencing for postal offenses: "We can find nothing unlawful about a court's looking to a defendant's later conduct in order to help the court decide whether the defendant is truly sorry for the crimes he is charged with"); *U.S. v. Watkins*, 911 F.2d 983, 984 (5th Cir. 1990) (affirmed denial of reduction based solely on fraud defendant's drug use while on release pending sentencing)

[3#12]; *U.S. v. Scroggins*, 880 F.2d 1204, 1215–16 (11th Cir. 1989) (continued drug use after theft arrest) [2#11].

The reduction has been properly denied for a refusal to provide financial information needed by the court to levy an appropriate fine. *U.S. v. Cross*, 900 F.2d 66, 70 (6th Cir. 1990) [3#5]. And false information given to a probation officer, even if not material, may warrant denial of the reduction. *U.S. v. De Felippis*, 950 F.2d 444, 447 (7th Cir. 1991) [4#13]. Cf. *U.S. v. Nuñez-Rodriguez*, 92 F.3d 14, 19–22 (1st Cir. 1996) (remanded: defendant's refusal to name accomplices may be considered in denying §3E1.1 reduction, but such refusal is not a per se bar to reduction).

Denial is also proper if defendant testifies untruthfully at trial. See, e.g., *U.S. v. Payne*, 962 F.2d 1228, 1236 (6th Cir. 1992) (district court found defendant had testified untruthfully at trial that he withdrew from conspiracy); *U.S. v. Zayas*, 876 F.2d 1057, 1060 (1st Cir. 1989) (committing perjury at trial) [2#9]. However, denial on the ground that the district court did not believe defendant's reason for committing the crime was held to be improper. Defendant otherwise accepted responsibility, and "[n]either §3E1.1 nor any cases we have found state or otherwise indicate that a defendant's claimed reason or motivation for committing a crime is a dispositive factor in determining whether to grant the adjustment unless the claim was intended as a defense to liability for the charged offense." *U.S. v. Gonzalez*, 16 F.3d 985, 991 (9th Cir. 1993) (superseding 6 F.3d 1415) [6#7]. See also *U.S. v. Khang*, 36 F.3d 77, 80 (9th Cir. 1994) (affirmed: lying about their motive for the crime in an attempt to get downward departure is not "relevant conduct," which would require denial of reduction, and, following *Gonzalez*, reduction could be given to defendants because "the lie would not establish a defense to the crime or avoid criminal liability"). The Sixth Circuit rejected *Gonzalez*, reasoning that "defendant's statements regarding his motivation are relevant in that they shed light on the sincerity of an asserted acceptance of responsibility. Where, as the district court found here, a defendant concocts a story that excuses his illegal conduct, a court may find no acceptance of responsibility. Even if the excuse is not a legal justification sufficient to negate criminal liability, it still might demonstrate the defendant's unwillingness to admit his culpability." *U.S. v. Greene*, 71 F.3d 232, 235 (6th Cir. 1995).

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

The reduction has been denied for refusal to reveal the whereabouts of money stolen from a robbery, which the court held was an indication that defendant had not demonstrated "sincere remorse for [his] crime." Also, voluntary restitution is one factor that favors granting the reduction, see §3E1.1, comment. (n.1(c)), and refusal to do so "blocks any inference of remorse or repentance." *U.S. v. Wells,* 154 F.3d 412, 413–14 (7th Cir. 1998). See also *U.S. v. Zichettello,* 208 F.3d 72, 107 (2d

Cir. 2000) (affirming denial of §3E1.1 reduction for refusal to pay promised restitution when funds to do so were available).

The lack of timeliness of a defendant's acceptance of responsibility may provide a reason for denial, and the district court "has substantial discretion on the issue." *U.S. v. Ochoa-Fabian*, 935 F.2d 1139, 1142 (10th Cir. 1991) (reduction properly refused defendant who denied essential elements of offense, was convicted at trial, and only afterward admitted guilt and expressed remorse). Accord *U.S. v. Osborne*, 931 F.2d 1139, 1155 (7th Cir. 1991) (affirmed: lack of remorse until "the final hour" proper basis for denial); *U.S. v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990) (affirming denial of reduction based partly on defendant's "delay in taking a plea until just before jury selection"). See also *U.S. v. Brenes,* 250 F.3d 290, 292–93 (5th Cir. 2001) (remanded: error to give reduction to defendant who went to trial and repeatedly denied responsibility until after warned several times by court during sentencing hearing that he faced longer sentence). The Fifth Circuit has noted that the addition of an extra-point reduction under §3E1.1(b), which focuses on the timeliness of a defendant's cooperation or guilty plea, does not mean that lack of timeliness is no longer a reason for denying the two-point reduction under §3E1.1(a). See *U.S. v. Diaz*, 39 F.3d 568, 572 (5th Cir. 1994) (affirmed: "While the terms of subsection (b) mandate consideration of timeliness, the terms of subsection (a) do not forbid it. Indeed, the consideration of timeliness is expressly allowed").

See also section III.E.4 for effect of legal defenses or proceeding to trial on decision to grant or deny reduction

2. Constitutional Issues

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

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

In holding that a sentencing court may not draw adverse inferences from a defendant's use of the Fifth Amendment to remain silent during sentencing, the Supreme Court added that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 . . . , is a separate question. It is not before us, and we express no view on it." *Mitchell v. U.S.,* 119 S. Ct. 1307, 1311–16 (1999) (remanded: defendant does not lose Fifth Amendment rights at sentencing by pleading guilty; district court erred by partly basing determination of drug quantity on adverse inference from defendant's failure to testify at sentencing), *rev'g* 122 F.3d 185 (3d Cir. 1997) [10#4].

The Ninth Circuit held that "a sentencing court cannot consider against a defendant any constitutionally protected conduct." The court reversed a denial that was based on defendant's failure to voluntarily surrender to authorities or assist in the recovery of the "fruits and instrumentalities of the offense," factors that are listed in the commentary to §3E1.1 as to be used in "determining whether a defendant qualifies for this provision." *U.S. v. Watt*, 910 F.2d 587, 590–93 (9th Cir. 1990) [3#10]. See also *U.S. v. La Pierre*, 998 F.2d 1460, 1467–68 (9th Cir. 1993) (remanded: may not deny reduction because defendant refused to discuss facts with probation officer and planned to appeal where defendant otherwise accepted responsibility) [6#1]. But cf. *U.S. v. Wells*, 154 F.3d 412, 413–14 (7th Cir. 1998) (reduction may be denied for defendant's refusal to disclose whereabouts of almost $700,000 from robbery).

Similarly, the Eleventh Circuit held that a court "may *not* balance the exercise of [statutory or constitutional] rights against the defendant's expression of remorse to determine whether the 'acceptance [of responsibility]' is adequate." *U.S. v. Rodriguez,* 959 F.2d 193, 195–98 (11th Cir. 1991) (remanded for reconsideration of denial to defendants who exercised Fifth Amendment rights and right to appeal) [4#23]. Note that the Ninth Circuit later held that an assertion of Fifth Amendment rights does not *entitle* a defendant to the reduction, and it cannot be granted to a defendant who refuses to make any statement, because an affirmative acceptance of responsibility is required. *U.S. v. Skillman,* 922 F.2d 1370, 1378–79 (9th Cir. 1990) (reversing reduction because "there was no indication of contrition . . . before or after" conviction). See also *U.S. v. Carroll,* 6 F.3d 735, 739 (11th Cir. 1993) (clear error to award reduction because of Fifth Amendment concerns when defendants "never admitted guilt nor expressed any remorse"); *Rodriguez,* 959 F.2d at 195–98 ("sentencing court is justified in considering the defendant's conduct prior to, during, and after the trial to determine if the defendant has shown any remorse").

The Third Circuit held that the Fifth Amendment protection against self-incrimination applies to related conduct, and the reduction may not be denied when a defendant refuses to admit conduct beyond the offense of conviction. *U.S. v. Frierson*, 945 F.2d 650, 658–60 (3d Cir. 1991) [4#11]. In ruling so, the appellate court agreed with the First and Second Circuits' holdings that denial of the reduction is a "penalty" rather than a "denied benefit." See *U.S. v. Oliveras*, 905 F.2d 623, 627–28 (2d Cir. 1990); *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989). The *Frierson*

court held, however, that this right "is not self-executing"; the reduction was properly refused, based on defendant's denial of possession of a gun in a count that was dismissed, because he volunteered the denial to his probation officer instead of remaining silent and claiming the privilege. 945 F.2d at 661–62. Accord *U.S. v. Corbin*, 998 F.2d 1377, 1390 (7th Cir. 1993) (affirmed: defendant failed to claim privilege, and denial was based on other, voluntarily made statements). Note that, at least for relevant conduct, since Nov. 1, 1992, the Guidelines have allowed defendants to remain silent and still receive the acceptance of responsibility reduction. See §3E1.1, comment. (n.1(a)) and discussion in sec. III.E.3.

For the offense of conviction, however, the Third Circuit later held that denial of the §3E1.1 reduction should be construed as a denied benefit rather than a penalty, concluding it must follow *Corbitt v. New Jersey,* 439 U.S. 212 (1978). "To the extent that *Corbitt* is in tension with our decision in *Frierson*, we must follow the Supreme Court. Sentencing Guideline 3E1.1 creates an analogous incentive for defendants to plead guilty, and under *Corbitt*, this incentive is constitutional." *U.S. v. Cohen,* 171 F.3d 796, 805 (3d Cir. 1999). Accord *U.S. v. Cojab,* 978 F.2d 341, 343 (7th Cir. 1992); *Mourning,* 914 F.2d at 706–07; *U.S. v. Trujillo,* 906 F.2d 1456, 1461 (10th Cir. 1990); *U.S. v. Gordon,* 895 F.2d 932, 936–37 (4th Cir. 1990); *Henry,* 883 F.2d at 1011–12.

Several circuits have rejected the argument that §3E1.1 punishes them for preserving their constitutional right to appeal by maintaining their innocence. The First Circuit, for example, reasoned that a defendant's punishment is not increased for failure to accept responsibility. "Instead, defendants who choose to demonstrate remorse are granted special leniency. The fact that §3E1.1 forces defendants to make a difficult choice simply does not violate their constitutional rights to trial or to an appeal." *U.S. v. Rosario-Peralta,* 199 F.3d 552, 570–71 (1st Cir. 1999). Accord *U.S. v. Davis*, 960 F.2d 820, 829–30 (9th Cir. 1992); *U.S. v. McDonald,* 935 F.2d 1212, 1222 (11th Cir. 1991); *U.S. v. Parker,* 903 F.2d 91, 105–06 (2d Cir. 1990); *U.S. v. Monsour,* 893 F.2d 126, 129 (6th Cir. 1990).

See also sections III.E.3 and 4

3. For Relevant Conduct or Offense of Conviction?

Must a defendant accept responsibility for all relevant criminal conduct, including counts that were dismissed, or only for conduct in the offense of conviction? The Background Commentary to §3E1.1 was amended Nov. 1, 1990, to clarify that "related conduct" should be considered. However, effective Nov. 1, 1992, that commentary was deleted and the language of the guideline and commentary changed. Now, defendant must accept responsibility "for his offense," §3E1.1(a). Application Note 1(a) was changed to list as an "appropriate consideration" for the reduction "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3. Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of convic-

tion . . . . However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

Thus, it would appear that relevant conduct may still come into play under §3E1.1. See, e.g., *U.S. v. Rutledge*, 28 F.3d 998, 1002 (9th Cir. 1994) (affirmed: under amended Note 1(a), "a defendant has the right to remain silent regarding relevant, uncharged conduct; but, once he relinquishes that right and falsely denies such conduct, the district court may weigh the false denial in considering a reduction for acceptance of responsibility"); *U.S. v. Anderson*, 15 F.3d 979, 980–81 (10th Cir. 1994) (following Note 1, affirmed denial because defendant falsely denied possessing a knife, conduct that was relevant to his offense of conviction); *U.S. v. Gonzales*, 12 F.3d 298, 300 (1st Cir. 1993) (citing 1992 amendment, defendant need not admit conduct beyond offense of conviction, but "a court may properly consider whether a defendant who mendaciously denies relevant conduct has acted in a manner inconsistent with accepting responsibility"); *U.S. v. White*, 993 F.2d 147, 150–51 (7th Cir. 1993) (noting 1992 amendment, finding sentencing court properly considered defendant's false denials of relevant conduct to deny reduction). See also *U.S. v. Patino-Cardenas*, 85 F.3d 1133, 1136 (5th Cir. 1996) (remanded: error to deny reduction to defendant who "adequately admitted the conduct comprising the offense and either admitted or did not falsely deny the additional relevant conduct identified by the government"); *U.S. v. Hammick*, 36 F.3d 594, 600–01 (7th Cir. 1994) (reduction could not be denied for refusal to discuss source of cash in excess of that received from charged offenses, but was properly denied for refusal to discuss means of travel to location of crime and source of counterfeit credit cards and other documents used in crime) [7#3]; *U.S. v. Meacham*, 27 F.3d 214, 217 (6th Cir. 1994) (holding that defendant who refused, on the advice of counsel, to discuss his role in narcotics conspiracy with his probation officer failed to demonstrate acceptance of responsibility).

Note that "'the conduct comprising the offense of conviction' may be broader than the conduct that meets the statutory elements of the offense." Thus, the Seventh Circuit held that it was proper to deny the reduction for a defendant, convicted of possessing marijuana while a prisoner in a federal correctional facility, because he refused to reveal the source of the marijuana. "[T]he sentencing court can require that the defendant provide a 'candid and full unraveling' of the circumstances surrounding the offense of conviction, including information about the methods used by the defendant to commit his crime and the source of the contraband he possessed at the time of arrest." *U.S. v. Larkin,* 171 F.3d 556, 558–59 (7th Cir. 1999).

A false denial of relevant conduct may not automatically preclude the award of a §3E1.1 reduction. Application Note 3 states that "[e]ntry of a plea of guilty prior to the commencement of trial combined with . . . truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable . . . will constitute significant evidence of acceptance of responsibility . . . . However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such ac-

ceptance of responsibility." The Second Circuit read this language "to counsel weighing the evidence favoring the acceptance of responsibility adjustment against evidence of conduct inconsistent with acceptance." Thus, "a false denial of relevant conduct is simply one factor among many to be weighed by a district court considering whether a downward adjustment for acceptance of responsibility is warranted." *U.S. v. Ruggiero*, 100 F.3d 284, 295 (2d Cir. 1996) (affirming §3E1.1 reduction even though defendant appeared to falsely deny relevant conduct). See also *U.S. v. Forte*, 81 F.3d 215, 218 (D.C. Cir. 1996) (dicta stating that Note 3 "strongly suggests . . . that the Commission viewed the lies about 'additional relevant conduct' discussed in Application Note 1(a) as merely a factor in the trial judge's decision, not a trump"). Cf. *U.S. v. Salinas,* 122 F.3d 5, 7 (5th Cir. 1997) (affirmed: allowing reduction for undereducated and unsophisticated defendant who may have inadvertently denied some relevant conduct, indicating that false denials must be intentional to run afoul of Note 1(a) in §3E1.1).

The Seventh Circuit held that a defendant may challenge the legal conclusion of whether admitted facts constitute relevant conduct and remain eligible for the §3E1.1 reduction. "We think this situation is closely analogous to challenging the constitutionality of a statute while admitting the conduct which would violate the statute, or challenging the applicability of a statute to the facts. In both cases, the application notes to the Guidelines suggest that such challenges do not deprive an otherwise eligible defendant of the reduction for acceptance of responsibility." In that case, it was defendant's attorney who raised the legal challenge, but also challenged the factual findings underlying the findings of relevant conduct. The appellate court had to determine when an attorney's arguments that, effectively, falsely deny relevant conduct, may be attributed to a defendant. "In a case such as this one, where the defendant remains otherwise silent as to relevant conduct but his lawyer challenges certain facts alleged in the PSR, we think the court should attempt to ensure that the defendant understands and approves the argument before attributing the factual challenges in the argument to the defendant for purposes of assessing acceptance of responsibility. . . . [B]ecause the acceptance of responsibility assessment is a finding relating to the moral acceptance of responsibility by the defendant, the district court should have some reason to attribute the attorney's statements to the otherwise silent defendant." *U.S. v. Purchess*, 107 F.3d 1261, 1267–69 (7th Cir. 1997) (affirmed denial on alternate ground) [9#6].

Before the 1990 and 1992 amendments, the circuits split on whether to consider relevant conduct. Compare *U.S. v. Piper*, 918 F.2d 839, 840–41 (9th Cir. 1990) (for count of conviction only) [3#16], *U.S. v. Oliveras*, 905 F.2d 623, 626–27 (2d Cir. 1990) (same) [3#9], and *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989) (same) [2#6], with *U.S. v. Frierson*, 945 F.2d 650, 655–56 (3d Cir. 1991) (for all criminal conduct, not just count of conviction) [4#11], *U.S. v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990) (same), *U.S. v. Munio*, 909 F.2d 436, 439–40 (11th Cir. 1990) (same), and *U.S. v. Gordon*, 895 F.2d 932, 936–37 (4th Cir. 1990) (same) [3#2]. See also *U.S. v. Ruth*, 946 F.2d 110, 113 (10th Cir. 1991) (affirmed refusal for defendant who did not accept responsibility for conduct in dismissed, related count);

U.S. v. Herrera, 928 F.2d 769, 774–75 (6th Cir. 1991) (reduction properly refused for defendant who accepted responsibility only for quantity of drugs in indictment, not for larger amount in related conduct). Cf. *U.S. v. Shipley*, 963 F.2d 56, 58–60 (5th Cir. 1992) (reduction properly denied for defendant who accepted full responsibility for offense but refused to admit leadership role: "Even though leadership role in the offense of conviction is covered in [§3B1.1], such a role is conduct related to the offense and thus proper grist for the 'acceptance of responsibility' mill.") [4#24].

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

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

4. Procedural Issues

a. Guilty pleas

Most courts have specifically held that a plea of guilty by itself is insufficient, that a defendant must affirmatively demonstrate acceptance of responsibility. See, e.g., *U.S. v. Ruth,* 946 F.2d 110, 113 (10th Cir. 1991); *U.S. v. Fields,* 906 F.2d 139, 142 (5th Cir. 1990); *U.S. v. Guarin,* 898 F.2d 1120, 1122 (6th Cir. 1990); *U.S. v. Gonzalez,* 897 F.2d 1018, 1020 (9th Cir. 1990); *U.S. v. Blanco,* 888 F.2d 907, 911 (1st Cir. 1989); *U.S. v. Ortiz,* 878 F.2d 125, 128 (3d Cir. 1989); *U.S. v. Spraggins,* 868 F.2d 1541, 1542–43 (11th Cir. 1989). See also USSG §3E1.1(c) ("A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."); *U.S. v. Reed,* 951 F.2d 97, 100 (6th Cir. 1991) (mere willingness to accept punishment is insufficient). Cf. *U.S. v. Harriott*, 976 F.2d 198, 202 (4th Cir. 1992) (reversed: "the district court's sole reason for finding that [defendant] had accepted responsibility . . . was that [defendant] agreed that he had been convicted").

The Eighth Circuit held that a guilty plea may be sufficient if the defendant also

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

Similarly, a defendant who enters an *Alford* plea may still qualify for the §3E1.1 reduction. See *U.S. v. Tucker,* 925 F.2d 990, 992–93 (6th Cir. 1991) (reduction is not per se precluded by use of *Alford* plea, but denial affirmed because defendant did not otherwise demonstrate acceptance of responsibility for her actions) [3#20]. Other circuits have basically agreed, indicating that the *Alford* plea is a factor that may be considered and that without a further demonstration of acceptance of responsibility the reduction may be denied. See, e.g., *U.S. v. Morris,* 139 F.3d 582, 584 (8th Cir. 1998) (affirmed: denial proper where "district court was careful to clarify that the *Alford* plea was only a factor in the decision whether to grant the reduction, not a disqualifier"); *U.S. v. Harlan,* 35 F.3d 176, 181 (5th Cir. 1994) (reduction properly denied to *Alford* defendant who refused to admit essential element of offense and persisted in explanation of conduct that the court did not find credible); *U.S. v. Burns,* 925 F.2d 18, 20–21 (1st Cir. 1991) (affirmed: "district court did not rely upon a per se rule regarding *Alford* pleas" to deny reduction); *U.S. v. Rodriguez,* 905 F.2d 372, 374 (11th Cir. 1990) (denial proper where court considered other evidence "tending to show that Rodriguez had not fully accepted responsibility").

b. Defenses

Some courts have concluded that a defendant's legal challenges cannot be the sole basis for denying the §3E1.1 reduction. See *U.S. v. Ochoa-Gaytan,* 265 F.3d 837, 844 (9th Cir. 2001) (remanded: "defendant's challenge to the admissibility of a custodial statement on the basis of *Miranda* is constitutionally protected conduct. A district court may not, therefore, deny a defendant a reduction for acceptance of responsibility based on the defendant's attempt to suppress her or his custodial statement."); *U.S. v. McKittrick,* 142 F.3d 1170, 1178 (9th Cir. 1998) (remanded: defendant "was entitled . . . to challenge the intent requirement of [the statute of conviction] without forgoing his eligibility for the reduction"); *U.S. v. Purchess,* 107 F.3d 1261, 1267 (7th Cir. 1997) (affirmed: do not deny reduction because "defendant challenges a legal conclusion drawn from the facts the defendant admits"); *U.S. v. Fells,* 78 F.3d 168, 172 (5th Cir. 1996) (remanded: error to deny reduction to defendant who "freely admitted all the facts but challenged their legal interpretation" at trial). See also USSG §3E1.1, comment. (n.2) (defendant may go to trial "to assert and preserve issues that do not relate to factual guilt" and remain eligible for reduction). Cf. *U.S. v. Hill,* 197 F.3d 436, 446–47 (10th Cir. 1999) (reduction properly denied for defendant who claimed he went to trial to preserve his legal argument that the charged conduct did not violate statute—"he never admitted, prior to trial, all of the essential elements of the charged crimes").

The Eleventh Circuit initially reached the same conclusion, see *U.S. v. Wright,*

117 F.3d 1265, 1275–77 (11th Cir. 1997) (remanded: error to base denial of reduction to defendant who truthfully admitted facts on court's belief his *legal* challenge lacked merit—"An otherwise deserving defendant cannot be denied a reduction under §3E1.1 solely because he asserts a challenge to his conviction that is unrelated to factual guilt, such as a constitutional challenge to the statute or a challenge to the applicability of the statute to his conduct."). However, the court granted rehearing on that issue and vacated the original opinion, holding instead that the denial was properly based on the sentencing court's belief that the defendant "was not remorseful and did not think that his conduct was wrong." *U.S. v. Wright,* 133 F.3d 1412, 1413–14 (11th Cir. 1998). The court went on to state that "even if the district court's conclusion rested exclusively on Wright's challenges to the constitutionality of his convictions, the district court's refusal to reduce Wright's offense level was permissible." Among the cases cited as support was *U.S. v. Smith,* 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (affirming §3E1.1(b) denial to defendant who claimed his objections were legal when they were actually factual: "Our case law permits a district court to deny a defendant a reduction under §3E1.1 based on conduct inconsistent with acceptance of responsibility, even when that conduct includes the assertion of a constitutional right. . . . In addition, frivolous legal challenges could suggest to the district court that the defendant has not accepted responsibility for his conduct. Therefore, we hold that a district court may consider the nature of such challenges along with the other circumstances in the case when determining whether a defendant should receive a sentence reduction for acceptance of responsibility.").

There is a split in the circuits over whether use of an entrapment defense at trial automatically precludes a §3E1.1 reduction. Some circuits liken it to pleading not guilty and going to trial, holding that the reduction "is not per se unavailable just because the defendant chooses to go to trial solely on an entrapment defense. . . . A defendant will need to evidence acceptance of responsibility, primarily through pretrial statements and conduct, before an acceptance of responsibility reduction would be warranted. *See* U.S.S.G. §3E1.1, cmt. 2." *U.S. v. Garcia,* 182 F.3d 1165, 1172–74 (10th Cir. 1999) (affirming reduction). See also *Joiner v. U.S.,* 103 F.3d 961, 963 (11th Cir. 1997) (in §2255 case, noting that defendant "would not have been barred as a matter of law from receiving an adjustment merely because he asserted an entrapment defense at trial . . . . Rather, as with cases involving any other defense, whether a defendant has accepted responsibility is a fact-based question which requires the district court to carefully review all of the evidence bearing on a particular defendant's contrition."); *U.S. v. Corral-Ibarra,* 25 F.3d 430, 440–41 (7th Cir. 1994) ("an entrapment defense, if pleaded in good faith," may not disqualify defendant from §3E1.1 reduction, but "it remains the defendant's task to manifest in some way that he has in fact acknowledged the wrongfulness of his conduct"); *U.S. v. Davis,* 36 F.3d 1424, 1435–36 (9th Cir. 1994) (same) (replacing opinion at 15 F.3d 902); *U.S. v. Fleener,* 900 F.2d 914, 918 (6th Cir. 1990) (affirmed: "Such a defense is no less inconsistent with [§3E1.1] than is a plea of not guilty, which does not raise an absolute bar to a court's consideration.") [3#6].

Other circuits have found that pursuing an entrapment defense was inconsistent

with acceptance of responsibility as a matter of law. The Fifth Circuit held that although defendant "admitted committing the criminal *acts*, his assertion of entrapment was a denial of factual guilt, because it is a denial of subjective predisposition and, consequently, of the required element of *mens rea*. . . . [A]n entrapment defense is a challenge to criminal intent and thus to culpability. Accordingly, this is not one of those 'rare situations,' contemplated by the guideline commentary, in which a defendant may proceed to trial and still satisfy §3E1.1(a)." *U.S. v. Brace,* 145 F.3d 247, 265 (5th Cir. 1998). See also *U.S. v. Chevre,* 146 F.3d 622, 625 (8th Cir. 1998) (affirmed: "We believe that '[w]here a defendant persists in asserting entrapment, she cannot also claim acceptance of responsibility.'"); *U.S. v. Simpson*, 995 F.2d 109, 112 (7th Cir. 1993) ("Where a defendant persists in asserting entrapment, she cannot also claim acceptance of responsibility"); *U.S. v. Hansen*, 964 F.2d 1017, 1021 (10th Cir. 1992) (same). Cf. *U.S. v. Kirkland,* 104 F.3d 1403, 1405–06 (D.C. Cir. 1997) (affirming denial on facts and, while not absolutely rejecting possibility, expressing agreement with cases above and stating that it doubted "that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility"); *U.S. v. Demes,* 941 F.2d 220, 222 (3d Cir. 1991) (affirmed: "Ordinarily a claim of entrapment at trial seems to be the antithesis of the acceptance of responsibility. . . . While it is conceivable to hypothesize a case in which a plea of entrapment would not be inconsistent with the acceptance of responsibility," this was not such a case).

Other cases, while not necessarily precluding the possibility of a §3E1.1 reduction for a defendant claiming entrapment, have affirmed denials based on the facts. See, e.g., *U.S. v. Thomas,* 97 F.3d 1499, 1501 (D.C. Cir. 1996) (reduction properly denied to defendant who "persisted in his entrapment claim from trial through sentencing, . . . offered not one word of remorse, of culpability, of human error, . .. did not apologize or exhibit any shame [and] insisted that he was 'truly' entrapped, in other words, that the government made him do it"); *U.S. v. Spires,* 79 F.3d 464, 467 (5th Cir. 1996) (affirmed: denial proper where defendant presented defenses of entrapment by estoppel and duress, "both of which required proof of additional facts" that were disputed at trial); *U.S. v. Molina,* 934 F.2d 1440, 1450–51 (9th Cir. 1991) (affirmed: although defense of entrapment does not necessarily preclude acceptance of responsibility, reduction properly denied because defendant's version of events differed from government's and indicated he did not accept responsibility).

The reduction was improperly denied for lack of timeliness for defendants who went to trial because plea agreements were not available, claimed duress as a defense, and maintained a claim of incomplete duress after trial. *U.S. v. Johnson,* 956 F.2d 894, 904–05 (9th Cir. 1992) [4#16]. See also *U.S. v. Dickerson,* 114 F.3d 464, 470 at n.2 (4th Cir. 1997) ("propounding a duress defense does not foreclose a finding of acceptance of responsibility"). And one court held that "a defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility re-

duction under the sentencing guidelines." *U.S. v. Barris,* 46 F.3d 33, 35 (8th Cir. 1995).

c. After trial

The reduction is not automatically precluded by a decision to go to trial, §3E1.1, comment. (n.2), and the court should consider defendant's reasons for doing so. See, e.g., *U.S. v. Guerrero-Cortez,* 110 F.3d 647, 654–56 (8th Cir. 1997) (remanded: clear error to deny reduction on ground that defendant did not admit conduct until after trial where record showed that defendant had always been willing to plead guilty to offenses involving two kilograms of cocaine—the amount he was ultimately held responsible for—but government refused to accept guilty plea unless defendant admitted to five kilograms); *U.S. v. McKinney,* 15 F.3d 849, 852–54 (9th Cir. 1994) (remanded: "this is one of the unusual cases"—defendant attempted to plead guilty, was rebuffed by court, was confused about his plea status, only put on "the most minimal and perfunctory of defenses," cooperated with authorities, and expressed sincere remorse); *U.S. v. Broussard,* 987 F.2d 215, 224 (5th Cir. 1993) (remanded: error to deny reduction to defendant who refused plea agreement and went to trial to contest whether law applied to his conduct—he did not deny "essential factual elements of guilt") [5#13]; *U.S. v. Rodriguez*, 975 F.2d 999, 1008–09 (3d Cir. 1992) (remanded for reconsideration of defendants' choices to reject plea agreements and contest issues on which they prevailed either at trial or on appeal) [5#5]. See also *U.S. v. Fields,* 39 F.3d 439, 447 (3d Cir. 1994) (remand required where denial of extra-point reduction under §3E1.1(b) "was based at least in part on the defendant's refusal to plead guilty to count III, on which he was acquitted"). Cf. *U.S. v. Castillo-Valencia,* 917 F.2d 494, 501 (11th Cir. 1990) (affirmed denial: "a defendant's decision to go to trial may properly be considered along with other factors in determining whether there has been an acceptance of responsibility").

The Tenth Circuit affirmed the reduction for a defendant, convicted of assault on a federal officer after hitting the officer's car with his truck during a chase, who went to trial to dispute that he had the intent to cause harm to the officer. "Our decision rests in part on the fact that Mr. Gauvin went to trial only to contest the legal element of intent. . . . Mr. Gauvin admitted to all the conduct with which he was charged. He simply disputed whether his acknowledged factual state of mind met the legal criteria of intent to harm or cause apprehension." Although the jury disagreed, the district court could find that defendant argued in good faith "that he did not intend, while drunk and scared, to cause injury to others. Further, he contended that his drunkenness rendered him incapable of forming the requisite mens rea. This defense—essentially a challenge to the applicability of the statute to his conduct, see USSG §3E1.1, comment. (n.2)—does not as a matter of law preclude application of the guideline." *U.S. v. Gauvin,* 173 F.3d 798, 806 (10th Cir. 1999).

Application Note 2 states that, whatever a defendant's reasons for going to trial, "a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." See also *U.S. v. Gallegos,* 129 F.3d 1140,

1147 (10th Cir. 1997) (remanded: error to grant reduction solely because of statements defendant made after trial).

However, the reduction should not be given to a defendant who withdraws a guilty plea and then denies guilt at trial. *U.S. v. Amos,* 952 F.2d 992, 995 (8th Cir. 1991) (reversed) [4#18]. And it was improper to grant the reduction to a defendant who admitted one element of his offense but denied another, in this case a perjury defendant who admitted he lied but denied the lies were material. The court also held that agreeing to a bench, rather than jury, trial was not a ground for the reduction. *U.S. v. Dickerson,* 114 F.3d 464, 469–70 (4th Cir. 1997) (remanded). See also *U.S. v. Starks,* 157 F.3d 833, 840–41 (11th Cir. 1998) (remanded: reduction should not have been given to defendant who admitted making illegal payments but denied having the requisite intent—"an essential element of the charges on which he was convicted" and therefore "a factual denial of guilt"). Note that one circuit has held that, after the reduction has been granted for a defendant who went to trial, the decision to go to trial may be used as the reason for selecting a higher sentence within the guideline range. See *U.S. v. Jones,* 997 F.2d 1475, 1477–80 (D.C. Cir. 1993) (en banc) [6#2].

The First Circuit distinguished the situation where a defendant, facing three charges, chose not to accept an offer to plead guilty to two of the charges and went to trial on all three because the government would not dismiss the third. Even though he was acquitted of the third charge, it was not an abuse of discretion to deny a §3E1.1 reduction for the offenses of conviction because "the fact remains that he could have pleaded to counts I and II, preserved his defense on count III, and spared the government the necessity of proving his guilt at trial on the drug counts." *U.S. v. De Leon Ruiz,* 47 F.3d 452, 455–56 (1st Cir. 1995). See also *U.S. v. Dozier,* 162 F.3d 120, 126–27 (D.C. Cir. 1998) (proper to refuse §3E1.1 reduction for defendant who tried to plead guilty to weapons charges if government would dismiss drug charges, went to trial and was convicted only on weapons counts, because he contested guilt on weapons charges at trial and also failed to adequately demonstrate acceptance of responsibility for any of the offenses). Cf. *U.S. v. Griffin,* 154 F.3d 762, 764 (8th Cir. 1998) (affirmed: denial not clearly erroneous for defendant who pled guilty before second trial, voluntarily surrendered law license, and publicly apologized to constituents, but had strongly denied any wrongdoing until after first trial ended in mistrial); *U.S. v. Maldonado,* 42 F.3d 906, 913–14 (5th Cir. 1995) (affirmed: not improper to deny reduction to defendant who, after being denied conditional plea of guilty, challenged search during bench trial but otherwise stipulated to all disputed facts—district court reasonably concluded that, because the challenged evidence was dispositive of guilt or innocence, "a challenge to the admissibility of the evidence is indistinguishable from a challenge to factual guilt").

The Seventh Circuit held that going to trial and steadfastly denying guilt does not preclude the reduction if there is an independent basis for granting it. "Application Note 1(c) to §3E1.1 lists 'voluntary payment of restitution prior to adjudication of guilt' as an independent reason for a two-level acceptance-of-responsibility reduction. Bean repaid the bank before the adjudication of guilt, and the district court

therefore was entitled to award a reduction for acceptance of responsibility even though Bean denied guilt." *U.S. v. Bean,* 18 F.3d 1367, 1368 (7th Cir. 1994) (remanded: departure for "extraordinary acceptance of responsibility" by repaying fraudulently obtained funds before trial was improper, but court should consider reduction under §3E1.1). Cf. *U.S. v. Szarwark,* 168 F.3d 993, 997 (7th Cir. 1999) (remanded: restitution must be voluntary—error to grant reduction where restitution by fraud defendant occurred when defrauded company simply kept money that it otherwise would have owed to defendant); *U.S. v. Bennett,* 37 F.3d 687, 695 (1st Cir. 1994) (remanded: restitution paid as part of settlement of civil lawsuit "was not a 'voluntary payment of restitution prior to adjudication of guilt' . . . that justifies a reduction for acceptance of responsibility" via Note 1(c)); *U.S. v. Irons,* 53 F.3d 947, 950 (8th Cir. 1995) (agreeing with *Bennett* that "restitution to settle a civil lawsuit . . . does not reveal remorse or a willingness to obey the law and is not what the Guidelines mean by a voluntary payment of restitution").

d. With obstruction of justice, §3C1.1

Note that the reduction may be given even if an obstruction of justice enhancement was imposed. USSG §3E1.1, comment. (n.4). See also *U.S. v. Lallemand*, 989 F.2d 936, 938 (7th Cir. 1993) (affirming §3C1.1 enhancement based on defendant's instructing friend to destroy evidence before defendant's arrest even though defendant received §3E1.1 reduction for post-arrest contrition); *U.S. v. Hicks,* 948 F.2d 877, 885 (4th Cir. 1991) (affirming reduction for helping authorities retrieve cocaine, even when §3C1.1 obstruction enhancement was given for discarding same cocaine during high-speed chase) [4#13]. But cf. *U.S. v. Hudson,* 272 F.3d 260, 264 (4th Cir. 2001) (error to give reduction to defendant who fled before sentencing and remained at large because he feared a long sentence: "as a matter of law, . . . fear that the government will not recommend a downward departure for assistance is not the 'extraordinary case' that permits the grant of acceptance of responsibility when the defendant's conduct supports an obstruction of justice"); *U.S. v. Amos*, 984 F.2d 1067, 1072–73 (10th Cir. 1993) (affirmed denial of §3E1.1 reduction where defendant's escape attempt before sentencing hearing earned §3C1.1 enhancement for this offense—not an "extraordinary case" warranting both adjustments).

To determine if a case is "extraordinary" under Note 4, the Ninth Circuit held that "the relevant inquiry . . . is whether the defendant's obstructive conduct is *not inconsistent* with the defendant's acceptance of responsibility. [This occurs] when a defendant, although initially attempting to conceal the crime, eventually accepts responsibility for the crime and abandons all attempts to obstruct justice. . . . In other words, as long as the defendant's acceptance of responsibility is not contradicted by an ongoing attempt to obstruct justice, the case is an extraordinary case within the meaning of Application Note 4." *U.S. v. Hopper,* 27 F.3d 378, 383 (9th Cir. 1994).

The Eighth Circuit, however, specifically disagreed with *Hopper* in holding that a district court erred in finding "as a matter of law that mere cessation of obstructive

conduct coupled with a guilty plea to the underlying offense necessarily makes a case extraordinary for purposes of §3E1.1, application note 4." Rejecting what it called the "bright line definition" of *Hopper* and noting that "there is no magic formula for defining an 'extraordinary case,'" the court held that "the district court should have taken into account the totality of the circumstances, including the nature of the appellee's obstructive conduct and the degree of appellee's acceptance of responsibility. Among other things, the district court should have considered whether, for example, the obstruction of justice was an isolated incident early in the investigation or an on-going effort to obstruct the prosecution. It should have considered whether appellee voluntarily terminated his obstructive conduct, or whether the conduct was stopped involuntarily by law enforcement. . . . The district court should have noted whether appellee admitted and recanted his obstructive conduct, or whether he denied obstruction of justice at sentencing. . . . Moreover, in our opinion the district court should have also weighed not only whether the defendant pleaded guilty to the underlying offense but also whether he assisted in the investigation of his offense and the offenses of others." *U.S. v. Honken,* 184 F.3d 961, 968–69 (8th Cir. 1999). Accord *U.S. v. Chung,* 261 F.3d 536, 540 (5th Cir. 2001); *U.S. v. Buckley,* 192 F.3d 708, 711 (7th Cir. 1999).

e. Other issues

The Fourth Circuit has held that rehabilitation prospects are not an element of acceptance of responsibility, and it was error to deny the reduction to a defendant whose mental condition made rehabilitation unlikely. *U.S. v. Braxton*, 903 F.2d 292, 296 (4th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 1854 (1991) [3#8]. But cf. *U.S. v. Reed*, 951 F.2d 97, 100 (6th Cir. 1991) (reduction denied because defendant did not show contrition, "which may be the best predictor for rehabilitation"). The Tenth Circuit held that "a defendant may not utilize post-sentencing contrition to warrant an acceptance of responsibility reduction at resentencing on remand if he was ineligible for such a reduction at the time his initial sentence was imposed." *U.S. v. Davis,* 182 F.3d 1201, 1202 (10th Cir. 1999) (affirmed: proper to deny reduction for rehabilitative efforts in prison).

If the denial of the acceptance of responsibility reduction is based on an improper ground, it may still be upheld if there is a valid ground for denial. See, e.g., *U.S. v. Purchess*, 107 F.3d 1261, 1269 (7th Cir. 1997) [9#6]; *U.S. v. Diaz*, 39 F.3d 568, 571 (5th Cir. 1994); *U.S. v. Ramirez*, 910 F.2d 1069, 1071 (2d Cir. 1990) [3#12].

A district court may not give a one-point reduction for a defendant's "partial acceptance of responsibility" or for "being halfway convinced that a defendant accepted responsibility." *U.S. v. Valencia*, 957 F.2d 153, 156 (5th Cir. 1992) ("plain language of §3E1.1 indicates that a district court *must* reduce the offense level by *two* levels if it finds that the defendant has *clearly* accepted responsibility") [4#21]. Accord *U.S. v. Jeter,* 236 F.3d 1032, 1034 (9th Cir. 2001); *U.S. v. Atlas*, 94 F.3d 447, 452 (8th Cir. 1996); *U.S. v. Carroll*, 6 F.3d 735, 740–41 (11th Cir. 1993).

A stipulation in a plea agreement by the government and defendant that the de-

fendant accepted responsibility is not binding on the sentencing court. *U.S. v. Nunley*, 873 F.2d 182, 187 (8th Cir. 1989) [2#5]. Also, due process does not require the court or the probation officer to inform a defendant that his or her sentence may be favorably adjusted for acceptance of responsibility. *U.S. v. Simpson*, 904 F.2d 607, 610–11 (11th Cir. 1990) [3#10]. For cases regarding notice to defendant that the court intends to deny the reduction, see section IX.E. Sentencing Procedure—Procedural Requirements.

Note that a defendant must accept responsibility for all counts of conviction to obtain the reduction. See *U.S. v. Thomas,* 242 F.3d 1028, 1034 (11th Cir. 2001); *U.S. v. Chambers,* 195 F.3d 274, 278–79 (6th Cir. 1999); *U.S. v. Ginn*, 87 F.3d 367, 370–71 (9th Cir. 1996); *Kleinebreil*, 966 F.2d at 953; *U.S. v. McDowell*, 888 F.2d 285, 293 (3d Cir. 1989). This also applies to the additional one-point reduction under §3E1.1(b). *U.S. v. Bourne,* 130 F.3d 1444, 1447 (11th Cir. 1997).

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

A November 1992 amendment added §3E1.1(b)(1) and (2) to grant an additional one-level reduction for certain timely acceptances of responsibility. This amendment is not listed in §1B1.10(d), and every circuit to rule on the issue has held that the amendment may not be applied retroactively. See *U.S. v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995); *U.S. v. Rodriguez-Diaz*, 19 F.3d 1340, 1341 (11th Cir. 1994); *U.S. v. Dullen*, 15 F.3d 68, 70–71 (6th Cir. 1994); *Ebbole v. U.S.*, 8 F.3d 530, 539 (7th Cir. 1993); *U.S. v. Aldana-Ortiz*, 6 F.3d 601, 603 (9th Cir. 1993) [6#6]; *U.S. v. Avila*, 997 F.2d 767, 768 (10th Cir. 1993); *U.S. v. Dowty*, 996 F.2d 937, 939 (8th Cir. 1993); *Desouza v. U.S.*, 995 F.2d 323, 324 (1st Cir. 1993); *U.S. v. Cacedo*, 990 F.2d 707, 710 (2d Cir. 1993). Cf. *U.S. v. Cassidy*, 6 F.3d 554, 556–57 (8th Cir. 1993) (error to refuse to consider §3E1.1(b)(2) for defendant who pled guilty before its effective date but was sentenced after date of sentencing controls).

a. General requirements

It has been held that the extra reduction may not be denied once the requirements of §3E1.1(b) have been met. The Fifth Circuit formulated a three-part test, based on the guideline itself, which is satisfied when: "1) the defendant qualifies for the basic 2-level decrease for acceptance of responsibility under subsection (a); 2) the defendant's offense level is 16 or higher before reduction . . . under subsection (a); and 3) the defendant *timely* 'assisted authorities' by taking one—but not necessarily both—of two 'steps': either (a) 'timely' furnishing information to the prosecution about defendant's own involvement in the offense (subsection (b)(1)); or (b) 'timely' notifying the authorities that the defendant will enter a guilty plea (subsection (b)(2))." The issue in this case was whether defendant satisfied step 3(b). The court determined, based on the language of the guideline and Application Note 6, that "the timeliness required . . . applies specifically to the governmental efficiency

recognized in two—but only two—discrete areas: 1) the *prosecution's* not having to prepare for trial, and 2) the *court's* ability to manage its own calendar and docket." The timeliness requirement "does *not* implicate . . . any other governmental function," such as the time required for the probation office to prepare its reports or when defendant begins serving his sentence. Thus, it was error to deny the reduction to this defendant for having obstructed justice under §3C1.1 by lying to the probation officer and possibly delaying the presentence report. "[A]s long as the obstruction does not cause the prosecution to prepare for trial or prevent the court . . . from managing its docket efficiently, obstruction of justice is not an element to be considered." *U.S. v. Tello,* 9 F.3d 1119, 1124–28 (5th Cir. 1993) [6#8].

Other circuits have agreed with *Tello*. See, e.g., *U.S. v. Rice,* 184 F.3d 740, 742 (8th Cir. 1999) ("language of §3E1.1(b)(2) is mandatory; when all of its conditions are met, the court has no discretion to deny the extra one-level reduction"); *U.S. v. McPhee,* 108 F.3d 287, 289–90 (11th Cir. 1997) (remanded: district court does not have discretion to award only two-point reduction once defendant has met requirements of §3E1.1(a) and (b)); *U.S. v. Townsend,* 73 F.3d 747, 755–56 (7th Cir. 1996) (remanded: when court specifically found that defendant met requirements of subsection (b), it had no discretion to deny that reduction because it had "reluctantly provide[d]" subsection (a) reduction despite belief that defendant had falsely denied relevant conduct); *U.S. v. Talladino,* 38 F.3d 1255, 1265–66 (1st Cir. 1994) (remanded: once §3E1.1(a) reduction is granted, if defendant satisfies subsection (b)'s requirements court may not deny extra reduction because of defendant's obstruction of justice—"The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied") [7#5]; *U.S. v. Corrigan,* 128 F.3d 330, 337 (6th Cir. 1997) (same).

The Fifth Circuit used "the *Tello* test" to reverse another denial of a §3E1.1(b) reduction. Defendant satisfied the first two steps, and the appellate court determined that defendant "clearly took the step defined in subsection (b)(2)" when he timely notified the authorities of his intention to plead guilty. "Having thus satisfied all three prongs, Mills was entitled—as a matter of right—to the third 1–level reduction . . . . [T]he court was without any sentencing discretion whatsoever to deny" the decrease. *U.S. v. Mills,* 9 F.3d 1132, 1137–39 (5th Cir. 1993) [6#8]. See also *U.S. v. Colussi,* 22 F.3d 218, 219–20 (9th Cir. 1994) (remanded: following *Tello,* when defendant qualifies for reduction under §3E1.1(a), "the district court must consider whether" defendant also qualifies for reduction under subsection (b)) [6#14]; *U.S. v. Keppler,* 2 F.3d 21, 23 (2d Cir. 1993) (dicta: When a defendant is entitled to §3E1.1(a) reduction, "the court must then determine whether the conditions of Guidelines §3E1.1(b) have been met, and if they have, the court must grant the third level of reduction").

The Ninth Circuit held that once defendant gave multiple day-of-arrest confessions and led police to evidence, he qualified under §3B1.1(b)(1) by timely providing complete information to authorities, and he could later challenge the admissibility of the confession without losing the reduction. *U.S. v. Stoops,* 25 F.3d 820,

822–23 (9th Cir. 1994) [6#15]. The court also rejected the government's claim that defendant did not actually "assist[] authorities" because the information he provided was "readily available" to the police without the confessions. Subsection (b) "does not require that the defendant timely provide information that the authorities would not otherwise discover or would discover only with difficulty; it requires merely that the defendant 'assist' the authorities by timely providing complete information or by timely notifying them of his intent to plead guilty." See also *U.S. v. Paster,* 173 F.3d 206, 215–16 (3d Cir. 1999) (remanded: agreeing with *Stoops* on both issues).

However, if defendant "recants or casts doubt on the accuracy of his original timely confession during the course of the suppression proceedings," the additional reduction may be denied because "the defendant will no longer have provided the government with 'complete information' concerning his involvement in the offense." *U.S. v. Robertson,* 260 F.3d 500, 508 (6th Cir. 2001). Cf. *U.S. v. Francis,* 39 F.3d 803, 809 (7th Cir. 1994) (affirmed denial of §3E1.1(b)(1) reduction: although defendant initially provided the FBI with details of his involvement in conspiracy, he later retracted portions of his statement concerning involvement of coconspirators).

The Third Circuit held that the reduction could not, without more, be denied to a defendant who would not accept responsibility for a count on which he was acquitted. Defendant was refused a plea agreement because he was willing to plead guilty to two counts but not a third. He was convicted at trial on two counts, which he did not contest, but acquitted on the third. He received the two-point reduction under §3E1.1(a), but was denied the extra point under §3E1.1(b). The appellate court remanded because, while there may be a legitimate ground for denying the reduction, "it appears that the court may have incorrectly considered the defendant's refusal to admit conduct not comprising part of the offenses of conviction." *U.S. v. Fields,* 39 F.3d 439, 446–47 (3d Cir. 1994). Cf. *U.S. v. Smith,* 106 F.3d 350, 352 (11th Cir. 1996) (remanded: §3E1.1(b) reduction cannot be denied to defendant who, after admitting amount of money involved in check kiting offense, made legal challenge to amount that could be used in setting offense level).

The Ninth Circuit reached the same conclusion in a similar case for a defendant who readily confessed and offered to plead guilty to two weapons offenses but steadfastly denied involvement in drug offenses. He went to trial because the government refused to negotiate a plea agreement for only the weapons offenses, was acquitted on the drug charges, but was denied the extra reduction. Remanding, the court held that a "defendant may not be punished, in the form of an increase in his guideline sentence or otherwise, for failing to provide information concerning his involvement in an offense of which he has been acquitted." Because defendant "consistently cooperated with the investigating officers, fully acknowledged his criminal liability for [the weapons offenses], and made efforts to plead to those charges," he "clearly qualifies for a reduction under" §3E1.1(b)(1). *U.S. v. Eyler,* 67 F.3d 1386, 1391–92 (9th Cir. 1995). See also *U.S. v. Corona-Garcia,* 210 F.3d 973, 980 (9th Cir. 2000) (remanded: once defendant made timely and complete confession he satis-

fied §3E1.1(b)(1) and it did not matter that he went to trial and sought to suppress his confession).

In a similar vein, the Second Circuit held that the reduction may not be denied because defendant was not truthful about the misconduct of others. The district court denied the reduction 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 remanded, emphasizing that subsection (b)(1) requires only that defendant "'assist 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.' . . . 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) [7#10].

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

b. Timeliness

Other cases have elaborated further on the timeliness requirement. The Eleventh Circuit held that §3E1.1(b)(2) is not facially unconstitutional, but held that to avoid an unconstitutional *application* of §3E1.1(b)(2) the district court must determine whether defendant's notification was timely in light of the circumstances. "Avoiding trial preparation and the efficient allocation of the court's resources are descriptions of the desirable consequences and objectives of the guideline. They are not of themselves precise lines in the sand that solely determine whether notification was timely. . . . Application must bear in mind the extent of trial preparation, the burden on the court's ability to allocate its resources efficiently, and reasonable opportunity to defense counsel to properly investigate." *U.S. v. McConaghy,* 23 F.3d 351, 353–54 (11th Cir. 1994) [6#15]. But see *U.S. v. Altier,* 91 F.3d 953, 958 (7th Cir. 1996) (holding that timeliness requirement does not violate Sixth Amendment right to counsel and affirming denial of (b)(1) reduction to defendant who waited until day before trial to plead guilty because he claimed he needed until then to go over with his attorney discovery materials only recently turned over by government). Cf. *U.S. v. Williams,* 86 F.3d 1203, 1206–07 (D.C. Cir. 1996) (affirming denial of reduction to defendant who did not plead guilty until less than three weeks before sched-

uled trial, which was five months after government's initial plea offer and three months after second offer); *U.S. v. Robinson,* 14 F.3d 1200, 1203 (7th Cir. 1994) (affirmed denial of reduction: guilty plea four days before trial was insufficient where government "had expended 'considerable funds and effort preparing for a five-to-six-week trial'" and district court's docket was affected).

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

The Ninth Circuit also indicated that all circumstances should be considered, including delays caused by a defendant's constitutional challenges. Without evidence that the government had prepared for trial, it was error to deny the reduction on the grounds that over a year passed before defendant entered a guilty plea and he had filed a pretrial motion to suppress evidence. Constitutionally protected conduct should not be considered against the defendant, and his "exercise of those rights at the pretrial stage should not in and of itself preclude a reduction for timely acceptance." The court also stated that "we do not consider the length of time that has passed in isolation," and here, in a complex case, there were "at least four continuances," the government filed two superseding indictments, defendant's pretrial motions were not frivolous or filed for purposes of delay, and no trial date had been set. *U.S. v. Kimple,* 27 F.3d 1409, 1412–15 & n.4 (9th Cir. 1994) (also noting that determination whether "the use of judicial resources would preclude an additional one-point reduction . . . should be made on a case-by-case basis") [6#15]. Cf. *U.S. v. Smith,* 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (affirming §3E1.1(b) denial to defendant who claimed his objections were legal when they were actually factual: "Our case law permits a district court to deny a defendant a reduction under §3E1.1 based on conduct inconsistent with acceptance of responsibility, even when that conduct includes the assertion of a constitutional right. . . . In addition, frivolous legal challenges could suggest to the district court that the defendant has not accepted responsibility for his conduct. Therefore, we hold that a district court may consider the nature of such challenges along with the other circumstances in the case when determining whether a defendant should receive a sentence reduction for acceptance of responsibility.").

The First Circuit similarly concluded that the nature of a defendant's pretrial motions must be considered before denying the reduction. "In determining whether motions and the responses thereto are bars to the one-level decrease, a key question is whether their primary effect has been to force the government to engage in work preparatory for trial, or instead to provide information or relief serving legitimate ends other than trial preparation. . . . Having said this, we also recognize that motion practice may at times be carried on so aggressively or extensively as to impose

heavy burdens upon the government. . . . A defendant who files a bevy of motions in order to put prosecutors 'through their paces' should be denied a reward of this type. Put another way, a defendant does not lose his right to the one-level decrease simply because his attorney has filed pre-trial motions to which the government responds—but he may be denied the decrease if the effect of the motions was to force the government to prepare for trial or if the motions placed unreasonable or unusually heavy burdens upon the government inconsistent with the purpose of the one-level decrease." *U.S. v. Marroquin,* 136 F.3d 220, 224–25 (1st Cir. 1998) (remanded: although defendant filed eight pretrial motions and the government responded to seven, they were "all of a kind appropriate at this pre-trial stage," the government admitted it did not prepare for trial, and defendant accepted a plea agreement shortly after the government responded and only two months after arraignment; thus, it was error to deny the reduction). See also *U.S. v. Dethlefs,* 123 F.3d 39, 43 (1st Cir. 1997) (affirming district court conclusion that, under the circumstances, defendant's pleas were timely, rejecting government's argument that pleas tendered more than a year after indictment and only two weeks before trial cannot meet §3E1.1(b)(1) requirements: "Timeliness is a concept, not a constant, and it normally must be evaluated in context.").

The Ninth Circuit later cautioned defendants that they should notify the government that they intend to plead guilty once constitutional or procedural challenges are resolved—if the government prepares for trial the plea is not timely and the reduction cannot be granted. See *Narramore,* 36 F.3d at 846–47 (defendant properly denied extra reduction because he did not plead guilty until one week before trial and "after the government had begun seriously to prepare for trial. . . . While Narramore may well have intended to plead guilty in the event that his motion to dismiss [for double jeopardy] was denied, he at no time approached the government with this information so the trial preparation could have been avoided. Nothing prevented him from doing so.") [7#3]. See also *U.S. v. Covarrubias,* 65 F.3d 1362, 1367–68 (7th Cir. 1995) (in similar situation, following *Narramore* in affirming denial); *U.S. v. Williams,* 74 F.3d 654, 656–57 (5th Cir. 1996) (following *Covarrubias*). Cf. *U.S. v. McClain,* 30 F.3d 1172, 1174 (9th Cir. 1994) (affirmed: fact that defendant notified his attorney that he wanted to plead guilty insufficient—by time government was informed it had prepared for trial).

The Fourth Circuit affirmed the denial for a defendant who filed three suppression motions, then after they were denied pled guilty nine days later and twenty-six days before trial. The court stated that denial of the reduction did not penalize defendant for attempting to protect his constitutional rights, but "merely" precluded the benefit of a reduction accorded to others who provide information or plead guilty in a more timely fashion. The court also noted the statement in *Kimple* that a defendant who fails to timely notify authorities of an intent to plead guilty if the constitutional challenges fail could be denied the reduction. *U.S. v. Lancaster,* 112 F.3d 156, 158–59 (4th Cir. 1997).

The First Circuit affirmed a denial of the reduction for a defendant who indicated a willingness to plead guilty except for a dispute as to the weight of the drugs—

"notification of an intention to enter a guilty plea, subject to a major condition, [does not] meet the standard of section 3E1.1(b)(2)." *U.S. v. Morillo,* 8 F.3d 864, 871–72 (1st Cir. 1993).

The Seventh Circuit stated that "an early notification of an intention to plead guilty does not by itself entitle a defendant to a reduction under subsection (b)(2) unless it served the purpose of conserving government and court resources." Here, defendants claimed that they had earned the reduction by giving early notice, but they "did not plead guilty until approximately one week before the trial, after various pre-trial conferences were held, and after the trial was rescheduled several times. . . . Until the defendants actually pleaded guilty, they could still change their minds and the government still had to prepare for the contingency that the defendants might elect to go to trial." *U.S. v. Francis,* 39 F.3d 803, 808 (7th Cir. 1994). See also *U.S. v. Rogers,* 129 F.3d 76, 80–81 (2d Cir. 1997) (affirmed: because "the suppression hearing was the main proceeding in this case," defendant's "offer to enter a conditional guilty plea and her bench trial on stipulated facts, coming *after* the suppression hearing, did not come sufficiently early in the proceedings" to merit reduction); *U.S. v. Chatman,* 119 F.3d 1335, 1342 (8th Cir. 1997) (affirming denial—although defendant stated several times before trial he intended to plead guilty, he did not actually sign plea agreement until day of trial, which forced government to prepare for trial). Cf. *U.S. v. Zwick,* 199 F.3d 672, 692–93 (3d Cir. 1999) (remanded: disagreeing with Seventh Circuit that *actual* conservation of government resources must result from notice to plead guilty—"conditional pleas raise unique issues, which need to be evaluated on a case-by-case basis" to determine whether a notice to plead guilty was sufficiently timely, although "it may be a rare case in which anything short of a timely entry of a guilty plea suffices"); *U.S. v. Munoz,* 83 F.3d 7, 9 (1st Cir. 1996) (remanded: "§3E1.1(b)(2) refers to the date that the defendant 'notif[ies] authorities of his intention to enter a plea of guilty,' not the date that the plea is entered"—thus defendant could not be denied reduction because he pled guilty after case had been placed on court calendar when parties had filed executed plea agreement with court before that time).

c. Other issues

Note that subsections (b)(1) and (2) are disjunctive, and the Tenth Circuit held that a court must consider whether defendant satisfied either one before denying the reduction. See *U.S. v. Ortiz,* 63 F.3d 952, 955–56 (10th Cir. 1995) (remanded: although district court properly found that defendant failed to satisfy (b)(2) because trial commenced before he pled guilty, court erred by not considering whether defendant satisfied (b)(1)). Accord *U.S. v. Paster,* 173 F.3d 206, 215 (3d Cir. 1999) (remanding denial of reduction under subsection (b)(2) when evidence indicated defendant satisfied (b)(1): "The third prong of §3E1.1(b) is in the disjunctive.").

The Eighth Circuit stated in a §3E1.1(b) case that it "gives great deference to a district court's refusal to grant a reduction for acceptance of responsibility and will reverse only for clear error." *U.S. v. McQuay,* 7 F.3d 800, 801 (8th Cir. 1993). In

McQuay and another recent case the court affirmed denials where defendant's actions were not "timely." See 7 F.3d at 802–03 (denial proper where defendant did not plead guilty until two days before second trial—he had been through one mistrial, he did not provide any information to government to assist its investigation, and the court had already rescheduled the second trial); *U.S. v. Schau,* 1 F.3d 729, 731 (8th Cir. 1993) (denial proper where "the authorities had recovered the stolen money and the government had already prepared for trial before [defendant] confessed and pleaded guilty"). Cf. *U.S. v. Booth,* 996 F.2d 1395, 1397 (2d Cir. 1993) (affirmed denial of defendant's claim to §3E1.1(b) reduction on basis of "extraordinary circumstances" of his cooperation, stating that "whether there are extraordinary circumstances warranting such an award is committed to the sound discretion of the district court"). But cf. *U.S. v. Garrett,* 90 F.3d 210, 214 (7th Cir. 1996) (remanded: denial "clearly erroneous" for defendant who filed unsuccessful pro se motion to withdraw guilty plea only after he could not contact his attorney—who had died—for over a month and did not pursue motion after new attorney was finally appointed).

The Eleventh Circuit held that a district court does not have discretion to grant less than a three-level reduction if it finds that defendant satisfied the requirements of §3E1.1(a) and (b). There was evidence that defendant had planned to escape from a halfway house where he was held pending sentencing, but authorities revoked his conditional release. The district court reduced the offense level by only two to account for the alleged escape plan, but the appellate court remanded. *U.S. v. McPhee,* 108 F.3d 287, 289–90 (11th Cir. 1997).

Two circuits have rejected constitutional challenges to §3E1.1(b)'s limitation of the extra level reduction to defendants with offense levels of sixteen and above. See *U.S. v. Jiles,* 259 F.3d 477, 480–81 (6th Cir. 2001) (affirmed: classification does not violate due process or equal protection rights of defendant who could only receive two-level reduction); *U.S. v. Wehr,* 20 F.3d 1035, 1037 (9th Cir. 1994) (affirmed: distinction is not irrational).

IV. Criminal History

A. Calculation

1. Consolidated or Related Cases

"Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)." USSG §4A1.2(a)(2). Application Note 3 provides: "Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing." Note that the intervening arrest exception was added Nov. 1991, and see *U.S. v. Rivers,* 50 F.3d 1126, 1129 (2d Cir. 1995) ("1991 amendment to Note 3 substantially modified the relevance of intervening arrests" and should not be used when instant offense was committed before amendment); *U.S. v. Bishop,* 1 F.3d 910, 912 (9th Cir. 1993) (addition of intervening arrest language was substantive change that "carries no weight in construing the 1990 version of §4A1.2(a)(2)"). See also §4A1.1(f) (add one point for violent offenses not counted because they were related to another crime of violence) (effective Nov. 1, 1991); *U.S. v. Waldon,* 206 F.3d 597, 609 (6th Cir. 2000) (affirming application of §4A1.1(f) to add three criminal history points for five burglaries that were treated as related under §4A1.1(a)).

"In determining whether cases are related, the first question is always whether the underlying offenses were punctuated by an intervening arrest; by the logic and ordering of Note 3, that inquiry is preliminary to any consideration of consolidated sentencing." *U.S. v. Gallegos-Gonzalez,* 3 F.3d 325, 327 (9th Cir. 1993) ("sentences for offenses separated by an intervening arrest are always unrelated under section 4A1.2 as amended in 1991, regardless of whether the cases were consolidated for sentencing"). Accord *U.S. v. Aguilera,* 48 F.3d 327, 330 (8th Cir. 1995); *U.S. v. Boonphakdee,* 40 F.3d 538, 544 (2d Cir. 1994) ("As the word 'otherwise' makes clear, whether an intervening arrest was present constitutes a threshold question that, if answered in the affirmative, precludes any further inquiry"); *U.S. v. Hallman,* 23 F.3d 821, 825 (3d Cir. 1994); *U.S. v. Springs,* 17 F.3d 192, 196 (7th Cir. 1994). Beyond that point, as the examples below indicate, whether sentences are related is often a fact-intensive inquiry.

a. "Occurred on the same occasion"

The Seventh Circuit rejected a claim that the pre-1991 version reading "single occasion" required the cases to be "factually related and inextricably intertwined" and held that the test is temporal proximity. *U.S. v. Connor,* 950 F.2d 1267, 1270–71 (7th Cir. 1991) (possession of weapons and possession of stolen goods at and prior to same date occurred on "single occasion"). But cf. *U.S. v. Manuel,* 944 F.2d 414,

416 (8th Cir. 1991) (federal forgeries over fourteen-month period not related to state forgery five months later); *U.S. v. Jones,* 899 F.2d 1097, 1101 (11th Cir. 1990) (bank robbery and attempted bank robbery occurring within ninety minutes were "temporally distinct" and therefore unrelated).

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

b. "Single common scheme or plan"

In applying this language, most courts look for "factual commonality. Factors such as temporal and geographical proximity as well as common victims and a common criminal investigation are dispositive." *U.S. v. Shewmaker,* 936 F.2d 1124, 1129 (10th Cir. 1991) (drug smuggling offense and conviction for failure to appear six months later to serve sentence for that offense were not part of common scheme or plan). See also *U.S. v. Mullens,* 65 F.3d 1560, 1565 (11th Cir. 1995) ("Convictions are part of a common scheme if 'substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purposes, or similar modus operandi.' U.S.S.G. §1B1.3, comment. (n. 9)."); *U.S. v. Butler,* 970 F.2d 1017, 1022–27 (2d Cir. 1992) (question of fact whether separate robberies committed fifteen minutes apart were related) [4#25]. The Ninth Circuit looks at several factors to determine whether prior offenses were part of a common scheme or plan: "(1) whether the crimes were committed 'within a short period of time'; (2) whether the crimes involved the same victim; (3) whether the defendant was arrested by the same law enforcement agency for both crimes; and (4) when the arrests occurred and whether both crimes were solved during the course of one investigation. . . . [T]he court will also examine the similarities in the offenses." Also, "whether two prior offenses are related under §4A1.2 is a mixed question of law and fact subject to de novo review." *U.S. v. Chapnick,* 963 F.2d 224, 226 (9th Cir. 1992).

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

(Nevada bank robbery not related to California bank robberies despite concurrent sentences—defendant was convicted in different jurisdictions for robberies of different banks over three-month period); *U.S. v. Jones,* 899 F.2d 1097, 1101 (11th Cir. 1990) (concurrent sentences for bank robbery and attempted bank robbery committed ninety minutes apart not related—involved different banks, separate trials, and different sentences).

The fact that the prior crimes were similar or fit a pattern does not mean they were related. See, e.g., *U.S. v. Chartier,* 970 F.2d 1009, 1014–16 (2d Cir. 1992) (although four similar robberies committed to support heroin addiction "fit a pattern, . . . they were not part of a single common scheme or plan") [4#25]; *U.S. v. Brown,* 962 F.2d 560, 564 (7th Cir. 1992) ("relatedness finding requires more than mere similarity of crimes, . . . common criminal motive or *modus operandi*"); *U.S. v. Lowe,* 930 F.2d 645, 647 (8th Cir. 1991) (convictions for check forgery not related even though they shared same modus operandi and motive—they were committed over two years, involved different victims and different locations); *U.S. v. Davis,* 922 F.2d 1385, 1389–90 (9th Cir. 1991) (crimes of issuing bad checks and theft not related simply because they shared same modus operandi—they were committed thirteen months apart, involved different victims, and arrests were made by two different law enforcement agencies two years apart); *U.S. v. Rivers,* 929 F.2d 136, 139–40 (4th Cir. 1991) (reversed: two robberies committed within twelve days in adjacent jurisdictions because defendant needed money for drugs, where second sentence made concurrent with first, not related—offenses occurred on different dates and in different locations, defendant was convicted and sentenced in different courts) [4#6]; *Kinney,* 915 F.2d at 1472 (three bank robberies in three months to support drug addiction). But cf. *U.S. v. Houser,* 929 F.2d 1369, 1374 (9th Cir. 1990) (reversed: two prior drug offenses within short period of time involving one undercover agent, tried and sentenced separately only because they occurred in different counties, were in fact related) [4#6]; *U.S. v. Breckenridge,* 93 F.3d 132, 139 (4th Cir. 1996) (if evidence showed that defendant's prior offenses that occurred in adjacent jurisdictions "would have been consolidated for trial but for geography, then they, like the prior offenses in *Houser*, should be treated as related for purposes of career offender sentencing").

However, the First Circuit has held that "the 'common scheme or plan' language should be given its ordinary meaning," and found that five separate bank robberies were "related" because they were committed as part of an overarching scheme to rob banks. The court concluded that the Commission intended "to adopt 'binding rules of thumb,' such as this one, as well as the even more mechanical rule that convictions for entirely separate crimes should be treated as one if they happen to be consolidated for trial or sentencing" (see section IV.A.1.c below). The court noted that having such strict rules, along with the ability to depart if the criminal history is thereby understated, see Application Note 3, actually increases district court discretion. *U.S. v. Elwell,* 984 F.2d 1289, 1294–96 (1st Cir. 1993) [5#9]. But see *U.S. v. Gelzer,* 50 F.3d 1133, 1143 (2d Cir. 1995) ("a single common scheme or plan entails something more cohesive than a pattern of repeated criminal conduct"). Cf. *U.S. v.*

Berry, 212 F.3d 391, 394–95 (8th Cir. 2000) (rejecting argument that "common scheme or plan" should be defined broadly as in §1B1.3(a)(2), finding narrower meaning best serves goals of §4A1.2).

The Seventh Circuit held that "[a] crime merely suggested by or arising out of the commission of a previous crime is not . . . related to the earlier crime . . . [as] part of a common scheme or plan." *U.S. v. Ali,* 951 F.2d 827, 828 (7th Cir. 1992) (robbery of a supermarket and forgery of a money order taken from the heist were unrelated since "the decision to commit the forgery arose only after the robber discovered what he had taken"). However, if a crime is committed for the purpose of committing another crime, they may be considered related. A defendant's prior sentence for check forgery was held to be related to his conviction for possession of stolen mail—from which the forged check came—because "the mail was stolen to find checks or other instruments that could be converted to use through forgery." *U.S. v. Hallman,* 23 F.3d 821, 825–26 (3d Cir. 1994) (remanded: case distinguishable from *Ali* because of defendant's intent) [6#16]. See also *U.S. v. Robinson,* 187 F.3d 516, 520 (5th Cir. 1999) (remanded: two prior crack sales were part of common scheme or plan where first one was to undercover agent and second one was only seven days later, within two blocks of the first, and to a second undercover agent sent by the first after defendant offered to pay him to send additional customers). Citing these cases, the Sixth Circuit determined that the underlying principle was that "prior convictions are not 'related' merely because they are part of a crime spree. . . . Instead, a defendant has the burden of establishing that his crimes were jointly planned or that the commission of one entailed the other." *U.S. v. Irons,* 196 F.3d 634, 638–39 (6th Cir. 1999) (affirmed: although defendant may have had general plan to repeatedly harass former girlfriend and her family, two offenses committed over a month apart were not part of common scheme or plan because "the separate dates, different substantive crimes involved, and various victims suggest that defendant's acts of harassment were random 'spur-of-the-moment' decisions based on his hostility toward his former girlfriend and her family and that they were not jointly planned").

c. "Consolidated for trial or sentencing"

Most of the cases in this section were decided before *Buford v. U.S.,* 121 S. Ct. 1276, 1278–81 (2001). The Supreme Court held that appellate courts should review deferentially the district court's decision on whether prior offenses were consolidated for sentencing for purposes of §4A1.2, comment. (n.3). "[A] district judge sees many more 'consolidations' than does an appellate judge. As a trial judge, a district judge is likely to be more familiar with trial and sentencing practices in general, including consolidation procedures. . . . Experience with trials, sentencing, and consolidations will help that judge draw the proper inferences from the procedural descriptions provided."

Effective Nov. 1991, §4A1.1(f) adds points for crimes of violence that are treated as related under §4A1.2(a)(2). Accompanying Application Note 6 specifies that

§4A1.1(f) applies to "two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (*i.e.,* offenses committed on different occasions that were . . . consolidated for trial or sentencing; *See* Application Note 3 of [§4A1.2])." The Seventh Circuit held that this guideline and application note "show that cases that are consolidated for sentencing are meant to be considered related." *U.S. v. Woods,* 976 F.2d 1096, 1100–01 (7th Cir. 1992) [5#5]. The court limited to pre-amendment cases *U.S. v. Elmendorf,* 945 F.2d 989, 997–98 (7th Cir. 1991), which had held that unrelated offenses that were consolidated for convenience could be counted as separate convictions. See also *U.S. v. Smith,* 991 F.2d 1468, 1473 (9th Cir. 1993) (under §4A1.2(a)(2) & comment. (n.3), prior convictions are related if they were consolidated for sentencing, despite factual differences) [5#12]. But cf. *U.S. v. McComber,* 996 F.2d 946, 947 (8th Cir. 1993) (affirmed treating as unrelated under §4A1.2(a)(2) consolidated sentences that "resulted from different offenses committed over a lengthy period of time. They were imposed on the same day because sentencing for some of the offenses had been postponed to allow restitution, while sentencing for others followed the revocation of probation. Most of the final sentences were made concurrent, but the cases remained under separate docket orders and no order of consolidation was entered") [5#15].

In a later case, however, the Seventh Circuit gave "consolidated" a narrower definition, "requiring either a formal order of consolidation or a record that shows the sentencing court considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions. . . . Consolidation should not occur by accident through the happenstance of the scheduling of a court hearing or the kind of papers filed in the case or the administrative handling of the case." The court affirmed a ruling that one robbery was not related to two others, despite "many characteristics of a consolidated sentencing." The cases were otherwise treated separately, there was no formal consolidation order, and there was "nothing in the record to indicate that . . . the cases were so related that they should be consolidated for sentencing." *U.S. v. Russell,* 2 F.3d 200, 201–04 (7th Cir. 1993) [6#4]. Accord *U.S. v. Allen,* 50 F.3d 294, 297–98 (4th Cir. 1995) ("requiring either a factual relationship between prior offenses or a consolidation order").

Several other circuits have agreed that there must be some greater indicia of relatedness than mere sentencing at the same time. See, e.g., *U.S. v. Correa,* 114 F.3d 314, 317 (1st Cir. 1997) ("offenses that are temporally and factually distinct . . . should not be regarded as having been consolidated . . . unless the original sentencing court entered an actual order of consolidation or there is some other persuasive indicium of formal consolidation apparent on the face of the record"); *Green v. U.S.,* 65 F.3d 546, 548–49 (6th Cir. 1995) ("cases are not 'consolidated' for sentencing when they proceed to sentencing under separate docket numbers, do not arise from the same nucleus of facts, lack an order of consolidation, and result in different sentences. This is true even when the defendant pleads guilty to the offenses in the same court, at the same time, before the same judge."); *U.S. v. Gelzer,* 50 F.3d 1133, 1143 (2d Cir. 1995) ("cases are not deemed consolidated simply because the defendant re-

ceived concurrent sentences even when the concurrent sentences are imposed on the same day," and where there was no order of consolidation and offenses were factually distinct they were not related for §4A1.2); *U.S. v. Klein,* 13 F.3d 1182, 1185 (8th Cir. 1994) (prior sentences imposed at same time were not related where each had separate docket number, they were factually distinct, and there was no formal order of consolidation). See also *U.S. v. Napoli,* 179 F.3d 1, 15–17 (2d Cir. 1999) (fact that cases were consolidated for purposes of plea and sentence following Rule 20 transfer of one of them did not make them "related" when they were factually distinct).

The Fifth Circuit held that a formal consolidation order is not required to find two cases are related. "[W]hen factually distinct offenses are charged in the same criminal information under the same docket number, those offenses have been 'consolidated' (even in the absence of a formal consolidation order) and are therefore related. Sentences flowing from such consolidated cases should not be counted separately under §§4A1.1–.2." *U.S. v. Huskey,* 137 F.3d 283, 287–88 (5th Cir. 1998) (remanded: noting other cases that had indicated one docket number for two offenses would be evidence of consolidation). But cf. *U.S. v. Kates,* 174 F.3d 580, 584 (5th Cir. 1999) (affirmed: two drug offenses that occurred one week apart were not related even though defendant was arrested for both on same day, received concurrent sentences from same judge, and was paroled on both offenses on the same day—cases were not formally consolidated and sentences were not identical).

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

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

F.2d 358, 361 (5th Cir. 1991) (concurrent sentencing, even at same hearing, is "only one factor").

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

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

Cases that were consolidated for trial, the Fourth Circuit held, are to be considered related. "The government does not cite a single case, nor have we found one, in which any court has held that cases consolidated for trial were unrelated for purposes of §4A1.2." Because federal and state laws require a connection or relation to consolidate offenses for trial, "the very fact that crimes are consolidated for trial demonstrates that they are related and there is no reason to believe the Sentencing Commission would not want them to be so treated for purposes of §4A1.2." *U.S. v. Breckenridge*, 93 F.3d 132, 137–38 (4th Cir. 1996).

d. Departure

Most circuits have held that upward departure may be warranted under §4A1.3 when counting consolidated sentences as one sentence underrepresents the seriousness of a defendant's criminal history. See, e.g., *U.S. v. Bauers*, 47 F.3d 535, 538 (2d Cir. 1995); *U.S. v. Hines*, 943 F.2d 348, 354 (4th Cir. 1991); *U.S. v. Ocasio*, 914 F.2d 330, 338 (4th Cir. 1990); *U.S. v. Medved*, 905 F.2d 935, 942 (6th Cir. 1990);

U.S. v. Williams, 901 F.2d 1394, 1397–98 (7th Cir. 1990), vacated on other grounds, 111 S. Ct. 2845 (1991); *U.S. v. White*, 893 F.2d 276, 279–80 (10th Cir. 1990) [3#1]; *U.S. v. Geiger*, 891 F.2d 512, 513–14 (5th Cir. 1989) [2#19]; *U.S. v. Dorsey*, 888 F.2d 79, 81 (11th Cir. 1989) [2#16]; *U.S. v. Anderson*, 886 F.2d 215, 216 (8th Cir. 1989). See also cases discussed in section VI.A.1.a, below.

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

2. "Prior Sentence"

To count as a "prior sentence" under §4A1.2(a)(1), the sentence must have been imposed "for conduct not part of the instant offense." The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that if the conduct of the present offense is "severable" from that of the prior offense, the prior offense may be considered. The Sixth and Eighth Circuits look for temporal and geographical proximity, common victims, societal harms, and criminal plan or intent. *U.S. v. Blumberg*, 961 F.2d 787, 792 (8th Cir. 1992) (proper to count 1973 burglary conviction that involved different accomplice and victim than did 1990 conspiracy to transport and possess stolen property); *U.S. v. Beddow*, 957 F.2d 1330, 1337–39 (6th Cir. 1992) (proper to count state conviction of carrying concealed weapon even though gun was found at time of arrest for instant federal money laundering offense). Accord *U.S. v. Hopson*, 18 F.3d 465, 468 (7th Cir. 1994). See also *U.S. v. Thomas*, 973 F.2d 1152, 1158 (5th Cir. 1992) ("critical inquiry is whether the prior conduct constitutes a 'severable, distinct offense'"—state and federal convictions for theft and altering VINs had different elements and involved different vehicles); *U.S. v. Banashefski*, 928 F.2d 349 (10th Cir. 1991) (proper to include state conviction for possession of stolen car in criminal history score of federal felon in possession of firearm offense, even though gun was found at time of arrest for driving stolen car).

Noting some differences in how circuits determine whether a prior offense constituted "conduct not part of the instant offense," the Tenth Circuit devised a two-part test combining both methods. "As a threshold matter, we must first examine whether the district court took the prior sentence into account in determining the base offense level. If the district court did take the prior sentence into account in calculating the offense level, then it is clear that to prevent double counting the court cannot use that same sentence in its criminal history calculation." If the court did not, or it is unclear, "[w]e also must review the court's underlying finding that the prior sentence was not part of the instant offense, i.e., that it was not relevant conduct. . . . To determine whether a prior offense is conduct related to the instant offense, courts generally examine several factors, including the similarity, temporal

proximity, and regularity of the instant offense and the prior sentence." The court added that, "at least where the scope of the charged conspiracy covers (1) a time frame, (2) a geographic area, and (3) a subject matter or purpose broad enough to include prior convictions, we hold that the government bears the burden of proving by a preponderance of the evidence that the prior convictions were not relevant conduct and hence not part of the charged conspiracy." *U.S. v. Torres*, 182 F.3d 1156, 1159–64 (10th Cir. 1999) (remanded because government failed to show prior offenses were not part of relevant conduct of instant offense).

Conduct that is part of the instant offense should be considered in the offense level as relevant conduct. See *U.S. v. Thomas*, 54 F.3d 73, 83 (2d Cir. 1995) (remanded: conduct from prior conviction that was part of instant offense should have been factored into offense level, not criminal history); *U.S. v. Query*, 928 F.2d 383, 385 (11th Cir. 1991) (state sentence that was imposed before instant federal sentence that was part of same course of conduct properly considered as relevant conduct rather than added to criminal history score) [4#2]. A Nov. 1993 amendment to Note 1 added language to clarify that "[c]onduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)." The Tenth Circuit followed this note in affirming that a sentence for a drug offense that occurred during a drug conspiracy, but was not used as relevant conduct in sentencing for the conspiracy, was properly counted as a prior sentence. *U.S. v. Williamson*, 53 F.3d 1500, 1526 (10th Cir. 1995) ("If the prior sentence was actually considered by the court in calculating the defendant's offense level, then the amendment to note 1 of §4A1.2 clarifies that the prior sentence may not be used to enhance the defendant's criminal history score."). See also §4A1.2, comment. (n.1) ("'Prior sentence' means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense.").

Courts should count crimes that were committed after the instant offense but for which sentence was imposed before the sentence in the instant offense. USSG §4A1.2(a)(1), comment. (n.1); *U.S. v. Flowers*, 995 F.2d 315, 317–18 (1st Cir. 1993); *U.S. v. Tabaka*, 982 F.2d 100, 102 (3d Cir. 1992); *U.S. v. Lara*, 975 F.2d 1120, 1129 (5th Cir. 1992); *U.S. v. Hoy*, 932 F.2d 1343, 1345 (9th Cir. 1991); *U.S. v. Walker*, 912 F.2d 1365, 1366 (11th Cir. 1990); *U.S. v. Smith*, 900 F.2d 1442, 1446–47 (10th Cir. 1990). See also *U.S. v. Dvorak*, 115 F.3d 1339, 1347–48 (7th Cir. 1997) (affirmed: earlier sentence for crime that occurred after instant offense was properly considered "prior sentence"); *U.S. v. Elwell*, 984 F.2d 1289, 1298 (1st Cir. 1993); *U.S. v. Espinal*, 981 F.2d 664, 667–68 (2d Cir. 1992) (offense that occurred after beginning of instant conspiracy offense properly included as prior conviction).

However, the First Circuit held that a federal sentence imposed subsequent to another federal sentence that was remanded for resentencing, should not have been considered at the resentencing of the first federal sentence. The court based this reading of "prior sentence" under §4A1.2(a)(1) on a combination of "the mandate rule, . . . statutes limiting resentencing, and . . . the distinction the law has long drawn between remands where a conviction has been vacated and remands where

only a sentence has been vacated." *U.S. v. Ticchiarelli,* 171 F.3d 24, 35–36 (1st Cir. 1999). The court specifically disagreed with *U.S. v. Klump,* 57 F.3d 801, 802–03 (9th Cir. 1995) [7#11], which allowed consideration at resentencing of a state sentence that was imposed after the original sentence where the *conduct* underlying the state offense had occurred before the original federal sentencing.

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

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

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

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

The First Circuit held that the fact that a defendant is resentenced after the original conviction and sentence are reversed does not affect the time limitation for including prior sentences in the criminal history score, §4A1.2(e). The period begins when defendant is resentenced, not when defendant was first sentenced. *U.S. v. Perrotta*, 42 F.3d 702, 704 (1st Cir. 1994) (affirmed: although original 1976 convic-

tion and sentence—which were reversed on appeal—occurred more than ten years before instant drug conspiracy began, 1978 sentence imposed after defendant pled guilty on remand occurred within ten years of beginning of conspiracy; also rejecting claim that adding point because of 1978 sentence is unconstitutional burden on defendant's right to appeal his original conviction).

The Second Circuit rejected a claim that defendant's 1976 felony drug conviction should not be counted under §4A1.2(e)(1) because the state later reclassified it as a misdemeanor with a maximum penalty of less than one year and one month. "The Guidelines make no additional provision for a state's reclassification of an offense for which a defendant has previously been convicted and sentenced. . . . [A] district court counting criminal history points should consider the state sentence that is actually imposed upon a defendant (unless, of course, one of the §4A1.2 exceptions applies) without regard to whether the offense has subsequently been reclassified by the state." *U.S. v. Mortimer*, 52 F.3d 429, 434 (2d Cir. 1995).

Courts should look to federal, rather than state, law to determine whether a prior sentence should be counted in the criminal history. See, e.g., *U.S. v. Gray,* 177 F.3d 86, 93 (1st Cir. 1999); *U.S. v. Jones*, 107 F.3d 1147, 1163 (6th Cir. 1997); *U.S. v. Carney,* 106 F.3d 315, 317 (10th Cir. 1997); *U.S. v. Rayner*, 2 F.3d 286, 287 (8th Cir. 1993); *U.S. v. Kemp*, 938 F.2d 1020, 1023–24 (9th Cir. 1991); *U.S. v. Daniels,* 929 F.2d 128, 130 (4th Cir. 1991); *U.S. v. Unger*, 915 F.2d 759, 763 (7th Cir. 1990). See also *U.S. v. Williams,* 176 F.3d 301, 312–13 (7th Cir. 1999) (juvenile offenses may be considered convictions or sentences under federal law for Guidelines' purposes regardless of how state law categorizes them).

3. Challenges to Prior Convictions

In a case where defendant was subject to a mandatory minimum term under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), the Supreme Court held that there is only a limited right to collaterally attack prior convictions. The Court concluded that nothing in §924(e) authorizes such attacks and that the Constitution requires that challenges be allowed only for a complete denial of counsel, not for claims such as defendant's—ineffective assistance of counsel and involuntary guilty pleas. *Custis v. U.S.*, 114 S. Ct. 1732, 1735–39 (1994) [6#13]. See also *U.S. v. Escobales,* 218 F.3d 259, 262 (3d Cir. 2000) (affirmed: following *Custis*, defendant did not have right to attack prior sentence at sentencing on claim he was denied right to jury trial); *U.S. v. Daly*, 28 F.3d 88, 89 (9th Cir. 1994) (following *Custis*, rejecting collateral attacks by ACCA defendant: "A sole exception to the prohibition against collateral attack of previous state convictions is for the indigent defendant who was not appointed counsel at his state trial. . . . Claims of denial of effective assistance of counsel, where counsel was appointed, and involuntarily pleading guilty do not fall within this exception").

The *Custis* Court also noted, however, that defendant may have a right to "attack his state sentences in Maryland or through federal habeas review," and if he "is successful in attacking these state sentences, he may then apply for reopening of any

federal sentence enhanced by the state sentences." 114 S. Ct. at 1739. See also *U.S. v. Doe,* 239 F.3d 473, 475 (2d Cir. 2001) (agreeing with other circuits that, following *Custis*, "defendants who successfully attack state convictions may seek review of federal sentences that were enhanced on account of such state convictions"); *U.S. v. Walker,* 198 F.3d 811, 813–14 (11th Cir. 1999) (affirming reduction in sentence via §2255 proceeding after defendant subject to ACCA moved successfully in state court to have one of his prior convictions vacated); *U.S. v. LaValle,* 175 F.3d, 1106, 1108 (9th Cir. 1999) (remanded: defendant should have been allowed to use §2255 to attack conviction that had been used for career offender status but was later vacated and dismissed—"a defendant who successfully attacks a state conviction may seek review of any federal sentence that was enhanced because of the prior state conviction"); *U.S. v. Cox*, 83 F.3d 336, 339–40 (10th Cir. 1996) (remanded: following *Custis*, district court must reconsider defendant's criminal history upon defendant's 28 U.S.C. §2255 motion after he had several prior convictions set aside or expunged; fact that sentence was previously affirmed on appeal does not preclude later use of §2255 to correct sentence); *U.S. v. Fondren*, 54 F.3d 533, 535 (9th Cir. 1994) ("adopt[ing] the position advanced by the *Custis* court" that defendant may apply to reopen federal sentence if prior convictions are reversed) (amending opinion at 43 F.3d 1228).

The Supreme Court later extended *Custis* to §2255 motions. "If . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under §2255. A defendant may challenge a prior conviction as the product of a *Gideon* violation in a §2255 motion, but generally only if he raised that claim at his federal sentencing proceeding." *Daniels v. U.S.,* 532 U.S. 374, 382–83 (2001).

Although *Custis* concerns §924(e) rather than the guidelines, several circuits have followed it in guidelines cases, concluding that a challenge under the guidelines is not legally distinguishable from a challenge under ACCA. See *U.S. v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996) (finding reasoning of *Custis* "equally compelling in the context of Guidelines sentencing"); *U.S. v. Allen*, 88 F.3d 765, 772 (9th Cir. 1996) (remanded: following *Custis*, defendant should have been allowed to claim that uncounseled prior convictions used to calculate his criminal history were obtained in violation of Sixth Amendment); *U.S. v. Bonds*, 48 F.3d 184, 186–87 (6th Cir. 1995); *U.S. v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994); *U.S. v. Garcia*, 42 F.3d 573, 581 (10th Cir. 1994) (also noting, as *Custis* indicated, that "[i]f a defendant is able to effectively attack his prior convictions, 'he may then apply for reopening of any federal sentence enhanced by the state sentences'"); *U.S. v. Munoz*, 36 F.3d 1229, 1237 (1st Cir. 1994); *U.S. v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994) [7#3]; *U.S. v. Jones*, 28 F.3d 69, 70 (8th Cir. 1994); *U.S. v. Jones*, 27 F.3d 50, 52 (2d Cir. 1994). See also *U.S. v. Killion*, 30 F.3d 844, 846 (7th Cir. 1994) ("we find it difficult to detect a

principled distinction" between cases under §924(e) and §4B1.1). Even before *Custis* some circuits did not distinguish between Guidelines cases and §924(e) cases. See, e.g., *U.S. v. Medlock*, 12 F.3d 185, 187–88 n.4 (11th Cir. 1994) ("The rationale underlying our decision is equally applicable to both Sentencing Guidelines cases and those originating in 18 U.S.C. §924(e)"); *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) (holding that its earlier decision in *Custis* "is controlling of our disposition" in challenge under guidelines). But cf. *U.S. v. Paleo*, 9 F.3d 988, 989 (1st Cir. 1992) (in rejecting challenge under §924(e), finding citation to guidelines cases inapposite because "the Guideline provision arises in a different legal context and uses language critically different from" §924(e)).

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

Note that, for guidelines purposes, prior sentences can be excluded only if they arose from convictions that "(A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case." USSG §4A1.2, comment. (n.6). When a previous conviction was set aside or the defendant was pardoned "for reasons unrelated to innocence or errors of law," the sentence should be counted. USSG §4A1.2, comment. (n.10). See also *U.S. v. Castillo,* 200 F.3d 735, 737–38 (11th Cir. 2000) (refusing to recalculate defendant's criminal history points in light of Note 10—although previous conviction was reversed and later charges subsequently nol prossed, the "state court conviction was certainly not set aside due to Castillo's innocence" and evidence showed defendant engaged in criminal conduct underlying the charges).

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

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

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

In contrast, the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits held that amended Application Note 6 prohibits a defendant from collaterally attacking a prior sentence at the sentencing hearing unless the Constitution or a federal statute requires that the challenge be allowed. See *U.S. v. Garcia*, 42 F.3d 573, 580 (10th Cir. 1994); *U.S. v. Mitchell*, 18 F.3d 1355, 1360–61 (7th Cir. 1994) [6#11]; *U.S. v. Isaacs*, 14 F.3d 106, 110–12 (1st Cir. 1994) (replacing opinion of June 22, 1993, reported at [5#15]) [6#10]; *U.S. v. Byrd*, 995 F.2d 536, 539–40 (4th Cir. 1993) [5#15]; *U.S. v. Elliott*, 992 F.2d 853, 855–56 (8th Cir. 1993) (reaffirming *U.S. v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991)) [5#13]; *U.S. v. Roman*, 989 F.2d 1117, 1119–20 (11th Cir. 1993) (en banc) [5#13]. But cf. *U.S. v. Day*, 949 F.2d 973, 980 (8th Cir. 1991) (Note 6 amendment does not affect defendant's right to collaterally attack prior state convictions under 18 U.S.C. §924(e)(1)).

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

except for those challenges that manifest, from a facial review of the record, a presumptively void prior conviction").

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

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

The Fourth Circuit has noted that the sentencing court's power to impose procedural requirements for sentencing challenges, see §6A1.2, gives it "broad discretion . . . to control the manner" of a challenge to a prior conviction. *Jones*, 907 F.2d at 465. Later, the Fourth Circuit set forth a general procedure: First, the defendant must identify "the precise constitutional challenge." Next, the court should ascertain whether proof will be testimonial or documentary, and then make a preliminary decision as to whether to allow the challenge to continue. If proof will involve "historical facts likely to be in dispute; . . . testimonial evidence from witnesses not yet located or verified; . . . events distant in time and place; and the estimate of time required to obtain proof indicates a protracted delay in imposing sentence, a discretionary decision not to entertain the proposed challenge obviously would be justified." *U.S. v. Jones*, 977 F.2d 105, 110–11 (4th Cir. 1992) (remanded: vague, inconclusive, self-serving testimony concerning ineffective assistance of counsel over ten years ago was insufficient to prove prior conviction was invalid). The Third Circuit endorsed the *Jones* procedure in *Brown*, 991 F.2d at 1167.

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

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

4. Juvenile and Expunged Convictions and Sentences

Juvenile convictions and sentences may be considered in computing a defendant's criminal history score, USSG §4A1.2(d). See *U.S. v. Davis,* 48 F.3d 277, 279 (7th Cir. 1995); *U.S. v. Johnson,* 27 F.3d 151, 154–55 (D.C. Cir. 1994); *U.S. v. Chanel,* 3 F.3d 372, 373 (11th Cir. 1993); *U.S. v. Daniels,* 929 F.2d 128, 130 (4th Cir. 1991); *U.S. v. Bucaro,* 898 F.2d 368, 371–72 (3d Cir. 1990) [3#5]; *U.S. v. Kirby,* 893 F.2d 867, 868 (6th Cir. 1990) [2#20]; *U.S. v. Williams,* 891 F.2d 212, 215–16 (9th Cir. 1989) [2#18]. The Ninth Circuit held that if a juvenile defendant was convicted as an adult but committed to a state juvenile detention center, that sentence is counted under §4A1.2(d)(1). *U.S. v. Carillo*, 991 F.2d 590, 592–94 (9th Cir. 1993) ("adult sentences" in Application Note 7 refers to "defendants who were 'convicted as an adult and received a sentence of imprisonment'") [5#13]. See also *U.S. v. Birch,* 39 F.3d 1089, 1095 (10th Cir. 1994) ("placement into the custody of the state secretary of social and rehabilitation services was a 'confinement' within the meaning of U.S.S.G. 4A1.2(d)(2)(A)"); *U.S. v. Fuentes,* 991 F.2d 700, 702 (11th Cir. 1993) (detention for more than sixty days at juvenile confinement center was "sentence" under §4A1.2(d)(2)); *U.S. v. Hanley,* 906 F.2d 1116, 1120 (6th Cir. 1990) (commitment to juvenile facility constitutes "imprisonment" for purposes of §4A1.1(e) enhancement for committing current offense "less than two years after release from imprisonment") [3#10].

A court should look to federal law rather than state law to determine if a prior juvenile conviction should be counted under §4A1.2(c), and it may look to the substance of the juvenile offense. *U.S. v. Unger,* 915 F.2d 759, 762–63 (1st Cir. 1990) [3#15]. See also *U.S. v. Baker,* 961 F.2d 1390, 1392–93 (8th Cir. 1992) (classification of prior conviction under state law as misdemeanor or juvenile crime not controlling). Cf. *U.S. v. Ward,* 71 F.3d 262, 263–64 (7th Cir. 1995) (affirmed: in determining that prior juvenile offense of "possession of a dangerous weapon by a child" was not an uncountable "juvenile status offense" under §4A1.2(c)(2), district court could

look beyond ambiguous title of offense to underlying facts as related in unchallenged police report and record of conviction).

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

There is some disagreement over whether juvenile sentences that were "set aside" under the Federal Youth Corrections Act (or similar state statutes) should be considered "expunged" under §4A1.2(j) and not counted in the criminal history score. Most circuits to decide the issue have held that "set aside" sentences should be counted. See, e.g., *U.S. v. Fosher,* 124 F.3d 52, 57–58 (1st Cir. 1997) ("FYCA's use of the term 'set aside' is not the same as the Guideline's treatment of 'expunged' convictions, but is more analogous to the Guideline's definition of a 'set aside' conviction, one that is to be counted in the criminal history calculation"); *Gass v. U.S.,* 109 F.3d 677, 679 (11th Cir. 1997) (conviction "set aside" under YCA is not "expunged" and may be counted); *U.S. v. Nicolace,* 90 F.3d 255, 258 (8th Cir. 1996) (conviction set aside under YCA is not expunged and is counted in criminal history score, including career offender status); *U.S. v. Wacker,* 72 F.3d 1453, 1479 (10th Cir. 1995) ("conviction that was set aside under the FYCA . . . was not 'expunged' for purposes of the Guidelines"); *U.S. v. Ashburn,* 20 F.3d 1336, 1342–43 (5th Cir.) ("the 'set aside' provision should not be interpreted to be an expungement under §4A1.2(j)"), *as reinstated on reh'g en banc,* 38 F.3d 803 (5th Cir. 1994) [6#13]; *U.S. v. McDonald,* 991 F.2d 866, 871–72 (D.C. Cir. 1993) ("set aside" in D.C. statute similar to YCA is not "expunged" under guidelines). But see *U.S. v. Kammerdiener,* 945 F.2d 300, 301 (9th Cir. 1991) (conviction "set aside" under YCA was "expunged" under §4A1.2(j)). See also *U.S. v. Doe,* 980 F.2d 876, 881–82 (3d Cir. 1992) (reversing denial of a motion for expungement, holding that "set aside" in YCA means "a complete expungement").

The Second Circuit held that "[i]n determining whether a state statute provides for 'expungement' within the meaning of §4A1.2(j), we look to the language and design of the state statute, as well as its purpose." Thus, the court in one case found that an adjudication under the New York youthful offender statute, which "does not call for an 'expungement' of the conviction . . . [and] does not require actions that would effectively eliminate all vestiges of the adjudication," could be counted. See *U.S. v. Matthews,* 205 F.3d 544, 546–48 (2d Cir. 2000). In another case, a juvenile conviction under a Vermont statute that provided that "the proceedings in the matter under this act shall be considered never to have occurred, all index references thereto shall be deleted, and the . . . reply to any request for information [shall be] that no record exists with respect to such person," was considered expunged under §4A1.2(j) and not counted. *U.S. v. Beaulieau,* 959 F.2d 375, 380 (2d Cir. 1992).

In analyzing §4A1.2(j) for adult expunged sentences, the Tenth Circuit agreed that "Application Note 10 requires sentencing courts to analyze the true basis for expungement under state law." However, the court held that "a state's use of the term 'expunge' is not controlling in determining whether a conviction is properly included in calculating a defendant's criminal history category. Instead, sentencing courts are to examine the grounds upon which a defendant was pardoned or his sentence was set aside or expunged." Following Application Note 10, the court concluded that "[a] conviction is 'expunged' for Guideline purposes only if the basis for the expungement under state law is related to 'constitutional invalidity, innocence, or errors of law.'" The court found that defendant's prior Arkansas battery conviction was not expunged on those grounds but rather "in order to restore civil rights or to remove the stigma associated with a criminal conviction," and thus under Note 10 and §4A1.2(j) should be counted in the criminal history score. *U.S. v. Hines,* 133 F.3d 1360, 1362–66 (10th Cir. 1998) (affirmed). See also *U.S. v. Stubblefield,* 265 F.3d 345, 347 (6th Cir. 2001) (affirmed: although defendant received no sentence for Ohio minor misdemeanor and state law said it "does not constitute a criminal record and need not be reported," conviction was not expunged and in some circumstances could be considered in later prosecutions); *U.S. v. Hayden,* 255 F.3d 768, 770–74 (9th Cir. 2001) (affirmed: proper to use defendant's prior convictions because, although California statute under which they were "set aside" had "released [defendant] from all penalties and disabilities resulting" from those convictions, it also specifically stated that set aside convictions may be revived "in any subsequent prosecution").

5. Other Sentences or Convictions

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

It has been held that §4A1.1(d) may be applied to an offense committed while on supervised probation for a traffic offense, *U.S. v. McCrudden,* 894 F.2d 338, 339 (9th Cir. 1990) [3#2], or while on "bench probation" for a prior conviction, *U.S. v. Martinez,* 905 F.2d 251, 254 (9th Cir. 1990), or on unsupervised release for a prior conviction, *U.S. v. Knighten,* 919 F.2d 80, 82 (8th Cir. 1990) (guidelines do not distinguish between supervised and unsupervised probation).

The Third Circuit held that a conviction procured by an *Alford* plea should be counted as a prior sentence. *U.S. v Mackins,* 218 F.3d 263, 268–69 (3d Cir. 2000) (affirmed: "because an *Alford* plea is an adjudication of guilt under §4A1.2(a)(1),

any sentence imposed pursuant to an *Alford* plea is a 'prior sentence' for purposes of §4A1.1").

Section 4A1.2(c) contains a listing of prior misdemeanor and petty offenses that should or should not be counted. Each list also states that "offenses similar to" the listed offenses should or should not be counted. Different circuits apply different analyses to determining when an offense is "similar." The Fifth Circuit adopted a multifactor test, directing courts to take a "common sense approach which relies on all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." *U.S. v. Hardeman,* 933 F.2d 278, 281 (5th Cir. 1991). The Second Circuit agreed, but added that courts should also look at "any other factor the court reasonably finds relevant in comparing prior offenses and Listed Offenses. Overall, the court should keep in mind that the goal of the inquiry is to determine whether the unlisted offense under scrutiny is 'categorically more serious' than the Listed Offenses to which it is being compared." *U.S. v. Martinez-Santos,* 184 F.3d 196, 200–06 (2d Cir. 1999).

Other sentences or convictions that may properly be counted in the criminal history score: *U.S. v. Amster,* 193 F.3d 779, 780–81 (3d Cir. 1999) (diversionary disposition resulting from plea of nolo contendere even when cases were eventually dismissed); *U.S. v. Shazier,* 179 F.3d 1317, 1319 (11th Cir. 1999) (when a pardon occurs after the sentence has been served, "pardoned convictions should be counted in the same way as they would be counted absent the pardon"); *U.S. v. Boyd,* 146 F.3d 499, 501–02 (7th Cir. 1998) (operating uninsured motor vehicle—more equivalent to driving without license than uncounted "minor traffic infraction"); *U.S. v. Valdez-Valdez,* 143 F.3d 196, 202 (5th Cir. 1998) (deferred adjudication where defendant served 180 days in work release program); *U.S. v. Roy,* 126 F.3d 953, 955 (7th Cir. 1997) (marijuana use—not equivalent to public intoxication, which is not counted); *U.S. v. Martinez,* 69 F.3d 999, 1000–01 (9th Cir. 1995) (vandalism); *U.S. v. Marrone,* 48 F.3d 735, 739 (3d Cir. 1995) (prior conviction that is element of RICO offense, §2E1.1, comment. (n.4)); *U.S. v. Vela*, 992 F.2d 1116, 1117–18 (10th Cir. 1993) (deferred sentence under Oklahoma law); *U.S. v. Jakobetz,* 955 F.2d 786, 804–06 (2d Cir. 1992) (driving-while-ability-impaired conviction—it is not a "minor traffic infraction"); *U.S. v. Avala-Rivera,* 954 F.2d 1275, 1277 (7th Cir. 1992) (reckless driving); *U.S. v. Wilson,* 927 F.2d 1188, 1189–90 (10th Cir. 1991) (AWOL conviction); *U.S. v. Hatchett*, 923 F.2d 369, 376–77 (5th Cir. 1991) (deferred adjudication of probation under Texas law); *U.S. v. Vanderlaan,* 921 F.2d 257, 258–60 (10th Cir. 1991) (sentence under 18 U.S.C. §§4251–55, Narcotic Addict Rehabilitation Act) [3#19]; *U.S. v. Giraldo-Lara,* 919 F.2d 19, 23 (5th Cir. 1990) ("deferred adjudication probation" when there was a finding of guilt); *U.S. v. Williams,* 919 F.2d 1451, 1457 (10th Cir. 1990) (domestic violence offense with one-year probation); *U.S. v. Locke,* 918 F.2d 841, 842 (9th Cir. 1990) (AWOL conviction); *U.S. v.*

Crosby, 913 F.2d 313, 314–15 (6th Cir. 1990) (prior conviction that is element of instant CCE offense) [3#14]; *U.S. v. Aichele,* 912 F.2d 1170, 1171 (9th Cir. 1990) (reckless driving) [3#13]; *U.S. v. Jones,* 910 F.2d 760, 761 (11th Cir. 1990) (conviction on plea of nolo contendere) [3#14]. See also *U.S. v. Lloyd,* 43 F.3d 1183, 1187–88 (8th Cir. 1994) (§4A1.2(c)(1)(A) includes Illinois's "conditional discharge"); *U.S. v. Caputo,* 978 F.2d 972, 976–77 (7th Cir. 1992) (same). But cf. *U.S. v. Johnson,* 43 F.3d 1211, 1215 (8th Cir. 1995) (remanded: "a straight stay of imposition of sentence without an accompanying term of probation of any kind is not a sentence of probation under U.S.S.G. §4A1.2(c)").

"Term of imprisonment": Whether a prior sentence included "imprisonment" affects how many points are added to the criminal history score. Compare USSG §4A1.1(a) & (b) (adding three and two points respectively for each "prior sentence of imprisonment," depending on length) with USSG §4A1.1(c) (adding one point for "each prior sentence not counted in (a) or (b)"). "Sentence of imprisonment" is defined in §4A1.2(b) as "a sentence of incarceration," and the Background Commentary to §4A1.1 indicates that "all other sentences, such as . . . residency in a halfway house," fall under subsection (c). Is confinement in a community treatment center a "sentence of imprisonment? Two circuits have said no. See *U.S. v. Pielago,* 135 F.3d 703, 713 (11th Cir. 1998) (concluding that Sentencing Guidelines treat such confinement as "functionally equivalent" to residency in halfway house); *U.S. v. Latimer*, 991 F.2d 1509, 1512–13 (9th Cir. 1993) (confinement in community treatment center is not incarceration under §4A1.2(e)(1)).

Similarly, the Sixth Circuit held that home detention is not "imprisonment" and falls under subsection (c). *U.S. v. Jones,* 107 F.3d 1147, 1161–65 (6th Cir. 1997) ("we are confident that, given its uniform treatment throughout the Guidelines, . . . [home confinement] would be classified in the 'all other sentences' category" in the Background Commentary; distinguishing *Rasco*, following). Cf. *U.S. v. Rasco,* 963 F.2d 132, 134–36 (6th Cir. 1992) (detention in halfway house upon revocation of parole should be added to original term of imprisonment, §4A1.2(k)). See also *U.S. v. Brooks,* 166 F.3d 723, 726–27 (5th Cir. 1999) (sentence to boot camp: "commentary to U.S.S.G. §4A1.1 explains that 'confinement sentences' of over six months qualify for §4A1.2(b) treatment, expressly distinguishing types of sentences not requiring twenty-four hours a day physical confinement, such as 'probation, fines, and residency in a halfway house.' Brooks was not free to leave the boot camp; his confinement there, therefore, falls into the former category of incarcerations eligible for §4A1.1(b) treatment"); *U.S. v. Ruffin,* 40 F.3d 1296, 1299 (D.C. Cir. 1994) (sentence of one-year work release, in which defendant was imprisoned on weekends and from 6:00 p.m. to 6:00 a.m. daily, was "sentence of imprisonment" under §4A1.1(b)); *U.S. v. Schomburg,* 929 F.2d 505, 507 (9th Cir. 1991) (sentence of one-year weekend work project was "sentence of imprisonment" under §4A1.1(b), despite lack of custodial confinement, because sheriff had discretion to alter sentence to include imprisonment).

6. Application of §4A1.1(d) and (e)

To escapees: Under §4A1.1(d), two points are added to the criminal history score if the defendant "committed the instant offense while under any criminal justice sentence." Section 4A1.1(e) adds two points (one if subsection (d) is also used) if the instant offense was committed "less than two years after release from imprisonment . . . or while in imprisonment or escape status." Defendants have argued that applying these sections to defendants convicted of escape amounts to improper double-counting because being imprisoned or in some form of custody is already an element of the offense of escape. Every appellate court that has considered this challenge has rejected it, however, and upheld the application of either or both of these sections to escapees. See *U.S. v. Meader,* 195 F.3d 66, 67 (1st Cir. 1999); *U.S. v. Thomas,* 930 F.2d 12, 13–14 (8th Cir. 1991); *U.S. v. Goolsby,* 908 F.2d 861, 863–64 (11th Cir. 1990); *U.S. v. Jimenez,* 897 F.2d 286, 287–88 (7th Cir. 1990) [3#5]; *U.S. v. Carroll,* 893 F.2d 1502, 1509–11 (6th Cir. 1990) [2#20]; *U.S. v. Wright,* 891 F.2d 209, 211–12 (9th Cir. 1989) [2#18]; *U.S. v. Vickers,* 891 F.2d 86, 87–88 (5th Cir. 1989) [2#18]; *U.S. v. Goldbaum,* 879 F.2d 811, 812–14 (10th Cir. 1989) [2#10]; *U.S. v. Ofchinick,* 877 F.2d 251, 255–57 (3d Cir. 1989) [2#9]. The Sixth Circuit has upheld the application of §4A1.1(d) to a failure to report defendant, §2J1.6. *U.S. v. Lewis,* 900 F.2d 877, 880–81 (6th Cir. 1990) [3#5].

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

Other: Application Note 4 of §4A1.1 states that a "criminal justice sentence" under §4A1.1(d) must have "a custodial or supervisory component, although active supervision is not required for this item to apply." See, e.g., *U.S. v. Mota-Aguirre,* 186 F.3d 596, 599 (5th Cir. 1999) (affirmed: "conditional pardon" under Texas law "was the functional equivalent of parole" and constitutes "criminal justice sentence" under §4A1.1(d)); *U.S. v. LaBella-Szuba,* 92 F.3d 136, 138 (2d Cir. 1996) (power to revoke conditional discharge sentence was "supervisory component" that brought sentence "within the meaning of a 'criminal justice sentence'"); *U.S. v. Compton,* 82 F.3d 179, 183–84 (7th Cir. 1996) (remanded: home detention with electronic monitoring "is not 'imprisonment' but a 'substitute for imprisonment'" and thus does not fall within "while in imprisonment" language of §4A1.1(e)); *U.S. v. Miller,* 56 F.3d 719, 722 (6th Cir. 1995) (affirmed: Kentucky sentence to "conditional discharge is the 'functional equivalent' of an unsupervised probation under U.S.S.G. §4A1.1(d)"). The Ninth Circuit held that a deferred or suspended sentence with no supervisory component is not a "criminal justice sentence" under §4A1.1(d). See

U.S. v. Kipp, 10 F.3d 1463, 1466–67 (9th Cir. 1993) (remanded: error to count state deferred sentence that had no supervisory component and was treated by district court as suspended sentence—"a suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence,' as that term is used in §4A1.1(d)") [6#9]. But cf. *U.S. v. Ramsey,* 999 F.2d 348, 351 (8th Cir. 1993) (proper to count under §4A1.1(c) sentence that was suspended and the charge ultimately dismissed after defendant testified in another case—Note 10 states that previous convictions set aside "for reasons unrelated to innocence or errors of law . . . are to be counted").

Some forms of detention are not "imprisonment" under §4A1.1(e). See, e.g., *U.S. v. Stewart,* 49 F.3d 121, 123–25 (4th Cir. 1995) (remanded: "detentions of defendants who are awaiting parole revocation hearings, when those revocation hearings do not result in reincarceration or revocation of parole," are not "sentences of imprisonment" countable under §4A1.1(e)). Cf. *U.S. v. Latimer*, 991 F.2d 1509, 1512–13 (9th Cir. 1993) (confinement in community treatment center is not incarceration under §4A1.2(e)(1)). See also discussion on "Terms of imprisonment" in previous subsection.

A juvenile confinement that is counted in defendant's criminal history score under §4A1.1(b) counts as "imprisonment" for §4A1.1(e). See *U.S. v. Allen,* 64 F.3d 411, 413 (8th Cir. 1995) ("commission of an offense within two years of release from a term of juvenile confinement which is assigned criminal history points under section 4A1.1(b) results in two additional criminal history points under U.S.S.G. §4A1.1(e)"); *U.S. v. Unger,* 915 F.2d 759, 763–64 (1st Cir. 1990); *U.S. v. Hanley,* 906 F.2d 1116, 1120 (6th Cir. 1990).

B. Career Offender Provision (§4B1.1)

Note: As part of Nov. 1997 amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1), (2), and (3) were renumbered as (a), (b), and (c), and subsections (1)(i) and (1)(ii) are now (a)(1) and (a)(2). Also, Application Notes 2 and 3 were replaced by a new Note 2, which states that §4B1.1 "expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry." Many of the cases that follow were decided before these changes and use the old subsection numbers.

1. "Crime of Violence"

a. General determination

One issue has been whether the determination that an offense is a "crime of violence" should be based solely on the elements of the offense or can be based on the underlying factual circumstances. The Supreme Court held that when determining

whether a prior offense was a "violent felony" under the Career Criminals Amendment Act, 18 U.S.C. §924(e), a trial court is required "to look only to the fact of conviction and the statutory definition of the prior offense," not to the facts underlying the conviction. *Taylor v. U.S.,* 495 U.S. 575, 602 (1990).

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

Note that, while a defendant's actual conduct may not be examined under the categorical approach of determining crimes of violence, the Sixth Circuit indicated that it may be considered in a decision to depart. In ruling that an escape from a county correctional center constituted a §4B1.2(1)(ii) crime of violence under the categorical approach, the court added that, on remand, "we do not exclude the possibility that a limited inquiry into his actual conduct at the time of his escape . . . , coupled with other relevant facts, might appropriately lead the sentencing court to conclude that a downward departure is warranted here." *U.S. v. Harris,* 165 F.3d 1062, 1068 (6th Cir. 1999).

It may be necessary to look beyond the statute of conviction if there is a dispute as to whether the offense in question is in fact one of those listed in §4B1.2. For example, burglary of a dwelling is listed, but many state statutes list burglary without distinguishing between dwellings and nondwellings. In such instances a court may look "to the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge." *U.S. v. Smith,* 10 F.3d 724, 733–34 (10th Cir. 1993) (remanded: state burglary statute was ambiguous, review of "official charging papers and sentencing documents" does not support finding that building was a "dwelling"). See also *U.S. v. Bennett,* 108 F.3d 1315, 1317–19 (10th Cir. 1997)

(remanded: second-degree burglary offense could not be considered crime of violence where record was ambiguous as to whether "dwelling" was involved—sentencing court may not rely on "knowledgeable speculation" and "we resolve any ambiguity in favor of narrowly interpreting the career offender provisions"). Cf. *U.S. v. Hill,* 131 F.3d 1056, 1064–65 (D.C. Cir. 1997) (remanded: "in determining whether a prior conviction constitutes a predicate offense for purposes of U.S.S.G. §2K2.1(a)(2) when the statutory description of the offense includes non-violent as well as violent crimes and when the defendant has pled guilty to a lesser included offense of a charge in the indictment, the sentencing court may not rely solely on the indictment to determine whether the offense of which the defendant was convicted was a crime of violence. Instead, the court must consult other available indices to verify that the defendant was indeed convicted of a crime of violence. These other indices may include the judgment of conviction, plea agreement or other statement by the defendant on the record, presentencing report adopted by the court, and the findings of the sentencing judge.").

Following *Smith,* the Eleventh Circuit found that "the ambiguity of the conviction and the statute under which Appellant was prosecuted required the court to look behind the judgment of conviction," but that the court "erred by relying on the charging document without determining whether Appellant pled guilty to the crimes charged. . . . [A] district court may not rely on a charging document without first establishing that the crime charged was the same crime for which the defendant was convicted." There was a plea agreement and defendant might have pled guilty to a less serious offense than originally charged. *U.S. v. Spell,* 44 F.3d 936, 939–40 (11th Cir. 1995). See also *U.S. v. Williams,* 47 F.3d 993, 994–95 (9th Cir. 1995) (affirmed: although state statute of conviction was ambiguous, defendant "pleaded nolo contendere to entering a residence and thus was convicted of a 'crime of violence' as defined in U.S.S.G. §4B1.2(1)(ii) because that section specifically defines the 'burglary of a dwelling' to be a 'crime of violence'"); *U.S. v. Sebero,* 45 F.3d 1075, 1077–78 (7th Cir. 1995) (affirmed: although state burglary statute was ambiguous, presentence report supported finding that building was a "dwelling"). But cf. *U.S. v. Hicks,* 122 F.3d 12, 12–13 (7th Cir. 1997) (remanded: where original charge of prior offense alleged defendant committed burglary of dwelling, but defendant had pled guilty to amended information charging burglary of a "building," district court "was not authorized to peek behind the information" to determine that defendant's earlier offense was actually residential burglary that constituted predicate violent felony under §4B1.2(1)(ii)).

The Fourth Circuit reached a similar conclusion for a defendant who had been convicted of conspiracy to commit a felony. No element of the state's conspiracy statute specified the use, attempted use, or threatened use of physical violence against another. The sentencing court looked to the indictment to find that the underlying felony was robbery. Affirming, the Fourth Circuit held that "a sentencing court can go beyond the general elements of a criminal conspiracy statute to determine whether a violent felony was the object of the conspiracy. When presented with a prior conviction for conspiracy, a sentencing court can determine the object of the conspiracy

from the record of conviction, the charging document, and the jury instructions." *U.S. v. Ward,* 171 F.3d 188, 192–93 (4th Cir. 1999). Cf. *U.S. v. Martin,* 215 F.3d 470, 472–75 (4th Cir. 2000) (remanded: although defendant was indicted for bank robbery, he was convicted of the lesser included offense of bank larceny, which under "the limited nature of the permissible factual inquiry" could not be construed as a crime of violence; nor is bank larceny by definition necessarily a crime of violence). But cf. *U.S. v. Riggans,* 254 F.3d 1200, 1203–04 (10th Cir. 2001) (affirmed: court may look at underlying facts of *instant* conviction, and defendant's bank larceny did, in fact, present a serious potential risk of physical injury to others; court decline to follow *Martin*).

For an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," §4B1.2(a)(2), some conduct may be considered. Since Nov. 1991, Application Note 2 of §4B1.2 has read: "Other offenses are included where . . . (B) the conduct set forth (*i.e.,* expressly charged) in the count of which defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of the inquiry." Several circuits have read this note to allow looking at the conduct alleged in the count of the indictment charging the offense of conviction, but not other conduct. See *U.S. v. Arnold,* 58 F.3d 1117, 1124 (6th Cir. 1995) ("district court should limit its examination to only those charges in the indictment that are essential to the offense to which defendant entered his plea . . . [but may also] consider defendant's plea agreement"); *U.S. v. Lee,* 22 F.3d 736, 738–40 (7th Cir. 1994) (look only at "conduct expressly charged in the count of which a defendant was convicted"); *U.S. v. Young*, 990 F.2d 469, 471–72 (9th Cir. 1993) ("courts may consider the statutory definition of the crime and . . . the conduct 'expressly charged'" in the count of conviction); *U.S. v. Joshua,* 976 F.2d 844, 856 (3d Cir. 1992) ("look solely to the conduct alleged in the count of the indictment charging the offense of conviction"); *U.S. v. Fitzhugh,* 954 F.2d 253, 254 (5th Cir. 1992) ("consider conduct expressly charged in the count of which defendant was convicted, but not any other conduct"); *U.S. v. Johnson,* 953 F.2d 110, 113–15 (4th Cir. 1991) (look only to conduct charged in indictment, even for offenses not listed in §4B1.2) [4#17]. But cf. *Riggans,* 254 F.3d at 1203–04 (limiting this approach to *past* convictions—court may look to underlying facts of *instant* conviction).

The D.C. Circuit held that "when a defendant pleads guilty to a lesser included offense of the offense charged in the indictment and the statutory definition of the lesser offense allows conviction for conduct that does not meet the definition of a 'crime of violence,' the indictment alone does not provide a sufficient basis for designating an offense a 'crime of violence.'" The district court "must consult other available indices to verify that the defendant was indeed convicted of a crime of violence. These other indices may include the judgment of conviction, plea agreement or other statement by the defendant on the record, presentencing report adopted by the court, and the findings of the sentencing judge." *U.S. v. Hill,* 131

F.3d 1056, 1062–65 (D.C. Cir. 1997). The Seventh Circuit concluded that it may be possible to use just the indictment if, by considering "only those charges in the information that are essential to the" lesser offense conviction and "only the minimum facts necessary to support [that] conviction," it is apparent whether or not defendant was convicted of a crime of violence. The court remanded a case after finding that defendant's prior sentence for "criminal recklessness" was a crime of violence based on the statutory requirements and the facts charged in the indictment. *U.S. v. Jackson,* 177 F.3d 628, 632–33 (7th Cir. 1999).

Some courts have allowed the use of documents other than just the indictment in determining whether defendant's prior conduct constituted a crime of violence under §4B1.2(1). See, e.g., *U.S. v. Palmer,* 68 F.3d 52, 59 (2d Cir. 1995) (affirmed: plea proceeding from prior nolo contendere plea could be used because it clearly established conduct of which defendant was convicted); *U.S. v. Wood,* 52 F.3d 272, 275 (9th Cir. 1995) (court may consider "any conduct charged in the indictment or information, the defendant's guilty plea or plea agreement, and any jury instructions"); *U.S. v. Gacnik,* 50 F.3d 848, 856 (10th Cir. 1995) (may consider "charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge"); *U.S. v. Spell,* 44 F.3d 936, 939–40 (11th Cir. 1995) ("inquiry is limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers (but only for offense of conviction), plea agreement, presentence report adopted by the court, and the findings of a sentencing judge"). But cf. *Palmer,* 68 F.3d at 59 (description of prior offense in presentence report for *current* offense cannot be used in lieu of "easily produced and evaluated court documents" from prior conviction).

Inquiry into underlying conduct is not necessary when the statute of conviction clearly indicates there was a serious risk of injury. See, e.g., *Parson,* 955 F.2d at 872–73 (state conviction for "'recklessly engag[ing] in conduct which creates a substantial risk of death to another person' . . . 'so closely tracks the language of the Guideline that the defendant's conviction *necessarily* meets the Guideline standard'") [4#17]. Conversely, the First Circuit held that, "[u]nder *Taylor*, when the predicate statutory crime has been determined to be typically non-violent, the inquiry ends." Thus, once the charging document for defendant's prior offense made it clear that he was convicted of a typically nonviolent offense, "it was error for the district court to look beyond the categorical nature of the crime . . . [and] inquire further to discover the reality of the defendant's prior crime as revealed in the Presentence Investigative Report" for that crime. *U.S. v. Damon,* 127 F.3d 139, 140–45 (1st Cir. 1997).

Prior to the 1991 amendment to Note 2, several circuits had held that the factual circumstances underlying an offense could be considered. See *U.S. v. John,* 936 F.2d 764, 769–70 (3d Cir. 1991); *U.S. v. Walker,* 930 F.2d 789, 794–95 (10th Cir. 1991); *U.S. v. Goodman,* 914 F.2d 696, 698–99 (5th Cir. 1990) [3#14]; *U.S. v. McVicar,* 907 F.2d 1, 1–2 (1st Cir. 1990) [3#13]; *U.S. v. Terry,* 900 F.2d 1039, 1042–43 (7th Cir.

1990) [3#13]; *U.S. v. Maddalena,* 893 F.2d 815, 820 (6th Cir. 1989) [2#19]; *U.S. v. Baskin,* 886 F.2d 383, 388–90 (D.C. Cir. 1989) [2#14].

Crimes of violence under the categorical approach (§4B1.2(a)(1)) include attempted burglary, *U.S. v. Guerra,* 962 F.2d 484, 485–86 (5th Cir. 1992), conspiracy to commit breaking and entering of a commercial building, *U.S. v. Fiore*, 983 F.2d 1, 4 (1st Cir. 1992), whether occupied or not, *U.S. v. Ray,* 245 F.3d 1256, 1257 (11th Cir. 2001), burglary of a hotel guest room, *U.S. v. McClenton,* 53 F.3d 584, 587–88 (3d Cir. 1995), and involuntary manslaughter, *U.S. v. Fry,* 51 F.3d 543, 546 (5th Cir. 1995) (using §4B1.2 definition for enhancement under §2K2.1); *U.S. v. Payton,* 28 F.3d 17, 19 (4th Cir. 1994) (same). Cf. *U.S. v. Gaitan,* 954 F.2d 1005, 1008–11 (5th Cir. 1992) (remanded: conduct underlying state possession convictions should not be considered to determine if they were "controlled substance offenses" under §4B1.2(2)).

Following are some of the cases that have found offenses that, by their nature, "present a serious potential risk of physical injury to another" under §4B1.2(a)(2): *U.S. v. Carter,* 266 F.3d 1089, 1091 (9th Cir. 2001) (transportation of minor with intent to engage in prostitution involves risk of disease and physical abuse); *U.S. v. Walker,* 181 F.3d 774, 780 (6th Cir. 1999) (solicitation to commit aggravated robbery); *U.S. v. Payne,* 163 F.3d 371, 375 (6th Cir. 1998) ("larceny from the person is a crime that creates a substantial risk of physical harm to another"); *U.S. v. Vahovick,* 160 F.3d 395, 397 (7th Cir. 1998) (possession of a weapon by prison inmate); *U.S. v. Coronado-Cervantes,* 154 F.3d 1242, 1244 (10th Cir. 1998) (sexual contact with a minor, and adding that "[e]very published appellate decision which has considered applying the 'otherwise' clause in the context of sexual offenses involving minors has found a 'serious potential risk of physical injury' to the minors under U.S.S.G. §4B1.2(1)(ii)," citing cases); *U.S. v. Meader,* 118 F.3d 876, 882–85 (1st Cir. 1997) (statutory rape of thirteen-year-old by thirty-eight-year-old); *U.S. v. Kirk,* 111 F.3d 390, 394–95 (5th Cir. 1997) (indecency with a child involving sexual contact (for §2K2.1 offense)); *U.S. v. Shannon,* 110 F.3d 382, 388–89 (7th Cir. 1997) (en banc) (second-degree sexual assault on a thirteen-year-old); *U.S. v. Williams,* 110 F.3d 50, 52–53 (9th Cir. 1997) ("kidnapping which occurs 'without consent' of the victim"); *U.S. v. Farnsworth,* 92 F.3d 1001, 1009 (10th Cir. 1996) (vehicular manslaughter "while under the influence of drugs or alcohol and with gross negligence"); *U.S. v. Dickerson,* 77 F.3d 774, 776–77 (4th Cir. 1996) ("crime of felony attempted escape from custody"); *U.S. v. Hascall,* 76 F.3d 902, 904 (8th Cir. 1996) (second-degree burglary of a commercial building); *U.S. v. Cox,* 74 F.3d 189, 190 (9th Cir. 1996) (solicitation of murder); *U.S. v. Rutherford,* 54 F.3d 370, 376 (7th Cir. 1995) (felony drunk driving); *U.S. v. Wood,* 52 F.3d 272, 275 (9th Cir. 1995) ("indecent liberties" with four-year-old); *U.S. v. Young,* 990 F.2d 469, 472 (9th Cir. 1993) (possession of deadly weapon by prison inmate); *U.S. v. Bauer,* 990 F.2d 373, 375 (8th Cir. 1993) (statutory rape conviction for sexual intercourse with a female child under the age of sixteen, regardless of consent); *U.S. v. De Jesus,* 984 F.2d 21, 24–25 (1st Cir. 1993) ("the crime of larceny from the person under Massachusetts law bears an inherent risk of violent outbreak"); *U.S. v. Huffhines,* 967 F.2d 314, 321 (9th Cir. 1992) (un-

lawful possession of a silencer); *U.S. v. Thompson,* 891 F.2d 507, 509–10 (4th Cir. 1989) (under previous version of §4B1.2(1), there is "substantial risk that physical force may be used" in state offense of pointing a firearm at a person).

Note that there is a split in the circuits regarding whether burglary of a commercial building or other "non-dwelling" should be included under §4B1.2(a)(2). See discussion and cases cited in *U.S. v. Wilson,* 168 F.3d 916, 927–29 (6th Cir. 1999), *U.S. v. Sawyer,* 144 F.3d 191, 196 (1st Cir. 1998), and *Hascall,* 76 F.3d at 905–06.

Several circuits have held that escape, whether from a secure or non-secure facility, always involves a risk of violence and therefore qualifies as a violent felony. See, e.g., *U.S. v. Gay,* 251 F.3d 950, 954–55 (11th Cir. 2001) (offense of escape "does present the potential risk of violence, even when it involves a 'walk-away' from unsecured correctional facilities"); *U.S. v. Nation,* 243 F.3d 467, 472 (8th Cir. 2001) ("every escape, even a so-called 'walkaway' escape, involves a potential risk of injury to others"); *U.S. v. Ruiz,* 180 F.3d 675, 676–77 (5th Cir. 1999) (escape from federal prison camp that had no physical barriers or armed guards); *U.S. v. Harris,* 165 F.3d 1062, 1068 (6th Cir. 1999) (remanded: felony escape from county correctional center workhouse); *U.S. v. Mitchell,* 113 F.3d 1528, 1532–33 (10th Cir. 1997) (escapes from a community treatment center and from a correction center); *U.S. v. Gosling,* 39 F.3d 1140, 1142–43 (10th Cir. 1994) ("willfully, unlawfully and feloniously escap[ing] from . . . [a] County Jail" (using §4B1.2 definition of crime of violence for §2K2.1(a)(2) enhancement)).

Some circuits have held that possession of a sawed-off shotgun is "inherently dangerous" and always "presents a serious potential risk of physical injury to another." See *U.S. v. Johnson,* 246 F.3d 330, 334–35 (4th Cir. 2001); *U.S. v. Brazeau,* 237 F.3d 842, 845 (7th Cir. 2001) (for §2K2.1(a)(4)(A)); *U.S. v. Allegree,* 175 F.3d 648, 651 (8th Cir. 1999); *U.S. v. Hayes,* 7 F.3d 144, 145 (9th Cir. 1993) (possession of unregistered sawed-off shotgun "otherwise involves conduct that presents a serious risk of physical injury to another") [6#4]. See also *U.S. v. Fortes,* 141 F.3d 1, 7–8 (1st Cir. 1998) (possession of sawed-off shotgun is "violent felony" for purposes of Armed Career Criminal Act). Cf. *U.S. v. Dwyer,* 245 F.3d 1168, 1172 (10th Cir. 2001) (affirmed: citing previous cases and holding that possession of unregistered weapon under 26 U.S.C. §5861(d) is crime of violence for purposes of §2K2.1(a)(2)).

b. Unlawful possession of firearm by felon

A Nov. 1991 amendment to §4B1.2, Application Note 2, is intended to clarify that "'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." The Supreme Court held that this change is binding: "Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision . . . as to those defendants to whom [the amendment] applies." The court did not, however, determine whether the amendment should be given retroactive effect. *Stinson v. U.S.,* 113 S. Ct. 1913, 1920 (1993). A Nov. 1992 amendment to §1B1.10(d) added the 1991 amendment to the list of amendments that may be considered for retroactive application. After

Stinson was remanded the Eleventh Circuit held that the amendment would be applied retroactively, accepting the Sentencing Commission's view of the amendment as a clarification rather than a substantive change in the law. *U.S. v. Stinson,* 30 F.3d 121, 122 (11th Cir. 1994). See also *U.S. v. Garcia-Cruz,* 40 F.3d 986, 989–90 (9th Cir. 1994) (remanded: amendment should be applied retroactively despite contrary circuit precedent). See also section I.E. Amendments.

When Note 2 was amended to preclude application of the career offender provision to the felon-in-possession offense, the Commission also amended §2K2.1 to increase the offense level for that crime. However, the change to §2K2.1 was not made retroactive, and two circuits have held that it may not be applied to pre-Nov. 1, 1991, offenses when the amendment to Note 2 of §4B1.2 is applied retroactively to lower a defendant's sentence. See *Hamilton v. U.S.,* 67 F.3d 761, 764–65 (9th Cir. 1995) (remanded: retroactive application of amended §2K2.1 is ex post facto violation) [8#2]; *U.S. v. Douglas,* 64 F.3d 450, 451–53 (8th Cir. 1995) (remanded: §2K2.1 is not listed in §1B1.10 and should not be applied retroactively) [8#2]. But cf. *U.S. v. Lykes,* 999 F.2d 1144, 1148–50 (7th Cir. 1993) (affirmed: not an ex post facto violation to apply amended §2K2.1 and amended Note 2 to defendant sentenced in 1992 for 1990 offense; alternatively, if applying later guideline would violate ex post facto, amended Note 2 would not be applied to 1989 guidelines because it was a substantive change that conflicted with circuit precedent).

Previously, two circuits had held that unlawful possession of a firearm by a felon is "by its nature" a crime of violence. See *U.S. v. Stinson,* 943 F.2d 1268, 1271–72 (11th Cir. 1991) [4#10]; *U.S. v. O'Neal,* 937 F.2d 1369, 1375 (9th Cir. 1990) (applying pre-1989 version of §4B1.2) (amending and superseding 910 F.2d 663 [3#13]). After the §4B1.2 definition of crime of violence was amended in 1989, the Ninth Circuit held that "being a felon in possession of a firearm is not a crime of violence." *U.S. v. Sahakian,* 965 F.2d 740, 742 (9th Cir. 1992) [4#23]. Accord *U.S. v. Fitzhugh,* 954 F.2d 253, 254–55 (5th Cir. 1992); *U.S. v. Johnson,* 953 F.2d 110, 113 (4th Cir. 1991); *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991).

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

Before the 1991 amendment, courts had held that unlawful possession of a gun *plus* some other threatening action may be a crime of violence. See *U.S. v. Cornelius,* 931 F.2d 490, 493 (8th Cir. 1991) (possession while hiding in house of person defendant previously threatened); *Walker,* 930 F.2d at 794–95 (possession plus firing weapon); *Alvarez,* 914 F.2d at 918–19 (possession plus struggling with arresting

officer) [3#14]; *U.S. v. McNeal,* 900 F.2d 119, 123 (7th Cir. 1990) (possession plus firing); *U.S. v. Williams,* 892 F.2d 296, 304 (3d Cir. 1989) (same); *U.S. v. Thompson,* 891 F.2d 507, 509 (4th Cir. 1989) (pointing firearm at a person is "by its nature" crime of violence). See also *Johnson,* 953 F.2d at 113–15 (absent aggravating circumstances charged in indictment, felon in possession of firearm is not a per se crime of violence) [4#17]; *U.S. v. Chapple,* 942 F.2d 439, 441–42 (7th Cir. 1991) ("simple possession of a weapon, without more," is not a crime of violence) [4#8].

2. "Controlled Substance Offense"

Before a 1995 amendment, the circuits had split over whether the career offender provision covers drug conspiracies. Most circuits to decide the issue have held that it does, concluding that the Commission properly used its general authority under 28 U.S.C. §994(a) to include conspiracy as a predicate offense in §4B1.2, comment. (n.1). See *U.S. v. Mendoza-Figueroa,* 65 F.3d 691, 693–94 (8th Cir. 1995) (en banc) (replacing vacated opinion at 28 F.3d 766 [6#14], which had followed *Price* below); *U.S. v. Jackson,* 60 F.3d 128, 132–33 (2d Cir. 1995); *U.S. v. Williams,* 53 F.3d 769, 772 (6th Cir. 1995); *U.S. v. Weir,* 51 F.3d 1031, 1031–32 (11th Cir. 1995); *U.S. v. Piper,* 35 F.3d 611, 616–19 (1st Cir. 1994) [7#2]; *U.S. v. Kennedy,* 32 F.3d 876, 888–90 (4th Cir. 1994) [7#2]; *U.S. v. Damerville,* 27 F.3d 254, 257 (7th Cir. 1994) [6#14]; *U.S. v. Hightower,* 25 F.3d 182, 186–87 (3d Cir. 1994) [6#14]; *U.S. v. Allen,* 24 F.3d 1180, 1186–87 (10th Cir. 1994) [6#14]; *U.S. v. Heim,* 15 F.3d 830, 832 (9th Cir. 1994) [6#11]. See also *U.S. v. Smith,* 54 F.3d 690, 693 (11th Cir. 1995) (same for attempts to commit drug offenses). Two circuits had held that it did not, because the enabling statute section that the provision was based on, 28 U.S.C. §994(h), does not specifically include conspiracy. *U.S. v. Bellazerius,* 24 F.3d 698, 701–02 (5th Cir. 1994) [6#14]; *U.S. v. Price,* 990 F.2d 1367, 1369–70 (D.C. Cir. 1993) [5#12].

A Nov. 1995 amendment to §4B1.1's Background Commentary, in response to *Price*, explains that the Commission relied on its "general guideline promulgation authority under 28 U.S.C. §994(a)–(f)" in setting the definition of career offenders. After the amendment, the Fifth Circuit held that the career offender guideline applies to conspiracies. *U.S. v. Lightbourn,* 115 F.3d 291, 293 (5th Cir. 1997) ("Sentencing Commission has now lawfully included drug conspiracies in the category of crimes triggering classification as a career offender under §4B1.1"). The D.C. Circuit, while acknowledging the amendment, held that it may not be applied retroactively to a defendant who committed the current offense before Nov. 1, 1995. *U.S. v. Seals,* 130 F.3d 451, 463 (D.C. Cir. 1997) (remanded).

A Nov. 1997 amendment to Application Note 1 of §4B1.2 resolved another circuit split by stating that unlawfully possessing a listed chemical, or a prohibited flask or equipment, with intent to manufacture a controlled substance is a "controlled substance offense" under §4B1.1. The Tenth Circuit had held that defendant's instant offense of possessing a "listed chemical" with intent to manufacture a controlled substance, 21 U.S.C. §841(d), was not "a controlled substance offense" for career offender purposes. *U.S. v. Wagner,* 994 F.2d 1467, 1475 (10th Cir. 1993)

(remanded: even though a controlled substance was involved in relevant conduct, §4B1.1 "refers to the charged offense" only, and the guidelines "specifically distinguish possession of a controlled substance from possession of a listed chemical with the intent to manufacture a controlled substance") [5#14]. The Fifth Circuit disagreed with *Wagner,* holding that a court "may examine the elements of the offense—though not the underlying criminal conduct—to determine whether the offense is substantially equivalent to one of the offenses specifically enumerated in §4B1.2 and its commentary." The court concluded that "possession of a listed chemical with intent to manufacture a controlled substance . . . is substantially similar to attempted manufacture of a controlled substance, and is therefore a controlled substance offense within the meaning of" §4B1.2. *U.S. v. Calverley,* 11 F.3d 505, 509–12 (5th Cir. 1993) (note: on rehearing en banc, 37 F.3d 160, the court determined that it would not review defendant's claims because they were not raised in the district court and there was no showing of plain error; thus, the precedential value of the original opinion is uncertain) [6#8].

As *Calverley* indicates, courts may have to look to the elements of an offense to determine whether it is a controlled substance offense under §4B1.1. The Ninth Circuit held that unlawful use of a communication facility in furtherance of a drug offense, 21 U.S.C. §843(b), was a predicate "controlled substance offense" for career offender purposes. As an element of §843(b), the defendant "must either commit an independent drug crime, or cause or facilitate such a crime." *U.S. v. Vea-Gonzales,* 999 F.2d 1326, 1329–30 (9th Cir. 1993). Accord *U.S. v. Walton,* 56 F.3d 551, 555–56 (4th Cir. 1995) (affirmed: "offense of 'us[ing] the public telephone system in committing, causing and facilitating . . . the distribution of cocaine and the conspiracy to distribute cocaine,' constitutes the aiding and abetting of a §4B1.2(2) offense, and therefore qualifies as a 'controlled substance offense'"); *U.S. v. Mueller,* 112 F.3d 277, 281–82 (7th Cir. 1997) (affirmed, agreeing with *Vea-Gonzales* and *Walton*); *U.S. v. Williams,* 176 F.3d 714, 717–18 (3d Cir. 1999) (agreeing with above decisions). But cf. *U.S. v. Dolt,* 27 F.3d 235, 238–39 (6th Cir. 1994) (remanded: Florida offense of solicitation to traffic in cocaine was not "controlled substance offense"—it is not listed in guideline and is distinct from "the offenses of aiding and abetting, conspiring, and attempting to commit" such an offense); *U.S. v. Baker,* 16 F.3d 854, 857–58 (8th Cir. 1994) (remanded: defendant's 21 U.S.C. §856 conviction for managing or controlling "crack house" may not be construed as a "controlled substance offense"—although managing residence for purpose of *distributing* controlled substance would qualify, managing residence for purpose of *using* drugs does not, and because jury's verdict was ambiguous as to whether defendant was convicted of possession or distribution, "he may not be sentenced based upon the alternative producing the higher sentencing range") [6#11]; *U.S. v. Liranzo,* 944 F.2d 73, 79 (2d Cir. 1991) (reversed: prior state conviction for "criminal facilitation" was not controlled substance offense—crime did not involve intent to commit underlying substantive offense, and career offender guidelines must be interpreted strictly). The Nov. 1997 amendment to Application Note 1 added to the list of "controlled substance offenses" maintaining any place for the purpose of facili-

tating a drug offense and using a communications facility in committing, causing, or facilitating a drug offense, "if the offense of conviction established that the underlying offense . . . was a 'controlled substance offense.'" See also *Williams,* 176 F.3d at 718 (for §843(b) offenses, amendment 568 is clarifying rather than substantive and may be applied retroactively).

The Fifth Circuit held that "neither the plain wording of §4B1.2(2), nor its commentary, allows consideration of underlying conduct. Therefore, the district court erred in considering the conduct underlying [defendants'] state possession convictions in order to expand them to possession with intent to distribute." *U.S. v. Gaitan,* 954 F.2d 1005, 1008–11 (5th Cir. 1992). Accord *U.S. v. Lipsey,* 40 F.3d 1200, 1201 (11th Cir. 1994) (affirmed: "court should look at the elements of the convicted offense, not the conduct underlying the conviction"). See also *U.S. v. Hernandez,* 145 F.3d 1433, 1440 (11th Cir. 1998) (remanded: error to use arrest affidavits to determine that defendant's prior convictions were for selling drugs rather than buying drugs, which is not a qualifying offense: "It is not the conduct for which Hernandez was arrested which is the determining factor," but "the conduct of which the defendant was convicted. . . . Here, while it may be clear what Hernandez was arrested for, it is unclear exactly what Hernandez pled to, and consequently the district court did not have the evidence before it necessary to enhance Hernandez's sentence under U.S.S.G. §4B1.1.").

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

3. Procedural Issues

a. General

The Eighth Circuit determined that the career offender guideline is ambiguous as to whether a defendant who has pleaded guilty to two prior violent felonies, but not yet been sentenced on them, may be sentenced as a career offender. The court held that the "rule of lenity" precluded sentencing under §4B1.1 but that the district court could depart upward because of the unusual circumstances and use the career offender provision to guide the extent of departure. *U.S. v. Jones,* 908 F.2d 365, 367 (8th Cir. 1990) [3#11]. See also *U.S. v. Delvecchio,* 920 F.2d 810, 812–13 (11th Cir. 1991) (consolidated sentences cannot be counted separately for career offender purposes, but departure may be appropriate).

Should a separate conviction for a felony that occurred during a conspiracy offense and was related to it be counted as a "prior felony conviction" under §4B1.2 at the sentencing hearing on the conspiracy conviction? The Seventh Circuit originally said yes in an early case. See *U.S. v. Belton,* 890 F.2d 9, 10–11 (7th Cir. 1989) [2#17]. However, the commentary to §4A1.2 was then amended to clarify that its provisions "are applicable to the counting of convictions under §4B1.1." Thus, "con-

duct that is part of the instant offense," defined as relevant conduct, is not counted under §4A1.2 and should not be counted under §4B1.2. The Seventh Circuit later reversed a career offender designation where the district court counted as a prior felony a cocaine distribution conviction that had occurred during and was related to the instant offense of conspiracy to distribute marijuana. *U.S. v. Garecht,* 183 F.3d 671, 674–78 (7th Cir. 1999) (distinguishing *Belton* because it was decided before the amendment). Accord *U.S. v. Kenyon,* 7 F.3d 783, 787–88 (8th Cir. 1993) (remanded: should not count prior cocaine conviction that was "part of the instant offense" of conspiracy to distribute cocaine).

The Eleventh Circuit held that a plea of "guilty but mentally ill" qualified as a guilty plea to a felony conviction that counted toward career offender status. State law showed that the plea "has the same operation at law as a conviction based on a plea of guilty" and therefore "is a 'guilty plea' within the meaning of section 4A1.2(a)(4) of the sentencing guidelines." *U.S. v. Bankston,* 121 F.3d 1411, 1414–16 (11th Cir. 1997) [10#4].

Note that some circuits have stated that the prior convictions requirement "is to be interpreted strictly." *U.S. v. Dolt,* 27 F.3d 235, 240 (6th Cir. 1994). Accord *U.S. v. Liranzo,* 944 F.2d 73, 79 (2d Cir. 1991); *U.S. v. Delvecchio,* 920 F.2d 810, 812 (11th Cir. 1991). Note also that it is the conviction that determines career offender status, not the sentence. See USSG §4B1.2, comment. (n.1) (defining "prior felony conviction" as offense punishable by imprisonment for more than one year "regardless of the actual sentence imposed"). Thus, the Tenth Circuit held that, because defendant was convicted of felony possession for sale of a controlled substance, she was properly deemed a career offender despite the fact that she was civilly committed to a narcotics treatment program instead of sent to prison. *U.S. v. Barba,* 136 F.3d 1276, 1278–79 (10th Cir. 1998).

The Fourth Circuit held that a post-offense reclassification to misdemeanor level does not change the status of a prior violent felony for career offender purposes. The court reasoned that, for the "two prior felony convictions" required for career offender status, §4B1.2(c)(2) provides that: "The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established." In this case, defendant "sustained his conviction for assault on a female in 1986. In 1986, assault on a female was punishable by a statutory maximum of 2 years. Thus, Johnson's assault conviction is properly considered a prior felony conviction for guideline purposes" notwithstanding its reclassification in 1994. *U.S. v. Johnson,* 114 F.3d 435, 445 (4th Cir. 1997) [9#8].

b. Juvenile offenses

A prior violent felony committed as a juvenile may be counted for career offender purposes if defendant was tried as an adult and received a sentence exceeding one year and one month, even if commitment was to a state juvenile authority. See *U.S. v. Holland,* 195 F.3d 415, 417–18 (8th Cir. 1999) (affirmed: proper to count conviction as adult for offense that occurred at age seventeen despite suspension of any

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

c. Federal or state law

Courts have held that "crime of violence" should be determined according to federal law, not state law. *U.S. v. John*, 936 F.2d 764, 770 n.4 (3d Cir. 1991) [4#7]; *U.S. v. Brunson*, 907 F.2d 117, 120–21 (10th Cir. 1990). See also *U.S. v. Baker*, 961 F.2d 1390, 1392–93 (8th Cir. 1992) (classification of conviction under state law is not controlling—defendant's armed robbery conviction was "felony" despite California's classification of it as misdemeanor (§4B1.2, comment. (n.3)); also defendant was adult at time of prior conviction because he was nineteen years old, even though he was sentenced as juvenile in California, see §4A1.2, comment. (n.7)); *U.S. v. Nimrod*, 940 F.2d 1186, 1188–89 (8th Cir. 1991) (whether second-degree burglary is "violent felony" is to be defined independent of state characterization) [4#7]; *U.S. v. Baskin*, 886 F.2d 383, 389 (D.C. Cir. 1989) (actual elements of offense control, not how state may characterize offense) [2#14]. But see *U.S. v. Thompson*, 891 F.2d 507, 510 (4th Cir. 1989) (using state law to determine whether pointing a firearm was crime of violence). Cf. *U.S. v. Diaz-Bonilla*, 65 F.3d 875, 877 (10th Cir. 1995) (affirmed: look to federal rather than state law to determine whether prior offense was felony for enhancement under §2L1.2(b)(1)); *U.S. v. Olvera-Cervantes*, 960 F.2d 101, 103–04 (9th Cir. 1992) (same).

The Tenth Circuit agrees that offenses are to be defined under federal law. However, in determining whether a prior state offense was a burglary of a "dwelling," the court stated that "[j]ust because we are not bound by a state's definition of dwelling . . . does not mean that state definitions are useless for career offender purposes. . . . [A] court can look beyond the statutory count of conviction in order

to resolve a patent ambiguity caused by a broad state statute . . . . However, . . . we limit that examination to the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judges." Any ambiguities are resolved "in favor of narrowly interpreting the career offender provisions." *U.S. v. Smith,* 10 F.3d 724, 733–34 (10th Cir. 1993) (remanded: office defendant burglarized was not a "dwelling"). Accord *U.S. v. Wood,* 52 F.3d 272, 275–76 & n.4 (9th Cir. 1995) (although "state law does not control" under §4B1.2(1)(ii), analysis "can be informed by how the states interpret and apply their own criminal laws"; "courts may consider the statutory definition of the crime, any conduct charged in the indictment or information, the defendant's guilty plea or plea agreement, and any jury instructions").

d. "Offense Statutory Maximum"

Before a Nov. 1994 amendment to §4B1.1, comment. (n.2), some circuits held that the "Offense Statutory Maximum" in the §4B1.1 Offense Level Table includes any applicable statutory sentencing enhancements that increase the maximum sentence. *U.S. v. Garrett,* 959 F.2d 1005, 1009–11 (D.C. Cir. 1992) [4#21]; *U.S. v. Amis,* 926 F.2d 328, 329–30 (3d Cir. 1991); *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 559–60 (9th Cir. 1989). In *Garrett,* the defendant's maximum sentence under 21 U.S.C. §841(b)(1)(B)(iii) was life due to his prior drug convictions. Thus his "Offense Statutory Maximum" was life. However, Amendment 506 states that "Offense Statutory Maximum" does "not includ[e] any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." This amendment was made retroactive under §1B1.10.

However, the Supreme Court ruled that the amendment was invalid and that the enhanced statutory maximum must be used. In 28 U.S.C. §994(h), the Sentencing Commission was directed to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for a career offender. The Court found that §994(h) was not ambiguous and that the "'term authorized' refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes. Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute." *U.S. v. LaBonte*, 117 S. Ct. 1673, 1675–78 (1997) [9#3]. A Nov. 1997 amendment changed Note 2 to reflect the *LaBonte* decision.

Before the Court's decision in *LaBonte*, the circuits had split on whether Amendment 506 was valid and enforceable. Compare *U.S. v. Branham,* 97 F.3d 835, 845–49 (6th Cir. 1996) (amendment conflicts with mandate of §994(h) and enhanced statutory maximum should be used) and *U.S. v. McQuilkin,* 97 F.3d 723, 731–33 (3d Cir. 1996) (same) and *U.S. v. Fountain,* 83 F.3d 946, 950–53 (8th Cir. 1996) (same) [8#8] and *U.S. v. Hernandez,* 79 F.3d 584, 595–601 (7th Cir. 1996) (same) [8#6] and *U.S. v. Novey,* 78 F.3d 1483, 1487–91 (10th Cir. 1996) (same) [8#6] with *U.S. v. Dunn,* 80 F.3d 402, 404–05 (9th Cir. 1996) (amended definition is reason-

able interpretation of the statute) [8#6] and *U.S. v. LaBonte,* 70 F.3d 1396, 1403–12 (1st Cir. 1995) (same) [8#4].

e. Other issues

Most circuits have held that the government is not required to file an information under 21 U.S.C. §851(a)(1) before prior convictions may be used for the career offender determination. See *U.S. v. Foster,* 68 F.3d 86, 89 (4th Cir. 1995); *U.S. v. Allen,* 24 F.3d 1180, 1184 (10th Cir. 1994); *U.S. v. Day,* 969 F.2d 39, 48 (3d Cir. 1992); *U.S. v. Koller,* 956 F.2d 1408, 1417 (7th Cir. 1992); *U.S. v. Meyers,* 952 F.2d 914, 918–19 (6th Cir. 1992); *U.S. v. Whitaker,* 938 F.2d 1551, 1552–53 (2d Cir. 1991); *Young v. U.S.,* 936 F.2d 533, 535–36 (11th Cir. 1991); *U.S. v. McDougherty,* 920 F.2d 569, 574 (9th Cir. 1990); *U.S. v. Sanchez,* 917 F.2d 607, 616 (1st Cir. 1990); *U.S. v. Marshall,* 910 F.2d 1241, 1244–45 (5th Cir. 1990); *U.S. v. Wallace,* 895 F.2d 487, 489–90 (8th Cir. 1990) [3#3]. Cf. *U.S. v. Novey,* 922 F.2d 624, 627–28 (10th Cir. 1991) (§851(a)(1) satisfied when government provided notice of one conviction and guideline sentence was within statutory maximum authorized on basis of that conviction).

District courts may consider downward departure for career offenders. *U.S. v. Webb*, 139 F.3d 1390, 1395 (11th Cir. 1998); *U.S. v. Lindia*, 82 F.3d 1154, 1165 (1st Cir. 1996); *U.S. v. Shoupe*, 35 F.3d 835, 838–39 (3d Cir. 1994); *U.S. v. Rogers*, 972 F.2d 489, 493 (2d Cir. 1992); *U.S. v. Beckham*, 968 F.2d 47, 54–55 (D.C. Cir. 1992); *U.S. v. Bowser*, 941 F.2d 1019, 1023 (10th Cir. 1991) [4#7]; *U.S. v. Adkins*, 937 F.2d 947, 952 (4th Cir. 1991) [4#7]; *U.S. v. Lawrence*, 916 F.2d 553, 554–55 (9th Cir. 1990) [3#15]; *U.S. v. Smith*, 909 F.2d 1164, 1169–70 (8th Cir. 1990) [3#11]; *U.S. v. Brown*, 903 F.2d 540, 545 (8th Cir. 1990) [3#8]. But cf. *U.S. v. Perez,* 160 F.3d 87, 89–90 (1st Cir. 1998) (en banc court evenly divided on question of whether "smallness" of defendant's prior drug offenses and her role in them could be used as basis for §4A1.3 departure). See also section VI.A.2.

Several courts have rejected double jeopardy and other constitutional challenges to the career offender statutes. See, e.g., *U.S. v. Brant,* 62 F.3d 367, 368 (11th Cir. 1995); *U.S. v. Carr,* 56 F.3d 38, 39 (9th Cir. 1995); *U.S. v. Piper,* 35 F.3d 611, 620 (1st Cir. 1994); *U.S. v. Spencer,* 25 F.3d 1105, 1111–12 (D.C. Cir. 1994); *U.S. v. Guajardo,* 950 F.2d 203, 207 (5th Cir. 1991); *U.S. v. Foote,* 920 F.2d 1395, 1401 (8th Cir. 1990); *U.S. v. McDougherty,* 920 F.2d 569, 576 (9th Cir. 1990); *U.S. v. Alvarez,* 914 F.2d 915, 919–20 (7th Cir. 1990); *U.S. v. O'Neal,* 910 F.2d 663 (9th Cir. 1990), *as amended*, 937 F.2d 1369, 1376 (9th Cir. 1991); *U.S. v. Hughes,* 901 F.2d 830, 832 (10th Cir. 1990); *U.S. v. Williams,* 892 F.2d 296, 304–05 (3d Cir. 1989); *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 560–61 (9th Cir. 1989) [2#9].

Claims that it was improper to include prior state drug convictions as predicate convictions have been rejected on the ground that inclusion of state offenses is not inconsistent with the statutory mandate. See *U.S. v. Gonsalves,* 121 F.3d 1416, 1418–19 (11th Cir. 1997); *U.S. v. Brown,* 23 F.3d 839, 841 (4th Cir. 1994); *U.S. v. Consuegra,* 22 F.3d 788, 789–90 (8th Cir. 1994); *U.S. v. Beasley,* 12 F.3d 280, 283–84 (1st Cir.

1993); *U.S. v. Rivera,* 996 F.2d 993, 995–996 (9th Cir. 1993); *U.S. v. Whyte,* 892 F.2d 1170, 1174 (3d Cir. 1989).

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

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

When determining defendant's income in "any twelve-month period," §4B1.3, comment. (n.2), a district court is not limited to considering income in distinct calendar years. "Rather, the district judge was justified in examining figures from the twelve-month period that began with the initiation of the defendant's criminal activities, because those figures are a more accurate indication of whether proceeds from crime served as the defendant's primary source of income during that time." *U.S. v. Kellams,* 26 F.3d 646, 648–49 (6th Cir. 1994) (affirmed: for defendant whose mail fraud began in Nov. 1991 and ended June 30, 1992, proper "twelve-month period" for defendant's activities was Nov. 1, 1991 to October 31, 1992). On a related issue, the Seventh Circuit held that the *net* income derived from the criminal activity, rather than gross proceeds, should be used when calculating the threshold amount. *U.S. v. Lee,* 939 F.2d 503, 504 (7th Cir. 1991) (remanded: although defendant obtained over $8000 worth of merchandise from fraudulent credit card use, he only netted $1000 from sale of merchandise, not enough for §4B1.3).

The Seventh Circuit held that the proof showing defendant derived the requisite amount of income from criminal activity may be indirect. It was proper to conclude that a defendant who possessed stolen mail "stole the required amount [for §4B1.3] from the mails that year in order to live and feed his drug habit" based on all of the evidence in context, which included defendant's own estimates that his "heroin habit required over $8,500 a year, [that he] 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." *U.S. v. Taylor,* 45 F.3d 1104, 1106–07 (7th Cir. 1995) [7#7]. Cf. *U.S. v. Morse,* 983 F.2d 851, 853 (8th Cir. 1993) (affirmed: possession of "vast number of credit cards, cash cards and drivers licenses" indicated "extensive scheme to use these cards to fraudulently obtain money" and convictions over previous ten years "establish[ed] a long pattern of fraudulent activity"; evidence of at least $12,000 in losses and no steady source of income over past year, plus admitted gambling addiction, satisfied

"engaged in as a livelihood" requirements); *U.S. v. Rosengard,* 949 F.2d 905, 909 (7th Cir. 1991) (affirmed: income tax returns declaring income over $24,000 per year, no evidence of legitimate employment in relevant time period, and admitted involvement in illegal gambling was sufficient evidence that defendant received income from illegal gambling exceeding threshold amount); *U.S. v. Salazar,* 909 F.2d 1447, 1450 (10th Cir. 1990) (affirmed: for defendant who fabricated false immigration documents, "90 criminal offenses of similar nature generating income in five figures, certainly constitute a pattern of dealing engaged in as a 'livelihood'").

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

Similarly, the criminal activity itself must be the occupation that provides the livelihood. The Sixth Circuit reversed a §4B1.3 enhancement for a fraud defendant who used false identities and phony credentials to obtain jobs in health care, such as physician's assistant. "Although Greene's jobs may have been obtained illegitimately through fraud, this criminal activity was not his primary occupation. Moreover, Greene's primary occupation, and his earnings, were from the positions that he held, not from the fraud itself." *U.S. v. Greene,* 71 F.3d 232, 237 (6th Cir. 1995).

Note, however, that although the instant offense must be part of the "pattern of criminal conduct engaged in as a livelihood," it does not have to actually produce income. The Second Circuit upheld a §4B1.3 determination for a passport offense that, "while not itself an income-producing crime, was part of a larger and sustained pattern of criminal conduct that Burgess engaged in as a livelihood. Burgess's use of another's passport permitted Burgess to travel anonymously from country to country defrauding various financial institutions" in a pattern of criminal conduct that satisfied the requirements of §4B1.3. *U.S. v. Burgess,* 180 F.3d 37, 41–42 (2d Cir. 1999).

Before §4B1.3 and its application notes were amended, effective Nov. 1, 1989, there was some question as to whether the phrase "from which he derived a substantial portion of his income" required that a certain minimum amount of income be derived from the criminal activity. See, e.g., *U.S. v. Cianscewski,* 894 F.2d 74, 77–79 (3d Cir. 1990) (holding earlier version of §4B1.3 inapplicable to defendants whose yearly profit from crime is less than 2000 times the hourly minimum wage) [3#2]; *U.S. v. Nolder,* 887 F.2d 140, 142 (8th Cir. 1989) (same) [2#15]. Contra *U.S. v. Munster-Ramirez,* 888 F.2d 1267, 1270 (9th Cir. 1989) (no minimum required, rather "sentencing court must determine a defendant's income and then determine what percentage or proportion of his income is derived from criminal activity"). The amendment settled the issue by replacing that language in the guideline with "engaged in as a livelihood" and stating in Note 2 that "income from the pattern of

criminal conduct" must exceed 2000 times the federal minimum wage in any twelve-month period.

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

D. Armed Career Criminal (§4B1.4)

Sentencing as an Armed Career Criminal under §4B1.4 is determined by whether defendant is subject to an enhanced sentence under 18 U.S.C. §924(e) by virtue of three prior convictions for a "violent felony" or "serious drug offense." Definitions relating to prior convictions or career offender in §§4A1.2 and 4B1.2 do not apply. See §4B1.4, comment. (n.1) ("definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. §924(e) are not identical to the definition of 'crime of violence' and 'controlled substance offense' used in §4B1.1 . . . , nor are the time periods for the counting of prior sentences under §4A1.2 . . . applicable"). See also *U.S. v. Wright,* 48 F.3d 254, 255–56 (7th Cir. 1995) (fifteen-year limit on use of felonies in §4A1.2(e) does not apply); *U.S. v. Riddle,* 47 F.3d 460, 462 (1st Cir. 1995) (§4A1.2 relatedness requirement does not apply); *U.S. v. Lujan*, 9 F.3d 890, 893 (10th Cir. 1993) (§4A1.2 time limits for prior convictions do not apply); *U.S. v. Ford,* 996 F.2d 83, 85 (5th Cir. 1993) (defendant properly sentenced under §4B1.4(b)(3)(A) for possessing firearm "in connection with a crime of violence"—§4B1.1's exclusion of firearm possession by felon as crime of violence does not apply to armed career criminal who fatally shot another with the weapon); *U.S. v. Maxey,* 989 F.2d 303, 308 (9th Cir. 1993) (affirmed: "section 4B1.4 does not incorporate section 4A1.2's definition of 'related' offenses in determining whether a defendant is subject to . . . its provisions, and . . . the Guidelines do not displace section 924(e) and case law interpreting it") [5#11]; *U.S. v. Medina-Gutierrez,* 980 F.2d 980, 982–83 (5th Cir. 1992) (affirmed: three burglary convictions committed within weeks of one another and sentenced on same day are to be treated as separate offenses for §4B1.4—"what matters under §924(e) is whether three violent felonies were committed on different occasions; whether they are considered 'related cases' under §4A1.2 is irrelevant.") [5#7].

However, the Eleventh Circuit held that because possession of a firearm by a convicted felon is not a "crime of violence" under the guidelines, it is not a prior "violent felony" under §924(e). Although acknowledging Note 1 in §4B1.4, quoted above, the court held that "the two expressions are not conceptually distinguishable for purposes of the narrow question raised in this appeal" and "conduct which does not pose a 'serious potential risk of physical injury to another' for purposes of §§4B1.1 and 4B1.2 similarly cannot pose such a risk with respect to §924(e) and §4B1.4." *U.S. v. Oliver,* 20 F.3d 415, 417–18 (11th Cir. 1994) (remanded: 1980 conviction for possession of firearm by felon cannot be used as predicate "violent felony") [6#14]. See also *U.S. v. Garcia-Cruz,* 978 F.2d 537, 542–43 (9th Cir. 1992) (remanded: prior

state conviction for felon in possession "is not an adequate predicate felony under the Armed Career Criminal Act"); *U.S. v. Doe,* 960 F.2d 221, 225–26 (1st Cir. 1992) (remanded: holding that §922(g)(1) conviction is not prior violent felony under §924(e), basing conclusion partly on §4B1.2 definition). But cf. *U.S. v. Fortes,* 141 F.3d 1, 7–8 (1st Cir. 1998) (distinguishing *Doe* and holding that "possession of a sawed-off shotgun [under 26 U.S.C. §5861(d)] is a 'violent felony' within the meaning of ACCA").

If a defendant's instant conviction of being a felon in possession of a firearm is found to be "in connection with a crime of violence" pursuant to §4B1.4(b)(3)(A) & (c)(2), the Sixth Circuit held that defendant need not have been actually convicted of that crime of violence for the court to apply the enhancements. *U.S. v. Rutledge,* 33 F.3d 671, 673–74 (6th Cir. 1994) (affirmed) [7#3]. See also *U.S. v. Mellerson,* 145 F.3d 1255, 1258 (11th Cir. 1998) (agreeing with *Rutledge*); *U.S. v. Young,* 115 F.3d 834, 837–38 (11th Cir. 1997) (affirming §4B1.4(b)(3)(A) enhancement for defendant who was not prosecuted for related burglary; also holding that "in connection with" properly applied where weapon was stolen during burglary); *U.S. v. Gary,* 74 F.3d 304, 316–17 (1st Cir. 1996) (affirming application of §4B1.4(b)(3)(A) where defendant was not convicted of connected breaking and entering; also, "in connection with" requirement satisfied "where a defendant's possession of a firearm aids or facilitates the commission of another offense"); *U.S. v. Guerrero,* 5 F.3d 868, 872–73 (5th Cir. 1993) (not clear error to apply §4B1.4(b)(3)(A) to defendant convicted of possessing firearms stolen in uncharged burglary). Cf. *U.S. v. Haynes,* 179 F.3d 1045, 1047 (7th Cir. 1999) (holding that "in connection with" means "the weapon facilitated or served some purpose to the felonious conduct," and conversely, "where the firearm's presence is merely coincidental or accidental to the offense, the weapon is not used or possessed 'in connection with' the offense"; here, "[t]he accessibility and proximity of Haynes' gun to the two drug transactions support the inference that the gun was possessed in connection with Haynes' illegal dealings").

However, the Seventh Circuit held that if the crime of violence is one that "present[ed] a serious potential risk of physical injury to another" under §4B1.2(1)(ii), it must at least be "expressly charged," see §4B1.2(1), comment. (n.2). The court reasoned that because §4B1.4(b)(3)(A) refers to §4B1.2(1) in defining "a crime of violence," it is limited by the commentary to §4B1.2(1). *U.S. v. Talbott,* 78 F.3d 1183, 1189–90 (7th Cir. 1996) (remanded: although defendant, convicted of firearm possession by felon, threatened two people with firearm, he was not convicted of that conduct and it was not "expressly charged" in the indictment).

Note that no Chapter 3 adjustments other than acceptance of responsibility are to be applied if the offense level is set under §4B1.3(b)(3). See text of guideline and *U.S. v. Fitzhugh,* 954 F.2d 253, 255 (5th Cir. 1992). Similarly, conduct that would otherwise warrant adjustment under Chapter 3 cannot provide a basis for departure when the §4B1.3(b)(3) offense level is used, unless the conduct would have warranted departure in addition to an upward adjustment because it was not adequately accounted for in the guidelines. *U.S. v. Gregory,* 56 F.3d 1078, 1086–87

(9th Cir. 1995) (remanded: because ACCA defendant's obstructive conduct was not "'substantially in excess' of that ordinarily involved" under §3C1.1, upward departure was improper).

Departure for an armed career criminal may be appropriate. See *U.S. v. Sanders,* 97 F.3d 856, 861 (6th Cir. 1996) (remanded to consider downward departure: "although the guidelines prescribe Category IV as the 'minimum' starting point for the criminal history of armed career criminals, there is nothing in the guidelines which would prohibit a departure below this level. Indeed, the background section to §4B1.4 not only notes that in some cases 'the criminal history category [prescribed] may not adequately reflect the defendant's criminal history' but also makes reference to §4A1.3 . . . [which] authorizes downward departures when a defendant's criminal history category 'over-represents the seriousness of defendant's criminal history'"); *U.S. v. Brown,* 9 F.3d 907, 912–13 (11th Cir. 1993) (affirming upward departure based on inadequate reflection of criminal past and threat to public welfare, §5K2.14). Cf. *Gregory,* 56 F.3d at 1085–86 (remanding departure for defendant with thirty-five criminal history points and nineteen convictions since 1977 (plus three earlier felony convictions that could not be counted), where district court also found that defendant had made no progress toward rehabilitation and had an extremely high likelihood of recidivism—departure is improper unless category VI "*significantly under-represents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes"). See also USSG §4B1.4(c), comment. (backg'd) ("A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant's criminal history; see §4A1.3 (Adequacy of Criminal History Category).").

The Eleventh Circuit rejected a downward departure—from 262–327 months to 188 months—based on the small amount of drugs in defendant's three predicate "serious drug offenses," which the district court found showed those offenses were actually "very minor" and that defendant was only a "small-time dealer." Relying on an earlier case that held a court could not look to the underlying facts of a "crime of violence" to depart for a career offender, the appellate court held that "it would make no sense in this case to conclude that although a sentencing court may not look behind the fact of an unambiguous judgment in determining whether a prior conviction serves as a predicate serious drug offense placing the defendant within the Armed Career Criminal Guideline [in the first place], it may do so to conclude a downward departure is warranted on the grounds that the offense involved only a small amount of drugs and therefore was not serious." *U.S. v. Rucker,* 171 F.3d 1359, 1362–63 (11th Cir. 1999).

V. Determining the Sentence

A. Consecutive or Concurrent Sentences

1. Multiple Counts of Conviction

When concurrent sentences are required under §5G1.2, consecutive sentences can be imposed if the procedures for departure are followed. *U.S. v. Quinones,* 26 F.3d 213, 216 (1st Cir. 1994) [6#17]; *U.S. v. Perez,* 956 F.2d 1098, 1102–03 (11th Cir. 1992) [4#20]; *U.S. v. Pedrioli,* 931 F.2d 31, 32 (9th Cir. 1991) [4#20]. Accord *U.S. v. Mosley,* 200 F.3d 218, 224–25 (4th Cir. 1999).

If a defendant is convicted of both guidelines and pre-guidelines offenses, §5G1.2 does not apply to the earlier offense and district courts have discretion to impose consecutive or concurrent sentences. *U.S. v. Preston,* 28 F.3d 1098, 1099 (11th Cir. 1994); *U.S. v. Hicks,* 997 F.2d 594, 599–600 (9th Cir. 1993); *U.S. v. Pollen,* 978 F.2d 78, 91–92 (3d Cir. 1992); *U.S. v. Hershberger,* 962 F.2d 1548, 1550–52 (10th Cir. 1992); *U.S. v. Ewings,* 936 F.2d 903, 910 (7th Cir. 1991); *U.S. v. Lincoln,* 925 F.2d 255, 256–57 (8th Cir. 1991); *U.S. v. Garcia,* 903 F.2d 1022, 1025–26 (5th Cir. 1990) [3#9]; *U.S. v. Watford,* 894 F.2d 665, 668–70 (4th Cir. 1990) [2#20]. This may be so even if pre-guidelines conduct is used to set the offense level for the guidelines offense. See *U.S. v. Parks,* 924 F.2d 68, 72–74 (5th Cir. 1991); *Watford,* 894 F.2d at 669. The Ninth Circuit had held that if losses from a pre-guidelines count are used to calculate the guidelines offense level, the court must impose concurrent sentences. *U.S. v. Niven,* 952 F.2d 289, 293–94 (9th Cir. 1991). However, the court later recognized that this decision was effectively overruled by *Witte v. U.S.,* 115 S. Ct. 2199 (1995). See *U.S. v. Scarano,* 76 F.3d 1471, 1477–79 (9th Cir. 1996) (may add pre-guidelines offense loss as relevant conduct to guidelines offense and impose consecutive sentences).

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

Two circuits have held that §5G1.2, not §5G1.3, applies when sentences for counts from separate indictments are not consolidated but are imposed sequentially. The courts reasoned that the language from §5G1.2's commentary, "multiple counts of conviction . . . (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding," should be read to cover sequential sentencing at one proceeding; §5G1.3 applies to sentences imposed on different occasions. See *U.S. v. Greer,* 91 F.3d 996, 1000–01 (7th Cir. 1996); *U.S. v. Hernandez Coplin,* 24 F.3d 312, 318 (1st Cir. 1994).

2. Pending State Sentences

Under 18 U.S.C. §3584(a) a federal sentence may be imposed to run consecutive to any previously imposed state sentence. There is disagreement in the circuits as to whether this applies to a state sentence that has not yet been imposed. Compare *U.S. v. Romandine,* 206 F.3d 731, 738 (7th Cir. 2000) (remanded: "We join the circuits that answer 'no,' because §3584(a) allows the district judge to specify the sequence of service only when sentences are imposed at the same time, or the other sentence is 'an undischarged term of imprisonment' to which the defendant is 'already subject.'") and *U.S. v. Quintero,* 157 F.3d 1038, 1039–41 (6th Cir. 1998) (remanded: holding, for sentence imposed after revocation of supervised release, that "§3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence") and *U.S. v. Clayton,* 927 F.2d 491, 492–93 (9th Cir. 1991) (district court had no authority to impose federal sentence to run consecutive to state sentence that was not yet imposed, but could have delayed sentencing until state sentence was imposed and then used discretion to impose consecutive sentence) with *U.S. v. Mayotte,* 249 F.3d 797, 799 (8th Cir. 2001) ("the authority to impose [a supervised release revocation] sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court") and *U.S. v. Williams,* 46 F.3d 57, 58–59 (10th Cir. 1995) ("We find no language in section 3584(a) prohibiting a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed.") and *U.S. v. Ballard,* 6 F.3d 1502, 1505–10 (11th Cir. 1993) (proper to make defendant's sentence for federal offense—committed while in state jail awaiting trial for unrelated state offense—consecutive to whatever state sentence defendant receives) [6#7] and *U.S. v. Brown,* 920 F.2d 1212, 1216–17 (5th Cir. 1991) (court may order guideline sentence to run consecutive to any later related state sentence) [3#19]. See also *U.S. v. Mun,* 41 F.3d 409, 413 (9th Cir. 1994) (affirmed denial of request for reduction of sentence after state sentence for same underlying conduct: following language of §5G1.3 (1987), section "5G1.3's provision mandating concurrent sentences applies only if 'the defendant is already serving one or more unexpired sentences.' At the time the federal court sentenced Mun he was not serving another sentence. The state sentence was imposed after the federal sentence. Therefore, §5G1.3 did not require the district court to alter its sentence to make it run concurrently with the state sentence.") (as amended Dec. 19, 1994) [7#1 and #5].

3. Defendant Subject to Undischarged Term (§5G1.3)

As of Nov. 1, 1995, §5G1.3 provides:

> (a) If the instant offense was committed while the defendant was serving a term of imprisonment . . . or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
>
> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense

> level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
>
> (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

The 1995 amendments to subsection (c) and the accompanying Application Notes were made to "afford[] the sentencing court additional flexibility to impose, as appropriate, a consecutive, concurrent, or partially concurrent sentence in order to achieve a reasonable punishment for the instant offense." See USSG App. C at Amendment 535. See also *U.S. v. Saintville,* 218 F.3d 246, 249 (3d Cir. 2000) ("a sentencing court must no longer make the hypothetical calculation"); *U.S. v. Mosley,* 200 F.3d 218, 224–25 (4th Cir. 1999) ("It is clear that, by no longer requiring district courts to engage in the mechanical process of creating a hypothetical combined guideline range for a defendant with a prior undischarged term of imprisonment and then sentencing the defendant within that combined range, the current version of §5G1.3(c) affords district courts more discretion than the version that existed before the effective date of Amendment 535."); *U.S. v. Velasquez,* 136 F.3d 921, 924–25 (2d Cir. 1998) (affirmed: noting that 1995 amendments were intended to give judges more discretion and holding that "there is no requirement for district court judges to make individualized findings with respect to the application of §5G1.3(c)" when record shows relevant factors were considered). These amendments were not listed in §1B1.10(c) as retroactive. Note that some of the §5G1.3(c) cases that follow were decided under the earlier versions.

The Eleventh Circuit held that the government could not omit relevant conduct from the PSR in order to avoid concurrent sentences under §5G1.3(b). Defendant was convicted of running a "chop shop," and the government supplied information for the PSR on all stolen cars involved in the chop shop operation except for three that were involved in a state sentence he was still serving (including the three cars would not have increased defendant's sentence). The district court thus used subsection (c) and made the federal sentence consecutive to the state sentence. The appellate court remanded, concluding that "the Government deliberately refrained from portraying Fuentes' chopping of the state Porsches as relevant conduct for one reason—to manipulate the application of the guidelines so that his federal sentence would run consecutively to the state sentences." Such manipulation is "contrary to both the letter and spirit of the guidelines. First, section 1B1.3 states that a defendant's offense level '*shall* be determined on the basis of' all relevant conduct. U.S.S.G. §1B1.3(a) (emphasis added). . . . Second, the guidelines were written to prevent the Government from manipulating indictments and prosecutions to increase artificially a defendant's sentence or sentences for the same criminal conduct. . . . We therefore conclude that when a defendant is serving an undischarged sentence resulting from conduct that is required to be considered in a subsequent sentencing proceeding as relevant conduct pursuant to section 1B1.3, section 5G1.3(b) provides that the subsequent sentence should run concurrently to the undischarged sentence." However, the court noted that, even though §5G1.3(b) requires concurrent sentences, the district court retains discretion to consider an up-

ward departure. *U.S. v. Fuentes,* 107 F.3d 1515, 1521–27 (11th Cir. 1997) [9#6]. Cf. *U.S. v. Blanc,* 146 F.3d 847, 854 (11th Cir. 1998) (distinguishing *Fuentes* and holding that two discrete fraud schemes that were years apart and did not involve the same subject matter, victims, or coconspirators, were not related and consecutive sentences could be imposed under §5G1.3(b)); *U.S. v. Rizzo,* 121 F.3d 794, 800–01 (1st Cir. 1997) (although deliberate manipulation to avoid §5G1.3(c)—by delaying later indictment or withholding evidence of relevant conduct—would be improper, defendant presented no evidence that either occurred).

a. Pre-1995 amendment case law

Before the 1995 amendments, following amendments in 1992, subsection (c) stated that "the sentence for the instant offense *shall* be imposed to run consecutively to the prior undischarged term of imprisonment to *the extent necessary to* achieve a reasonable *incremental* punishment for the instant offense. (Emphasis added to show language deleted by 1995 amendments.) At the same time, Application Note 3 set forth a methodology for courts to consider in calculating a "reasonable incremental punishment." Courts were to "approximate 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." Note that the references to §5G1.2 were removed by the 1995 amendments. Thus, the Ninth Circuit held that "sentencing courts are no longer required to calculate a hypothetical §5G1.2 sentence. Sentencing courts are instead required to give careful consideration to each of the factors specifically enumerated in the guideline and determine, based on those factors, whether a concurrent, partially concurrent, or consecutive sentence will achieve a 'reasonable punishment' and 'avoid unwarranted disparity.'" *U.S. v. Luna-Madellaga,* 133 F.3d 1293, 1295–96 (9th Cir. 1998).

After the 1992 amendments, most circuits held that courts had to *consider* §5G1.3(c) and Note 3, but could depart or use a different methodology if they explained the reason for doing so. See, e.g., *U.S. v. Hernandez,* 64 F.3d 179, 182–83 & n.5 (5th Cir. 1995) (remanded: must consider §5G1.3(c) and Application Note 3 methodology, and if "district court chooses not to follow the methodology, it must explain why the calculated sentence would be impracticable in that case or the reasons for using an alternate method," but it "need not apply a departure analysis"); *U.S. v. Holifield,* 53 F.3d 11, 14–17 (3d Cir. 1995) (affirmed: "court may employ a different method in determining the sentence as long as it indicates its reasons for not employing the commentary methodology") [7#10]; *U.S. v. Brassell,* 49 F.3d 274, 278–79 (7th Cir. 1995) (remanded: district court may impose other sentence if Note 3 methodology "does not yield an appropriate incremental punishment"); *U.S. v. Johnson,* 40 F.3d 1079, 1083–84 (10th Cir. 1994) (remanded: "district court should employ the methodology under §5G1.3(c). If the district court departs from the analysis required pursuant to §5G1.3(c), it must explain its rationale for doing so"); *U.S. v. Wiley-Dunaway,* 40 F.3d 67, 70–72 (4th Cir. 1994) (remanded: holding it is "appropriate to enforce subsection (c) as if it were a guideline, but in a manner that

affords the degree of discretion spelled out by the commentary and illustrations," adding that §5G1.3(c) and Note 3 "only require[] that the district court 'consider' such a sentence 'to the extent practicable' to fashion a 'reasonable incremental punishment'"); *U.S. v. Redman,* 35 F.3d 437, 440–42 (9th Cir. 1994) (departure affirmed: "court must attempt to calculate the reasonable incremental punishment that would be imposed under the commentary methodology. If that calculation is not possible or if the court finds that there is a reason not to impose the suggested penalty, it may use another method to determine what sentence it will impose. The court must, however, state its reasons for abandoning the commentary methodology in such a way as to allow us to see that it has considered the methodology") [7#3]; *U.S. v. Brewer,* 23 F.3d 1317, 1322 (8th Cir. 1994) (remanded: district court must follow §5G1.3(c) and accompanying commentary unless it follows proper procedures for departure); *U.S. v. Coleman,* 15 F.3d 610, 612–13 (6th Cir. 1994) (remanded: courts must consider §5G1.3(c) and "to the extent practicable" utilize methodology in comment. (n.3)).

See also *U.S. v. Myers,* 66 F.3d 1364, 1377–78 (4th Cir. 1995) (remanded: where combined sentence calculated under §5G1.3(c) was 262–327 months and defendant was serving at least 480 months on state sentence, court could not impose any part of federal sentence consecutively absent reasons for not using §5G1.3 method); *U.S. v. Lagatta,* 50 F.3d 125, 128 (2d Cir. 1995) (affirmed sentence reached by departure rather than application of Note 3 method: "Although that method is one which the court should 'consider' in determining a reasonable incremental punishment, the commentary's plain language does not make it the exclusive manner . . . . Nor does the commentary require that the district court explicitly demonstrate that it engaged in the multi-count sentencing methodology."); *U.S. v. Torrez,* 40 F.3d 84, 87–88 (5th Cir. 1994) (affirmed under harmless error analysis: although it was plain error for district court not to have considered §5G1.3(c), the method in Note 3 for calculating incremental penalty is not binding and evidence indicates it is "entirely likely that the district court would impose consecutive sentences expressly upon remand"). Cf. *U.S. v. Whiting,* 28 F.3d 1296, 1311 (1st Cir. 1994) (vacating defendant's sentence because district court failed to follow same methodology in previous version of §5G1.3(c)).

As the preceding cases indicate, most circuits have concluded that courts should explain their reasons for not following the Note 3 methodology, but need not follow the usual procedure for a departure. See also *U.S. v. Spiers,* 82 F.3d 1274, 1278–79 (3d Cir. 1996) (specifically rejecting requirement for departure analysis). However, some circuits have held that departure procedures should be followed when a court employs an alternate method for calculating a sentence under §5G1.3(c). See, e.g., *U.S. v. Hill,* 59 F.3d 500, 504 (4th Cir. 1995) (remanded: court may depart from §5G1.3(c) sentence, but must specify reasons and follow proper departure procedure); *Brassell,* 49 F.3d at 278–79 (if court departs from Note 3 it "should provide the requisite departure analysis"); *Brewer,* 23 F.3d at 1322 (district court must follow §5G1.3(c) and accompanying commentary unless it follows proper procedures for departure).

b. Calculations under §5G1.3(c)

The current Note 3 states that courts should "be cognizant of . . . the time served on the undischarged sentence and the time likely to be served before release; [and] the fact that the prior undischarged sentence may have been imposed in state court." The pre-Nov. 1995 version of Note 3 stated that "this determination frequently will require an approximation. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the actual punishment that would have been imposed under the guidelines." Some circuits held that courts should use an estimate of the actual, rather than nominal, length of an undischarged state sentence when calculating the "reasonable incremental punishment" and "combined sentence of imprisonment" under §5G1.3(c). A court may use "the 'real or effective' term of imprisonment . . . *if* that 'real or effective' term of state imprisonment can be fairly determined on a reliable basis." *U.S. v. Yates,* 58 F.3d 542, 548–49 (10th Cir. 1995) (remanded for court to make more specific findings based on evidence, "including pertinent state statutes and regulations," of what defendant's actual state sentence will likely be) [7#11]. Accord *U.S. v. Whiting,* 28 F.3d 1296, 1311 (1st Cir. 1994) (1991 version of §5G1.3(c) refers to "the real or effective [state] sentence—not to a nominal one"). See also *U.S. v. Stewart,* 59 F.3d 496, 499 (4th Cir. 1995) (affirmed: where "appellant and the probation officer both agreed that he would probably be paroled after 11 years" of twenty-two-year state sentence, that was reasonable estimate to use under §5G1.3(c)); *U.S. v. Redman,* 35 F.3d 437, 439 (9th Cir. 1994) (affirming §5G1.3(c) sentence using estimate that defendant would actually serve thirty-six months of fifteen-year state sentence) [7#3].

Note that a defendant's criminal history category does not change under §5G1.3. The Ninth Circuit rejected a defendant's argument that, because his "total punishment" under Note 3 should be calculated as if "all of the offenses [had] been federal offenses for which sentences were being imposed at the same time," his prior conviction should not be treated as a "prior sentence" under §4A1.2. "We reject this bootstrapping argument. As the government notes, the sole purpose of calculating the hypothetical combined guideline range is to aid the court in its determination of a reasonable incremental punishment. It is not meant to reduce a defendant's criminal history." *U.S. v. Garrett,* 56 F.3d 1207, 1209–10 (9th Cir. 1995).

c. Multiple undischarged terms

Application Note 5, added Nov. 1, 1995, states:

> Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

The Ninth Circuit reached a similar conclusion in a case governed by the earlier version of §5G1.3. Defendant was subject to several undischarged state prison terms,

at least one of which was totally unrelated to the instant federal offenses. The district court correctly concluded that §5G1.3(b) did not apply to such a situation and used §5G1.3(c) to impose a sentence for the federal crimes that ran concurrently with the state crimes but did not give credit for time served. "The text of §5G1.3(b) does not expressly address the multiple-offenses problem. That provision's language reasonably could be read either way. . . . [However], the purpose behind that provision makes clear what the resolution to this problem should be. Section 5G1.3(b) was adopted to address the 'unfairness' that would result from receiving a second sentence for activities which were considered as relevant conduct in a prior proceeding." In this situation, "the fact that at least one of the offenses underlying the undischarged prison term was completely unrelated to the instant offense" eliminates the unfairness of not giving credit for time served on the undischarged term. "[R]ejection of §5G1.3(b) in such multiple-offenses situations would leave the court free fully to consider, under §5G1.3(c), all of the potential permutations and complexities that can arise in a multiple-offenses context." *U.S. v. Kimble,* 107 F.3d 712, 714–15 (9th Cir. 1997). Accord *U.S. v. Caraballo,* 200 F.3d 20, 28 (1st Cir. 1999) (also discussing meaning of "fully taken into account" under §5G1.3(b)). See also *U.S. v. Brown,* 232 F.3d 44, 48–49 (2d Cir. 2000) (affirmed: following Note 5, proper to use §5G1.3(c) where undischarged state term had only been fully taken into account in one of defendant's three federal offenses).

d. Departure

A downward departure may be warranted under §5G1.3(c) if a defendant has so little time left on a prior sentence that the sentence calculated under Note 3 is less than the time already served plus the minimum guideline sentence for the current offense. However, departure is not required, and the court may sentence defendant within the guideline range for the current offense. *U.S. v. Holifield,* 53 F.3d 11, 14–17 (3d Cir. 1995) (affirmed: proper to impose concurrent fifteen-month sentence—the low point of the guideline range—even though Note 3 called for total punishment of twenty-four months and defendant had already served seventeen months on prior twenty-one-month sentence) [7#10]. Accord *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"). See also §5G1.3(c), comment. (n.3) ("this methodology does not, itself, require the court to depart") and Illustration D (indicating total sentence greater than Note 3 calculation is proper in such a situation).

[**Note:** A proposed Nov. 1, 2002, amendment would resolve the circuit split summarized in the next two paragraphs. New Application Note 7 of §5G1.3 will state: "In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had

the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense."]

A related problem occurs when the prison term for related conduct has already been served. "Section 5G1.3 on its face does not apply to" this situation, and the Seventh Circuit held that departure is permissible, but not required, in order to account for the related sentence as if §5G1.3 applied. See *U.S. v. Blackwell,* 49 F.3d 1232, 1241–42 (7th Cir. 1995) (district court decision not to depart is upheld, but since case is remanded for other reasons "we do encourage the court upon remand to reconsider its decision") [7#9]. Accord *U.S. v. O'Hagan,* 139 F.3d 641, 656–58 (8th Cir. 1998) (affirming such a departure and specifically disagreeing with *McHan* below).

The Fourth Circuit disagreed that a departure was authorized, holding that "the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority." The court also held that, "[a]t least where there is no indication that the government intentionally delayed the defendant's processing for the purpose of rendering §5G1.3(c) inapplicable," departure is not warranted where a delay between conviction and sentencing renders §5G1.3 inapplicable because a defendant completes another sentence during that time. *U.S. v. McHan,* 101 F.3d 1027, 1040–41 (4th Cir. 1996) (remanded) [9#4]. See also *U.S. v. Turnipseed,* 159 F.3d 383, 387 (9th Cir. 1998) (affirmed: "To interpret the phrase 'undischarged term of imprisonment' to include an already-completed prison term would contradict the plain meaning of the term 'undischarged,'" so §5G1.3(b) does not apply to defendant who had completed related state sentence; request for credit for that sentence would be construed as departure request, which district court had discretion to deny); *U.S. v. Rizzo,* 121 F.3d 794, 800 (1st Cir. 1997) (indicating agreement with *McHan* that §5G1.3 does not apply if previous sentence is discharged before instant sentencing).

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

e. Interaction with 18 U.S.C. §3584(a)

Prior versions of §5G1.3 had directed that the current sentence be imposed to run consecutively to any "unexpired sentences" being served "at the time of sentencing" on the instant offense. The circuits had split on whether the guidelines could impose such a requirement in light of 18 U.S.C. §3584(a), which gives courts dis-

cretion to impose consecutive or concurrent sentences. Most courts have held that the conflict between guideline and statute may be resolved by allowing courts to depart from the requirements of §5G1.3 when appropriate; courts should follow the usual procedures for departure. See *U.S. v. Schaefer,* 107 F.3d 1280, 1285–86 (7th Cir. 1997); *U.S. v. Flowers,* 995 F.2d 315, 316–17 (1st Cir. 1993); *U.S. v. Gullickson*, 981 F.2d 344, 349 (8th Cir. 1992); *U.S. v. Shewmaker,* 936 F.2d 1124, 1127–28 (10th Cir. 1991); *U.S. v. Pedrioli,* 931 F.2d 31, 32 (9th Cir. 1991); *U.S. v. Stewart,* 917 F.2d 970, 972–73 (6th Cir. 1990); *U.S. v. Miller,* 903 F.2d 341, 349 (5th Cir. 1990) [3#9]; *U.S. v. Rogers,* 897 F.2d 134, 137–38 (4th Cir. 1990) [3#3]; *U.S. v. Fossett,* 881 F.2d 976, 980 (11th Cir. 1989) [2#11]. But see *U.S. v. Nottingham,* 898 F.2d 390, 393–95 (3d Cir. 1990) (§5G1.3 conflicts with 18 U.S.C. §3584(a), district courts retain discretion to impose concurrent or consecutive sentences) [3#5]; *U.S. v. Wills,* 881 F.2d 823, 826–27 (9th Cir. 1989) (same, but appears to be superseded by *Pedrioli, supra*) [2#11]. See also *U.S. v. Vega,* 11 F.3d 309, 315 (2d Cir. 1993) (affirmed federal sentence to run consecutively to unexpired state sentence—if district court did not retain discretion under §3584(a), it properly departed from §5G1.3).

The Tenth Circuit applied this reasoning to the later version of §5G1.3(a), holding that, because of the possibility of departure, the district court erred when it concluded it did not have discretion to impose concurrent sentences under §5G1.3(a). *U.S. v. Mihaly,* 67 F.3d 894, 896 (10th Cir. 1995) (remanded: court "clearly possessed discretion to make a general departure from the guidelines and to sentence Mr. Mihaly to concurrent sentences").

Also upholding the later version of §5G1.3(a), the Third Circuit found it "unnecessary to address . . . [whether] the guideline departure mechanism adequately preserves a court's discretion," holding that there is "no inherent conflict between the general discretion granted under §3584(a) and the limitation of that discretion in certain instances by the Guidelines. . . . [W]e find that §5G1.3(a) is not in conflict with §3584(a) merely because the Guideline limits sentencing discretion in the exceptional case of an offense committed while serving or awaiting a term of imprisonment. In the vast majority of circumstances contemplated by §5G1.3, courts retain discretion to run sentences concurrently or consecutively." The court did note that, on remand, the district court could consider a downward departure. *U.S. v. Higgins,* 128 F.3d 138, 141–42 (3d Cir. 1997) (also stating that its holding in *Nottingham, supra,* "is no longer relevant in assessing the validity of the present §5G1.3(a)").

f. Consecutive to revocation sentence

"If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of proba-

tion, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4)." USSG §5G1.3, comment. (n.6) (1995) (formerly note 4).

A majority of circuits to decide the issue have held that courts must follow Note 6 and impose consecutive sentences. See *U.S. v. Goldman*, 228 F.3d 942, 944 (8th Cir. 2000) (remanded: "Application Note 6 is mandatory and requires consecutive sentences"); *U.S. v. Alexander,* 100 F.3d 24, 27 (5th Cir. 1996) (affirmed: "Application Note 6 is mandatory"); *U.S. v. Gondek,* 65 F.3d 1, 3 (1st Cir. 1995) (affirmed: "departure to one side, application note 4 (now 6) is mandatory"); *U.S. v. Bernard,* 48 F.3d 427, 431–32 (9th Cir. 1995) (affirmed application of this note and also held that, because it is consistent with earlier version of §5G1.3(c), it was proper to apply it to defendant who committed original offense before 1993); *U.S. v. Flowers,* 13 F.3d 395, 397 (11th Cir. 1994) (affirmed: before note, following §§5G1.3(c) and 7B1.3(f) rather than §5G1.3(b) to conclude that "policy favoring imposition of consecutive sentences in cases of violation of release . . . governs" where sentence for offense was imposed after revocation sentence); *U.S. v. Glasener,* 981 F.2d 973, 975–76 (8th Cir. 1992) (affirmed: same—"mere order in which the sentences were imposed does not alter the result"). Cf. USSG §7B1.3(f) & comment. (n.5) (imprisonment imposed after revocation shall be consecutive to any sentence defendant is serving, whether or not that sentence was imposed for conduct that formed basis of revocation); *U.S. v. Kikuyama,* 109 F.3d 536, 538–39 (9th Cir. 1997) (remanded: while Note 6 or other factors may warrant consecutive sentences for instant bank robbery counts and supervised release revocation, district court could not make sentences consecutive based on defendant's need for mental treatment).

However, three circuits have disagreed. For example, the Second Circuit concluded that "where the Sentencing Commission chose the word 'should' instead of 'shall' or 'must,' the Commission meant what it said and said what it meant. . . . '[S]hould' implies, suggests, and recommends, but does not require. The use of 'should' in Application Note 6 provides a sentencing court with the discretion to take a course of action not suggested by the Note, should that court conclude that the circumstances of a given case warrant such a deviation." The court also agreed with defendant's argument that "the use of the word 'incremental' in Note 6 to describe the penalty to be imposed upon a violator of probation, parole or supervised release evinces an intent to impose a moderate additional penalty and not a fully consecutive sentence." *U.S. v. Maria,* 186 F.3d 65, 70–73 (2d Cir. 1999) (remanded: and specifically disagreeing with the First, Fifth, and Ninth Circuits). Accord *U.S. v. Swan,* 275 F.3d 272, 279–83 (3d Cir. 2002) (remanded: although Note 6 "indicate[s] the Commission's strong preference for imposing a consecutive sentence," district court "should also exercise its discretion" within guideline and statute); *U.S. v. Tisdale,* 248 F.3d 964, 977–79 (10th Cir. 2001) (remanded: agreeing with reasoning of *Maria* that "'should' does not mean 'shall'" and "note 6's language is *permissive*").

g. "Term of imprisonment"

One circuit has held that a state parole term was an "undischarged term of imprisonment" because under the state law "[p]arolees shall at all times be considered confined, in the legal custody of the department of corrections." The court concluded that the state "has retained custody of French until the termination of his ten-year sentence," even though he was released from prison after ten months, and that the "retention of custody means that French is subject to an 'undischarged term of imprisonment.'" Thus, even though defendant's federal sentencing occurred after his release from state prison, the district court did not err by crediting defendant for his time served when sentencing him on a related federal charge, effectively making the sentences concurrent under §5G1.3(b). *U.S. v. French,* 46 F.3d 710, 717 (8th Cir. 1995). See also *U.S. v. Murphy,* 69 F.3d 237, 244–45 (8th Cir. 1995) (affirming consecutive sentence under §5G1.3(a) for defendant who was on parole at time of federal offenses—because state law provides that parolees "shall remain in the legal custody of the [state]," defendant committed the instant offense while subject to an "undischarged term of imprisonment").

However, the First and Seventh Circuits have held that an undischarged term of probation following release from a state prison sentence is not an "undischarged term of imprisonment" under §5G1.3 requiring sentencing credit against a federal sentence. See *U.S. v. Cofske,* 157 F.3d 1, 1–2 (1st Cir. 1998) (affirmed); *Prewitt v. U.S.,* 83 F.3d 812, 817–18 (7th Cir. 1996) (affirmed). Cf. *U.S. v. Sabarese,* 71 F.3d 94, 96 (3d Cir. 1995) (affirmed: under 1988 version of §5G1.3, prior sentence of probation does not require concurrent sentence for later related offense—"use of the term 'sentence' in §5G1.3 clearly refers to a sentence of imprisonment. Otherwise, the language of §5G1.3 would make no sense."). The Seventh Circuit also held that home detention is not a "term of imprisonment" under §5G1.3 and need not be taken into account in setting the federal sentence. "'Home detention' differs from 'imprisonment' throughout the Guidelines' schema. It is not 'imprisonment' but is a 'substitute for imprisonment.' See §5B1.4(b)(20)." *U.S. v. Phipps,* 68 F.3d 159, 161–62 (7th Cir. 1995) (court properly credited state prison term, but not home detention term that followed it, against federal sentence for related offense) [8#3].

h. Mandatory minimums

The Supreme Court reversed a Tenth Circuit decision that had concluded the mandatory minimum five-year sentence under 18 U.S.C. §924(c) "may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve*." See *U.S. v. Gonzalez,* 65 F.3d 814, 819–22 (10th Cir. 1995) (noting that this is "entirely consistent with the Guidelines" at §5G1.3(b)). The Court, however, held that the phrase "any other term of imprisonment" in §924(c) must be read to include state sentences, and thus "the plain language of 18 U.S.C. §924(c) forbids a federal district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. The statute does not, however, limit the court's authority to order that other federal

sentences run concurrently with or consecutively to other prison terms—state or federal—under §3584." *U.S. v. Gonzalez,* 117 S. Ct. 1032, 1035–38 (1997) [9#2].

Two circuits have distinguished §924(e), holding that where concurrent sentences are called for under §5G1.3(b) and credit should be given for time served on a related state sentence alone, the guideline should be applied even if the resulting time served on the federal sentence would fall below the mandatory minimum required by 18 U.S.C. §924(e). "Unlike a §924(c)(1) mandatory minimum sentence, which cannot be made concurrent with the sentence for any other offense, §924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of the same course of conduct. In these circumstances, although the issue is not free from doubt, we conclude that time previously served under concurrent sentences may be considered time 'imprisoned' under §924(e)(1) if the Guidelines so provide." *U.S. v. Kiefer,* 20 F.3d 874, 876–77 (8th Cir. 1994) (remanded) [6#12]. Accord *U.S. v. Drake,* 49 F.3d 1438, 1440–41 (9th Cir. 1995) [7#9]. See also *U.S. v. Dorsey,* 166 F.3d 558, 562–64 (2d Cir. 1999) (remanded: adopting reasoning of *Kiefer* in upholding Application Note 2 of §5G1.3(b) regarding adjusting sentence when the Bureau of Prisons will not give credit for time served on a related charge). Accord *U.S. v. Ross,* 219 F.3d 592, 595 (7th Cir. 2000).

B. Probation (§5B1)

General: It has been held that probation with community service cannot be substituted for intermittent confinement when confinement is required under §5C1.1. *U.S. v. Delloiacono,* 900 F.2d 481, 483–84 (1st Cir. 1990) [3#6]. Cf. *U.S. v. Lively,* 20 F.3d 193, 197–98 (6th Cir. 1994) (affirmed: court has discretion under §5C1.1(c) to impose sentence of imprisonment or probation with term of home confinement).

When determining the possible length of a term of probation under §5B1.2, "the offense level" means the adjusted offense level, not the base offense level. *U.S. v. Harry,* 874 F.2d 248, 249 (5th Cir. 1989) [2#7].

Conditions: In general, a discretionary condition of probation must bear some reasonable relation to the offense and the statutory purposes of probation. "The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing." USSG §5B1.3(b). See, e.g., *U.S. v. Peterson,* 248 F.3d 79, 82–86 (2d Cir. 2001) (because of defendant's prior state conviction for incest, conditions limiting access to children and requiring sex offender counseling were reasonable; however, condition of broad restriction on computer use was not reasonably related to current or past offense, and third-party notification requirement for incest conviction was not authorized by statute because it was not related to offense of conviction); *U.S. v. Warren,* 186 F.3d 358, 366–67 (3d Cir. 1999) (remanding travel restriction because court "did not make findings in support of the travel restriction, nor did it indicate how the restriction fit within the statutory aims of probation"); *U.S. v. Voda,* 994 F.2d 149,

153–54 (5th Cir. 1993) (remanded: firearm prohibition improperly given to defendant convicted of pollution offense, a nonviolent misdemeanor); *U.S. v. Stoural,* 990 F.2d 372, 373 (8th Cir. 1993) (remanded: alcohol prohibition and subjection to warrantless searches for alcohol or drugs were not reasonably related to crime of conversion of collateral).

The Second Circuit held that, "under the Guidelines, an occupational restriction is a special condition of probation that the court is not to impose unless it finds, *inter alia*, that there is reason to believe that, without such a restriction, the defendant will continue to engage in unlawful conduct similar to that for which he was convicted, and that such a restriction is, therefore, reasonably necessary to protect the public." *U.S. v. Doe,* 79 F.3d 1309, 1322 (2d Cir. 1996) (remanded: error to impose condition requiring defendant to notify tax clients that he was convicted of aiding and abetting the preparation and filing of a false tax income tax return—defendant was guilty of only one count, had no prior offense, and cooperated with government, and there was no evidence that an occupational restriction was necessary to protect the public). Cf. *U.S. v. Cutler,* 58 F.3d 825, 839 (2d Cir. 1995) (affirmed: condition prohibiting attorney from practicing within Eastern District of New York for six months was justified under facts of case); *U.S. v. Peete,* 919 F.2d 1168, 1181 (6th Cir. 1990) (affirmed: elected official convicted of Hobbs Act violations could be prohibited from seeking or serving in elected public office during probation period).

The Ninth Circuit held that defendants may not be ordered to repay court-appointed attorney's fees as a condition of probation. *U.S. v. Lorenzini,* 71 F.3d 1489, 1492–94 (9th Cir. 1995) [8#3]. Cases before the effective date of the Sentencing Reform Act of 1984 were split on whether former 18 U.S.C. §3561 authorized repayment of attorney's fees as a condition of probation. Compare *U.S. v. Gurtunca,* 836 F.2d 283, 287–88 (7th Cir. 1987) (reimbursement authorized, but lack of funds would be defense against revocation for nonpayment) and *U.S. v. Santarpio,* 560 F.2d 448, 455–56 (1st Cir. 1977) (same—"the condition cannot be enforced so as to conflict with Hamperian's sixth amendment rights; if Hamperian is unable to pay the fees, revocation of probation for nonpayment would be patently unconstitutional") with *U.S. v. Jimenez,* 600 F.2d 1172, 1174–75 (5th Cir. 1979) (§3561 does not allow for reimbursement as condition of probation).

See also section VII.A. Revocation of Probation

C. Supervised Release (§5D1)

1. Length of Term

The Eighth Circuit upheld a ten-year term of supervised release agreed to in a plea bargain, although §5D1.2(a) set a five-year limit. The court held that if the term of supervised release authorized in §5D1.2(a) was construed as a guideline range, then it was subject to departure, and departure to a ten-year term was justified in this case. *U.S. v. LeMay,* 952 F.2d 995, 998 (8th Cir. 1991) [4#14]. See also *U.S. v. Eng,* 14

F.3d 165, 171–72 (2d Cir. 1994) (affirming upward departure to life term of supervised release). Cf. *U.S. v. Amaechi,* 991 F.2d 374, 379 (7th Cir. 1993) (remanded departure to life term of supervised release because defendant did not receive adequate notice; also noted that "a life term of supervised release is extraordinary and not often warranted"); *U.S. v. Pico,* 966 F.2d 91, 92 (2d Cir. 1992) (remanding imposition of life term of supervised release when guideline maximum was five years; court has authority to depart for supervised release, but it failed to follow proper procedures for departure) [5#1]; *U.S. v. Marquez,* 941 F.2d 60, 64 (2d Cir. 1991) (court should give reasons for departure in supervised release terms where it does not also depart in length of imprisonment). Cf. *U.S. v. Gibbs,* 58 F.3d 36, 37–38 (2d Cir. 1995) (when term of release may be extended under §3583(e)(2) "if less than the maximum authorized term was previously imposed," that refers to maximum authorized by statute, not guidelines maximum in §5D1.2(a)).

Note that a departure above the term limits in the guidelines may be limited by 18 U.S.C. §3583(b), which sets maximum terms of one, three, or five years, depending on the seriousness of the offense of conviction. See, e.g., *U.S. v. Saunders,* 957 F.2d 1488, 1494 (8th Cir. 1992) (remanded: departure to five-year term improper where statutory maximum was three years) [4#20]. These limits apply "except as otherwise provided," and some statutes clearly require longer terms for serious offenses by repeat offenders.

There is a split in the circuits as to whether a statute that requires a term of "at least" a certain term of years falls within the "otherwise provided" language and allows for a term of release longer than §3583(b)'s maximums. Several circuits hold that longer terms are allowed. See *U.S. v. Page,* 131 F.3d 1173, 1177–80 (6th Cir. 1997) (affirming four-year term for Class C felony: after Anti-Drug Abuse Act of 1986, "the maximum terms of supervised release previously set in section 3583(b) no longer applied in specific drug-related statutes" like §841(b)); *U.S. v. Garcia,* 112 F.3d 395, 398 (9th Cir. 1997) (adopting holding of *Eng, infra*, and affirming five-year term of release for §841(b)(1)(C) offense); *U.S. v. Williams,* 65 F.3d 301, 309 (2d Cir. 1995) (affirmed: five-year limit in §3583(b)(1) and §5D1.2(1) is overridden by "at least 4 years" language in §841(b)(1)(B), thus allowing ten-year term); *U.S. v. Orozco-Rodriguez,* 60 F.3d 705, 707–08 (10th Cir. 1995) (affirmed: although §3583(b)(2) permitted maximum of three years' supervised release, four-year term was authorized by "at least 3 years" language in statute of conviction, 21 U.S.C. §841(b)(1)(C)); *U.S. v. Mora,* 22 F.3d 409, 412 (2d Cir. 1994) (remanded because facts did not support extent of departure, but life term of supervised release would not violate §3583(b)(1)'s five-year limit because 21 U.S.C. §841(b)(1)(B)'s required term of "at least 4 years" overrides §3583(b)(1)); *Eng,* 14 F.3d at 172–73 (same, affirming departure to life term where required term was "at least 5 years" in §841(b)(1)(A)); *LeMay,* 952 F.2d at 998 (affirmed ten-year term where §841(b)(1)(A) required "at least 5 years"). The Fifth Circuit held that the "at least" language sets the minimum term but does not override the maximums set in §3583(b). See *U.S. v. Kelly,* 974 F.2d 22, 24 (5th Cir. 1992) (remanded: where 21 U.S.C. 841(b)(1)(C) requires term of "at least 3 years," error to impose five-year

term because §3583(b) set limit of three years). Accord *U.S. v. Good,* 25 F.3d 218, 221 (4th Cir. 1994) (for five-year limit in §3583(b)(1) versus "at least 4 years" language in §841(b)(1)(B)).

A November 1994 amendment to §5G1.2's commentary states that "even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. §3624(e)." Previously, there had been some disagreement on whether supervised release terms on multiple counts can run consecutively. Compare *U.S. v. Shorthouse,* 7 F.3d 149, 152 (9th Cir. 1993) (periods of supervised release can run consecutively when one sentence is required to be consecutive to the other) and *U.S. v. Maxwell,* 966 F.2d 545, 550–51 (10th Cir. 1992) (same) [5#1] with *U.S. v. Gullickson,* 982 F.2d 1231, 1235–36 (8th Cir. 1993) (terms must be concurrent, "dictum" in *Saunders* to contrary should not be followed) [5#8]. See also *U.S. v. Hernandez-Guevara,* 162 F.3d 863, 877 (5th Cir. 1998) (remanded: under §3624(e) and §5G1.2 commentary, cannot impose term of supervised release to run consecutively to term imposed in previous case); *U.S. v. Bailey,* 76 F.3d 320, 323–24 (10th Cir. 1996) (remanded: §3624(e) clearly prohibits consecutive terms of supervised release for separate offenses). Cf. *U.S. v. Ravoy,* 994 F.2d 1332, 1337–38 (8th Cir. 1993) (error to impose term of "inactive supervised release" that exceeded maximum statutory term and had effect of imposing consecutive terms of release prohibited by *Gullickson*) [5#15]. The Ninth Circuit later determined that the 1994 amendment was clarifying, rather than substantive, and should be applied retroactively, thus effectively overruling *Shorthouse*. See *U.S. v. Sanders,* 67 F.3d 855, 857 (9th Cir. 1995) (remanding consecutive terms given to defendant in 1993).

After reduction of sentence: The Supreme Court resolved a circuit split on the question of when a sentence is later reduced to less than time already served, should the subsequent period of supervised release be considered to have begun on the date defendant should have been released in order to account for the "extra" time spent in prison? Reversing a Sixth Circuit case, the Court found that "the language of 18 U.S.C. §3624(e) controls." That statute "directs that a supervised release term does not commence until an individual 'is released from imprisonment.' . . . The statute does not say 'on the day the person is released or on the earlier day when he should have been released.' Indeed, the third sentence admonishes that 'supervised release does not run during any period in which the person is imprisoned.'" The Court also noted that defendants can seek relief under §3583(e)(2), whereby the trial court may modify an individual's conditions of supervised release, and §3583(e)(1), under which a court may terminate an individual's supervised release obligations 'at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." *U.S. v. Johnson,* 120 S. Ct. 1114, 1117–19 (2000) [10#7].

Three circuits had previously held that supervised release begins on the actual day of release from prison, regardless of whether the release should have been sooner. See *U.S. v. Joseph,* 109 F.3d 34, 36–39 (1st Cir. 1997) (although defendant succeeded

in having one conviction overturned, which reduced his sentence to thirty-nine months less than the time he had already served, he could not receive compensation for that extra time by a reduction in his term of supervised release) [9#7]; *U.S. v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996) (although clarifying guideline amendment reduced defendant's sentence to less than time served, excess time defendant spent in prison should not be credited against his term of supervised release) [9#1]. See also *U.S. v. Jeanes,* 150 F.3d 483, 485 (5th Cir. 1998) (affirmed: citing *Joseph* in rejecting defendant's claim that his excess time served and good time credits resulting from vacated conviction entitles him to reduced term of supervised release—defendant may, under 18 U.S.C. §3583(e)(1), request termination of release after one year, and "we opt not to invent some form of 'automatic credit' as a means of compensation").

However, the Ninth Circuit disagreed, holding that when the retroactive application of a guideline amendment reduces defendant's prison term to less than time already served, the term of supervised release begins on the date defendant should have been released. *U.S. v. Blake,* 88 F.3d 824, 825–26 (9th Cir. 1996) (remanded: noting that §3624(a) states that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's term of imprisonment," resolving seeming conflict with §3624(e) in favor of leniency in light of purpose behind retroactive reduction of guideline sentence) [9#1]. Accord *Johnson v. U.S.,* 154 F.3d 569, 571 (6th Cir. 1998) (reversed: for defendant who had §924(c) conviction overturned, agreeing with *Blake* that "the date of his 'release' for purposes of §3624(a) was the date he was entitled to be released rather than the day he walked out the prison door," so extra time he served in prison should be credited toward supervised release term). Cf. *U.S. v. Etherton,* 101 F.3d 80, 81 (9th Cir. 1996) (allowing reduction in sentence imposed upon revocation of supervised release because retroactive guideline amendment would have reduced defendant's original sentence to less than the time he had served on that sentence) [9#4] (but see USSG 1B1.10, comment. (n.3)).

When such a reduction results from retroactive application of a guideline amendment, Nov. 1997 amendments to §1B1.10 and its commentary provide guidance. Section 1B1.10(b) now adds that, if a sentence is reduced, "in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served." If an amended sentence would have been less than time served, new Application Note 5 states that "the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. §3583(e)(1)." The court should then consider the "totality of circumstances," not just the fact that the original sentence should have been shorter, in deciding whether to grant a §3583(e)(1) motion. Cf. *U.S. v. Pregent,* 190 F.3d 279, 282–83 (4th Cir. 1999) (affirming denial of reduction under §3583(e)(1) for defendant who claimed original sentence was too long).

2. Conditions

Note: Amendments in Nov. 1997 significantly changed §5D1.3. Many of the cases in this section were decided before the amendments.

a. Occupational restrictions

Note that while §5F1.5 provides that a condition of supervised release may prohibit or restrict "engaging in a specified occupation, business, or profession," there must be a "reasonably direct relationship" between that occupation and the offense conduct, and the restriction must be "reasonably necessary to protect the public" because otherwise defendant would likely engage in the same unlawful conduct. Such a condition must be "for the minimum time and to the minimum extent necessary to protect the public."

Following §5F1.5, the Eighth Circuit rejected a condition that prohibited a defendant from employment as a truck driver if that involved an absence from his residence of more than twenty-four hours. It was not related to defendant's conviction, imposed a financial hardship on him and his family because he could not earn as much money from other jobs, and it was not shown that less severe restrictions would not be effective. *U.S. v. Cooper,* 171 F.3d 582, 585–86 (8th Cir. 1999). Cf. *U.S. v. Berridge,* 74 F.3d 113, 118–19 (6th Cir. 1996) (affirmed: indicating that probation condition that prohibited working in banking industry during period of probation was departure that required district court "to state the reasons for the imposition of a sentence outside the guideline range on the record," but finding omission was harmless error because record clearly supported condition).

The Fifth Circuit held that forbidding defendant to work in the car sales field during a period of supervised release, §5F1.5, was not a departure subject to advance notice because the Guidelines contemplate imposition of such a condition. *U.S. v. Mills,* 959 F.2d 516, 518–20 (5th Cir. 1992) (remanding, however, because court exceeded discretion in ordering defendant to close and sell car sales business). Cf. *U.S. v. Coenen,* 135 F.3d 938, 943–44 (5th Cir. 1998) (affirmed: community notification condition that went beyond what is contemplated in Guidelines is "more analogous to an upward departure" and required "reasonable pre-sentencing notice"; here, defendant had "actual knowledge" that the notification condition might be imposed and that satisfied notice requirement). The Eighth Circuit approved a condition prohibiting defendants from being self-employed, finding it justified by "defendants' long-standing and extensive pattern of criminal racketeering activities," which had occurred when they set up their own insurance companies. *U.S. v. Coon,* 187 F.3d 888, 900 (8th Cir. 1999).

On a related issue, employer notification requirements have been upheld as a condition of supervised release when such a requirement was reasonably related to the offense and the statutory goals of supervision. See, e.g., *U.S. v. Ritter,* 118 F.3d 502, 504–05 (6th Cir. 1997) (affirming requirement that embezzlement defendant notify current and future employers of conviction); *U.S. v. Schechter,* 13 F.3d 1117,

1118–19 (7th Cir. 1994) (affirming notification requirement for computer consultant convicted of tax evasion after stealing from three employers).

Only the district court, not the probation officer, has authority to set occupational restrictions. See *U.S. v Dempsey,* 180 F.3d 1325, 1326 (11th Cir. 1999) (remanded: district court erred in refusing to set aside imposition of occupational restriction by probation officer).

b. Other restrictions

A court could properly impose conditions of release that prohibited a defendant who sexually abused a six-year-old from (1) having contact with children under the age of eighteen unless approved by his probation officer, (2) loitering within 100 feet of school yards and other places primarily used by children, and (3) possessing any inappropriate sexually stimulating or sexually oriented material. "In a case such as this, even very broad conditions are reasonable if they are intended to promote the probationer's rehabilitation and to protect the public." *U.S. v. Bee,* 162 F.3d 1232, 1235–36 (9th Cir. 1998). See also *U.S. v. Walser,* 275 F.3d 981, 987–88 (10th Cir. 2001) (affirmed: not plain error to bar use of or access to Internet without permission of probation officer for defendant convicted of possessing child pornography); *U.S. v. Paul,* 274 F.3d 155, 165–72 (5th Cir. 2001) (affirmed: under facts of defendant's possession of child pornography offense, conditions requiring that he avoid "direct and indirect contact with minors, . . . places, establishments, and areas frequented by minors," not "engag[e] in any paid occupation or volunteer service which exposes him either directly or indirectly to minors," and "not have[,] possess or have access to computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image," were not impermissibly vague or overbroad"); *U.S. v. Loy,* 237 F.3d 251, 262–69 (3d Cir. 2001) (affirming condition that barred defendant—convicted of receiving and possessing child pornography—from having unsupervised contact with minors, but finding that condition prohibiting defendant from possessing "all forms of pornography, including legal adult pornography," was unconstitutionally vague and would have to be narrowed to be valid); *U.S. v. Crandon,* 173 F.3d 122, 127–28 (3d Cir. 1999) (affirmed: condition limiting access to Internet for defendant who used Internet to meet, have sex with, and take pictures of fourteen-year-old girl reasonably related to deterrence and protection of public); *U.S. v. Fabiano,* 169 F.3d 1299, 1307 (10th Cir. 1999) (affirming condition requiring registration under Colorado state sex offender registration statute as reasonably related to deterrence and protection of public). But cf. *U.S. v. Scott,* 270 F.3d 632, 635–36 (8th Cir. 2001) (remanded: abuse of discretion to impose conditions tailored to sex offenses on bank robbery defendant because of unrelated sex crime that occurred fifteen years earlier).

Some circuits have held that, following *Burns v. U.S.,* 501 U.S. 129 (1991), and Fed. R. Crim. P. 32(c)(1), notice may be required before imposing a condition to register as a sex offender or give notice to the community when the condition is not expressly contemplated by the Guidelines or statute. See *U.S. v. Angle,* 234 F.3d 326,

347 (7th Cir. 2000), agreeing with *Coenen*, below); *U.S. v. Bartsma,* 198 F.3d 1191, 1199–1200 (10th Cir. 1999) (remanded: "the *Burns* rationale applies when a district court is considering imposing a sex offender registration requirement as a special condition of supervised release, and the condition is not on its face related to the offense charged"; here, defendant had a history of sex offenses, but was convicted of possession of a firearm by a felon); *U.S. v. Coenen,* 135 F.3d 938, 941–43 (5th Cir. 1998) (holding that "far-reaching conditions of community notification" that went beyond Guidelines policy statements required notice, but affirming because defendant had actual knowledge that the conditions might be imposed). Cf. *U.S. v. Lopez,* 258 F.3d 1053, 1056 (9th Cir. 2001) (distinguishing preceding cases in holding that notice was not required before imposing special condition to participate in mental health program, a condition contemplated by the Guidelines).

Total abstinence from alcohol has been held to be a proper condition of release under §5D1.3(b) when the evidence shows that defendant has a history of alcohol abuse. See *U.S. v. Schave,* 186 F.3d 839, 842 (7th Cir. 1999) (also prohibiting use of "other legally obtained intoxicants"); *U.S. v. Cooper,* 171 F.3d 582, 586 (8th Cir. 1999) (including prohibition on "frequenting bars, taverns or other establishments whose primary source of income is derived from the sale of alcohol"); *U.S. v. Wesley,* 81 F.3d 482, 484 (4th Cir. 1996); *U.S. v. Thurlow,* 44 F.3d 46, 47 (1st Cir. 1995); *U.S. v. Johnson,* 998 F.2d 696, 699 (9th Cir. 1993). Cf. *U.S. v. Prendergast,* 979 F.2d 1289, 1292–93 (8th Cir. 1992) (condition of alcohol abstinence improper when there is "no evidence indicating that Prendergast suffers from alcoholism or that the use of alcohol in any way contributed to the commission of the offense"). The Eighth Circuit distinguished *Prendergast* in a case involving a drug defendant who had a long history of drug abuse. Although he had no history of alcohol abuse, the probation officer's recommendation "indicated that any use of alcohol would limit Behler's ability to maintain a drug-free lifestyle . . . [and] the record indicates that any use of alcohol is inconsistent with the treatment philosophy of most substance abuse recovery programs nationwide," thus allowing the district court "to rely on the evidence of record indicating that an alcohol ban is necessary for Behler's total rehabilitation." *U.S. v. Behler,* 187 F.3d 772, 779 (8th Cir. 1999).

Other restrictions have been approved that are designed to protect the public and reduce the chance of recidivism. See, e.g., *U.S. v. Monteiro,* 270 F.3d 465, 469–73 (7th Cir. 2001) (partly affirming condition that defendant's "person, residence, and vehicle shall be subject to search and seizure upon demand of any law enforcement officer"—defendant's very extensive history of fraudulent behavior warranted search condition, but seizure condition was overbroad); *U.S. v. Behler,* 187 F.3d 772, 780 (8th Cir. 1999) (affirming condition to provide probation officer with financial information because "money and greed were at the heart of Behler's drug distribution offenses and . . . monitoring Behler's financial situation would aid in detecting any return to his former lifestyle of drug distribution"); *Schave,* 186 F.3d at 843–44 (prohibition on associating with white supremacist groups or their members valid for defendant who was convicted of illegal explosives charge related to selling to

white supremacist group member explosives to be used against civil rights groups); *U.S. v. Ensminger,* 174 F.3d 1143, 1148 (10th Cir. 1999) (need to protect public justified financial restrictions and disclosure requirements on defendant who engaged in schemes to defraud financial institutions and belonged to organization that does not believe in authority of federal banking system); *U.S. v. Crandon,* 173 F.3d 122, 126–27 (3d Cir. 1999) (limit on Internet access for defendant who used Internet to commit sex offense was clearly "related to the dual aims of deterring him from recidivism and protecting the public"); *U.S. v. Fabiano,* 169 F.3d 1299, 1307 (10th Cir. 1999) (affirmed: condition requiring registration under Colorado state sex offender registration statute "was reasonably related to (1) deterrence of criminal conduct by Defendant; and (2) protection of the public"); *U.S. v. Fellows,* 157 F.3d 1197, 1203–04 (9th Cir. 1998) (affirming condition for convicted pedophile that he participate in treatment program and "follow all other lifestyle restrictions or treatment requirements imposed by defendant's therapist"); *U.S. v. Peppe,* 80 F.3d 19, 23–24 (1st Cir. 1996) (affirmed: court could prohibit loan-sharking defendant from engaging in credit activity without prior approval of probation officer during supervised release).

It has also been held that, because the factors to consider in USSG §5D1.3(b) need not *all* be relevant to a special condition, the court may impose a condition that is not directly related to the offense of conviction. See, e.g., *U.S. v. Sicher,* 239 F.3d 289, 291 (3d Cir. 2000) (in affirming condition that defendant not enter two counties without permission of parole officer, rejecting claim that a condition "must relate to *both* the nature of the offense and the circumstances and history of the defendant"); *U.S. v. Bull,* 214 F.3d 1275, 1276–78 (11th Cir. 2000) (affirming condition requiring treatment for anger control for credit card fraud defendant who had extensive history of domestic and other violence); *Cooper,* 171 F.3d at 587 (affirming condition to participate in domestic violence program for defendant convicted of unlawfully transporting explosive materials); *U.S. v. Wilson,* 154 F.3d 658, 667 (7th Cir. 1998) (affirming order that abortion protestor participate in mental health treatment program based on history of emotional disturbance and erratic behavior); *U.S. v. Brown,* 136 F.3d 1176, 1186 (7th Cir. 1998) (affirming condition that stamp and wire fraud defendant not engage in any gambling activities because he had history of compulsive gambling with large losses). See also *Johnson,* 998 F.2d at 697 ("[T]he items listed in 5D1.3(b) are not necessary elements, each of which has to be present. They are merely factors to be weighed, and the conditions imposed may be unrelated to one or more of the factors, so long as they are sufficiently related to the others").

c. Payment of attorney fees or restitution

The Third and Ninth Circuits remanded orders that a defendant repay his court-appointed attorney's fees as a condition of supervised release. See *U.S. v. Evans,* 155 F.3d 245, 249–50 (3d Cir. 1998) (remanded: such a condition does not meet the goals of sentencing under §3553(a) and thus violates §3583(d)); *U.S. v. Eyler,* 67

F.3d 1386, 1393–94 (9th Cir. 1995) (same, remanding order to repay fees within one year of release from prison) [8#3]. The First Circuit, however, concluded that "imposing the cost of CJA counsel on the defendant, where the defendant proves able to pay, is a deterrent to crime just like any other financial imposition. . . . The condition that Merric repay counsel fees out of available funds is thus 'reasonably related' to deterrence, one of the factors specified by Congress [in §§3553(a) and 3583(d)], and therefore also satisfies a further factor ('the need to protect the public from further crimes of the defendant')." *U.S. v. Merric,* 166 F.3d 406, 410–11 (1st Cir. 1999).

The Second Circuit affirmed the imposition of a condition that called for a tax-evasion defendant to pay ten percent of his gross monthly income toward his 1988 tax liability. Defendant claimed this was actually an improper order of restitution that was not allowed under the restitution statute. However, the court held that "a plain reading of §§3583(d) and 3563(b) permits a judge to award restitution as a condition of supervised release without regard to the limitations in §3663(a)." *U.S. v. Bok,* 156 F.3d 157, 166–67 (2d Cir. 1998) (also noting that the 1990 guidelines at §5E1.1(a) "specifically authorized a trial court to order restitution as a condition of supervised release in all cases, without reference to the limitations in §3663(a). . . . Revisions to the Guidelines have been even clearer, requiring the trial judge to order restitution as a condition of supervised release or probation where restitution would be available under §3663(a) but for the fact that the offense is not within the category of offenses listed in the statute. . . . §5E1.1(a)(2) (1997)."). Accord *U.S. v. Dahlstrom,* 180 F.3d 677, 686 (5th Cir. 1999) (affirmed: agreeing with *Bok* that, "although restitution may not be directly permitted under §3663(a), a district court may order restitution within the context of a supervised release" because "§§3583(d) and 3563(b) . . . permit a restitution award regardless of the limitations set out in §3663(a)"). Cf. *U.S. v. A-Abras, Inc.,* 185 F.3d 26, 30–35 (2d Cir. 1999) (affirmed: court had authority under statute and Guidelines to require as condition of release that defendant make set monthly payments to City of New York for previously imposed city fine; if condition conflicted with payment schedule set by city, defendant could seek modification under §3583(e)).

3. Deportation and Alien Defendants

Most circuits to decide the issue have held that courts cannot directly order deportation as a condition of supervised release. The First and Fifth Circuits held "that [18 U.S.C.] §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."'" *U.S. v. Quaye,* 57 F.3d 447, 449–50 (5th Cir. 1995), fol-

lowing and quoting *U.S. v. Sanchez,* 923 F.2d 236, 237 (1st Cir. 1991) [7#11]. Accord *U.S. v. Phommachanh,* 91 F.3d 1383, 1385–88 (10th Cir. 1996); *U.S. v. Xiang,* 77 F.3d 771, 772–73 (4th Cir. 1996). See also *U.S. v. Kassar,* 47 F.3d 562, 568 (2d Cir. 1995) (remanded: district court had no authority to order INS to deport defendant after completion of prison term). Cf. *U.S. v. Flores-Uribe,* 106 F.3d 1485, 1487–88 (9th Cir. 1997) (absent request of U.S. Attorney and concurrence of INS Commissioner, district court has no authority to order deportation).

The Eleventh Circuit had held that §3583(d) "authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *U.S. v. Chukwura,* 5 F.3d 1420, 1423–24 (11th Cir. 1993) (affirmed deportation order for convicted foreign national) [6#6]. See also *U.S. v. Oboh,* 92 F.3d 1082, 1084–87 (11th Cir. 1996) (en banc) (declining to overturn *Chukwura*). However, the court later determined that passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (signed Sept. 30, 1996), removed that authority. The Act states, in 8 U.S.C. §1229a(a)(3), that "a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." The only time a district court may order deportation is when such an order is "requested by the United States Attorney with the concurrence of the [INS] Commissioner and the court chooses to exercise such jurisdiction." 8 U.S.C. §1228(c)(1) (as amended by the Act). "Thus, we hold that 8 U.S.C. §1229a(a) eliminates any jurisdiction district courts enjoyed under §3583(d) to independently order deportation." The court also held that §1229a(a) "is applicable to all pending cases." *U.S. v. Romeo,* 122 F.3d 941, 943–44 (11th Cir. 1997).

An amendment to §5D1.3(d), effective Nov. 1, 1998, added the following as a recommended "special" condition of supervised release: "If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. §1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge."

One court has held that when home detention is available under §5C1.1(d) and (e)(3) as a condition of supervised release, it must be served in a location where adequate supervision of defendant is possible. See *U.S. v. Porat,* 17 F.3d 660, 670–71 (3d Cir. 1994) (remanded: error to allow home detention to be served in Israel: "Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence. . . . It is not clear that the probation office could properly insure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel") [6#11], vacated on other grounds and remanded for reconsideration, 115 S. Ct. 2604 (1995). Cf. *U.S. v. Pugliese,* 960 F.2d 913, 915–16 (10th Cir. 1992) (affirmed: not an abuse of discretion to deny defendant's request to serve supervised release in Thailand because required monitoring by probation officer would not be possible).

There is some disagreement on whether a period of supervised release may be tolled while a defendant is out of the U.S. after being deported, to resume when defendant returns. The Sixth Circuit held that it was proper to sentence a defendant to twenty-four months in prison after revocation of his supervised release, which would have ended before he illegally reentered the U.S. had his release term not been tolled after his voluntary deportation. The court held that tolling a period of supervised release is allowed under the "broad discretion to fashion appropriate conditions of supervised release" granted to district courts under USSG §5D1.3 and 18 U.S.C. §3583(d). In this case, "the tolling order was an appropriate penological measure, designed to ensure that the defendant would be subject to supervision if and when he returned to the United States. The tolling order was also appropriate from a deterrence standpoint. It is unlikely that Mr. Isong could have been supervised after his deportation to Nigeria. Supervised release without supervision is not much of a deterrent to further criminal conduct." *U.S. v. Isong,* 111 F.3d 428, 429–31 (6th Cir. 1997) [9#7]. See also *U.S. v. (Mary) Isong,* 111 F.3d 41, 42 (6th Cir. 1997) (affirming condition of supervised release that defendant remain under supervision for three years, not including any time she is not in the country if she is deported).

The Second Circuit, noting its disagreement with *Isong*, reversed an order that defendant's period of supervised release would be tolled after his prison term ended and he was deported. "[W]e conclude that Congress did not intend to authorize the courts to toll the supervised release term after the defendant's release from prison for a period during which he is deported or excluded from the United States." *U.S. v. Balogun,* 146 F.3d 141, 144–47 (2d Cir. 1998). Accord *U.S. v. Juan-Manuel,* 222 F.3d 480, 485–88 (8th Cir. 2000) (remanded: "we join the Second Circuit and conclude that Congress did not intend to authorize sentencing courts to suspend a defendant's period of supervised release upon deportation and during any period of exclusion from or unknown presence in the United States").

4. Other

It has been held that §§5D1.1 and 5D1.2, which require a term of supervised release, do not conflict with 18 U.S.C. §3583(a), which states that a court "may" impose supervised release. "U.S.S.G. §§5D1.1 and 5D1.2 can be read consistently with 18 U.S.C. §3583. . . . [The guidelines] allow for departure if . . . the trial judge determines no post-release supervision is necessary," and thus "do not take away the trial judge's ultimate discretion in ordering supervised release" granted by §3583(a). *U.S. v. Chinske,* 978 F.2d 557, 558–59 (9th Cir. 1992) [5#6]. See also *U.S. v. West,* 898 F.2d 1493, 1503 (11th Cir. 1990) (28 U.S.C. §994(a) provides authority for guidelines' mandatory provisions for supervisory release). [**Note:** Nov. 1995 amendments to §5D1.1, comment. (n.1), and §5D1.2 specify the circumstances under which a court may depart from the guideline and impose no term of supervised release and delete the requirement of a term of release of three to five years whenever a statute requires any term of release. See also the July 30, 1996, memo on this topic

from the Committee on Criminal Law of the Judicial Conference of the United States, sent to all district judges and chief probation officers.]

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

The Seventh Circuit held that the number of drug tests defendants face on supervised release may not be left to the discretion of the probation officer. The court reasoned that "18 U.S.C. §3853(d) requires that *the court* determine the number of drug tests to which the defendants must submit. We therefore reverse the judge's decision on this issue and remand it . . . in order that the judge may determine and direct the specific number of drug tests that [defendant's] will be subject to while on supervised release." *U.S. v. Bonanno,* 146 F.3d 502, 511 (7th Cir. 1998). See also *U.S. v. Kent,* 209 F.3d 1073, 1078–79 (8th Cir. 2000) (remanded: condition for psychiatric counseling if probation officer determined it was necessary "is inconsistent with Article III, as well as U.S.S.G. §5D1.3(b), which specifically provides that the *court* may impose special conditions of supervised release").

D. Restitution (§5E1.1)

Note: Section 5E1.1 was significantly revised by Nov. 1997 amendment, responding to the Mandatory Victims Restitution Act of 1996 (MVRA). The amended guideline "applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 . . . , use the former §5E1.1 . . . in lieu of this guideline in any other case." USSG §5E1.1(g)(1). Note: Most of the cases after the first section below were decided under pre-MVRA law, and may or may not be applicable to restitution under amended 18 U.S.C. §§3663A and 3664. For example, a defendant's ability to pay restitution is no longer relevant to the decision to order restitution in most cases, but must still be examined when setting a payment schedule. Ability to pay must still be determined when restitution is ordered under §3663.

1. Ability to Pay and Calculation

a. MVRA

The Mandatory Victims Restitution Act of 1996 (MVRA), effective Apr. 24, 1996, added 18 U.S.C. §3663A and substantially amended the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§3663–3664. Among other things, the MVRA man-

dates an order of full restitution for certain offenses regardless of the defendant's ability to pay, which is only to be considered in setting up a schedule of payments. See §3664(f)(1)(A) and (f)(2). See also *U.S. v. Myers,* 198 F.3d 160, 169 (5th Cir. 1999) ("The MVRA required the district court to order the full amount of restitution, without regard for Myers' economic circumstances and ability to pay"); *U.S. v. Rea,* 169 F.3d 1111, 1114 (8th Cir. 1999) ("The restitution order procedures statute requires the court to order restitution for the full amount of the victim's loss, without regard to the defendant's economic circumstances. *See* 18 U.S.C. §3664(f)(1)(A)."); *U.S. v. Szarwark,* 168 F.3d 993, 998 (7th Cir. 1999) ("district courts are no longer permitted to consider a defendant's financial circumstances when determining the amount of restitution to be paid"); *U.S. v. Jacobs,* 167 F.3d 792, 796 (3d Cir. 1999) ("subsection (f)(1)(A) replaced deleted subsection (a), which had required the sentencing court to consider the financial resources and needs of the defendant").

As noted above, the financial resources of the defendant must still be considered when setting the payment schedule. The Eighth Circuit remanded a case where the district court properly ordered full restitution, but ordered payments of $750 per month for a defendant who was married with three children, earned only $400 per month in his previous job, and had little in the way of other assets, job skills, or education. "When fashioning a restitution payment schedule, a court is required to consider the defendant's financial resources and other assets, projected earnings and other income, and financial obligations, including obligations to dependents. *See* 18 U.S.C. §3664(f)(2)." *Rea,* 169 F.3d at 1114. Some circuits hold that ability to pay must also be considered when ordering an immediate lump sum payment, which is authorized by §3664(f)(3)(A). See, e.g., *Myers,* 198 F.3d at 169 (remanded: error to order immediate lump-sum payment without determination of defendant's ability to pay under §3664(f)(2) where defendant "had absolutely no ability to pay the restitution immediately"); *U.S. v. Coates,* 178 F.3d 681, 683 (3rd Cir. 1999) (remanded: although MVRA "does authorize the district court to direct the defendant to pay in a single, lump sum payment," failure to consider ability to pay that sum under §3664(f)(2)(A) "constitutes plain error").

Note also that a restitution order "may" require "nominal periodic payments" when the economic circumstances of the defendant do not allow payment of any restitution or payment of the full amount under any reasonable schedule of payments. 18 U.S.C. §3664(f)(3)(B).

Under former §3664(a), a defendant's financial circumstances had to be considered when determining the amount of restitution to be paid. Most circuits to decide the issue have concluded that the MVRA cannot be applied retroactively and district courts must consider ability to pay for defendants who committed their offenses before Apr. 24, 1996. See, e.g., *U.S. v. Schulte,* 264 F.3d 656, 662 (6th Cir. 2001); *U.S. v. Edwards,* 162 F.3d 87, 89–92 (3d Cir. 1998) [10#4]; *U.S. v. Siegel,* 153 F.3d 1256, 1259–60 (11th Cir. 1998) [10#4]; *U.S. v. Williams,* 128 F.3d 1239, 1241 (8th Cir. 1997); *U.S. v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997) [10#4]; *U.S. v. Thompson,* 113 F.3d 13, 15 n.1 (2d Cir. 1997) [10#4]. See also *U.S. v. Richards,* 204 F.3d

177, 213 (5th Cir. 2000) (agreeing that retroactive application of MVRA would violate ex post facto clause, but defendants failed to show court applied MVRA); *U.S. v. Bapack,* 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997) (without discussion, applying pre-MVRA provisions on review) [10#4].

Two circuits disagreed, holding that restitution is not criminal punishment and there was no ex post facto violation in applying the MVRA retroactively. See *U.S. v. Nichols,* 169 F.3d 1255, 1279–80 & nn.8–9 (10th Cir. 1999) [10#4]; *U.S. v. Newman,* 144 F.3d 531, 538 (7th Cir. 1998) [10#4].

Some circuits have held that "the MVRA applies to an ongoing conspiracy where the conspiracy began before the statute's effective date, but concluded after the statute's effective date." *U.S. v. Futrell,* 209 F.3d 1286, 1289–90 (11th Cir. 2000). See also *U.S. v. Boyd,* 239 F.3d 471, 472 (2d Cir. 2001); *U.S. v. Kubick,* 205 F.3d 1117, 1128–29 (9th Cir. 1999) (remanded: MVRA may be applied to conspiracy offense that began before but ended after Apr. 24, 1996); *Williams,* 128 F.3d at 1241–42 (affirming application of MVRA to related conduct that occurred before MVRA's effective date—defendant "had fair warning his criminal conduct could trigger mandatory restitution under §3663A(a)(3) to persons other than the victims of his May 30[, 1996] offense") [10#4].

b. Findings and procedure

Under former 18 U.S.C. §3664(a), and current §3663(a)(1)(B)(i)(I), an order of restitution must take into account the defendant's ability to pay. See also *U.S. v. Remillong,* 55 F.3d 572, 574 (11th Cir. 1995); *U.S. v. Lively,* 20 F.3d 193, 204 (6th Cir. 1994); *U.S. v. Colletti,* 984 F.2d 1339, 1348 (3d Cir. 1992); *U.S. v. Bailey,* 975 F.2d 1028, 1031–32 (4th Cir. 1992); *U.S. v. Rogat,* 924 F.2d 983, 985 (10th Cir. 1991); *U.S. v. Mitchell,* 893 F.2d 935, 936 (8th Cir. 1990).

Some circuits require specific findings to facilitate review. See *U.S. v. Jackson*, 978 F.2d 903, 915 (5th Cir. 1992); *U.S. v. Logar,* 975 F.2d 958, 961 (3d Cir. 1992); *U.S. v. Sharp,* 927 F.2d 170, 174 (4th Cir. 1991); *U.S. v. Owens*, 901 F.2d 1457, 1459–60 (8th Cir. 1990) [3#7]. Cf. *U.S. v. Tortora*, 994 F.2d 79, 81 (2d Cir. 1993) (detailed findings not necessary but record must demonstrate that court considered factors listed in 18 U.S.C. §3664(a)) (pre-guidelines case); *U.S. v. Hairston*, 888 F.2d 1349, 1352–53 (11th Cir. 1989) (same). Other circuits do not. *U.S. v. Kunzman,* 54 F.3d 1522, 1532 (10th Cir. 1995) ("not required to make specific findings as to a defendant's ability to pay, provided sufficient information was available to and considered by the court"); *U.S. v. Lombardo,* 35 F.3d 526, 530 (11th Cir. 1994) (same); *U.S. v. Blanchard,* 9 F.3d 22, 25 (6th Cir. 1993) ("This court has refused . . . to require the district court to make factual findings on the record regarding the financial ability to pay"); *U.S. v. Ahmad,* 2 F.3d 245, 246–47 (7th Cir. 1993) ("Restitution is the norm, and a judge who *declines* to order full restitution must make explicit findings. . . . No comparable provision requires findings for ordering restitution."); *U.S. v. Savoie*, 985 F.2d 612, 618 (1st Cir. 1993) (specific findings not required); *U.S. v. Smith,* 944 F.2d 618, 623 (9th Cir. 1991) (same). See also *U.S. v.*

Murphy, 28 F.3d 38, 41 (7th Cir. 1997) (to prevail on claim that court did not consider a mandatory factor under §3664, such as ability to pay, defendant "must show either that (1) it is not improbable that the judge failed to consider the mandatory factor and was influenced thereby, or (2) the judge explicitly repudiated the mandatory factor").

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

c. Setting terms of payment

Several circuits have held that the district court, not a probation officer, must set the terms for payment of restitution, including the amount and schedule. See, e.g., *U.S. v. Mikaelian,* 168 F.3d 380, 391 (9th Cir. 1999) (remanded: because "district court may not delegate to the probation officer the determination of the amount of restitution owed," it was error to set high amount and leave it to probation officer to adjust amount later if defendant did not have the ability to pay); *U.S. v. Graham,* 72 F.3d 352, 356–57 (3d Cir. 1995) (remanded: "district court must . . . designate the timing and amount of the restitution payments," including "the extent to which payment may be deferred"); *U.S. v. Mohammad,* 53 F.3d 1426, 1438 (7th Cir. 1995) (remanded: "a court abdicates its judicial responsibility when it authorizes a probation officer to determine the manner of restitution"); *U.S. v. Sung,* 51 F.3d 92, 94 (7th Cir. 1995) ("when a court permits the defendant to make restitution by installments, the judge must specify the schedule; this task may not be left to the staff"); *U.S. v. Johnson,* 48 F.3d 806, 808–09 (4th Cir. 1995) (remanded: error to leave to probation officer ultimate determination of total amount of restitution defendant would pay, within range set by court, to be based on defendant's ability to pay—"making decisions about the amount of restitution, the amount of installments, and their timing, is a judicial function and therefore is non-delegable") [7#8]; *U.S. v. Porter,* 41 F.3d 68, 71 (2d Cir. 1994) (remanded: amount and scheduling of restitution must be set by district court at time of sentencing); *U.S. v. Albro,* 32 F.3d 173, 174 (5th Cir. 1994) (probation officer may make recommendations, but "the district court must designate the timing and amount of payments"); *U.S. v. Gio,* 7 F.3d 1279, 1292–93 (7th Cir. 1994).

See also *U.S. v. Lindo,* 52 F.3d 106, 107–08 (6th Cir. 1995) (remanded: failure to pay fine according to schedule drafted by probation officer was not violation of probation condition to pay fine "because only the district court had the authority

to impose an installment schedule to pay the fine"). But cf. *U.S. v. Stinson,* 97 F.3d 466, 468 n.1 (11th Cir. 1996) (per curiam) (finding that challenge to delegation of payment schedules to the probation office "is foreclosed by our decision in *U.S. v. Lombardo,* 35 F.3d 526, 528 n.2 (11th Cir. 1994)"); *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).

It has been held that courts may not leave it to the Bureau of Prisons to set the installment amount and the timing of restitution payments using the Inmate Financial Responsibility Program. See *U.S. v. Mortimer,* 94 F.3d 89, 91 (2d Cir. 1996); *U.S. v. Pandiello,* 184 F.3d 682, 688 (7th Cir. 1999); *U.S. v. Miller,* 77 F.3d 71, 77–78 (4th Cir. 1996) (for fine and restitution payments). Note also that §3664(f)(2) (eff. Apr. 24, 1996) states that "the court shall, pursuant to §3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid." Section 3572 states that "[i]f the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made." But cf. *Weinberger v. U.S.,* 268 F.3d 346, 359–60 (6th Cir. 2001) ("district court acted properly by setting the total amount of restitution Weinberger is required to pay and by delegating the schedule of payments to the Probation Office" through the IFRP).

Some courts have also held that the prohibition on delegation continues under the MVRA. See, e.g., *U.S. v. McGlothlin,* 249 F.3d 783, 785 (8th Cir. 2001) (error to delegate payment schedule during incarceration to Bureau of Prisons—provision of MVRA that "the manner of payments and 'the length of time over which scheduled payments will be made shall be set by the court.' 18 U.S.C. §3572(d)(2) . . . . We interpret this statement to require the district court to set a detailed payment schedule at sentencing."); *U.S. v. Coates,* 178 F.3d 681, 685 (3d Cir. 1999) (rule against delegation of payment schedule by court applies equally under MVRA).

Similarly, the Eighth Circuit held that a court cannot delegate the designation of the specific victims to whom restitution is to be paid. "Upon careful review of the law governing the district court's authority to order restitution, we hold that the district court lacked authority to leave the designation of the payee or payees entirely to the discretion of the probation office . . . . As a general rule, the district courts should designate the recipient or recipients when ordering restitution pursuant to 18 U.S.C. §3663. . . . In the present case, we direct the district court, on remand, to identify the payees in the restitution order and to specify either the amounts to be paid each victim or an appropriate method of equitable distribution." *U.S. v. Stover,* 93 F.3d 1379, 1389 (8th Cir. 1996). The Third Circuit also held that "the court should designate recipients of the restitution. . . . [T]he unguided discretion to determine who are 'victims' should not be entrusted to either the U.S. Attorney or the Probation Office." However, where "the victims are numerous and difficult to identify, the court may define an appropriate victim class and direct the United States Attorneys Office to locate the persons fitting the description." *U.S. v. Seligsohn,* 981 F.2d 1418, 1423–24 (3d Cir. 1992). See also *U.S. v. Miller,* 900 F.2d

919, 922–24 (6th Cir. 1990) (court should "make clear whom it has found to be a victim entitled to restitution payments and the amount of restitution each victim is to be paid"); USSG §5E1.1, comment. (backg'd) ("restitution order should specify the manner in which, and the persons to whom, payment is to be made").

The Second Circuit remanded a restitution order that only set a payment schedule for after defendant was released from prison. "[B]ecause the court must order restitution at the time of sentencing and the defendant is under a continuing obligation to pay restitution as funds become available, the restitution order must contain a repayment schedule for the terms of both incarceration and supervised release. . . . While we recognize the difficulty the district court may encounter in fashioning a precise dollar amount for the period of incarceration, a payment schedule expressed as a percentage of the defendant's monthly income while incarcerated, e.g. 10% of monthly income, is satisfactory. We have also noted that district courts may 'properly draw upon the [Inmate Financial Responsibility Program] guidelines stated in the Code of Federal Regulations in fashioning an order of restitution that specifies the amounts to be paid, so long as discretionary authority to depart from the court's order is not vested in prison officials.'" *U.S. v. Kinlock,* 174 F.3d 297, 300–01 (2d Cir. 1999).

d. Indigence

Most circuits have held that indigence does not bar restitution, but several added that there should be some evidence defendant could actually pay the amount ordered. See, e.g., *U.S. v. Dunigan,* 163 F.3d 979, 982 (6th Cir. 1999) (remanded: "district court must have, at a minimum, some indication that a defendant will be able to pay the amount of restitution ordered in order to comply with 18 U.S.C. §3664(a)"); *U.S. v. Fuentes,* 107 F.3d 1515, 1529 (11th Cir. 1997) (remanded: "Although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, . . . it may not order restitution in an amount that the defendant cannot repay."); *U.S. v. Newman,* 6 F.3d 623, 631 (9th Cir. 1993) ("sentencing court is not prohibited from imposing restitution even on a defendant who is indigent at the time of sentencing so long as the record indicates that the court considered the defendant's future ability to pay"); *U.S. v. Seligsohn*, 981 F.2d 1418, 1423 (3d Cir. 1992) (but "should make additional findings to justify [restitution] order"); *U.S. v. Bailey,* 975 F.2d 1028, 1032 (4th Cir. 1992) (but "must make a factual determination that the defendant can feasibly comply with the order without undue hardship to himself or his dependents"); *U.S. v. Grimes,* 967 F.2d 1468, 1473 (10th Cir. 1992) (restitution order will not stand absent evidence defendant is able to pay); *U.S. v. Stevens,* 909 F.2d 431, 435 (11th Cir. 1990) (authority to order installment payments "reconcile[s] concerns about [presently] indigent defendants to make restitution"); *U.S. v. Owens,* 901 F.2d 1457, 1459–60 (8th Cir. 1990) (court should make specific finding as to defendant's ability to pay) [3#7]. See also *U.S. v. Hunter,* 52 F.3d 489, 494 (3d Cir. 1995) (but "restitution is only appropriate in an amount that the defendant can *realistically be expected to pay*"—remanded because

restitution "of $75,000 appears to be unfounded in light of Hunter's limited resources and future ability to pay"); *U.S. v. Mortimer,* 52 F.3d 429, 436 (2d Cir. 1995) (but error to require indigent defendant to pay full amount of restitution immediately—court should devise reasonable payment schedule). The *Owens* court also held that restitution is not mandatory under the guidelines, but remains within the discretion of the sentencing court. 901 F.2d at 1459.

An indigent defendant's earning potential may be considered in setting restitution, including income that may be earned in prison. See, e.g., *U.S. v. Blanchard,* 9 F.3d 22, 25 (6th Cir. 1993) (despite present indigency, defendant and his wife demonstrated earning potential; also, district court can later reassess defendant's ability to pay the restitution ordered); *U.S. v. Narvaez,* 995 F.2d 759, 764–65 (7th Cir. 1993) (present indigency does not bar restitution where defendant has some earning potential and thus may be able to pay the amount ordered—defendant had recently started job and did not have to pay all at once); *U.S. v. Williams,* 996 F.2d 231, 233–35 (10th Cir. 1993) (but there must be "an objectively reasonable possibility that the restitution can be paid, . . . more than a mere chance"; court cited Bureau of Prisons "Inmate Financial Responsibility Program," which helps inmates meet court-ordered financial obligations); *U.S. v. Paden,* 908 F.2d 1229, 1237 (5th Cir. 1990) (restitution may be based on defendant's earning potential).

Note, however, that a "mere possibility that a defendant will unexpectedly acquire a large sum of money is not sufficient to support an order in an amount he is unlikely to be able to pay. *U.S. v. Fuentes,* 107 F.3d 1515, 1530–34 (11th Cir. 1997) (remanded: court also "discuss[es] the proper procedures for determining restitution when a defendant alleges that she is unable to pay"). See also *U.S. v. Logar,* 975 F.2d 958, 964 (3d Cir. 1992) ("[I]f it is realistic that [the] defendant may inherit a substantial sum from a well-off relative or has a story to write that will be a bestseller, then the district court would be entitled to consider these possible additional sources of income in fashioning a restitution order. On the other hand, we will not put the court in the lottery business.").

e. Other issues

A restitution order may not be based on future earnings that will come from illegal activity. See *U.S. v. Myers,* 41 F.3d 531, 534 (9th Cir. 1994) (remanded: "district court erred by basing its restitution order solely on Myers' ability to defraud people rather than on her ability to earn money lawfully"); *U.S. v. Gilbreath,* 9 F.3d 85, 86–87 (10th Cir. 1993) (remanded: district court cannot anticipate that restitution will be satisfied from future loansharking activities).

On the other hand, an order partly based on a reasonable inference that defendant still had access to stolen funds was upheld. "Where there is evidence that a defendant's criminal conduct caused the loss and the missing funds cannot be accounted for, the district court may reasonably infer that the defendant knows their whereabouts. In such cases, it is appropriate . . . to fashion a restitution order that prevents the defendant from reaping any gain from his criminal activities after be-

ing released." *U.S. v. Boyle,* 10 F.3d 485, 492 (7th Cir. 1993) (restitution order for $2 million was not unreasonably premised on defendant's future earning potential and access to $1.7 million of the missing money). Cf. *U.S. v. Blanchard,* 9 F.3d 22, 24 (6th Cir. 1993) (in affirming restitution order, noted that defendant had successfully concealed assets worth $118,000 in a bankruptcy case).

Other circuits have agreed, finding that where there is a "'reasonable belief that there are secreted assets,' . . . the district court may calculate the total proceeds of defendant's crime minus amounts already accounted for, and then place the burden of accounting for the remainder on the defendant." *U.S. v. Voigt,* 89 F.3d 1050, 1092–93 (3d Cir. 1996) (affirming order for $7,040,000 restitution: there was "ample" evidence that defendant "had attempted to secrete the proceeds of his criminal activity in foreign bank accounts and in his former girlfriend's name"). Accord *U.S. v. Olson,* 104 F.3d 1234, 1238 (10th Cir. 1997) (following *Voight*, "we hold that when a defendant has secreted proceeds from an illegal activity, the illegal proceeds are presumed assets of the defendant unless the defendant proves otherwise"; order for over $6 million affirmed where defendant "could not explain what happened to the $5.6 million he received from his victims"). See also *U.S. v. Zaragoza,* 123 F.3d 472, 478–79 (7th Cir. 1997) (affirmed: "district judge's finding that it was reasonably probable that these defendants had access to and control over the missing proceeds effectively counters their assertions that they are without the ability to pay and that the restitution order is impossible to fulfill").

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

The Second Circuit affirmed the imposition of a condition of supervised release that called for a tax-evasion defendant to pay ten percent of his gross monthly income toward his 1988 tax liability. Defendant claimed this was actually an improper order of restitution that was not allowed under the restitution statute. However, the court held that "a plain reading of §§3583(d) and 3563(b) permits a judge to award restitution as a condition of supervised release without regard to the limitations in §3663(a)." *U.S. v. Bok,* 156 F.3d 157, 166–67 (2d Cir. 1998) (also noting that the 1990 guidelines at §5E1.1(a) "specifically authorized a trial court to order restitution as a condition of supervised release in all cases, without reference to the limitations in §3663(a). . . . Revisions to the Guidelines have been even clearer, requiring the trial judge to order restitution as a condition of supervised release or probation where restitution would be available under §3663(a) but for the fact that the offense is not within the category of offenses listed in the statute. . . . §5E1.1(a)(2) (1997).").

2. Relevant Conduct

There may be some instances when restitution may be ordered for losses from relevant conduct. Restitution is to be made in accordance with the Victim and Wit-

ness Protection Act (VWPA), 18 U.S.C. §§3663–3664. [Note: These sections were significantly amended by the Antiterrorism and Effective Death Penalty Act of 1996, effective Apr. 24, 1996.] See also *U.S. v. Snider*, 957 F.2d 703, 706 (9th Cir. 1991) (court does not have inherent power to order restitution in absence of VWPA authority). The Supreme Court held that restitution under the VWPA is limited to "the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. U.S.*, 110 S. Ct. 1979, 1981 (1990) (decided prior to 1990 amendments to 18 U.S.C. §3663). See also *U.S. v. Levy*, 992 F.2d 1081, 1085 (10th Cir. 1993) (remanded: error to impose restitution beyond two counts of conviction); *U.S. v. Cobbs*, 967 F.2d 1555, 1559 (11th Cir. 1992) (remanded: error to order restitution for loss from use of unauthorized access devices when defendant was convicted only of *possession* of those devices); *U.S. v. Clark*, 957 F.2d 248, 253–54 (6th Cir. 1992) (remanded: restitution limited to damage to two FBI vehicles, which were recovered, that defendant was convicted of stealing; may not include value of other cars stolen but not charged); *U.S. v. Daniel*, 956 F.2d 540, 543–44 (6th Cir. 1992) (remanded: restitution to United States could not include civil liabilities from statutory penalties associated with unreported taxes due—only liability from offense of conviction is proper); *U.S. v. Garcia*, 916 F.2d 556, 556–67 (9th Cir. 1990) (restitution may not be imposed on dismissed count). Where, however, the only "victim of the offense," 18 U.S.C. §3663(a)(1), was a bank, restitution was properly ordered paid to innocent holders of fraudulent cashier's checks who had reimbursed the bank for the monies collected when they cashed the checks: 18 U.S.C. §3663(e)(1) provides "that the court may, in the interest of justice, order restitution to any person who has compensated the victim for [the] loss." *U.S. v. Koonce*, 991 F.2d 693, 698–99 (11th Cir. 1993).

However, the VWPA was amended after *Hughey* by the Crime Control Act of 1990 (effective Nov. 29, 1990), to allow restitution "to the extent agreed to by the parties in a plea agreement." 18 U.S.C. §3663(a)(3). See *U.S. v. Arnold*, 947 F.2d 1236, 1237–38 (5th Cir. 1991) (restitution not limited by loss from count of conviction where defendant admitted in plea agreement that larger loss was attributable to fraudulent scheme). Cf. *U.S. v. Bailey*, 975 F.2d 1028, 1033–34 (4th Cir. 1992) (where defendant pled guilty to "defraud[ing] investors of monies in excess of fifteen million dollars," restitution order of $16.2 million to victims not specified in indictment is proper). Note that there is a split on whether retroactive application of this amendment violates the ex post facto clause. Compare *U.S. v. Wells,* 177 F.3d 603, 607–10 (7th Cir. 1999) (may be applied to 1980 arson offense) and *U.S. v. Rice*, 954 F.2d 40, 44 (2d Cir. 1992) (no ex post facto problem) and *U.S. v. Arnold*, 947 F.2d 1236, 1237 n.1 (5th Cir. 1991) (same) with *Snider*, 957 F.2d at 706 n.2 (ex post facto problem). Previously, some circuits stated that district courts lack authority to order restitution in an amount greater than damages from the crime of conviction, even if defendant agreed to the larger amount in a plea agreement. *Snider*, 957 F.2d at 706–07 (remanded); *U.S. v. Young*, 953 F.2d 1288, 1290 (11th Cir. 1992) (remanded); *U.S. v. Braslawsky*, 951 F.2d 149, 151 (7th Cir. 1991) (dicta). But cf. *U.S. v. Marsh*, 932 F.2d 710, 713 (8th Cir. 1991) (restitution is limited to specific con-

duct underlying offense of conviction, but affirmed imposition of restitution for full amount of loss that was allowed under terms of pre-*Hughey* plea agreement).

The definition of "victim" in §3663(a)(2) was also amended in 1990, and for "an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity," a victim is "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." The same definition is used in §3663A. The Sixth and Seventh Circuits have noted that this appears to authorize restitution for an entire fraudulent scheme, not just the count of conviction. See *U.S. v. Jewett*, 978 F.2d 248, 252–53 (6th Cir. 1992) (but cannot be applied retroactively); *U.S. v. Brothers*, 955 F.2d 493, 496 n.3 (7th Cir. 1992) (same). See also *U.S. v. Henoud*, 81 F.3d 484, 488–89 (4th Cir. 1996) (affirming order based on victims in entire scheme, citing cases and amendment); *U.S. v. Haggard*, 41 F.3d 1320, 1329 (9th Cir. 1994) (affirmed: citing amendment, holding that family harmed by false-claims scheme were victims entitled to restitution for loss of income). But cf. *U.S. v. Riley,* 143 F.3d 1289, 1292 (9th Cir. 1998) (remanded: although defendant used money gained from tax fraud conspiracy of conviction to obtain fraudulent car loan, loss from car loan could not be included in conspiracy loss because it "was simply not part of the [tax fraud] scheme"); *U.S. v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) (remanded: people who had credit cards stolen could not receive restitution for losses of wallets, purses, etc. from robbery—defendant's offense was using unauthorized access devices, and under VWPA "if the harm to the person does not result from conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction, the district court may not order the defendant to pay restitution to that individual"); *U.S. v. Kones,* 77 F.3d 66, 70 (3d Cir. 1996) (affirmed: interpreting "directly harmed" in VWPA "to require that the harm to the victim be closely related to the scheme, rather than tangentially linked"). Other circuits have joined the Sixth and Seventh in holding that the amended definition may not be applied retroactively. See, e.g., *U.S. v. Gilberg*, 75 F.3d 15, 20–22 (1st Cir. 1996); *U.S. v. Elliott*, 62 F.3d 1304, 1314 (11th Cir. 1995); *U.S. v. DeSalvo*, 41 F.3d 505, 515 (9th Cir. 1994).

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

However, the Fifth and Seventh Circuits have given a more expansive reading to *Hughey*, holding that it allows restitution for the entire scheme described in counts to which defendant pled guilty. *See U.S. v. Stouffer*, 986 F.2d 916, 928–29 (5th Cir. 1993); *U.S. v. Bennett*, 943 F.2d 738, 740 (7th Cir. 1991). Conversely, the Third Circuit held that restitution could be *limited* by the conduct a defendant pleads guilty to when that establishes the "offense of conviction." *U.S. v. Akande,* 200 F.3d

136, 138–43 (3d Cir. 1999) (remanded: where defendant pled guilty to fraud conspiracy "from 12/31/97 to 7/8/98," it was error to order restitution for amounts fraudulently obtained before Dec. 31, 1997).

May a defendant be ordered to pay restitution to cover the government's costs of investigation? One circuit has said yes, allowing "a condition in the nature of restitution on a sentence of supervised release" that ordered defendant to repay the government's cost of purchasing drugs from him. The court reasoned that this payment is valid under the supervised release statute's "catch-all provision," 18 U.S.C. §3583(d), and is not subject to the limitations of the VWPA. *U.S. v. Daddato*, 996 F.2d 903, 904–06 (7th Cir. 1993).

However, other circuits have held that such restitution falls under, and is prohibited by, the VWPA. See *U.S. v. Cottman,* 142 F.3d 160, 169–70 (3d Cir. 1998) (remanded: "when the government chooses to apprehend offenders through a sting operation, the government is not a 'victim' under the provisions of the VWPA," and it cannot be considered a victim under 18 U.S.C. §§3563(b) or 3583(d)); *U.S. v. Khawaja,* 118 F.3d 1454, 1460 (11th Cir. 1997) (remanded: government should not be compensated for funds paid as "commissions" in money laundering sting—it did not "lose" money as a direct result of defendant's activities, "[n]or is the IRS a victim under VWPA"); *U.S. v. Meacham*, 27 F.3d 214, 218–19 (6th Cir. 1994) (VWPA "does not authorize a district court to order restitution for the government's costs of purchasing contraband while investigating a crime, even if the defendant explicitly agreed to such an order in a plea agreement . . . . [T]he repayment of the cost of investigation is not 'restitution' within the meaning of the Act") [6#15]; *U.S. v. Gibbens*, 25 F.3d 28, 32–36 (1st Cir. 1994) (although government may be a "victim" under VWPA, "a government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA; however, "other methods of recovery remain open to the government, notably fines or voluntary agreements for restitution incident to plea bargains") [6#16]; *Gall v. U.S.*, 21 F.3d 107, 111–12 (6th Cir. 1994) ("such investigative costs are not losses, but voluntary expenditures by the government for the procurement of evidence"; also, restitution imposed as a condition of supervised release is still subject to the provisions of VWPA); *U.S. v. Salcedo-Lopez*, 907 F.2d 97, 98 (9th Cir. 1990) (improper to order restitution for the government's cost of investigating and prosecuting the offense: "Any loss for which restitution is ordered must result directly from the defendant's offense"). Cf. *U.S. v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir. 1996) (error to include fraud victim's cost of reconstructing bank statements and borrowing money to replace stolen funds—"VWPA provides no authority for restitution of consequential damages involved in determining the amount of the loss or in recovering those funds"); *U.S. v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992) ("an award of restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property").

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

E. Fines (§5E1.2)

1. Ability to Pay and Calculation

a. Burden of proof

District courts must consider a defendant's ability to pay a fine, and the burden is on the defendant to prove an inability to pay. See *U.S. v. Sanchez-Estrada,* 62 F.3d 981, 989 (7th Cir. 1995); *U.S. v. Peppe,* 80 F.3d 19, 23 (1st Cir. 1996); *U.S. v. Demes,* 941 F.2d 220, 223 (3d Cir. 1991); *U.S. v. Marquez,* 941 F.2d 60, 64 (2d Cir. 1991); *U.S. v. Bradley,* 922 F.2d 1290, 1298 (6th Cir. 1991); *U.S. v. Rafferty,* 911 F.2d 227, 232 (9th Cir. 1990); *U.S. v. Rowland,* 906 F.2d 621, 623 (11th Cir. 1990); *U.S. v. Walker,* 900 F.2d 1201, 1205–06 (8th Cir. 1990); USSG §5E1.2(d) and (f). Cf. *U.S. v. Doyan,* 909 F.2d 412, 414–15 (10th Cir. 1990) (court must *consider* defendant's financial resources, but "Guidelines impose no obligation to tailor the fine to the defendant's ability to pay"; it is not abuse of discretion to impose fine "that is likely to constitute a significant financial burden"). Note that several circuits allow defendant to rely on facts in the PSR to establish inability to pay; the burden is then on the government to show that defendant can in fact pay the fine. See *U.S. v. Fair*, 979 F.2d 1037, 1041 (5th Cir. 1992) [5#7]; *U.S. v. Rivera*, 971 F.2d 876, 895 (2d Cir. 1992); *U.S. v. Cammisano*, 917 F.2d 1057, 1064 (8th Cir. 1990); *U.S. v. Labat*, 915 F.2d 603, 606 (10th Cir. 1990).

Although the Seventh Circuit has held that "[r]estitution is not a reason to waive the fine," *U.S. v. Ahmad,* 2 F.3d 245, 248 (7th Cir. 1993), it has also stated that "a district court may rightly withhold a fine if the payment of that fine on top of restitution 'would be the straw that broke the camel's back,'" *U.S. v. Trigg,* 119 F.3d 493, 499 (7th Cir. 1997) (finding that district court properly explained that defendant could not pay both fine and partial restitution).

A defendant "cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition. The district court must determine whether the defendant has proved his present and prospective inability to pay a fine." *U.S. v. Hairston,* 46 F.3d 361, 376–77 (4th Cir. 1995) (remanded: error not to impose fine because defendant's financial condition was unclear). See also *U.S. v. Berndt,* 86 F.3d 803, 808 (8th Cir. 1996) (affirmed: "there is substantial evidence that the defendant attempted to conceal assets from the government for the purpose of reducing the amount of fine he would be required to pay. The debts that the defendant claims are also suspect."); *U.S. v. Sasso,* 59 F.3d 341, 352 (2d Cir. 1995) (affirmed: although PSR stated defendant appeared unable to pay fine, defendant had refused to provide financial records and thus did not prove his inability to pay fine within guideline range); *U.S. v. Sobin,* 56 F.3d 1423, 1430 (D.C. Cir. 1995) (affirmed: "absence of evidence of [defendant's] present financial condition is directly attributable to his diversion of funds and his refusal to provide any financial information or releases. Under the Guidelines, Sobin bears the burden of establishing inability to pay. . . . Having made no effort to carry his burden below, he cannot now argue that the fine is beyond his means to pay."); *U.S. v. Soyland,* 3 F.3d 1312, 1315 (9th Cir.

1993) (defendant contended she was "unable to pay the assessed $25,000 fine. She refused to provide financial information to the probation officer and thus failed to carry the burden of showing an inability to pay the fine. U.S.S.G. §5E1.2(f)").

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

b. Indigence and future income

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

Some circuits have held that courts may consider the income defendants can earn while in prison. See, e.g., *U.S. v. Walker,* 83 F.3d 94, 95 (4th Cir. 1996) (affirmed: "district court properly may consider income earned during incarceration through the Inmate Financial Responsibility Program in determining whether to impose, and the amount of, a fine"); *U.S. v. Haggard,* 41 F.3d 1320, 1329 (9th Cir. 1994) (affirmed: defendant "can earn the money to pay a fine by working in the Inmate Financial Responsibility Program while incarcerated"); *U.S. v. Fermin,* 32 F.3d 674, 682 n.4 (2d Cir. 1994) (same); *U.S. v. Gomez,* 24 F.3d 924, 927 (7th Cir. 1994) (affirmed: fines could be imposed on indigent defendants based on their likely future wages in prison) [6#17]; *U.S. v. Tosca,* 18 F.3d 1352, 1355 (6th Cir. 1994) (fine may properly be imposed on indigent defendant because "he can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program"); *U.S. v. Turner,* 975 F.2d 490, 498 (8th Cir. 1992) (same).

Keeping a defendant from profiting from the crime may also be considered. The Third Circuit held that the potential future earnings from the sale of rights to the story of defendant's crime may be considered in setting the fine—including a departure to a larger fine—but the value of those rights must be supported by evidence. *U.S. v. Seale,* 20 F.3d 1279, 1284–87 (3d Cir. 1994) (remanded: "given the facts and circumstances surrounding this highly publicized crime, the district court was realistic in finding that the Seales might become able to pay a fine in the future," but the evidence did not support the size of the fines after departure") [6#12]. See also *U.S. v. Salameh,* 261 F.3d 271, 276 (2d Cir. 2001) (affirmed: $250,000 fine and $250,000,000 restitution imposed on defendants in 1993 World Trade Center

bombing was not abuse of discretion, despite their present indigence, where defendants did not "counter the inference that future income from media contracts was a substantial possibility"). Cf. *U.S. v. Orena,* 32 F.3d 704, 716 (2d Cir. 1994) (affirming $2.25 million fine where sentencing court found "beyond a reasonable doubt that [defendant was] concealing significant assets" derived from long-time loansharking activities); *U.S. v. Wilder,* 15 F.3d 1292, 1300–01 (5th Cir. 1994) (affirmed: departure to $4 million fine was proper to "ensure that Wilder disgorged any gain from his criminal activities" where evidence showed defendant gained at least $2 million and caused over $5 million in losses). See also §5E1.2, comment. (n.4) (upward departure from fine guideline range may be warranted in some cases). However, a "suspicion" that defendant has assets is not a proper basis for setting the amount of a fine. See *U.S. v. Anderson,* 39 F.3d 331, 358–59 (D.C. Cir. 1994) (remanded: court improperly based $1 million fine on suspicion that defendant had assets in Panama—government must show that assets actually exist before burden falls on defendant to show inability to pay fine), *partly rev'd on other grounds,* 59 F.3d 1323 (D.C. Cir. 1995) (en banc).

c. Findings

District courts must consider the factors set out in the fine statute and guidelines before imposing a fine, but most circuits have held that specific findings are not required as long as the record shows the court considered each of the factors in setting the fine. See, e.g., *U.S. v. Berndt,* 86 F.3d 803, 808 (8th Cir. 1996) ("court need not provide detailed findings under each of the factors . . . , but must provide enough information on the record to show that it considered the factors . . . so that the appellate court can engage in meaningful review"); *U.S. v. Peppe,* 80 F.3d 19, 22 (1st Cir. 1996); *U.S. v. Margano,* 39 F.3d 1358, 1372–73 (7th Cir. 1994); *U.S. v. Lombardo,* 35 F.3d 526, 530 (11th Cir. 1994); *U.S. v. Washington-Williams,* 945 F.2d 325, 327–28 (10th Cir. 1991); *U.S. v. Marquez,* 941 F.2d 60, 64 (2d Cir. 1991); *U.S. v. Matovsky,* 935 F.2d 719, 722 (5th Cir. 1991); *U.S. v. Mastropierro,* 931 F.2d 905, 906 (D.C. Cir. 1991). Cf. *U.S. v. Tosca,* 18 F.3d 1352, 1354–55 (6th Cir. 1994) (indicating record need only show court considered required factors—more particularized findings not required absent request by defendant).

Other circuits require specific findings showing that the factors affecting defendant's ability to pay were considered. See, e.g., *U.S. v. Castner,* 50 F.3d 1267, 1277 (4th Cir. 1995) (but noting that "district court may satisfy these requirements if it adopts a defendant's presentence investigation report (PSR) that contains adequate factual findings to allow effective appellate review"); *U.S. v. Miller,* 995 F.2d 865, 869 (8th Cir. 1993) ("district court must make findings on the record that demonstrate that it considered the seven factors set forth in U.S.S.G. §5E1.2(e)"); *U.S. v. Demes,* 941 F.2d 220, 223 (3d Cir. 1991). The Fifth Circuit later held that "specific findings are necessary if the court adopts a PSR's findings, but then decides to depart from the PSR's recommendation on fines or cost of incarceration." *U.S. v. Fair*, 979 F.2d 1037, 1041–42 (5th Cir. 1992) [5#7]. The Eleventh Circuit vacated a

$100,000 fine because the trial court did not explicitly discuss the factors justifying its imposition. *U.S. v. Paskett,* 950 F.2d 705, 709 (11th Cir. 1992) (PSR was inconclusive on defendant's wealth; that over $1 million was found in defendant's bedroom did not justify fine).

It was clearly erroneous to find that a defendant with a net worth of at least $50,000, with another $200,000 in a spendthrift trust, was unable to pay a fine. *U.S. v. Hickey,* 917 F.2d 901, 907 (6th Cir. 1990) [3#15]. In appropriate circumstances, the court may consider the financial resources of defendant's family. See *U.S. v. Granado,* 72 F.3d 1287, 1293–94 (7th Cir. 1995) (may impose fine on defendant based on properties that were titled to children and common-law wife because evidence showed he had actually purchased and exercised control over properties); *U.S. v. Fabregat,* 902 F.2d 331, 334 (5th Cir. 1990) (may consider wealth of family members where family had repeatedly provided financial assistance to defendant). Courts may also consider the defendant's earning potential, *U.S. v. Ruth,* 946 F.2d 110, 114 (10th Cir. 1991), and the fact that a monetary judgment is owed to defendant, *U.S. v. Joshua,* 976 F.2d 844, 856 (3d Cir. 1992). But cf. *U.S. v. Kadonsky,* 242 F.3d 516, 520 (3d Cir. 2001) (error to use two pending lawsuits as basis for finding that defendant could pay fine without evaluating his likelihood of success—"Where a sentencing court looks to the possibility of future income to satisfy the contemplated fine, it is crucial that the court take carefully into account the risk that such income will not in fact be realized."). But it was clearly erroneous to base a fine on the equity defendant had before she sold her property to pay her attorney, without evidence that defendant "stripp[ed] herself of property" to avoid paying the fine. *Washington-Williams,* 945 F.2d at 326–27.

d. Other issues

Note that some circuits have held that the district court cannot delegate to the Bureau of Prisons or the probation department the amount and schedule of installment payments for a fine. See, e.g., *U.S. v. Merric,* 166 F.3d 406, 409 (1st Cir. 1999) (remanded: "district judge could not empower the probation officer to make a final decision as to the installment schedule for payments. . . . [W]e join the other circuit courts that have held that it is the inherent responsibility of the judge to determine matters of punishment and this includes final authority over all payment matters."); *U.S. v. Miller*, 77 F.3d 71, 77–78 (4th Cir. 1996) (remanded: may not leave amount and timing of fine and restitution payments to Bureau of Prisons to set using standards of Inmate Financial Responsibility Program); *U.S. v. Kassar*, 47 F.3d 562, 568 (2d Cir. 1995) (remanded: "district court impermissibly delegated to the probation department the determination of the schedule of installment payments for the fine and restitution"—18 U.S.C.A. §3572 "impose[s] upon the 'court' the responsibility for determining installment payments" for fine). Cf. *U.S. v. Lindo*, 52 F.3d 106, 107–08 (6th Cir. 1995) (remanded: failure to pay fine according to schedule drafted by probation officer was not violation of probation condition to pay fine "because only the district court had the authority to impose an installment schedule to pay

the fine"). See also 18 U.S.C. §3572(d)(2) (effective Apr. 24, 1996) ("If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.").

However, the Seventh Circuit held that when immediate payment of a fine is ordered, the Bureau of Prisons has the authority under the Inmate Financial Responsibility Program to set a payment plan when defendant cannot pay all of the fine up front. "Cases in which a district court expressly has delegated to the BOP its discretion to schedule fine payments have no application here. . . . [Immediate payment orders] generally are interpreted to require not immediate payment in full but 'payment to the extent that the defendant can make it in good faith, beginning immediately.' . . . Thus, the payment schedule established by the BOP does not conflict with the sentencing court's immediate payment order. Nothing barred the BOP from ensuring pursuant to the IFRP that Mr. McGhee make good-faith progress toward satisfying his court-ordered obligations." *McGhee v. Clark,* 166 F.3d 884, 886 (7th Cir. 1999).

2. Miscellaneous

In a Nov. 1997 amendment, §5E1.2(i), which mandated an additional fine for the cost of imprisonment, probation, or supervised release, was deleted as a separate requirement. Instead, §5E1.2(d)(7) calls for courts to consider such costs as one of the factors in determining the amount of the punitive fine under §5E1.2(a) and (c). The amendment is intended to resolve the circuit split noted below regarding whether a punitive fine had to be imposed before a fine for costs could be. The following cases were decided before this amendment.

The circuits had split on whether the cost-of-imprisonment fine under §5E1.2(i) is valid and whether it may only be imposed after a punitive fine under §5E1.2(a) and (c). The Third Circuit invalidated §5E1.2(i), holding that it was not authorized by statute. *U.S. v. Spiropoulos*, 976 F.2d 155, 164–68 (3d Cir. 1992) [5#3]. Other circuits have held that the required cost-of-imprisonment fine is constitutional and does not violate the Sentencing Reform Act. See *U.S. v. Breeding*, 109 F.3d 308, 310–12 (6th Cir. 1997) ("Sentencing Commission did not exceed its authority in enacting §5E1.2(i)"); *U.S. v. Price*, 65 F.3d 903, 909 (11th Cir. 1995) (fine does not violate due process and is authorized by statute); *U.S. v. Zakhor*, 58 F.3d 464, 466–68 (9th Cir. 1995) (same); *U.S. v. May*, 52 F.3d 885, 892 (10th Cir. 1995) (same); *U.S. v. Watroba*, 48 F.3d 933, 935–36 (6th Cir. 1995) (same); *U.S. v. Leonard*, 37 F.3d 32, 40–41 (2d Cir. 1994) (§5E1.2(i) is authorized by statute; also, §5E1.2(i) fine is not upward departure from §5E1.2(c) fine table but separate fine under separate guideline); *U.S. v. Turner*, 998 F.2d 534, 538 (7th Cir. 1993) (§5E1.2(i) is authorized by statute); *U.S. v. Hagmann*, 950 F.2d 175, 186–87 (5th Cir. 1991) (upholding two-level fine system—punitive plus cost-of-imprisonment—and rejecting argument that because latter fine actually goes to crime victim fund it is irrational and violates

Fifth Amendment) [4#15]; *U.S. v. Doyan*, 909 F.2d 412, 414–16 (10th Cir. 1990) (rejecting equal protection challenge and holding that "Sections 5E1.2(e) and 5E1.2(i) . . . mandate a punitive fine that is at least sufficient to cover the costs of the defendant's incarceration and supervision").

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

Four circuits have held that a punitive fine under §5E1.2(a) and (c) must be imposed before a cost-of-imprisonment fine under §5E1.2(i) is imposed. See *U.S. v. Norman*, 3 F.3d 368, 369 (11th Cir. 1993) [6#5]; *U.S. v. Fair*, 979 F.2d 1037, 1042 (5th Cir. 1992) [5#7]; *U.S. v. Corral*, 964 F.2d 83, 84 (1st Cir. 1992); *U.S. v. Labat*, 915 F.2d 603, 606–07 (10th Cir. 1990) [3#15]. Four other circuits have held that the punitive fine is not an absolute prerequisite. See *U.S. v. Aguilera*, 48 F.3d 327, 329 (8th Cir. 1995) (affirming imposition of §5E1.2(i) fine without §5E1.2(c) fine); *U.S. v. Sellers*, 42 F.3d 116, 119 (2d Cir. 1994) (affirmed: "the total fine is the significant figure. . . . If the defendant is not able to pay the entire fine amount that the court would otherwise impose pursuant to subsections (c) and (i), the district court may exercise its sound discretion in determining which of the two subsections (or which combination of them) to rely upon in pursuing the goals of sentencing") [7#6]; *U.S. v. Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993) (affirmed imposition of cost-of-imprisonment fine without punitive fine) [6#5]; *Turner*, 998 F.2d at 538 (refusing to hold cost-of-imprisonment fine may never be imposed without first imposing punitive fine, but concluding that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under §5E1.2(i)") [6#2].

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

F. Exception to Mandatory Minimum (§5C1.2)

1. General

a. Retroactivity issues

Pursuant to section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, codified at 18 U.S.C. §3553(f), a defendant may be sentenced under the guidelines rather than a higher mandatory minimum sentence if certain conditions are met. See §5C1.2 for text. This section applies to defendants sentenced on or after Sept. 23, 1994, and the Eighth Circuit held that it should be applied to a defendant who was originally sentenced before then but will be resentenced on remand

after that date. See *U.S. v. Polanco,* 53 F.3d 893, 898–99 (8th Cir. 1995) (error for district court to sentence defendant below mandatory minimum absent 18 U.S.C. §3553(e) motion, but on remand court should consider whether defendant qualifies for lower sentence under §3553(f) and §5C1.2).

There is a split in the circuits as to whether the safety valve may be applied to a defendant who was originally sentenced before its effective date but is later resentenced under 18 U.S.C. §3582(c)(2). The Sixth Circuit held that §3553(f) should be considered in that instance and generally when a sentence is pending on appeal or remanded for resentencing. "The statute's language does not address the question of its application to cases pending on appeal. The statute's purpose statement, however, suggests that it should receive broad application and should apply to cases pending on appeal when the statute was enacted. . . . When a sentence is modified under 18 U.S.C. §3582(c)(2), the courts are required to consider the factors that are set out in 18 U.S.C. §3553(a). . . . The consideration of these factors is consistent with the application of the safety valve statute. Therefore, §3553(a) authorizes consideration of the safety valve statute when a defendant is otherwise properly resentenced under §3582(c)(2). . . . [W]e hold that appellate courts may take the safety valve statute into account in pending sentencing cases and that district courts may consider the safety valve statute when a case is remanded under §3742 or §3582(c), the Sentencing Guidelines or other relevant standards providing for the revision of sentences." *U.S. v. Clark,* 110 F.3d 15, 17–18 (6th Cir. 1997) [9#7]. See also *U.S. v. Mihm,* 134 F.3d 1353, 1355 (8th Cir. 1998) ("[T]he §3553(f) safety valve is a general sentencing consideration that the district court must take into account in exercising its present discretion to resentence under §3582(c)(2). . . . [T]he grant of §3582(c)(2) relief to Mihm is a distinct sentencing exercise, one that results in a sentence 'imposed on or after' September 23, 1994. Thus, there is no retroactivity bar to applying §3553(f) in these circumstances.").

However, other circuits have reached the opposite result. The Tenth Circuit held that §3553(f) could not be applied to a defendant originally sentenced in 1993 who filed a motion for reduction of sentence under §3582(c)(2) after the method for determining the weight of marijuana plants was retroactively amended Nov. 1, 1995. The Guidelines' §1B1.10(b) states that when "a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. §3582(c)(2), the court should consider the sentence that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." Because the safety valve provision is not listed in subsection (c) for retroactive application, it cannot be applied retroactively via §3582(c)(2). The court distinguished *Polanco* and other cases by noting that §3582(c) "is a different animal" that does not involve a vacation of sentence or remand for de novo resentencing, in which instance the guidelines in effect at the time of resentencing would be used. *U.S. v. Torres,* 99 F.3d 360, 362–63 (10th Cir. 1996) (affirmed: defendant still subject to five-year mandatory minimum) [9#2]. Accord *U.S. v. Stockdale,* 129 F.3d 1066, 1068 (9th Cir. 1997) ("A person whose sentence is reduced pursuant to the change in the weight equivalencies is not entitled to retroactive application of the

safety valve statute, whether his original sentence was pursuant to a guideline range or the statutory minimum. Both the language of the applicable provisions and their purposes require this result."), *as amended on denial of reh'g,* 139 F.3d 767 (9th Cir. 1998).

Specifically disagreeing with *Clark* above, the Eleventh Circuit rejected a defendant's attempt to use §3582(c)(2) to apply §3553(f) where §3553(f) took effect after he was sentenced but while his appeal was pending. The safety valve applies only to "sentences imposed on or after" Sept. 23, 1994, and the court held that "a sentence is imposed when the district court enters the final judgment, . . . not when the sentence subsequently is affirmed on appeal." *U.S. v. Pelaez,* 196 F.3d 1203, 1205–06 & n.4 (11th Cir. 1999).

A new subsection (4) (now subsection (6)) was added to §2D1.1(b) to provide a two-level reduction for offense levels above 26 if defendant qualifies for §5C1.2. The effective date of this subsection was Nov. 1, 1995, and two courts held that it could not be applied retroactively. See *U.S. v. Sanchez,* 81 F.3d 9, 12 (1st Cir. 1996) (amendment is substantive and is not listed in §1B1.10(c) as retroactive); *U.S. v. McFarlane,* 81 F.3d 1013, 1015 (11th Cir. 1996) (§2D1.1(b)(4) is not retroactive). Cf. *U.S. v. Flores-Ochoa,* 139 F.3d 1022, 1024 (5th Cir. 1998) (in §2255 action, rejecting claim that Sentencing Commission should have made §2D1.1(b)(4) retroactive). Note that the offense level above 26 limit was removed by a 2001 amendment to §2D1.1(b)(6).

For cases involving the interaction of §5C1.2 and §2D1.1(b)(6), see section II.A.3.b.

b. Departure issues

Note that §3553(f) "specifically provides that the reduced sentence be within the range provided by the sentencing guidelines, and it only authorizes a downward departure from the *statutory* mandatory minimum sentence." The Eighth Circuit therefore held that a defendant's argument "that §3553(f) itself authorizes a departure from the sentencing guidelines contradicts the language of the statute and is without merit." *U.S. v. Collins,* 66 F.3d 984, 987–88 (8th Cir. 1995) (rejecting challenge to guideline minimum sentence of sixty-three months where statutory minimum was sixty months). Accord *U.S. v. Solis,* 169 F.3d 224, 226 (5th Cir. 1999) (where "Guideline range is higher than the statutory minimum . . . , §5C1.2 does not apply" and it was error to depart); *U.S. v. Pratt,* 87 F.3d 811, 813 (6th Cir. 1996) (affirmed: "Neither 18 U.S.C. §3553(f) nor U.S.S.G. §5C1.2 contains language that could be interpreted to authorize a downward departure from the guideline sentencing range without an independent basis for the departure."); *U.S. v. McFarlane,* 81 F.3d 1013, 1014–15 (11th Cir. 1996) (affirmed: rejecting defendant's claim that district court had authority to sentence him below guideline range after application of §3553(f) only reduced his sentence by three months); *U.S. v. Gaston,* 68 F.3d 1466, 1468 (2d Cir. 1995) (affirming denial of departure from guideline range: §3553(f) "is limited to departures from statutory minimum sentences and does not authorize downward departures from the Guidelines").

However, when there is an independent basis for departure from the guideline range, the Fifth Circuit held that the safety valve allowed a sentence below the mandatory minimum where the pre-departure guideline range was above the minimum. After the safety valve and other guideline adjustments, defendant had a range of 135–168 months, but faced a 120-month mandatory minimum. The district court found he warranted departures for extraordinary family circumstances and serious coercion or duress, but felt constrained by §5C1.2 to depart only to 120 months instead of the 108 months it preferred to give. The appellate court remanded, finding that the guideline and commentary indicate "that the defendant's entire sentence is exempt from the statutory minimum sentence" when the safety valve applies. The court distinguished *Solis*, supra, because in that case the basis of the departure was substantial assistance, which was improper because the government had not filed a §5K1.1 motion. *U.S. v. Lopez,* 264 F.3d 527, 531 (5th Cir. 2001).

The Ninth Circuit held that the safety valve provision does not authorize a departure to a sentence of probation when the statute of conviction, in this case 21 U.S.C. §841(a) and (b), prohibits it. Remanding, the court concluded that §841 "establishes the probation ban as the ultimate floor in case the mandatory minimum sentence is somehow avoided. We therefore hold that the 'notwithstanding any other provision of law' language in §3553(f) is tied only to the ability to disregard statutory minimum terms of imprisonment; any other reading would eviscerate this ultimate floor in §841." The court noted that the Guidelines also prohibit probation in this case by incorporating the ban in statutes like §841, and also by prohibiting probation for Class A felonies such as defendant's. See USSG §5B1.1(b)(1) and (2). *U.S. v. Green,* 105 F.3d 1321, 1323–24 (9th Cir. 1997) [9#5].

Several circuits have held that a downward criminal history departure cannot be used to qualify for the safety valve a defendant who otherwise has more than one criminal history point. See *U.S. v. Penn,* 282 F.3d 879, 881–82 (6th Cir. 2002) ("Because §4A1.1 dictated that Penn receive two criminal history points, the district court was also without authority under 18 U.S.C. §3553(f) to order a sentence below the statutory mandatory minimum."); *U.S. v. Webb,* 218 F.3d 877, 881 (8th Cir. 2000) ("Webb has four criminal history points. Nothing in section 4A1.3 . . . indicates that a category change under this provision deletes previously assessed criminal history points for the purposes of the section 5C1.2 analysis."); *U.S. v. Owensby,* 188 F.3d 1244, 1246–47 (10th Cir. 1999) (affirmed: "commentary to the safety valve provision under §5C1.2 clearly states that the provision's reference to 'more than 1 criminal history point' means criminal history points 'as determined under §4A1.1,'" not as later reduced under §4A1.3); *U.S. v. Robinson,* 158 F.3d 1291, 1294 (D.C. Cir. 1998) (remanded: "the plain language of the statute and relevant guideline clearly provide that a court may not sentence a defendant under the 'safety valve' provision when that defendant has more than 1 criminal history point as calculated under U.S.S.G. §4A1.1—regardless of whatever downward departure a court might grant under U.S.S.G. §4A1.3"); *U.S. v. Orozco,* 121 F.3d 628, 629–30 (11th Cir. 1997) (affirmed: "a defendant is not eligible for the safety-valve provision if the defendant's

criminal history category is Category I because of a downward departure when the defendant had more than one criminal history point"); *U.S. v. Resto,* 74 F.3d 22, 27–28 (2d Cir. 1996) (affirmed: defendant with four criminal history points could not qualify for safety valve despite downward departure to criminal history category I—"more than 1 criminal history point" under §3553(f) is determined by points calculated under §4A1.1, before any possible departure) [8#5]; *U.S. v. Valencia-Andrade,* 72 F.3d 770, 773–74 (9th Cir. 1995) (affirmed: same for defendant with two points before departure—"Section 3553(f) is not ambiguous. It explicitly precludes departure from the mandatory minimum provisions of 21 U.S.C. §841 if the record shows that a defendant has more than one criminal history point.") [8#5].

c. Violence or firearm possession

Eligibility for the safety valve requires that "the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." §3553(f)(2); §5C1.2(2). Application Note 3 defines "offense" as "the offense of conviction and all relevant conduct." Note 4, "[c]onsistent with §1B1.3 (Relevant Conduct)," limits the accountability of a "defendant" to "his own conduct and conduct that he aided or abetted, counseled, commanded, induced, or willfully caused." However, the terms "possess" and "in connection with" are not further defined, and this has led to some variation in how circuit courts apply these terms.

The Eighth Circuit held that "in connection with" should be interpreted as the same language in §2K2.1(b)(5) is, essentially as relevant conduct. Thus, a defendant who disputed that he possessed a weapon "in connection with" his offense, but did not dispute that the weapon possession was relevant conduct, did not qualify for the safety valve. *U.S. v. Burke,* 91 F.3d 1052, 1053 (8th Cir. 1996). The D.C. and Third Circuits, while not referring to §2K2.1(b)(5), also concluded that possessing a weapon during relevant conduct precluded application of the safety valve. See *U.S. v. Plunkett,* 125 F.3d 873, 874–75 (D.C. Cir. 1997) (affirmed: safety valve did not apply to defendant who, although he had no weapon during single drug transaction that was basis of offense of conviction, admittedly possessed firearm during relevant conduct); *U.S. v. Wilson,* 106 F.3d 1140, 1144–45 (3d Cir. 1997) (affirming that defendant did not qualify for safety valve because his earlier drug dealing involved firearms and his "prior drug dealing was relevant conduct to the offense of conviction for possession of crack with the intent to distribute for the purposes of the Relevant Conduct and Safety Valve Provisions") [9#5]. The Second Circuit agreed with both lines of reasoning, finding that §5C1.2's commentary properly includes relevant conduct for weapon possession and that the "in connection with" language from §5C1.2 and §2K2.1 has essentially the same effect. *U.S. v. Chen,* 127 F.3d 286, 290–91 (2d Cir. 1997) (although defendant did not carry firearm during actual offense of conviction, he clearly possessed firearms during related conduct).

Three circuits have concluded that "in connection with the offense" under

§5C1.2(2) is the same as "connected with the offense" under §2D1.1(b)(1)," with two of the circuits holding that receiving the §2D1.1(b)(1) enhancement necessarily precludes a safety valve reduction. See *U.S. v. Moore,* 184 F.3d 790, 795 (8th Cir. 1999) ("Our conclusion that the increase under §2D1.1(b)(1) was proper dictates our conclusion that Moore was ineligible for the 'safety valve' provision under §5C1.2(2)."); *U.S. v. Smith,* 175 F.3d 1147, 1149 (9th Cir. 1999) ("Section 5C1.2(2) incorporates the same "connected with" phraseology as the commentary to §2D1.1, and . . . conduct which warrants an increase in sentence under §2D1.1(b)(1) necessarily defeats application of the safety valve."); *U.S. v. Vasquez,* 161 F.3d 909, 911–12 (5th Cir. 1998) (following previous cases that "suggest that the analysis whether a sufficient nexus exists between a possessed firearm and the offense is the same under both §5C1.2(2) and §2D1.1(b)(1)" in concluding that "despite any difference in semantics between §2D1.1(b)(1) and §5C1.2(2), the two provisions should be analyzed analogously"). See also *U.S. v. Nelson,* 222 F.3d 545, 550–51 (9th Cir. 2000) (remanded: agreeing that *conduct* supporting finding of possession is same under both sections, defendant need only show weapons were not possessed in connection with offense by preponderance of evidence, not that it was "clearly improbable"). Cf. *U.S. v. DeJesus,* 219 F.3d 117, 122 (2d Cir. 2000) (defining "in connection with" as equivalent to "in relation to" language of 18 U.S.C. §924(c)(1), and holding defendant who received a gun as collateral for drug debt thereby possessed weapon "in connection with the offense" and was ineligible for safety valve).

Several circuits have held that a codefendant's possession of a firearm does not necessarily preclude a safety valve reduction, even if defendant received a §2D1.1(b)(1) enhancement. The defendant must have "possessed" the weapon as that term is limited by Application Note 4. As one circuit reasoned, the language of Note 4 "mirrors §1B1.3(a)(1)(A). Of import is the fact that this language omits the text of §1B1.3(a)(1)(B) which provides that 'relevant conduct' encompasses acts and omissions undertaken in a 'jointly undertaken criminal activity,' *e.g.* a conspiracy." Therefore, "we conclude that in determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators." *U.S. v. Wilson,* 105 F.3d 219, 222 (5th Cir. 1997) [9#5]. Accord *U.S. v. Pena-Sarabia,* 297 F.3d 983, 987–89 (10th Cir. 2002) ("we hold a joint criminal actor's firearm possession is not attributable to a defendant for purposes of applying the mandatory minimum safety valve provision of U.S.S.G. §5C1.2(2), unless the defendant induced such possession in accordance with §5C1.2(2) comment. (n.4)"); *U.S. v. Clavijo,* 165 F.3d 1341, 1343 (11th Cir. 1999) ("Mere possession by a co-defendant, therefore, while sufficient to trigger section 2D1.1(b)(1), is insufficient to knock a defendant out of the safety- valve protections of section 5C1.2."); *U.S. v. Wilson,* 114 F.3d 429, 432 (4th Cir. 1997) (even though §2D1.1(b)(1) applied, "for limited purposes of applying [§5C1.2], possession of a firearm by a coconspirator is not attributed to the defendant"); *In re Sealed Case,* 105 F.3d 1460, 1461–65 (D.C. Cir. 1997) (noting that, unlike §2D1.1(b)(1), "'the defendant' must do the possessing" to preclude §5C1.2(2)) [9#3].

The Tenth Circuit's opinion in *Pena-Sarabia* overruled a prior opinion that had

disagreed with the majority view. See *U.S. v. Hallum,* 103 F.3d 87, 89–90 (10th Cir. 1996) (in affirming denial of safety valve because a weapon was found in one defendant's nearby vehicle, concluding that "participants in joint criminal enterprises can be accountable for the foreseeable acts of others that further the joint activity"; also holding that "a firearm's proximity and potential to facilitate the offense is enough to prevent application of USSG §5C1.2(2)") [9#3].

d. Other

Note that a defendant who qualifies for the safety valve "is exempt from any otherwise applicable . . . statutory minimum term of supervised release." USSG §5C1.2, comment. (n.9). The Eighth Circuit concluded that Note 9 "makes it clear that the safety-valve applies to both terms of imprisonment and terms of supervised release." It remanded a case where the defendant qualified for the safety valve but the district court still imposed a ten-year mandatory term of supervised release. "Not only was the court not bound by the mandatory minimum statute, it had no authority to consider it at all" because §5C1.2 directs courts to "impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence" when defendant qualifies for the safety valve. *U.S. v. Hendricks,* 171 F.3d 1184, 1185–87 (8th Cir. 1999). See also *U.S. v. Powers,* 194 F.3d 700, 705–07 (6th Cir. 1999) (remanded: gross weight of LSD mixture is only used to determine whether defendant receives statutory minimum sentence—once defendant qualifies for safety valve, use weight-per-dose calculation in guidelines).

The First Circuit vacated the denial of a safety valve made on the basis that the plea agreement precluded it. Because the provision is mandatory if its requirements are met, "[i]n a non-binding plea agreement, the government cannot contract around the safety valve; the most that it can do is attempt to persuade the sentencing court that the provision does not apply." *U.S. v. Ortiz-Santiago,* 211 F.3d 146, 151–52 (1st Cir. 2000) (also noting that, although the plea agreement excluded any other "adjustments" than §3E1.1, the safety valve provision is not technically an "adjustment" as that term is used in the Guidelines).

The Sixth Circuit rejected a claim that subsection (4) requires that a defendant have been both an organizer, leader, manager, or supervisor *and* engaged in a continuing criminal enterprise. Defendant cannot qualify for the safety valve if he meets either condition. *U.S. v. Bazel,* 80 F.3d 1140, 1142–45 (6th Cir. 1996).

The Third Circuit holds that the safety valve provision cannot be applied to 21 U.S.C. §860, the "schoolyard" statute. "By its terms, 18 U.S.C. §3553(f) applies only to convictions under 21 U.S.C. §§841, 844, 846, 961 and 963. Section 860 is not one of the enumerated sections." *U.S. v. McQuilkin,* 78 F.3d 105, 108–09 (3d Cir. 1996) [8#6]. Accord *U.S. v. Kakatin,* 214 F.3d 1049, 1051–52 (9th Cir. 2000). The Eleventh Circuit agreed, adding that the fact that §841(a) has been held to be a lesser included offense of §860, or is charged in the same count, does not change the result. *U.S. v. Anderson,* 200 F.3d 1344, 1347–48 (11th Cir. 2000).

2. Providing Information to Government

Most of the appellate cases to date have revolved around subsection 5, which states that defendant cannot qualify for the reduction unless,

> not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. §3553(f)(5); USSG §5C1.2(5).

a. Burden of proof

The initial burden of proof "is incontestably on the defendant to demonstrate by a preponderance of the evidence that he is eligible for the reduction. . . . Once he has made this showing, however, it falls to the Government to show that the information he has supplied is untrue or incomplete." *U.S. v. Shrestha,* 86 F.3d 935, 939–40 (9th Cir. 1996) [8#9]. See also *U.S. v. Sabir,* 117 F.3d 750, 754 (3d Cir. 1997) (defendant "had the burden to show by a preponderance of the evidence that the safety valve provisions were applicable to his case"); *U.S. v. Cruz,* 106 F.3d 1553, 1557 (11th Cir. 1997) ("defendant has the burden of proving his eligibility for relief under §5C1.2"); *U.S. v. Gambino,* 106 F.3d 1105, 1110 (2d Cir. 1997) ("burden should fall on the defendant to *prove* to the court that he has provided the requisite information"); *U.S. v. Verners,* 103 F.3d 108, 110 (10th Cir. 1996) ("defendant has the burden of proving, by a preponderance of the evidence, the applicability of this section"); *U.S. v. Ramirez,* 94 F.3d 1095, 1100–01 (7th Cir. 1996) (defendant "had the burden of proving, by a preponderance of the evidence, his entitlement to the reduction under §5C1.2"); *U.S. v. Ajugwo,* 82 F.3d 925, 929 (9th Cir. 1996) (same); *U.S. v. Montanez,* 82 F.3d 520, 523 (1st Cir. 1996) ("It is up to the defendant to persuade the district court that he has 'truthfully provided' the required information and evidence to the government."); *U.S. v. Adu,* 82 F.3d 119, 124 (6th Cir. 1996) [8#6]; *U.S. v. Flanagan,* 80 F.3d 143, 146 (5th Cir. 1996) [8#6]; *U.S. v. Romo,* 81 F.3d 84, 85–86 (8th Cir. 1996) [8#6]; *U.S. v. Ivester,* 75 F.3d 182, 184–85 (4th Cir. 1996) [8#6].

In affirming a district court's factual finding that defendant had not "truthfully provided to the Government all information . . . ," §5C1.2(5), the Seventh Circuit concluded that "the district court's determination that a defendant is not eligible for the reduction permitted by §5C1.2 ought to be governed by the clearly erroneous standard. The court's determination is a fact-specific one and will often depend on credibility determinations that cannot be replicated with the same accuracy on appeal." *U.S. v. Rodriguez,* 69 F.3d 136, 144 (7th Cir. 1995). Accord *U.S. v. Acosta-Olivas,* 71 F.3d 375, 378 n.3 (10th Cir. 1995). But cf. *U.S. v. Miller,* 179 F.3d 961, 968–69 (5th Cir. 1999) (remanded: where defendant asserts he has made truthful claim, court cannot base denial of reduction on government's "assertion to the con-

trary [that] is merely speculative" and without evidence); *U.S. v. Miranda-Santiago,* 96 F.3d 517, 528–30 (1st Cir. 1996) ("district court's bare conclusion that [defendant] did not 'cooperate fully,' absent either specific factual findings or easily recognizable support in the record, cannot be enough to thwart her effort to avoid imposition of a mandatory minimum sentence"); *U.S. v. Real-Hernandez,* 90 F.3d 356, 361 (9th Cir. 1996) (remanded: error to base rejection of safety valve reduction on reasons stated by court before final sentencing hearing—"district court . . . must provide reasons for agreeing or refusing to apply section 5C1.2 at the time of sentencing") [9#1].

The Fourth Circuit held that if the government agrees to debrief a defendant, it may not then refuse to do so and argue against application of the safety valve. The court ordered the government to comply with the plea agreement and debrief the defendant so the district court could determine whether defendant met his burden of proof under §3553(f). *U.S. v. Beltran-Ortiz,* 91 F.3d 665, 669 & n.4 (4th Cir. 1996) [9#1].

b. "Provided to the Government"

Courts have also held that defendants have the burden of providing—by affirmative steps if necessary—their information to the government. It does not matter whether the government asks for, already has, or cannot use the information. "[W]e conclude that the language of the safety valve provision indicates that the burden is on the defendant to provide the Government with all information and evidence regarding the offense. There is no indication that the Government must solicit the information. Further, the provision explains that if the information is not useful to the Government or if the Government is already aware of the information, the court is not precluded from finding that the defendant has sufficiently complied with subsection five, thus illustrating that the focus of subsection five is on the defendant's providing information, rather than on the Government's need for information." *U.S. v. Flanagan,* 80 F.3d 143, 146–47 (5th Cir. 1996) (remanded: error to give §5C1.2 departure when defendant made no effort to provide any information to government) [8#6]. "The defendant's statement that he gave the government 'all they asked,' if true, does not satisfy his burden of proof under §3553(f)(5) and §5C1.2(5). These provisions clearly require an affirmative act by the defendant truthfully disclosing all the information he possesses that concerns his offense or related offenses." *U.S. v. Adu,* 82 F.3d 119, 124 (6th Cir. 1996) [8#6].

See also *U.S. v. Ortiz,* 136 F.3d 882, 884 (2d Cir. 1997) (affirmed: burden is on defendant, and sending letter to court expressing willingness to provide information is insufficient); *U.S. v. Romo,* 81 F.3d 84, 85–86 (8th Cir. 1996) (defendant "had the burden to show, through affirmative conduct, that he gave the Government truthful information and evidence about the relevant crimes before sentencing") [8#6]; *U.S. v. Ivester,* 75 F.3d 182, 184–86 (4th Cir. 1996) ("plain language" of §3553(f)(5) "obligates defendants to demonstrate, through affirmative conduct, that they have supplied truthful information to the Government . . . [and] defendants

cannot claim the benefit of §3553(f) by the mere fact that the Government never sought them out for debriefing") [8#6]; *U.S. v. Arrington,* 73 F.3d 144, 148 (7th Cir. 1996) (defendant must "satisfy the court that he has 'truthfully provided to the Government all [of the] information and evidence . . . [that he] has concerning the offense.' . . . Although [defendant] is not required to provide information that the government expressly states that it does not want, he at least must offer what he has.") [8#5]; *U.S. v. Wrenn,* 66, F.3d 1, 3 (1st Cir. 1995) (it was not sufficient for defendant "to accede to the government's allegations during colloquy with the court at the plea hearing. Section 3553(f)(5) contemplates an affirmative act of cooperation with the government no later than the time of the sentencing hearing.") [8#1].

The Seventh Circuit distinguished the previous decisions in a case where the defendant both submitted a written account of his offense and invited the government in writing to interview him, which the government declined to do. "Under these circumstances, [defendant's] written statement (if truthful) combined with his offer to meet with the government satisfied the safety valve disclosure requirement." *U.S. v. Brack,* 188 F.3d 748, 763 (7th Cir. 1999) (remanded).

The First Circuit held that, while submitting to debriefing by the government is not required to qualify for the safety valve, it is advisable "as a practical matter" for a defendant to do so. The court upheld the denial of a departure to a defendant whose only "information" was an eight-page letter sent to the government that largely replicated an affidavit filed earlier by one of the federal agents in the case. "As a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course. It is up to the defendant to persuade the district court that he has 'truthfully provided' the required information and evidence to the government. . . . And a defendant who contents himself with a letter runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment, just as the district judge did in this case. . . . The possibility remains, however rare, that a defendant could make a disclosure without a debriefing (*e.g.,* by letter to the prosecutor) so truthful and so complete that no prosecutor could fairly suggest any gap or omission." *U.S. v. Montanez,* 82 F.3d 520, 522–23 (1st Cir. 1996) [8#8]. Cf. *U.S. v. Dukes,* 147 F.3d 1033, 1035 (8th Cir. 1998) (affirming reduction for defendant who gave statement to police while in hospital: "Although the defendant must show that he has provided complete and truthful information, . . . nothing in the guideline or statute specifies the form or place or manner of disclosure," citing *Montanez*).

c. "All information"

Several circuits have held that the requirement in §3553(f)(5) to provide "all information and evidence" should be read broadly, and may include names of suppliers and coconspirators and relevant conduct, not just defendant's actions within the offense of conviction. The Tenth Circuit, for example, concluded that the safety valve and relevant conduct guidelines together "appear to require disclosure of 'all

information' concerning the offense of conviction and the acts of others if the offense of conviction is a conspiracy or other joint activity. . . . We therefore hold that the district court erred in interpreting §3553(f)(5) to require a defendant to reveal only information regarding his own involvement in the crime, not information he has relating to other participants." *U.S. v. Acosta-Olivas,* 71 F.3d 375, 377–79 (10th Cir. 1995) (also rejecting claim that such an interpretation improperly duplicates §5K1.1) [8#5].

The Eleventh Circuit stressed that defendant must tell all she knows even if "information a defendant chooses to withhold or misrepresent would not, even if fully and accurately disclosed, be of use to the government." *U.S. v. Figueroa,* 199 F.3d 1281, 1282–83 (11th Cir. 2000). See also *U.S. v. Mathis,* 216 F.3d 18, 29 (D.C. Cir. 2000) (affirming denial where defendant admittedly had no useful information, the government expressed no interest, and defendant did not proffer any information at all, holding defendant cannot avoid his affirmative disclosure obligation merely because the government suggests a debriefing would be unproductive").

However, the Fifth Circuit held that the information required under §5C1.2(5) is limited by its use of the phrase "concerning . . . offenses that were part of the same course of conduct or of a common scheme or plan," which must be interpreted as relevant conduct under §1B1.3, comment. (n.9). Thus, a defendant's untruthful statements about two earlier drug offenses could not be used to deny the safety valve reduction where they could not be considered conduct relevant to the offense of conviction under §1B1.3. *U.S. v. Miller,* 179 F.3d 961, 964–67 (5th Cir. 1999) (remanded).

The Sixth Circuit held that providing information about coconspirators did not extend to testifying. The court remanded a safety valve denial for a defendant who concededly gave a truthful account of all information he had concerning his involvement in the offense of conviction and related conduct and otherwise met the requirements for a safety valve reduction, but told the government that he would refuse to testify before a grand jury or at a trial concerning his coconspirators. "The government's position is contradicted by the clear language of the statute—the defendant's obligation is to provide information and evidence to the government, not to a court. . . . Given the phrase 'to the Government,' it is our view that a common-sense reading of the statute leads to the conclusion that evidence is limited to those things in the possession of the defendant prior to his sentencing, excluding testimony, that are of potential evidentiary use to the government." *U.S. v. Carpenter,* 142 F.3d 333, 335–36 (6th Cir. 1998) [10#5].

See also *U.S. v. Tang,* 214 F.3d 365, 370–71 (2d Cir. 2000) (affirming denial for defendant who "refus[ed] to give information about a particular co-conspirator in Hong Kong, based on his fear for the safety of his fiancée and family members in Hong Kong"—"it seems unlikely that Congress was unaware that those with knowledge of narcotics traffic would in some instances have legitimate apprehension about disclosing what they know," so there is "no basis for creating a fear-of-consequences exception to the safety valve provision"); *U.S. v. Gambino,* 106 F.3d 1105, 1111–12

(2d Cir. 1997) (defendant must provide truthful information regarding offense and all relevant conduct, including names of drug suppliers); *U.S. v. Romo,* 81 F.3d 84, 85–86 (8th Cir. 1996) ("To satisfy §3553(f)(5), Romo was required to disclose all the information he possessed about his involvement in the crime and his chain of distribution, including the identities and participation of others.") [8#6]; *U.S. v. Thompson,* 81 F.3d 877, 879–80 (9th Cir. 1996) ("we hold that a defendant must give the Government *all* the information he has concerning the offense, *including* the source of his drugs, to avail himself of the benefit of §5C1.2"); *U.S. v. Ivester,* 75 F.3d 182, 184 (4th Cir. 1996) ("satisfaction of §3553(f)(5) requires a defendant to disclose all he knows concerning both his involvement and that of any co-conspirators") [8#6]; *U.S. v. Arrington,* 73 F.3d 144, 148 (7th Cir. 1996) (reduction properly refused to defendant who provided "the basic details of his offense conduct" but "made no further efforts to cooperate, . . . failed to respond to a proffer letter sent by the government, . . . [and] did not initiate any contact with government officials offering to provide details of his involvement in drug dealing," such as the name of his supplier—"the court may reasonably require a defendant to reveal information regarding his chain of distribution") [8#5]; *U.S. v. Rodriguez,* 69 F.3d 136, 144 (7th Cir. 1995) (if courier did not know names of persons he received drugs from or delivered them to, "then he at least should have communicated that fact to the government in order to qualify for the reduction"). Cf. *U.S. v. Maduka,* 104 F.3d 891, 894 (6th Cir. 1997) (rejecting defendant's claim that he did not have to supply name of supplier because he was convicted of substantive distribution offense rather than conspiracy).

But cf. *U.S. v. Thompson,* 76 F.3d 166, 168–71 (7th Cir. 1996) (rejecting government claim that §5C1.2 departure was error: defendant "suffered from a diminished capacity to understand complex situations" and had "a low level of cognitive functioning," but she "provided the government all information and evidence she had concerning the offense" and "was forthright within the range of her ability," thus satisfying §5C1.2(5)'s requirements).

See also section V.F.2.g

d. "Truthfully"

The Second Circuit held that the information provided must be *objectively* truthful—it is not sufficient that a defendant, due to some form of memory impairment, gives the government false information that she *subjectively* believes is true. See *U.S. v. Reynoso,* 239 F.3d 143, 146–50 (2d Cir. 2000) (affirmed: defendant "must prove *both* that the information he or she provided to the Government was objectively true *and* that he or she subjectively believed that such information was true").

The Fifth Circuit stated that "a mere challenge to factual findings at sentencing does not automatically exclude application of §5C1.2" by violating subsection (5)'s requirement to truthfully provide information to the government. However, defendant's claim that he received a much smaller amount of drugs than the court attributed to him directly contradicted the government's evidence—and in fact con-

tradicted one of his own statements. "In these circumstances, the district court could have concluded that Edwards did not . . . truthfully provide all relevant information." *U.S. v. Edwards,* 65 F.3d 430, 433 (5th Cir. 1995) (affirmed).

The Ninth Circuit held that a jury's verdict does not control the sentencing court's finding as to whether defendant was truthful. Defendant denied that he knew he was transporting heroin, but the jury's guilty verdict indicated it did not believe him. The court did and, because defendant otherwise qualified, reduced his sentence under the safety valve. Affirming, the appellate court held that §3553(f) "requires a determination by the judge, *not the jury*, as to the satisfaction of the five underlying criteria. . . . Consistent with the language of §3553(f) and the different roles involved when determining guilt and imposing sentence, we hold that the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." *U.S. v. Sherpa,* 110 F.3d 656, 660–62 (9th Cir. 1996) (amending 97 F.3d 1239) [9#7]. Cf. *U.S. v. Thompson,* 106 F.3d 794, 800–01 (7th Cir. 1997) (proper to deny reduction to defendants whose story of unknowing involvement in drug offense was disbelieved by both jury and court: "[T]he safety valve provision requires that defendants act in good faith. As a result, the court's assessment that defendants continued to cling to a false version of events and dispute their own culpability, up to and including the sentencing hearing, is a sufficient basis for refusing to invoke the safety valve provision. Denying involvement is not the same as lacking useful information. It would be illogical if defendants could use the very story which led to their conviction as a means of obtaining a reduced sentence.").

See also summaries of *Shrestha* and *Long* below in section V.F.2.f

e. "To the Government"

Three circuits have held that statements made by the defendant to a probation officer do not satisfy the requirement to provide information "to the government." "We agree with the Government and the district court that the probation officer is, for purposes of §5C1.2, not the Government. The purpose of the safety valve provision was to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences. . . . A defendant's statements to a probation officer do not assist the Government." *U.S. v. Rodriguez,* 60 F.3d 193, 195–96 (5th Cir. 1995) (affirmed: probation officer interviewed defendant in preparation of presentence report, but neither defendant nor officer spoke to government's case agent, and, when court gave defendant opportunity to do so, defendant refused) [8#1]. The First Circuit agreed with *Rodriguez* that statements to a probation officer do not satisfy the requirement to provide information "to the Government," concluding "that 'government' in §5C1.2(5) refers to the prosecutorial authority." *U.S. v. Jimenez Martinez,* 83 F.3d 488, 495–96 (1st Cir. 1996) [8#8]. Accord *U.S. v. Contreras,* 136 F.3d 1245, 1245–46 (9th Cir. 1998) (affirmed: "probation officer is not 'the Government' for the purposes of the Safety Valve"). Cf. *U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) ("defendant has not 'provided' to the

government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversations conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. . . . Nor does it suffice for the defendant to accede to the government's allegations during colloquy with the court at the plea hearing.) [8#1].

The Ninth Circuit held that "the Government" can include an Assistant U.S. Attorney in another case. Defendant faced sentencing for a 1994 marijuana offense and claimed he should receive a §5C1.2 reduction, but there was evidence he had committed a similar offense in 1993 that he had not admitted. Before he was finally sentenced, he admitted his involvement in the 1993 offense, but only to the AUSA in that case, not to the 1994 offense prosecutors. The court held that was sufficient: "A defendant need not disclose information to any particular government agent to be eligible for relief under section 5C1.2. 'The prosecutor's office is an entity,' and knowledge attributed to one prosecutor is attributable to others as well." The court also rejected the government's argument that the 1993 case debriefing should not trigger the safety valve because it "was a totally separate case and was only relevant to show [defendant] had not been truthful" when he told government agents in the 1994 case that he did not know anything. "The plain language of section 5C1.2(5) allows any provision of information in any context to suffice, so long as the defendant is truthful and complete." *U.S. v. Real-Hernandez,* 90 F.3d 356, 361 (9th Cir. 1996) [9#1].

The Sixth Circuit reversed a safety valve denial for a defendant who met the requirements but told the government that he would refuse to testify before a grand jury or at a trial concerning his coconspirators. "The government's position is contradicted by the clear language of the statute—the defendant's obligation is to provide information and evidence to the government, not to a court. . . . Given the phrase 'to the Government,' it is our view that a common-sense reading of the statute leads to the conclusion that evidence is limited to those things in the possession of the defendant prior to his sentencing, excluding testimony, that are of potential evidentiary use to the government." *U.S. v. Carpenter,* 142 F.3d 333, 335–36 (6th Cir. 1998) [10#5].

f. Timing and distinguished from §3E1.1 and §5K1.1

By exactly what time must a defendant provide information to the government? And may a defendant provide an untruthful version of his or her offense conduct until just before the sentencing hearing, or even during it, and still qualify for the safety valve reduction by being truthful at the last moment? Subsection 5 simply states that the defendant must provide the requisite information "not later than the time of the sentencing hearing." The Tenth Circuit held that, because a defendant "may present information relating to subsection 5 to the government before the sentencing hearing, . . . Defendant's attempt to furnish information to the court

and the government in the Judge's chambers prior to the sentencing hearing is not 'too late.'" *U.S. v. Gama-Bastidas,* 142 F.3d 1233, 1243 (10th Cir. 1998).

The Seventh Circuit concluded that "not later than the time of the sentencing hearing" should be construed to mean by the time the sentencing hearing begins, rather than during the hearing. The court reversed a safety valve reduction to a defendant who continually lied or withheld information until three continuances of the sentencing hearing had been granted to allow him to "come clean." "Because the statute requires that the defendant truthfully provide all information 'to the Government' rather than to the sentencing court, an interpretation of the safety valve which would allow a defendant to deliberately mislead the government during a presentencing interview and wait until the middle of the sentencing hearing to provide a truthful version to the court runs contrary to the plain language of the statute." Allowing a defendant "to lie to the government and cure his misstatements during the middle of the sentencing hearing only when confronted by the government with evidence that he had lied . . . is inconsistent with the purposes of the provision." The court also noted that allowing defendant to drag out his story can impede the government's efforts to investigate the involvement of others. *U.S. v. Marin,* 144 F.3d 1085, 1092–95 (7th Cir. 1998) [10#7]. Accord *U.S. v. Brenes,* 250 F.3d 290, 293 (5th Cir. 2001) (remanded: agreeing with *Marin* and vacating safety valve reduction for defendant who consistently refused to provide information until during sentencing hearing after repeated prodding by the court).

Similarly, the Eighth Circuit held that a defendant may not lie to the government about a material fact in an interview and then satisfy §3553(f)(5) by finally admitting the truth under cross-examination at the sentencing hearing. Otherwise, "defendants could deliberately mislead the government about material facts, yet retain eligibility for relief under §3553(f) by 'curing' their misstatement at the sentencing hearing." This would defeat "the government's interest in full truthful disclosure when it interviews defendants. This interest is reflected in the text of §3553(f)(5) in the clause requiring the defendant's information be 'truthfully provided to the Government.'" *U.S. v. Long,* 77 F.3d 1060, 1062–63 (8th Cir. 1996) (affirming denial of §3553(f) reduction) [8#6].

The Eighth Circuit later distinguished its decision in *Long*, however, affirming a reduction for a defendant who had "repeatedly lied to government interviewers about aspects of the offense and did not truthfully cooperate until just before her sentencing hearing." The statute and guideline do not prohibit the reduction for "defendants who wait until the last minute to cooperate fully," or "whose tardy or grudging cooperation burdens the government with a need for additional investigation. These factors are expressly relevant to other sentencing determinations, such as" §§3E1.1(b) and 5K1.1. "But they are not a precondition to safety valve relief." *U.S. v. Tournier,* 171 F.3d 645, 647–48 (8th Cir. 1999) [10#7]. The Second and Eleventh Circuits agree that lying or withholding information does not preclude a safety valve reduction "so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing." *U.S. v. Brownlee,* 204 F.3d 1302, 1304–05 (11th Cir. 2000) (remanded: but agreeing with Second Circuit that "the evidence of [a defendant's earlier] lies becomes 'part of the total mix of

evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant's proffer'") [10#7]; *U.S. v. Schreiber,* 191 F.3d 103, 106–09 (2d Cir. 1999) (remanded: "We agree with *Marin* that the deadline for compliance should be set at the time of the commencement of the sentencing hearing," but "[n]othing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information") [10#7].

In the opposite situation, where defendant is truthful at first but then recants or changes his or her version of events, there is also some disagreement. The Ninth Circuit upheld a §3553(f) reduction for a defendant who had provided full information to the government after his arrest, but then denied important parts of that story at trial and through sentencing. In rejecting the government's argument to analogize to §3E1.1, the court stated there was "no reason to require a defendant to meet the requirements for acceptance of responsibility in order to qualify for relief under the safety valve provision. . . . The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is §3E1.1, or . . . with providing the government a means to reward a defendant for supplying useful information, as is §5K1.1. . . . The safety valve provision authorizes district courts to grant relief to defendants who provide the Government with complete information by the time of the sentencing hearing. Shrestha's recantation does not diminish the information he earlier provided." *U.S. v. Shrestha,* 86 F.3d 935, 939–40 (9th Cir. 1996) [8#9].

However, the Ninth Circuit later distinguished *Shrestha* and affirmed the denial of a reduction for a defendant who seemed to tell the truth at first, but then changed his story in an apparent attempt to exonerate his drug suppliers. The court found it significant that "in *Shrestha* the defendant did not recant as to the information he had provided about others involved in the transaction," and noted that defendant's "recantation casts doubt on his truthfulness." *U.S. v. Lopez,* 163 F.3d 1142, 1143–44 (9th Cir. 1998) [10#7].

The Eighth Circuit also distinguished *Shrestha* in affirming a safety valve denial for a defendant who implicated another when he was first interviewed by a DEA agent, then later denied the other individual was involved and disputed the DEA agent's report on that issue. *Shrestha* "involved the need to apply the safety valve statute so as not to interfere with a defendant's right to testify at trial, a factor not involved in this case. . . . Leaving aside the trial testimony question posed by *Shrestha,*" a defendant who "initially tells the government the whole truth but later recants . . . is no more entitled to safety valve relief than the defendant who never discloses anything about the crime and its participants." *U.S. v. Morones,* 181 F.3d 888, 890–91 (8th Cir. 1999) [10#7].

The Seventh Circuit specifically rejected a claim that it was inconsistent to deny a §3553(f) motion after granting defendant a three-level reduction for acceptance of responsibility under §3E1.1. "Although §3E1.1(a) forbids a defendant from falsely denying relevant conduct, . . . it imposes no duty on a defendant to volunteer any information aside from the conduct comprising the elements of the offense. . . . In contrast, §3553(f) states that a defendant must disclose 'all information' concern-

ing the course of conduct—not simply the facts that form the basis for the criminal charge. Accordingly, the district court correctly held that §3553(f)(5) requires more than §3E1.1(a)." *U.S. v. Arrington,* 73 F.3d 144, 149 (7th Cir. 1996) [8#5]. Accord *U.S. v. Conde,* 178 F.3d 616, 622–23 (2d Cir. 1999) (government could stipulate that defendant's admissions qualified him for §3E1.1 reduction while successfully arguing that his failure to admit being a heroin supplier disqualified him for §5C1.2 purposes; agreeing with other circuits that "[t]he disclosure obligation imposed by the safety-valve provision is different" from §3E1.1's); *U.S. v. Yate,* 176 F.3d 1309, 1310 (11th Cir. 1999) (affirmed: "conclusion that a defendant accepted responsibility under section 3E1.1 does not preclude a finding that the defendant has failed to meet the affirmative-disclosure requirement of section 5C1.2(5)"); *U.S. v. Sabir,* 117 F.3d 750, 753–54 (3d Cir. 1997) (affirmed: "the mere fact that a defendant is entitled to a 2- or 3-level reduction in his offense level for acceptance of responsibility does not establish that the defendant has satisfied the requirements of section 3553(f)(5). Section 3553(f) and section 3E1.1 are not coterminus."). See also *U.S. v. Adu,* 82 F.3d 119, 124 (6th Cir. 1996) ("the fact that the defendant qualified for a two-level acceptance of responsibility reduction under §3E1.1 does not establish eligibility for a safety valve reduction under §5C1.2"); *U.S. v. Ivester,* 75 F.3d 182, 184 (4th Cir. 1996) ("Section 3553(f)(5) requires more than accepting responsibility for one's own acts"). Cf. *U.S. v. Webb,* 110 F.3d 444, 447–48 (7th Cir. 1997) (distinguishing between §5C1.2(5) and §3E1.1 in making determination under §2D1.1(b)(6), see *Outline* at II.A.3.b) [9#7].

The Tenth Circuit rejected a defendant's argument that interpreting §3553(f)(5) to require that a defendant divulge all information about relevant conduct in addition to the offense of conviction would essentially duplicate USSG §5K1.1, noting that under §3553(f) the decision is made by the court and does not require a government motion, and the information does not have to be "relevant or useful" to the government. *U.S. v. Acosta-Olivas,* 71 F.3d 375, 379 (10th Cir. 1995) [8#5]. Accord *U.S. v. Maduka,* 104 F.3d 891, 894–95 (6th Cir. 1997) ("sections 5C1.2 and 5K1.1 perform distinct functions"); *U.S. v. Thompson,* 81 F.3d 877, 880–81 (9th Cir. 1996) (purpose and operation of two provisions differ); *U.S. v. Ivester,* 75 F.3d 182, 185 (4th Cir. 1996) (agreeing with *Acosta-Olivas* that the substantial assistance statute and guideline have different requirements and procedures) [8#6]. And whereas testifying against coconspirators may be required to earn a §5K1.1 reduction, the Sixth Circuit held that a refusal to testify could not be used to deny a safety valve reduction if defendant otherwise qualified for it. See *U.S. v. Carpenter,* 142 F.3d 333, 335–36 (6th Cir. 1998) (remanded: "the defendant's obligation is to provide information and evidence to the government, not to a court") [10#5].

g. Other challenges

The Seventh Circuit rejected the argument that requiring defendant to volunteer information of his criminal conduct beyond the offense of conviction violated his Fifth Amendment right against self-incrimination. "[W]e have held that requiring

a defendant to admit criminal conduct related to but distinct from the offense of conviction in order to gain a reduction for acceptance of responsibility does not implicate the Fifth Amendment" because it does not penalize defendants but denies a benefit. "The same is true of §3553(f), which requires a defendant to provide complete and truthful details concerning his offense in order to qualify for a sentence below the statutory minimum." *U.S. v. Arrington,* 73 F.3d 144, 149–50 (7th Cir. 1996) [8#5]. Accord *U.S. v. Cruz,* 156 F.3d 366, 374–75 (2d Cir. 1998) (affirmed: "we find no violation of the Fifth Amendment in the requirement of §§3553(f), 5C1.2 and 2D1.1(b)(4) that the defendant disclose relevant conduct beyond what is included in the offense of conviction in order to obtain the benefit of the safety valve"; however, court noted that it has previously ruled that §3E1.1 does not require defendants to admit conduct beyond the counts of conviction to receive reduction for acceptance of responsibility); *U.S. v. Washman,* 128 F.3d 1305, 1307 (9th Cir. 1997). See also *U.S. v. Torres,* 114 F.3d 520, 527 (5th Cir. 1997) (affirmed: refusal to apply §5C1.2 did not violate defendant's Fifth Amendment rights by penalizing him for decision not to testify at trial). Cf. *U.S. v. Stewart,* 93 F.3d 189, 195 (5th Cir. 1996) (rejecting defendant's claim that requirements of safety valve force her to work as informant for government).

VI. Departures

A. Criminal History

1. Upward Departure

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

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

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

The Eleventh Circuit held that prior conduct that is counted as relevant conduct in setting the offense level for the current sentence may not also be used to support upward departure. A "prior sentence" cannot be counted in the criminal history if it was for "conduct that is part of the instant offense." USSG §4A1.2, comment. (n.1) (formerly note 2). Although §4A1.3(a) allows consideration of departure for "prior sentence(s) not used in computing the criminal history category," the court held that "prior" should have the same meaning in both sections. Therefore, "[w]hen a district court determines that the conduct underlying a conviction is relevant conduct to the instant offense, and considers it as a factor in calculating the base offense level, it cannot then be simultaneously considered as a 'prior sentence' under Section 4A1.3." *U.S. v. Hunerlach,* 258 F.3d 1282, 1285–87 (11th Cir. 2001) (remanded).

When even criminal history category VI—including when category VI is required for a career offender—did not adequately reflect defendant's criminal record, departure above that level has been permitted. See, e.g., *U.S. v. Lowe,* 106 F.3d 1498, 1502 (10th Cir. 1997) ("it is permissible to depart upward from Criminal History Category VI when the defendant is also a career offender"); *U.S. v. Streit,* 17 F.3d

306, 308 (9th Cir. 1994) (same, affirming departure); *U.S. v. Lee,* 955 F.2d 14, 15 (5th Cir. 1992); *U.S. v. Jordan,* 890 F.2d 968, 974–77 (7th Cir. 1989) [2#18]; *U.S. v. Joan,* 883 F.2d 491, 494–96 (6th Cir. 1989) [2#13]; *U.S. v. Roberson,* 872 F.2d 597, 607 (5th Cir. 1989) [2#6].

Some circuits, however, have cautioned that the circumstances must be compelling or egregious to warrant departure above category VI. See, e.g., *U.S. v. Carillo-Alvarez,* 3 F.3d 316, 320–23 (9th Cir. 1993) (remanded departure for defendant with nineteen criminal history points because defendant's history "is simply not serious enough"—a high number of criminal history points is not by itself sufficient, and "departure from category VI is warranted only in the highly exceptional case") [6#5]; *U.S. v. Cervantes,* 878 F.2d 50, 55 (2d Cir. 1989) ("Only the most compelling circumstances . . . would justify a [§4A1.3] departure above Category VI."); *U.S. v. Thomas,* 961 F.2d 1110, 1115 (3d Cir. 1992) (remanded: citing *Cervantes,* held that criminal history score of fifteen points was not so "extraordinary" as to warrant departure above category VI).

The Seventh Circuit affirmed a departure above category VI because of the seriousness of defendant's criminal history and also because he "fit the classic profile of a career recidivist" who is a threat to the public welfare, §5K2.14. *U.S. v. Spears,* 965 F.2d 262, 278–79 (7th Cir. 1992) [4#24]. The court later concluded that upward departure is also appropriate "where the defendant has accumulated criminal history points that far exceed the number required to place him in the highest criminal history category." *U.S. v. McKinley,* 84 F.3d 904, 911 (7th Cir. 1996) (forty points). See also *U.S. v. Thomas,* 24 F.3d 829, 832–33 (6th Cir. 1994) (criminal history score of forty-three, "one of the highest we could find in reported cases, is clearly sufficiently unusual to warrant departure") [6#15]; *U.S. v. Chappell,* 6 F.3d 1095, 1102 (5th Cir. 1993) (affirmed: defendant's "criminal history score of 25 far exceeded the minimum score for Criminal History Category VI and did not take into account several stale" convictions for similar offenses). Cf. *U.S. v. Santos,* 93 F.3d 761, 763 (11th Cir. 1997) (affirming upward departure from category VI for defendant who already had offense level increased because he was an armed career criminal, §4B1.4, because his "21 criminal history points far exceeded the 13 points needed for a Criminal History Category VI[, his] . . . score did not reflect several other prior convictions or conduct, including a burglary and conduct in connection with an aggravated battery[, and] . . . those other crimes [were not] needed to sentence Santos as an armed career criminal").

See also cases below in section 3.c. Computation—Departure Above Category VI

a. Consolidation of related prior sentences

Departures have been affirmed under Application Note 3 of §4A1.2, which advises that consolidation of related prior sentences may result in the underrepresentation of defendant's criminal history. See, e.g., *U.S. v. Bauers,* 47 F.3d 535, 538 (2d Cir. 1995); *U.S. v. Williams,* 922 F.2d 578, 581–82 (10th Cir. 1990) [3#17]; *U.S. v. Ocasio,*

914 F.2d 330, 334 (1st Cir. 1990) (remanded because extent of departure unreasonable); *U.S. v. Williams,* 901 F.2d 1394, 1396–97 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2845 (1991); *U.S. v. White,* 893 F.2d 276, 279–80 (10th Cir. 1990) [3#1]; *U.S. v. Geiger,* 891 F.2d 512, 513–14 (5th Cir. 1989) [2#19]; *U.S. v. Dorsey,* 888 F.2d 79, 80–81 (11th Cir. 1989) [2#16]; *U.S. v. Jackson,* 883 F.2d 1007, 1008–09 (11th Cir. 1989) [2#14]; *U.S. v. Roberson,* 872 F.2d 597, 606–07 (5th Cir. 1989) [2#6]. But note that when the related prior crimes were violent offenses, §4A1.1(f) (Nov. 1991) applies and departure may be inappropriate.

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

b. Remote convictions

Convictions too old to include in the criminal history calculation may provide a basis for departure if they are "evidence of similar, or serious dissimilar, criminal conduct." USSG §4A1.2, comment. (n.8) (1992). See also *U.S. v. Wyne,* 41 F.3d 1405, 1408–09 (10th Cir. 1994) (remanding departure because remote convictions did not make up "serious dissimilar" criminal conduct: "little, if any, weight should have been given to the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest in the instant case," and there was insufficient evidence that conduct in other remote convictions was, in fact, serious; burden of proof is on government to demonstrate seriousness) [7#6]; *U.S. v. Gentry,* 31 F.3d 1039, 1041 (10th Cir. 1994) (remanded because "district court failed to specifically find that Defendant's ten uncounted [remote] convictions were evidence of 'similar' or 'serious dissimilar' criminal conduct"); *U.S. v. Eve,* 984 F.2d 701, 704–05 (6th Cir. 1993) (remanding departure based in part on remote conviction because they did not fit in the "very narrow exception to the exclusion of old sentences" in Note 8); *U.S. v. Leake,* 908 F.2d 550, 554 (9th Cir. 1990) (before 1992 amendment, may only use similar convictions). See also *U.S. v. Smallwood,* 35 F.3d 414, 417–18 & n.8 (9th Cir. 1994) (remanded: change to Note 8 allowing consideration of dissimilar conduct may not be applied retroactively—amendment was not simply clarifying but "changes the substantive law and the meaning and effect of the guidelines in this circuit"). Cf. *U.S. v. Brown,* 51 F.3d 233, 234 (11th Cir. 1995) (affirmed: although remote fraud offenses were not similar to instant escape offense, departure warranted where district court concluded that prior convictions were serious because "*what you find is a pattern which as a whole seems very serious to me because it continued over such a long period of time*" (emphasis added by appellate court)).

The Ninth Circuit has indicated that whether previous convictions involved similar criminal conduct is determined by the general characteristics of the offenses—e.g., fraud, theft, violence—not the particular facts surrounding each crime. Thus, a defendant's prior remote convictions for child molestation were not similar to the instant offense of falsifying a passport application, even if the latter was motivated by a desire to escape an investigation into new child molestation charges. *U.S. v.*

Donaghe, 50 F.3d 608, 612 (9th Cir. 1994) (replacing withdrawn opinion at 37 F.3d 477). But cf. *U.S. v. Bridges,* 175 F.3d 1062, 1071–73 (D.C. Cir. 1999) (distinguishing *Donaghe* and holding court is not limited to statutory elements of instant offense but may look to any relevant conduct).

Before Note 8 was amended Nov. 1, 1992, most circuits had allowed the use of dissimilar conduct in limited situations. See, e.g., *U.S. v. Diaz-Collado*, 981 F.2d 640, 643–44 (2d Cir. 1992) (assuming dissimilar, outdated convictions can be grounds for departure, affirmed upward departure based on frequency of and lenient sentences for outdated convictions); *U.S. v. Rusher,* 966 F.2d 868, 881–82 (4th Cir. 1992) (dissimilar old convictions may be used as "reliable information" to depart); *U.S. v. Aymelek,* 926 F.2d 64, 73 (1st Cir. 1991) (may use dissimilar remote convictions only if they are evidence of an "unusual penchant for serious criminality") [3#20]; *U.S. v. Williams,* 910 F.2d 1574, 1578–79 (7th Cir. 1990) (in "appropriate circumstances," remote convictions may be considered as part of "overall assessment" of whether criminal history score adequately reflects defendant's past) [3#13], *rev'd on other grounds*, 112 S. Ct. 1112 (1992) [4#17]; *U.S. v. Russell,* 905 F.2d 1439, 1443–44 (10th Cir. 1990) (departure partly based on dissimilar conviction beyond fifteen-year period proper where defendant was incarcerated for most of that period); *U.S. v. Carey,* 898 F.2d 642, 646 (8th Cir. 1990) (affirmed departure based in part on remote, dissimilar convictions because of seriousness of criminal history and defendant's "incorrigibility") [3#5]; *U.S. v. Harvey*, 897 F.2d 1300, 1305–06 (5th Cir. 1990) (affirmed upward departure based partly on dissimilar, remote convictions). Cf. *Nichols* in VI.A.1.g.

c. Prior unlawful conduct not accounted for

An upward departure may be appropriate for prior unlawful conduct that is not adequately factored into the criminal history score. USSG §4A1.3(a)–(e). See, e.g., *U.S. v. Turchen,* 187 F.3d 735, 742–43 (7th Cir. 1999) (proper to base departure on conduct for which defendant was found not guilty by reason of insanity); *U.S. v. Fordham,* 187 F.3d 344, 347–48 (3d Cir. 1999) (foreign conviction where court "was confidant that the conviction was fair"); *U.S. v. Delmarle,* 99 F.3d 80, 85–86 (2d Cir. 1996) (reliable evidence of conduct underlying foreign conviction); *U.S. v. Hardy,* 99 F.3d 1242, 1251 (1st Cir. 1996) (reliable evidence of criminal conduct in convictions that were later vacated); *U.S. v. Camp,* 72 F.3d 759, 761–62 (9th Cir. 1995) (conduct in causing death that was previously unpunished because defendants received state transactional immunity) [8#4]; *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) ("non-conviction misconduct may be a proper basis for departure . . . if it reveals extensive immersion in criminality similar in type to the charged offense"); *U.S. v. Korno,* 986 F.2d 166, 168–69 (7th Cir. 1993) (under §4A1.3(a), Canadian convictions that were not counted under §4A1.2(h)); *U.S. v. Cash*, 983 F.2d 558, 561 (4th Cir. 1992) (prior conviction later held constitutionally invalid where underlying conduct was not in dispute) [5#7]; *U.S. v. Doucette*, 979 F.2d 1042, 1047–48 (5th Cir. 1992) (sentences for three unrelated prior convictions were

consolidated); *U.S. v. Schweihs,* 971 F.2d 1302, 1318–19 (7th Cir. 1992) (reversed conviction that provided reliable evidence of past criminal activity); *U.S. v. O'Dell,* 965 F.2d 937, 938 (10th Cir. 1992) (uncharged conduct); *U.S. v. Lee,* 955 F.2d 14, 16 (5th Cir. 1992) (similar offenses not prosecuted to conviction); *U.S. v. Thornton,* 922 F.2d 1490, 1493 (10th Cir. 1991) (prior uncharged criminal conduct) [3#19]; *U.S. v. Thomas,* 914 F.2d 139, 144 (8th Cir. 1990) (seriousness of earlier offenses not accounted for) [3#14]; *U.S. v. McKenley,* 895 F.2d 184, 186–87 (4th Cir. 1990) (past acquittals by reason of insanity for serious offenses not accounted for) [3#2]; *U.S. v. Sturgis,* 869 F.2d 54, 57 (2d Cir. 1989) (other criminal conduct not accounted for) [2#2]; *U.S. v. Spraggins,* 868 F.2d 1541, 1543–44 (11th Cir. 1989) (evidence of uncharged criminal conduct) [2#4]. See also §4A1.2, comment. (n.6) (reversed, vacated, or invalidated convictions not counted in criminal history may be considered for departure under §4A1.3).

Although §4A1.3(e) specifies that departure may be based upon "prior *similar* conduct not resulting in a criminal conviction" (emphasis added), the First Circuit held that §4A1.3 was not an exclusive list of departure grounds and therefore "in an appropriate case, a criminal history departure can be based upon prior dissimilar conduct that was neither charged nor the subject of a conviction." The court affirmed an upward departure for a defendant convicted of firearms offenses partly on the basis of a seventeen-year "history of persistent and vicious domestic violence," for which there was ample evidence but no criminal convictions. *U.S. v. Brewster,* 127 F.3d 22, 25–28 (1st Cir. 1997) [10#4]. But cf. *U.S. v. Chunza-Plazas,* 45 F.3d 51, 56 (2d Cir. 1995) (vacating upward departure based on dissimilar foreign criminal conduct that had not resulted in conviction: "Even assuming that [§4A1.3(e)] might reasonably be extended to include criminal conduct in a foreign country, a court might properly consider that conduct only if it is 'similar' to the crime of conviction.").

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

Pending charges may also be considered in the departure decision. See, e.g., *U.S. v. Morse,* 983 F.2d 851, 854 (8th Cir. 1993) (in circumstances of case, use of pending charges in combination with other factors was warranted); *U.S. v. Gaddy,* 909 F.2d 196, 201 (7th Cir. 1990) ("The Guidelines permit consideration of prior similar adult criminal conduct not resulting in conviction, which covers pending charges"). The Eighth Circuit later cautioned, however, that "[t]he Guidelines do not allow the district court to consider pending charges unless the conduct underlying those charges is admitted" or otherwise proved. *U.S. v. Joshua,* 40 F.3d 948, 953 (8th Cir. 1994).

Some circuits have held that charges that were dismissed as part of a plea bargain may not be used for departure, but an amendment, effective Nov. 1, 2000, added §5K2.21 to specifically allow that. See discussion in section IX.A.1.

The Second Circuit held that, while foreign convictions may sometimes be considered as a basis for departure, unrelated, uncharged foreign criminal conduct may not. See *U.S. v. Chunza-Plazas,* 45 F.3d 51, 56–57 (2d Cir. 1995) (remanded: for defendant convicted of immigration offense, error to consider government's claims that he had committed serious crimes in Colombia while working for the Medellin drug cartel) [7#7].

d. History of arrests

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

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

e. Similarity to prior offense

The Background Commentary to §4A1.1 indicates that similarity of the current offense to prior offenses may be a ground for criminal history departure under §4A1.3. Departures on this ground have been upheld in part because such similarity indicates a greater likelihood defendant will commit future crimes. See, e.g., *U.S. v. Segura-Del Real,* 83 F.3d 275, 277–78 (9th Cir. 1996) (departure above criminal history category VI for defendant with seventeen prior convictions and repeated immigration violations); *U.S. v. Castrillon-Gonzalez,* 77 F.3d 403, 407 (11th Cir. 1996) (repeated illegal entry into U.S. after deportation); *U.S. v. Molina*, 952 F.2d 514, 519 (D.C. Cir. 1992) ("very likely that an alien who surreptitiously enters the country on five occasions, despite criminal sanctions and repeated deportation, will do so again"); *U.S. v. Madrid,* 946 F.2d 142, 143–44 (1st Cir. 1991); *U.S. v. Dzielinski,* 914 F.2d 98, 101–02 (7th Cir. 1990); *U.S. v. Barnes,* 910 F.2d 1342, 1345 (6th Cir. 1990) [3#12]; *U.S. v. Rodriguez-Castro,* 908 F.2d 438, 442 (9th Cir. 1990) (for use of alias when arrested and for high-speed chase in escape attempt because defendant

had engaged in same conduct in prior offenses); *U.S. v. Chavez-Botello,* 905 F.2d 279, 281 (9th Cir. 1990) [3#9]; *U.S. v. Jackson,* 903 F.2d 1313, 1319–20 (10th Cir.), rev'd on other grounds, 921 F.2d 985 (10th Cir. 1990) (en banc); *U.S. v. Carey,* 898 F.2d 642, 646 (8th Cir. 1990) [3#5]; *U.S. v. Coe,* 891 F.2d 405, 411–12 (2d Cir. 1989) (four bank robberies in two-week period while an escapee and prior criminal conduct indicated likelihood of future crimes) [2#18]; *U.S. v. Fisher,* 868 F.2d 128, 130 (5th Cir. 1989) (for "egregious" criminal history of repeat offenses) [2#3]; *U.S. v. De Luna-Trujillo,* 868 F.2d 122, 124–25 (5th Cir. 1989) [2#2]. See also *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) ("longstanding and extensive" involvement in misconduct similar to charged offense); *U.S. v. Gaddy,* 909 F.2d 196, 201 (7th Cir. 1990) (five outstanding arrest warrants for prior similar conduct) [3#11].

Although a defendant's prior offenses were not necessarily similar to the instant offense of involuntary manslaughter—resulting from a drunk driving incident—"[s]ix of the[] seven prior offenses involved drugs or alcohol, indicating a serious, longstanding substance abuse problem that Goings had failed to address." Because of that similarity, plus the facts that defendant failed to complete a court-ordered alcohol treatment program and his previous convictions only counted for four criminal history points under §4A1.1(c)'s "cap" for sentences of less than sixty days, departure was warranted to account for the higher likelihood of committing future crimes. *U.S. v. Goings,* 200 F.3d 539, 542–43 (8th Cir. 2000).

f. Criminal conduct while awaiting sentencing

Departures have been affirmed when reliable evidence indicated that a defendant continued to commit unlawful acts after arrest or conviction on the current offense but before sentencing, on the ground that this additional criminal conduct is not included in the criminal history score but should be accounted for. See, e.g., *U.S. v. Myers,* 41 F.3d 531, 533–34 (9th Cir. 1994) (committing similar fraud while on release awaiting sentencing); *U.S. v. Fahm,* 13 F.3d 447, 451 (1st Cir. 1994) (among other reasons, committing fraud offense while awaiting sentencing on similar charges); *U.S. v. Keats,* 937 F.2d 58, 66–67 (2d Cir. 1991) (additional frauds committed after release on bail); *U.S. v. George,* 911 F.2d 1028, 1030–31 (5th Cir. 1990) (fled jurisdiction while on bond awaiting sentencing) [3#14]; *U.S. v. Franklin,* 902 F.2d 501, 506 (7th Cir. 1990) (continued drug use or dealing while on bond) [3#8]; *U.S. v. Fayette,* 895 F.2d 1375, 1379–80 (11th Cir. 1990) (post-plea criminal conduct) [3#4]; *U.S. v. Sanchez,* 893 F.2d 679, 681 (5th Cir. 1990) (continued unlawful conduct while on pretrial release) [3#1]; *U.S. v. White,* 893 F.2d 276, 279–80 (10th Cir. 1990) (current offense committed while out on bail) [3#1]; *U.S. v. Geiger,* 891 F.2d 512, 513–14 (5th Cir. 1989) (same) [2#19]; *U.S. v. Jordan,* 890 F.2d 968, 976–77 (7th Cir. 1989) (continued use of and dealing in drugs) [2#18]. Cf. *U.S. v. Fortenbury,* 917 F.2d 477, 479 (10th Cir. 1990) (improper to depart upward by offense level instead of criminal history category for illegal possession of guns after conviction but before sentencing—commission of crime is element of criminal history).

It is also proper to depart if defendant committed the instant offense while awaiting trial or sentencing for another offense that is not counted in the criminal history score. See USSG §4A1.3(d). See also *U.S. v. Polanco-Reynoso,* 924 F.2d 23, 25 (1st Cir. 1991) (while on bail awaiting sentencing for uncounted state charge) [3#20]; *U.S. v. Matha,* 915 F.2d 1220, 1222 (8th Cir. 1990) (current drug offense while awaiting state trial on four-count drug charge); *U.S. v. Gaddy,* 909 F.2d 196, 200–01 (7th Cir. 1990) (seven uncounted burglary convictions on which defendant was not sentenced because he jumped bail were reliable evidence of prior similar criminal conduct) [3#11]; *U.S. v. Jones,* 908 F.2d 365, 367 (8th Cir. 1990) (departure appropriate because ambiguity in career offender guideline precluded its use for defendant who pled guilty to but was not yet sentenced for two prior violent felonies) [3#11].

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

In a related vein, the Seventh Circuit affirmed an upward departure for a defendant who committed five bank robberies while on supervised release for an earlier bank robbery. Although §4A1.1(d) adds two criminal history points for any offense committed while on release, only one offense is needed to trigger it, and the district court did not abuse its discretion in holding that committing five offenses was outside the "heartland" of §4A1.1(d). *U.S. v. King,* 150 F.3d 644, 650–51 (7th Cir. 1998). See also *U.S. v. Doe,* 18 F.3d 41, 47–48 (1st Cir. 1994) (proper to base departure partly on "the fact that *Doe* had committed at least five earlier crimes while he was on bail, or was awaiting trial, or was under some other kind of 'court supervision,' in respect to a different crime").

g. Juvenile convictions

Effective Nov. 1, 1992, Application Note 8 to §4A1.2 was amended to allow departures for "similar, or serious dissimilar, criminal conduct" outside the time period, which may include juvenile offenses. See, e.g., *U.S. v. Franklyn,* 157 F.3d 90, 99 (2d Cir. 1998) (following Note 8, affirmed departure for three uncounted, remote juvenile convictions); *U.S. v. Williams*, 989 F.2d 1137, 1141 (11th Cir. 1993), same, for "serious dissimilar" remote juvenile convictions). The Eighth Circuit cautioned that such conduct must be shown by the facts—a mere record of arrests or criminal charges is not sufficient. See *U.S. v. Joshua,* 40 F.3d 948, 953 (8th Cir. 1994) (remanded: only two of several instances of defendant's juvenile criminal conduct used for departure were adequately demonstrated by facts). The court also noted that when prior dissimilar conduct is not serious, if defendant received lenient treatment "such [treatment] may be used to enhance a sentence on the basis that a defendant's criminal history is inadequately rated, for [it] may be evidence that leniency has not been effective." 40 F.3d at 953.

Note that juvenile offenses may be considered for departure under the "likeli-

hood that the defendant will commit other crimes" prong of §4A1.3. *U.S. v. Barber,* 200 F.3d 908, 912–13 (6th Cir. 2000) ("juvenile offenses may . . . be considered as part of a recidivism inquiry" for departure"); *U.S. v. Croom,* 50 F.3d 433, 435 (7th Cir. 1995) (citing Note 8, "juvenile convictions may not be counted directly, but they may be considered as part of the pattern of recidivism" warranting departure).

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

h. Discipline problems in prison

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

i. Likelihood of recidivism

Courts may depart upward if the defendant's criminal history score "does not adequately reflect . . . the likelihood that the defendant will commit other crimes." USSG §4A1.3. See also *U.S. v. Koeberlein,* 161 F.3d 946, 952 (6th Cir. 1998) (affirmed for criminal category VI defendant who "ignored warrants, violated probation, escaped from detention, and committed new crimes while charges were pending," thus showing "an extremely high risk of recidivism"); *U.S. v. Brewster,* 127 F.3d 22, 25–28 (1st Cir. 1997) (seven convictions too old to count plus seventeen-

year "history of persistent and vicious domestic violence" for which there were no criminal convictions) [10#4]; *U.S. v. Paredes,* 87 F.3d 921, 926–27 (7th Cir. 1996) (affirmed for criminal history category VI defendant whose "past reflects her unrelenting deviant tendencies and documents her consistent return to a life of crime following incarceration"); *U.S. v. Saffeels,* 39 F.3d 833, 837–38 (8th Cir. 1994) (district court properly based upward departure on defendant's "extensive criminal history and on its conclusion that Saffeels was incorrigible and thus needed to be deterred from future criminal activity"); *U.S. v. Riggs,* 967 F.2d 561, 563 (11th Cir. 1992) (affirmed for computer hacker with repeated incidents of hacking who, while on probation for one offense, wrote "tutorial" to explain to others how to break into telephone computer systems); *U.S. v. Sturgis,* 869 F.2d 54, 56–57 (2d Cir. 1989) (affirmed: "based upon defendant's recent criminal history, i.e., two pending felony convictions as well as three prior misdemeanor arrests . . . all within two months of the instant offense, defendant was 'likel[y] . . . [to] commit other crimes.'").

"The principal factors we apply in assessing likelihood of recidivism are 1) the quantity (or 'repetitiveness') of uncounted criminal conduct, 2) the similarity of uncounted criminal conduct to the offense conduct, and 3) the degree to which the defendant has been deterred by prior sentences." *U.S. v. Connelly,* 156 F.3d 978, 985 (9th Cir. 1998) (affirming upward departure based on extensive history of theft offenses). See also *Riggs,* 967 F.2d at 563 ("Similarity of offenses has been closely linked to recidivism."); *U.S. v. DeLuna-Trujillo,* 868 F.2d 122, 125 (5th Cir. 1989) ("The recidivist's relapse into the same criminal behavior . . . suggests an increased likelihood that the offense will be repeated yet again."). Cf. *U.S. v. Bennett,* 975 F.2d 305, 309 (6th Cir. 1992) (affirming departure for category VI defendant who "has been tried eight times in the past eighteen years for over a dozen offenses, . . . has been sentenced to more than 12 years behind bars, has served nearly 8 of those years, and has escaped from prison once," but stating that "upward departures from the Guidelines for reasons of recidivism should be rare events").

The Tenth Circuit upheld a downward departure for a career offender based partly on the fact that age and ill health made it less likely that he would commit future crimes. Although "circumstances surrounding the instant offense cannot be used as a basis for a criminal history category departure, . . . a district court may rely on offender characteristics such as age and infirmity [USSG §5H1.1] that are logically relevant to a defendant's criminal history or likelihood for recidivism, but only in combination with other circumstances of a defendant's criminal history." *U.S. v. Collins,* 122 F.3d 1297, 1305–06 (10th Cir. 1997) [10#3].

2. Downward Departure

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

is not appropriate for first-time offenders on the ground of a reduced risk of recidivism. "[T]he low likelihood of petitioners' recidivism was not an appropriate basis for departure. Petitioners were first-time offenders and so were classified in Criminal History Category I, . . . [which] 'is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.' 1992 USSG §4A1.3." *Koon v. U.S.,* 116 S. Ct. 2035, 2052–53 (1996) [8#7]. See also *U.S. v. Sherpa,* 265 F.3d 144, 149 (2d Cir. 2001) (affirmed: request to depart below Category I properly denied as "plainly contrary to the explicit language of" §4A1.3")

Most circuits have held that downward departure under §4A1.3 may be considered for career offenders if that category overrepresents the seriousness of defendant's criminal history or the likelihood that defendant will commit future crimes. See *U.S. v. Webb,* 139 F.3d 1390, 1395 (11th Cir. 1998); *U.S. v. Lindia,* 82 F.3d 1154, 1165 (1st Cir. 1996); *U.S. v. Shoupe,* 35 F.3d 835, 838–39 (3d Cir. 1994); *U.S. v. Beckham,* 968 F.2d 47, 54–55 (D.C. Cir. 1992); *U.S. v. Adkins,* 937 F.2d 947, 952 (4th Cir. 1991) [4#7]; *U.S. v. Lawrence,* 916 F.2d 553, 554–55 (9th Cir. 1990) [3#15]; *U.S. v. Brown,* 903 F.2d 540, 545 (8th Cir. 1990) (remanded because district court erroneously believed it could not depart downward for career offender) [3#8]. See also *U.S. v. Reyes,* 8 F.3d 1379, 1383–87 (9th Cir. 1993) (court had authority to depart because defendant's criminal history and offense were minor compared with most career offenders) [6#7]; *U.S. v. Brown,* 985 F.2d 478, 482 (9th Cir. 1993) (remanded: although age is not ordinarily relevant to departure, §5H1.1, departure for career offender may be considered if nature of prior offenses and youth at time of one prior conviction "render his criminal past significantly less serious than that of a typical career offender") [5#9]; *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) ("unique combination of factors"—youth, proximity in time of prior offenses, imposition of concurrent sentences—none of which "standing alone may have warranted departure," provided proper basis for departure; reasonable to sentence within range that applied absent career offender status) [4#7]; *U.S. v. Senior,* 935 F.2d 149, 151 (8th Cir. 1991) (proper to depart from 292–365-month career offender range to 120-month statutory minimum, based on defendant's age at time of prior felonies, proximity in time of prior felonies, consolidation of prior felonies, and short length of time served; reasonable to base sentence on 92–115-month range that applied absent career offender classification); *U.S. v. Smith,* 909 F.2d 1164, 1169–70 (8th Cir. 1990) (downward departure, from 292–365-month range to 240-month term, justified by "relatively minor nature" of prior offenses and defendant's youth when he committed those crimes) [3#11]. But cf. *U.S. v. Perez,* 160 F.3d 87, 89–90 (1st Cir. 1998) (en banc court evenly divided on question of whether "smallness" of defendant's prior drug offenses and her role in them could be used as basis for §4A1.3 departure).

The Second and Ninth Circuits have also held that career offender status would not bar downward departure for "extraordinary acceptance of responsibility." *Brown,* 985 F.2d at 482–83; *U.S. v. Rogers,* 972 F.2d 489, 494 (2d Cir. 1992) [5#4].

The Sixth Circuit affirmed a downward departure—to the offense level and criminal history category that applied absent career offender status—because defendant's extraordinary family responsibilities, the age of his prior convictions (1976 and 1985), the time between convictions, and his attempts to deal with his drug and alcohol problems "indicate that the seriousness of [his] record and his likelihood of recidivism was over-stated by an offense level of 32 and a criminal history category of VI." Defendant had "specifically requested the court to compare him 'to other defendants who would typically be career offender material.' [He] also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court noted that, while "the age of Fletcher's convictions, standing alone, does not warrant a downward departure, a district court may take the age of prior convictions into account when considering a defendant's likelihood of recidivism." *U.S. v. Fletcher,* 15 F.3d 553, 556–57 (6th Cir. 1994) [6#11]. But cf. *U.S. v. McNeil,* 90 F.3d 298, 301–02 (8th Cir. 1996) (finding that facts did not warrant downward departure for career offender).

The Tenth Circuit also upheld a departure for a career offender down to the non-career offender guideline range. The departure was based on a combination of circumstances: defendant's age and ill health, which made it less likely that he would commit future crimes; defendant's predicate offenses were minor drug offenses for which he received lenient sentences, indicating a less serious criminal history than other career offenders; and because the oldest offense likely would have been too old to count as a predicate offense if it had been prosecuted in a more timely fashion. *U.S. v. Collins,* 122 F.3d 1297, 1300–09 (10th Cir. 1997) [10#3].

Downward departures for career offenders have been held inappropriate under several circumstances, such as: When based on the small amount of drugs in the current offense or length of time since the prior offenses, *U.S. v. Richardson,* 923 F.2d 13, 17 (2d Cir. 1991) [3#20]; the fact that the prior offenses involved only threatened, not actual, violence, *U.S. v. Gonzalez-Lopez,* 911 F.2d 542, 549–50 (11th Cir. 1990) [3#13]; or for the small amount of drugs involved and nonviolent criminal history of defendant, *U.S. v. Hays,* 899 F.2d 515, 519–20 (6th Cir. 1990) [3#5].

The Second Circuit held that there cannot be a generalized exception for "street-level" drug sellers (i.e., small amounts) that allows departure from criminal history category VI or the career offender offender guideline. However, a court may "consider whether to make a departure based on an individualized consideration of factors relevant to an assessment of whether CHC VI 'significantly over-represents the seriousness of [the] defendant's criminal history or the likelihood that the defendant will commit further crimes.' USSG §4A1.3. Such factors might include, for example, the amount of drugs involved in [defendant]'s prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in CHC VI." *U.S. v. Mishoe,* 241 F.3d 214, 218–19 (2d Cir. 2001).

Two circuits held that prior lenient sentences do not warrant downward departure; in fact, §4A1.3 indicates that prior lenient treatment may be grounds for *upward* departure. See *U.S. v. Tejeda,* 146 F.3d 84, 87 (2d Cir. 1998) (remanded); *U.S.*

v. Phillips, 120 F.3d 227, 232 (11th Cir. 1997) (remanded). The *Phillips* court also held that a district court's belief that defendant may not actually have been guilty of one of his predicate offenses—based on the sentencing court's knowledge of charging practices in the county court defendant was convicted in—cannot warrant departure from the career offender guideline. Absent evidence that the conviction was obtained in violation of the right to counsel, departing would "circumvent the rule prohibiting a collateral attack on a prior conviction in a sentence proceeding" and "is an abuse of discretion." 120 F.3d at 231–32 [10#2]. But cf. *Collins, supra*, at 1307–08 (in upholding downward departure for career offender based partly on leniency of prior sentences, stating that district court "could conclude that a defendant who received a 'relatively lenient' sentence for a predicate conviction has a less serious criminal history than a career offender whose predicate convictions resulted in lengthy periods of incarceration") [10#3].

The Tenth Circuit rejected a defendant's claim that a district court could base a departure under §5K2.0 on the ground that defendant was actually innocent of one of the predicate violent felonies to which he pled nolo contendere. Following the categorical approach, the district court may not look to "the conduct and circumstances surrounding" the prior conviction, but only to "what was actually adjudicated in the prior proceeding." *U.S. v. Garcia,* 42 F.3d 573, 577–78 (10th Cir. 1994) (record of plea established that defendant committed burglary).

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

a. Generally

"In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable." USSG §4A1.3. Most of the circuits have explicitly adopted this procedure as the rule for sentencing courts to follow in determining the length of departures based on inadequate criminal history category. See *U.S. v. Hickman*, 991 F.2d 1110, 1114 (3d Cir. 1993); *U.S. v. Lambert,* 984 F.2d 658, 662–63 (5th Cir. 1993) (en banc) [5#10]; *U.S. v. Rusher,* 966 F.2d 868, 884 (4th Cir. 1992); *U.S. v. Johnson,* 934 F.2d 1237, 1239 (11th Cir. 1991); *U.S. v. Richison,* 901 F.2d 778, 781 (9th Cir. 1990) [3#8]; *U.S. v. Allen,* 898 F.2d 203, 204–05 (D.C. Cir. 1990) [3#5]; *U.S. v. Kennedy,* 893 F.2d 825, 829 (6th Cir. 1990) [3#1]; *U.S. v. White,* 893 F.2d 276, 280 (10th Cir. 1990) [3#1]; *U.S. v. Summers,* 893 F.2d 63, 68 (4th Cir. 1990) [2#19]; *U.S. v. Anderson,* 886 F.2d 215, 216 (8th Cir. 1989) [2#14]; *U.S. v. Cervantes,* 878 F.2d 50, 54–55 (2d Cir. 1989) [2#8]; *U.S. v. Miller,* 874 F.2d 466, 470–71 (7th Cir. 1989); *U.S. v. Lopez,* 871 F.2d 513, 515 (5th Cir. 1989) [2#5].

The Second Circuit held that this procedure does not require courts to assign criminal history point values to the conduct warranting departure; such comparisons may assist the appellate court's evaluation of the reasonableness of the departure, but for some conduct comparisons may be unavailable. *U.S. v. Jakobetz,* 955 F.2d 786, 806 (2d Cir. 1992). On the other hand, assigning points to the conduct

that is the basis of departure may provide a reasonable way to determine the extent of the departure. See, e.g., *U.S. v. Tai,* 41 F.3d 1170, 1176–77 (7th Cir. 1994) (affirmed: reasonable to increase criminal history category by assigning three points to extortionate conduct that likely would have resulted in sentence greater than one year).

Note that one court has stated that this method does not require courts "to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects. Ordinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure from the category calculated under the Guidelines and its explanation for the category it has chosen as appropriate." *Lambert,* 984 F.2d at 663. See also *U.S. v. Bridges,* 175 F.3d 1062, 1065–66 (D.C. Cir. 1999) (affirming departure from category II to V absent explicit consideration of categories III and IV, stating that §4A1.3 "does not require a step-by-step procedure for departing from one criminal history category to another").

However, some circuits require "that the sentencing court's reasons for rejecting each lesser category be clear from the record as a whole. . . . [T]he requirements of §4A1.3 are not met by [the court's] declaration that 'criminal history categories two, three, four and five are too lenient for the conduct in this case.'" *U.S. v. Harris,* 44 F.3d 1206, 1212 (3d Cir. 1995) (remanding for clearer explanation of departure from category I to VI). See also *U.S. v. Okane,* 52 F.3d 828, 837 (10th Cir. 1995) (district court must explain "with precision and specificity, the methodology and reasoning it utilized in selecting a particular criminal history category in upwardly departing"); *U.S. v. Tropiano,* 50 F.3d 157, 162 (2d Cir. 1995) ("district court must pause at each category to consider whether that category adequately reflects the seriousness of the defendant's record. Only upon finding a category inadequate may the court proceed to the next category.").The Seventh Circuit held that where the district court boosted defendant's criminal history category from I to III, remand was not required because the record revealed why category II was skipped. *U.S. v. Newman,* 965 F.2d 206, 211 (7th Cir. 1992).

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

To calculate the extent of an upward departure where category V did not adequately represent a defendant's criminal history and 18 U.S.C. §924(e)'s 180-month mandatory minimum already superseded defendant's 33–41-month guideline range, the district court located the offense level under category V that included a 180-month sentence, increased the offense level two points, and then imposed a 230-month sentence within that level. Although the Fifth Circuit did "not ratify this methodology," it affirmed the sentence as reasonable in light of the "unique aspects" of defendant's criminal history. *U.S. v. Carpenter,* 963 F.2d 736, 743–46 (5th Cir. 1992). The Ninth Circuit, however, remanded a criminal history departure above the 120-month mandatory minimum because the district court did not ex-

plain how it calculated the departure above defendant's 63–78-month guideline range. The mandatory minimum is not a substitute for the guideline range, which is the starting point for calculating departures. *U.S. v. Rodriguez-Martinez,* 25 F.3d 797, 799–800 (9th Cir. 1994) ("the existence of a mandatory minimum sentence does not alter the manner in which a district court determines the appropriate extent of a departure") [6#15].

Some circuits have held that it is reasonable to calculate the extent of a downward departure for a career offender by departing from both the offense level and criminal history category and using the guideline range that would have applied absent the career offender classification. See *U.S. v. Rivers,* 50 F.3d 1126, 1131 (2d Cir. 1995); *U.S. v. Fletcher,* 15 F.3d 553, 557 (6th Cir. 1994) [6#11]; *U.S. v. Clark,* 8 F.3d 839, 846 (D.C. Cir. 1993) [6#7]; *U.S. v. Reyes,* 8 F.3d 1379, 1389 (9th Cir. 1993) [6#7]; *U.S. v. Bowser,* 941 F.2d 1019, 1026 (10th Cir. 1991) [4#7]; *U.S. v. Senior,* 935 F.2d 149, 151 (8th Cir. 1991). See also *U.S. v. Shoupe,* 35 F.3d 835, 837–38 (3d Cir. 1994) (remanded because district court concluded it could not depart by offense level for career offender: "Because career offender status enhances both a defendant's criminal history category and offense level, . . . a sentencing court may depart in both under the proper circumstances") [7#4].

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

Note that courts must distinguish between departures based on criminal history and those based on aggravating or mitigating circumstances. Except for departures above category VI (see subsection 3.c below) or for career offenders, it is error to calculate the extent of a criminal history departure by reference to offense levels. *U.S. v. Harvey,* 2 F.3d 1318, 1325 (3d Cir. 1993); *U.S. v. Dawson,* 1 F.3d 457, 463–64 (7th Cir. 1993); *U.S. v. Deutsch,* 987 F.2d 878, 887 (2d Cir. 1993); *U.S. v. Thornton,* 922 F.2d 1490, 1494 (10th Cir. 1991) [3#19]; *U.S. v. Fortenbury,* 917 F.2d 477, 479–80 (10th Cir. 1990) [3#15]. But cf. *U.S. v. Hines,* 26 F.3d 1469, 1478 n.7 (9th Cir. 1994) (district court could properly depart by offense levels because departure was based on both §§5K2.0 and 4A1.3) [6#17]; *U.S. v. Schmeltzer,* 20 F.3d 610, 613–14 (5th Cir. 1995) (without specifically analyzing this issue, affirmed offense level departure for both aggravating and criminal history factors); *U.S. v. Nomeland,* 7 F.3d 744, 747 (8th Cir. 1993) (affirming §5K2.0 departure for category VI defendant based on both criminal history and aggravating factors: "When the district court has relied upon a combination of departure factors, its failure to specify whether it departed under §5K2.0 or §4A1.3 does not preclude affirmance.").

The guideline sentencing range must be properly calculated before departure. See *U.S. v. Emery,* 991 F.2d 907, 910 (1st Cir. 1993) ("decision to depart does not . . .

render moot questions concerning" whether guideline range is properly calculated); *U.S. v. Mondaine,* 956 F.2d 939, 943 (10th Cir. 1992) (same, remanded).

b. Upward departure to career offender level

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

Other circuits have found it inappropriate. See, e.g., *U.S. v. Ruffin,* 997 F.2d 343, 347 (7th Cir. 1993) (remanded departure to career offender level because defendant did not have required two prior felony convictions as defined in guideline—"Only *real* convictions support a sentence under sec. 4B1.1. Reconstructions and other efforts to approximate the seriousness of a criminal history . . . must be treated as sec. 4A1.3 provides") [5#15]; *U.S. v. Faulkner,* 952 F.2d 1066, 1072–73 (9th Cir. 1991) (inappropriate to use career offender provision as departure guide) (amending 934 F.2d 190 [4#8]); *U.S. v. Robison,* 904 F.2d 365, 372–73 (6th Cir. 1990) (may not depart to career offender status because court feels defendant "got a break" in prior sentencing) [3#8]; *U.S. v. Hawkins,* 901 F.2d 863, 866–67 (10th Cir. 1990) (improper to depart on the ground that defendant "narrowly missed" career offender status) [3#7]. Cf. *U.S. v. Croom,* 50 F.3d 433, 435 (7th Cir. 1995) (remanded: "Meeting most of the criteria for designation as an armed career criminal (or 'career offender' under the Guidelines) does not permit the judge to impose the penalties designed for those who meet all of the criteria, but it does permit a departure in the *direction* of those penalties."); *U.S. v. Thomas,* 961 F.2d 1110, 1122 (3d Cir. 1992) (agreeing with reasoning of *Faulkner,* holding that without actual conviction it was improper to depart by analogy to 18 U.S.C. §924(e), the armed career criminal statute).

c. Computation—departure above category VI

As of the Nov. 1992 amendments, §4A1.3 contains a method for departing upward when defendant is already in category VI: "[T]he court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." Some circuits have approved this method and directed that it be used. See, e.g., *U.S. v. Pennington,* 9 F.3d 1116, 1118–19 (5th Cir. 1993) (courts must use vertical method to depart above CHC VI); *U.S. v. Carr,* 5 F.3d 986, 994 (6th Cir. 1993) (courts must look to higher offense levels, may no longer hypothesize to categories above VI; court must also explain why it chooses particular offense level) [6#5]; *U.S. v. Cash,* 983 F.2d 558, 561 n.6 (4th Cir. 1992) (prior to amendment, indicating approval of using higher offense levels).

Some circuits have held that a district court following the amended methodology are not required to make specific, level-by-level explanations and findings as to how it reached the final offense level. See, e.g., *U.S. v. Hannah,* 268 F.3d 937, 940–42 (10th Cir. 2001) (remanded: §4A1.3 "does not require that express findings be made concerning each incremental step"; however, as with any departure, district court must "specifically articulate reasons for the degree of departure"); *U.S. v. Dixon,* 71 F.3d 380, 381–83 (11th Cir. 1995) ("courts need not make step-by-step findings en route to the ultimate sentencing range; rather, criminal history departures above category VI will be reviewed for reasonableness, based on findings as to why an upward departure is warranted and why the particular sentencing range chosen is appropriate"); *U.S. v. Thomas,* 24 F.3d 829, 833–36 (6th Cir. 1994) (district court need not specifically consider and reject each intermediate offense level between original guideline range and range in which departure sentence falls) [6#15]; *U.S. v. Harris,* 13 F.3d 555, 558–59 (2d Cir. 1994) (same: district court need not follow "rigid step-by-step approach"). But cf. *U.S. v. Streit,* 962 F.2d 894, 907–08 (9th Cir. 1992) (prior to 1992 amendment, disapproved of "vertical" method of analogy to higher offense levels).

The Seventh Circuit affirmed a departure where the district court added one offense level for every three criminal history points defendant had above fifteen, concluding that this "methodology was reasonable and sufficiently linked to the structure of the Guidelines." *U.S. v. McKinley,* 84 F.3d 904, 911 (7th Cir. 1996) (defendant's 40 criminal history points warranted departure of eight offense levels).

The Fifth Circuit affirmed as "reasonable and not an abuse of discretion" a departure where the district court "add[ed] one offense level for each criminal history point above the thirteen points required to reach category VI, and assess[ed] four additional levels for [other] reasons." *U.S. v. Rosogie,* 21 F.3d 632, 634 (5th Cir. 1994) (from offense level 12 and 23 criminal history points, a guideline range of 30–37 months, court departed to 150-month sentence) [6#14]. The court later stated that it "requires only that the district court consider each intermediate adjustment and state that it has done so, and explain why the guideline category is inappropriate and why the category chosen is appropriate. Ordinarily such explanation will

make clear, either implicitly or explicitly, why the intermediate adjustments are inadequate." *U.S. v. Daughenbaugh,* 49 F.3d 171, 175 (5th Cir. 1995) (affirmed departure from 57–71 months to 240 months where "the district court scaled the criminal offense levels from 18 to 32, explaining, 'I have considered all of the other offense levels up to a level 35. . . . I considered the information in the presentence investigation and for the reasons I've stated, [selected] the level of sentencing I believe is appropriate in your case'").

Before the 1992 amendments, some courts had extrapolated from the criminal history categories. The Seventh Circuit, noting that sentencing ranges increase approximately 10%–15% from one criminal history category to another, instructed a sentencing court to "use this ten to fifteen percent increase to guide the departure" of a category VI defendant. *U.S. v. Schmude,* 901 F.2d 555, 560 (7th Cir. 1990) [3#6]. Some circuits also allowed the creation of hypothetical categories above VI, extrapolating from the guidelines based on defendant's criminal history points. See *Cash*, 983 F.2d at 561 [5#7]; *U.S. v. Glas,* 957 F.2d 497, 498–99 (7th Cir. 1992) (creating new criminal history category XIV for defendant with thirty-nine criminal history points by adding one category for every three points above thirteen and increasing minimum sentence by three months for each new category) [4#20]; *U.S. v. Jackson,* 921 F.2d 985, 993 (10th Cir. 1991) (en banc).

This method has also been used when departing above category VI for a career offender. See *U.S. v. Lowe,* 106 F.3d 1498, 1502 (10th Cir. 1997) (affirmed: reasonable for district court to determine that defendant's criminal history category should be hypothetical category VIII, or increase of two categories, to calculate departure by increasing offense level by two); *Streit,* 962 F.2d at 905–06 (remanded: proper to use hypothetical categories to depart upward for career offender, but calculation to category IX was not adequately explained) [4#24].

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

Some circuits had also held that the career offender guideline could be used as a reference for departure above category VI. *Cash*, 983 F.2d at 562 [5#7]; *U.S. v. Williams,* 922 F.2d 578, 583 (10th Cir. 1990) [3#17]; *U.S. v. Gardner,* 905 F.2d 1432, 1437–39 (10th Cir. 1990) [3#9]. The Ninth and Tenth Circuits disagree whether the Armed Career Criminal guideline, §4B1.4, may be used as a guide for departure in offenses prior to its effective date of Nov. 1, 1990. Compare *U.S. v. Canon,* 66 F.3d 1073, 1080–81 (9th Cir. 1995) (remanded: ex post facto violation to base departure for offense that occurred in Aug. 1990 on analogy to sentence that would be imposed under §4B1.4) with *U.S. v. Tisdale,* 7 F.3d 957, 965–68 (10th Cir. 1993) (affirmed: no ex post facto violation where district court made clear it was only using §4B1.4 for guidance to determine whether extent of departure was reasonable).

B. Aggravating Circumstances

Departures for aggravating circumstances depend largely on the individual circumstances of each case, see USSG §5K2.0. Following are several of the more common categories of upward departure, including grounds that were found improper. See section X.A.1 for a discussion of the general rules governing the authority to depart.

Note that, although the "combination of circumstances" departure authorized by the Commentary to §5K2.0 is generally considered for downward departures, it can also be used to depart upward. See, e.g., *U.S. v. Iannone,* 184 F.3d 214, 227–29 (3d Cir. 1999) (affirming two-level departure based on combination of "the following factors: (1) Iannone's masquerade as a decorated Vietnam combat veteran, a person in the witness protection program, and a government agent on a secret mission; (2) Iannone's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) Iannone's attempt to conceal his fraud by faking his own death; (4) Iannone's fabricated story about his family's having been killed by a drunk driver; and (5) the severe psychological harm Iannone's fraud caused his victims").

1. Upward Departure Permissible

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

a. Defendant's conduct not adequately covered by—

Offense guideline (except weapons related): *U.S. v. Medford,* 194 F.3d 419, 425–26 (3d Cir. 1999) (remanded: non-monetary effects of theft of important cultural artifacts not accounted for in §2B1.1); *U.S. v. Coon,* 187 F.3d 888, 900 (8th Cir. 1999) (fraud's effect on health insurance claimants whose bills were never paid and for company's debts that were not included in loss calculation); *U.S. v. Blackley,* 167 F.3d 543, 551–52 (D.C. Cir. 1999) (fraud guideline did not adequately account for false statement by high government official who lied twice under oath); *U.S. v. Whiteskunk,* 162 F.3d 1244, 1250–52 (10th Cir. 1998) ("degree of recklessness" exceeding that in involuntary manslaughter guideline); *U.S. v. Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997) (injury to bystander not accounted for in §2A2.1); *U.S. v. Achiekwelu*, 112 F.3d 747, 757 (4th Cir. 1997) ("intricacy and sophistication of Achiekwelu's scheme were substantially in excess of the typical fraud case that involves 'more than minimal planning,'" thus warranting departure); *U.S. v. Akindele*, 84 F.3d 948, 953–54 (7th Cir. 1996) (extent of harm to victims of fraud scheme); *U.S. v. Kay*, 83 F.3d 98, 101–02 (5th Cir. 1996) (fraud scheme's "repetitiveness, intricacy, and sophistication . . . were substantially in excess" of ordinary bank fraud and not adequately covered by more than minimal planning adjustment); *U.S. v. Pittman*, 55 F.3d 1136, 1139 (6th Cir. 1995) (§§2A1.5 and 2E1.4 do not account for multiple victims in attempted murder-for-hire scheme); *U.S. v. Haggard*, 41 F.3d 1320, 1328 (9th Cir. 1994) (three-level adjustment under §2J1.2(b)(2) did not ad-

equately account for $89,000 cost to FBI of investigating false claims, §5K2.5); *U.S. v. Rainone*, 32 F.3d 1203, 1209 (7th Cir. 1994) (RICO defendants were part of large, longstanding, very successful "organized crime" gang); *U.S. v. Cherry*, 10 F.3d 1003, 1009–10 (3d Cir. 1993) (departure by analogy to §3C1.1 warranted for fleeing to Cuba for twenty years to avoid prosecution for murder, even though offense guideline used, §2J1.6, usually precludes use of §3C1.1); *U.S. v. Anderson*, 5 F.3d 795, 804 (5th Cir. 1993) (frequency and nature of sexual abuse of kidnapping victim); *U.S. v. McAninch*, 994 F.2d 1380, 1387–89 (9th Cir. 1993) (racist motivation in committing mail fraud and threatening communications offenses) [5#14]; *U.S. v. Flinn*, 987 F.2d 1497, 1505 (10th Cir. 1993) (defendant convicted of fraudulent phonecard use falsely reported hostage situation at hotel, causing hotel property damage, §5K2.5); *U.S. v. Willey*, 985 F.2d 1342, 1349 (7th Cir. 1993) (arsonist destroyed another's business, ruined the owner's reputation, endangered lives); *U.S. v. Claymore*, 978 F.2d 421, 424–25 (8th Cir. 1992) (police officer, charged with one count of sexual abuse, forcibly raped minor several times and fathered her child); *U.S. v. Schweihs*, 971 F.2d 1302, 1316–17 (7th Cir. 1992) (using organized crimes connections in extortion offense); *U.S. v. Ponder*, 963 F.2d 1506, 1509–10 (11th Cir. 1992) (neither offense level nor §4A1.1(d) adequately accounted for possession of drugs with intent to distribute inside jail); *U.S. v. Roth*, 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, amount of theft twice upper limit in guideline) [4#4]; *U.S. v. Harotunian*, 920 F.2d 1040, 1044–45 (1st Cir. 1990) (amount embezzled far above highest amount in guideline) [3#17]; *U.S. v. Pridgen*, 898 F.2d 1003, 1004 (5th Cir. 1990) (enhancement for kidnapping during robbery, §2B3.1(b)(4), inadequately reflected seriousness of conduct and statutory penalties for kidnapping) [3#7]; *U.S. v. Lucas*, 889 F.2d 697, 700–01 (6th Cir. 1989) (robbery guideline addresses physical injury to victims but not psychological injury) [2#17]; *U.S. v. Warters*, 885 F.2d 1266, 1275 (5th Cir. 1989) (remanded: fact that misprision defendant may be guilty of underlying offense not accounted for in misprision guideline) [2#15].

Offense guideline (weapons related): *U.S. v. Leahy,* 169 F.3d 433, 443–44 (7th Cir. 1999) (possession of enough deadly toxin to kill over a hundred people not accounted for by §2K2.1, departure would be proper under §§5K2.6, 5K2.14); *U.S. v. Raimondi,* 159 F.3d 1095, 1102–03 (7th Cir. 1998) (three-level departure proper for recklessly brandishing weapon in threatening manner several times during period of heavy cocaine use because §2D1.1 did not adequately account for such conduct); *U.S. v. Arce,* 118 F.3d 335, 340–43 (5th Cir. 1997) (making videotape showing others how to construct silencer, falsely claiming he had sold weapons in response to manufacturer's notice they were about to become illegal and should be returned) [10#1]; *U.S. v. Collins*, 109 F.3d 1413, 1422 (9th Cir. 1997) (§2A2.1(b)(1)(A) did not account for defendant who "deliberately constructed a [destructive] device to inflict pain and extensive life threatening and permanent injuries or death"); *U.S. v. Hardy*, 99 F.3d 1242, 1249 (1st Cir. 1996) (for type and use of firearms, §5K2.6); *U.S. v. Hawkins*, 87 F.3d 722, 729–30 (5th Cir. 1996) (multiple victims and ten robbers with three weapons in carjacking); *U.S. v. Joshua*, 40 F.3d 948, 951–52 (8th Cir. 1994) (dangerous nature of weapon—a semiautomatic pistol—involved

in possession of firearm in school zone, §5K2.6) [7#6]; *U.S. v. Medina-Gutierrez*, 980 F.2d 980, 983–84 (5th Cir. 1992) (frequent purchases of weapons) [5#7]; *U.S. v. Nakagawa*, 924 F.2d 800, 805 (9th Cir. 1991) ("arsenal of 18 firearms, some fully automatic, elevated the factor of weapon possession in this case to an extraordinary level," §5K2.6); *U.S. v. Loveday*, 922 F.2d 1411, 1416–17 (9th Cir. 1991) (weapons possession offense did not account for dangers of homemade bomb and giving bomb to another to use) [3#18]; *U.S. v. Baker*, 914 F.2d 208, 211 (10th Cir. 1990) (use of explosives for intimidation in bank robbery; abduction at gunpoint during explosives offense) [3#14]; *U.S. v. Thomas*, 914 F.2d 139, 144 (8th Cir. 1990) (dangerous nature of fully loaded firearms in illegal possession of weapons offense) [3#14]; *U.S. v. Mahler*, 891 F.2d 75, 76–77 (4th Cir. 1989) (use of handgun replica in robbery not covered in guidelines) [2#18].

Adjustments (except obstruction): *U.S. v. Moskal,* 211 F.3d 1070, 1073–74 (8th Cir. 2000) (large number of vulnerable victims, at least thirty); *U.S. v. Melvin,* 187 F.3d 1316, 1321–22 (11th Cir. 1999) (large number of particularly vulnerable indirect victims of fraud); *U.S. v. Holmes,* 193 F.3d 200, 203–04 (3d Cir. 1999) ("extraordinary abuse of trust" beyond §3B1.3); *U.S. v. Szabo,* 176 F.3d 930, 932–33 (7th Cir. 1999) (proper to impose one level departures for each of robberies seven through nine—"more than five" offenses in §3D1.4 means six, and departure is warranted for any number above that); *U.S. v. Pitts,* 176 F.3d 239, 246–48 (4th Cir. 1999) (in affirming departure for high-ranking FBI agent who committed espionage, stating that departure for "extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland" of §3B1.3); *U.S. v. Kahn,* 175 F.3d 518, 522 (7th Cir. 1999) (multiple vulnerable victims); *U.S. v. Wells,* 163 F.3d 889, 899 (4th Cir. 1998) (for domestic terrorism occurring before §3A1.4 was amended to include it); *U.S. v. Scott,* 145 F.3d 878, 886–87 (7th Cir. 1998) (grouping under §3D1.2(b) inadequately accounted for two separate murder-for-hire schemes against same victim); *U.S. v. Trigg,* 119 F.3d 493, 502 (7th Cir. 1997) (involving family members in past and current offenses not adequately accounted for by §3B1.1(a) adjustment); *U.S. v. Wright,* 119 F.3d 390, 393 (6th Cir. 1997) (restraint of victim, §3A1.3, does not account for torture of victim); *U.S. v. Kay*, 83 F.3d 98, 102 (5th Cir. 1996) ("true insidiousness" of abuse of trust not adequately covered by §3B1.3); *U.S. v. MacLeod*, 80 F.3d 860, 865–66 (3d Cir. 1996) (calculation under §3D1.4 did not adequately account for number of child pornography victims); *U.S. v. McAninch*, 994 F.2d 1380, 1388 (9th Cir. 1993) (where victims were vulnerable to racist conduct but defendant did not have requisite state of mind for §3A1.1 adjustment) [5#14]; *U.S. v. Bartsh*, 985 F.2d 930, 934–35 (8th Cir. 1993) (abuse of trust by U.S. bankruptcy trustee embezzling funds not accounted for in §3B1.3) [5#9]; *U.S. v. Fousek*, 912 F.2d 979, 981 (8th Cir. 1990) (bankruptcy trustee embezzling estate funds) [3#13]; *U.S. v. Chase*, 894 F.2d 488, 491 (1st Cir. 1990) (multiple counts adjustment, §3D1.1–1.4, inadequate to account for fifteen robbery counts) [3#1]; *U.S. v. Crawford*, 883 F.2d 963, 966 (11th Cir. 1989) (role in

offense that "did not rise to the level of an aggravating role, as defined by guideline 3B1.1") [2#14].See also section VI.B.2.a

See also *U.S. v. Coe,* 220 F.3d 573, 579–81 (7th Cir. 2000) (departure based on policies underlying SCAMS Act, 18 U.S.C. §2326, in addition to vulnerable victim enhancement proper because they "are sufficiently distinct to avoid double-counting"); *U.S. v. Scrivener,* 189 F.3d 944, 951–53 (9th Cir. 1999) (same); *U.S. v. Brown,* 147 F.3d 477, 487–88 (6th Cir. 1998) (same) [10#5]; *U.S. v. Smith,* 133 F.3d 737, 749 (10th Cir. 1997) (same) [10#5].

b. Obstructive conduct not adequately covered under §3C1

Generally: *U.S. v. Ventura,* 146 F.3d 91, 97 (2d Cir. 1998) (departure for second obstructive act in addition to §3C1.1 increase: "Departure may be especially justified where, as here, the defendant obstructed justice more than once through wholly discrete and unrelated acts."); *U.S. v. Furkin,* 119 F.3d 1276, 1283–84 (7th Cir. 1997) (multiple and varied obstructive acts); *U.S. v. Ismoila,* 100 F.3d 380, 398 (5th Cir. 1996) (enhancement under §3C1.1 and two-level departure proper for defendant who harbored fugitive coconspirator during his trial and urged her to flee); *U.S. v. Beasley*, 90 F.3d 400, 404 (9th Cir. 1996) (violent escape attempt by attacking correctional officer and trying to grab her gun); *U.S. v. Black*, 78 F.3d 1, 5–6 (1st Cir. 1996) (attempt to hide assets to avoid restitution by defendant who had already received §3C1.1 enhancement for other obstructive conduct) [8#6]; *U.S. v. Clements,* 73 F.3d 1330, 1341–42 (5th Cir. 1996) (four-level enhancement "based . . . on a finding of at least four instances of obstruction of justice"); *U.S. v. Merino*, 44 F.3d 749, 756 (9th Cir. 1994) (repeated flights and use of aliases to avoid prosecution and extradition); *U.S. v. Wint*, 974 F.2d 961, 970–71 (8th Cir. 1992) (death threats against codefendant and family) [5#4]; *U.S. v. Baez*, 944 F.2d 88, 90 (2d Cir. 1991) (abducting and threatening to kill informant); *U.S. v. Wade*, 931 F.2d 300, 306 (5th Cir. 1991) (defendant had coconspirator threaten and shoot at person); *U.S. v. Ward*, 914 F.2d 1340, 1348 (9th Cir. 1990) (defendant's perjury at trial was "significantly more egregious than the ordinary cases of obstruction listed in . . . §3C1.1); *U.S. v. Drew*, 894 F.2d 965, 974 (8th Cir. 1990) (§3C1.1, does not adequately account for attempt to murder witness) [3#2].

Dangerous conduct while fleeing arrest: Guideline §3C1.2 (Nov. 1990) provides a two-level increase if a defendant "created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." However, Application Notes 2 and 6 provide that an upward departure may also be warranted "where a higher degree of culpability [than recklessness] was involved" or if "death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person." See, e.g., *U.S. v. Shaw*, 91 F.3d 86, 89–90 (9th Cir. 1996) (21-mile chase up to 100 m.p.h., sideswiped bus, fired at pursuing officers); *U.S. v. Beasley*, 90 F.3d 400, 403 (9th Cir. 1996) (high-speed chase at up to 100 m.p.h. with wife and four-year-old son in car); *U.S. v. Lee*, 989 F.2d 180, 182–83 (5th Cir. 1993) (§3C1.2 and §3A1.2(b) enhancements did not

preclude §5K2.6 departure where defendant led police on a high-speed chase and recklessly attempted to shoot out civilians' car tires and ignite truck's gas tank); *U.S. v. Hernandez-Rodriguez*, 975 F.2d 622, 625–27 (9th Cir. 1992) (§3C1.2 does not preclude upward departure for three-hour high-speed chase while transporting illegal aliens). But cf. *U.S. v. Torres-Lopez*, 13 F.3d 1308, 1312 (9th Cir. 1994) (remanded: defendant's flight "was only a few minutes and less than five miles long . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2") [6#10].

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

c. Drug-related factors and conduct in dismissed counts

U.S. v. Cullens, 67 F.3d 123, 125 (6th Cir. 1995) (large quantity of marijuana in simple possession offense); *U.S. v. Legarda*, 17 F.3d 496, 501–02 (1st Cir. 1994) (purity of cocaine and having children present during transaction); *U.S. v. Thomas*, 956 F.2d 165, 167 (7th Cir. 1992) (drug-house guard facilitated management of drug house, §5K2.9); *U.S. v. Martinez-Duran*, 927 F.2d 453, 456 (9th Cir. 1991) (presence at sale and actual possession of drugs in telephone offense; rev'd on other grounds); *U.S. v. Sardin*, 921 F.2d 1064, 1066 (10th Cir. 1990) (amount of drugs in offense of operating crack house; rev'd on other grounds) [3#17]; *U.S. v. Wylie*, 919 F.2d 969, 980 (5th Cir. 1990) (drug use in front of children, chief money supplier for drug buys, concealing role through intimidation and bribery) [3#18]; *U.S. v. Crawford*, 883 F.2d 963, 964–66 (11th Cir. 1989) (amount of drugs in simple possession offense) [2#14]; *U.S. v. Ryan*, 866 F.2d 604, 606–10 (3d Cir. 1989) (amount, purity, and packaging of drugs in simple possession offense) [2#1]; *U.S. v. Juarez-Ortega*, 866 F.2d 747, 748–49 (5th Cir. 1989) (possession of weapon in drug case despite acquittal on weapon charge) [2#1].

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

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

U.S. v. Myers, 66 F.3d 1364, 1375 (4th Cir. 1995) (effects of "unusually cruel and brutal" carjacking and rape); *U.S. v. Price*, 65 F.3d 903, 911–12 (11th Cir. 1995) (serious effects on targeted victims of murder-for-hire scheme, changes in lifestyles); *U.S. v. Otto*, 64 F.3d 367, 371 (8th Cir. 1995) (stalking and terrorizing ex-girlfriend over eighteen-month period); *U.S. v. Chatlin*, 51 F.3d 869, 874 (9th Cir. 1995) (minor victim's lingering fear, need for intensive counseling for post-traumatic stress disorder after repeated sexual abuse); *U.S. v. Anderson*, 5 F.3d 795, 804–05 (5th Cir. 1993) (effects of extended and brutal kidnapping and rape); *U.S. v. Miller*, 993 F.2d 16, 21 (2d Cir. 1993) ("inordinate psychological harm" to victim of threatening communications); *U.S. v. Passmore*, 984 F.2d 933, 936–37 (8th Cir. 1993) (for harm to minor induced by defendant into sexual relationship and joining his criminal schemes—although §5K2.3 by its terms only applies to victims of offense, this was unusual case); *U.S. v. Newman*, 965 F.2d 206, 209–10 (7th Cir. 1992) (serious psychological and physical harm to victim in fraud case); *U.S. v. Ellis*, 935 F.2d 385, 396 (1st Cir. 1991) (extreme pyschological harm to child victim of sexual abuse); *U.S. v. Pergola*, 930 F.2d 216, 219 (2d Cir. 1991) (repeatedly threatening ex-girlfriend) [4#2]; *U.S. v. Benskin*, 926 F.2d 562, 565–66 (6th Cir. 1991) (long duration of fraud scheme, amount of money and number of victims, emotional harm to victims) [3#20]; *U.S. v. Astorri*, 923 F.2d 1052, 1058–59 (3d Cir. 1991) (extreme psychological injury to fraud victims) [3#20]; *U.S. v. Lucas*, 889 F.2d 697, 700–01 (6th Cir. 1989) (psychological injury to robbery victims) [2#17]. Cf. *U.S. v. Nomeland*, 7 F.3d 744, 748–49 (8th Cir. 1993) (although psychological injury to bank robbery victims here would not, by itself, warrant departure, it could be taken into account "as one of a combination of aggravating factors that justified an upward departure").

See also *U.S. v. Oliver,* 118 F.3d 562, 567 (7th Cir. 1997) (rejecting defendant's argument that §5K2.3 departure was invalid because evidence provided "no base line showing a 'normal' psychological reaction to such a traumatic event with which to compare Oliver's victim's reaction. . . . [W]e have not required a comparative analysis where the evidence revealed substantial psychological damage," and Sentencing Commission "envisioned that no comparative statement be included in evidentiary submissions at sentencing.").

Injury to indirect or secondary victims may warrant departure under §5K2.3 in some circumstances. The Fourth Circuit held that "an indirect victim must have some nexus or proximity to the offense. Put simply, an individual is an indirect victim because of his relationship to the offense, not because of his relationship to the direct victim." *U.S. v. Terry,* 142 F.3d 702, 711–12 (4th Cir. 1998) (but remanding departure because indirect victims—relatives of two people killed by a reckless driver convicted of involuntary manslaughter—"had [no] relationship to the offense beyond their relationship to the direct victims") [10#5]. See also *U.S. v. Morrison,* 153 F.3d 34, 54 (2d Cir. 1998) (affirming §5K2.3 departure of fourteen offense levels based in part on injury to "secondary victims" who had direct contact with defendant, although they were not direct victims of offenses of conviction); *U.S. v. Haggard,* 41 F.3d 1320, 1327–28 (9th Cir. 1994) (where defendant deliber-

ately lied to authorities about having information on long-missing child's whereabouts and directed some comments to child's family, "family was a direct victim of [the] criminal conduct" and §5K2.3 departure was proper) [7#5]; *U.S. v. Muzingo,* 999 F.2d 361, 363 (8th Cir. 1993) (affirming departure based partly on "extreme psychological injury" to the son of the defendant and victim, §5K2.3). Cf. *U.S. v. Hoyungawa,* 930 F.2d 744, 747 (9th Cir. 1991) (remanded: "§5K2.3 applies only to direct victims of the charged offense," and does not apply to family of police officer who was killed on duty by defendant).

See also discussion in section VI.B.2.e

e. Death, physical injury, abduction, or extreme conduct, §§5K2.1, 5K2.2, 5K2.4, 5K2.8

U.S. v. Philiposian, 267 F.3d 214, 219–20 (3d Cir. 2001) (affirmed for serious permanent injury not adequately considered under §2A2.2(b)(3)(C) adjustment for any permanent injury); *U.S. v. Merrival,* 176 F.3d 1079, 1081–82 (8th Cir. 1999) (from 15–21 months to 70 months for involuntary manslaughter defendant because two deaths and three serious injuries resulted, §§5K2.1 and 5K2.2); *U.S. v. Checora,* 175 F.3d 782, 792–93 (10th Cir. 1999) (voluntary manslaughter victim "was effectively tortured because there was repeated punching, kicking, and stomping over the course of an hour," after attempting to run away he was tackled, beaten some more, dragged fifty feet to abandoned house where he had his throat slit twice and a 360-pound iron stove placed across his body, §5K2.8); *U.S. v. Paster,* 173 F.3d 206, 216–21 (3d Cir. 1999) ("unusually violent and brutal" killing of estranged wife by multiple stabbings warranted §5K2.8 departure, but remanded for reconsideration of large extent of departure); *U.S. v. Davis,* 170 F.3d 617, 623–25 (6th Cir. 1999) (unusually degrading conduct toward telemarketing victims—badgering and insulting them repeatedly—"inflicted extensive psychic injury" that warranted eight-level departure under §5K2.8); *U.S. v. Wright,* 119 F.3d 390, 393 (6th Cir. 1997) (under §§5K2.2 and 5K2.8 for torture of victim, which is not covered by §3A1.3, restraint of victim); *U.S. v. Bailey*, 112 F.3d 758, 770–73 (4th Cir. 1997) (departing under §§5K2.2, 5K2.4, 5K2.5, and 5K2.8 for defendant who, after inflicting serious injury to wife, kept her locked and bound in trunk of car for several days before seeking medical help, resulting in massive, permanently disabling injuries); *U.S. v. Sherwood*, 98 F.3d 402, 412 (9th Cir. 1996) (unusually degrading conduct toward kidnap victim, §5K2.8); *U.S. v. Hawkins*, 87 F.3d 722, 728–29 (5th Cir. 1996) (beating and shooting victims during carjacking, §5K2.8); *U.S. v. Myers*, 66 F.3d 1364, 1374–75 (4th Cir. 1995) (extreme conduct during "unusually cruel and brutal" carjacking and rape, including "gratuitous infliction of injury"); *U.S. v. Price*, 65 F.3d 903, 910–11 (11th Cir. 1995) (ordering that victim of murder-for-hire be mutilated, §5K2.8); *U.S. v. Williams*, 51 F.3d 1004, 1012 (11th Cir. 1995) (for carjacking victim accidentally killed by other victim who shot at defendant—"death or serious injury was intended or knowingly risked," §5K2.1); *U.S. v. Clark*, 45 F.3d 1247, 1252 (8th Cir. 1995) (repeatedly threatening to kill carjacking/abduction victim

before finally releasing him, §5K2.8); *U.S. v. Haggard*, 41 F.3d 1320, 1327–28 (9th Cir. 1994) (false claims of knowing identity of child's killer and location of body "was in fact unusually cruel and degrading to [child's] family") [7#5]; *U.S. v. Davis*, 30 F.3d 613, 615–16 (5th Cir. 1994) (death indirectly caused by defendant during robbery, even though unintended) [7#2]; *U.S. v. Menzer*, 29 F.3d 1223, 1235 (7th Cir. 1994) (multiple deaths and extreme violence in arson); *U.S. v. Anderson*, 5 F.3d 795, 805 (5th Cir. 1993) (unusually heinous and degrading conduct during two-day kidnapping and rape); *U.S. v. Roston*, 986 F.2d 1287, 1293 (9th Cir. 1993) (defendant convicted of second-degree murder beat victim, choked her into unconsciousness, and threw her into sea, §5K2.8); *U.S. v. Yankton*, 986 F.2d 1225, 1229–30 (8th Cir. 1993) (pregnancy resulting from rape not accounted for as "serious bodily injury" under §2A3.1(b)(4), may warrant departure) [5#10]; *U.S. v. White*, 979 F.2d 539, 544–45 (7th Cir. 1992) (death of victim defendant transported for prostitution—finding that defendant "knowingly risked his victim's death" sufficient for §5K2.1); *U.S. v. Billingsley*, 978 F.2d 861, 866–67 (5th Cir. 1992) (defendant killed victim and stole victim's treasury check, §5K2.1; enhancement for risk of serious bodily injury, §2F1.1(4), did not preclude departure); *U.S. v. Newman*, 965 F.2d 206, 209–10 (7th Cir. 1992) (serious psychological and physical harm to victim in fraud case, §§5K2.2, 5K2.3); *U.S. v. Uccio*, 940 F.2d 753, 759–60 (2d Cir. 1991) (kidnapping and assault of coconspirator—§5K2.4 not limited to innocent bystanders or victims) [4#10]; *U.S. v. Gomez*, 901 F.2d 728, 729 (9th Cir. 1990) (dangerous and inhumane treatment of illegal aliens being transported) [3#7]; *U.S. v. Velasquez-Mercado*, 872 F.2d 632, 637–38 (5th Cir. 1989) (molested female illegal aliens being transported) [2#6]. Cf. *U.S. v. Rivalta*, 892 F.2d 223, 231–33 (2d Cir. 1989) ("death of victim," §5K2.1, requires explicit finding) [2#20].

The Seventh Circuit concluded that an upward departure under §5K2.1 may be based on a death "resulting from relevant conduct as opposed to conduct comprising the offense of conviction." Section 5K2.1 "allows a departure 'if death resulted,' without any reference to whether the death resulted from the offense of conviction or from relevant conduct." The court affirmed a departure based on the death of a drug courier making a trip that was related to, but not part of, the conspiracy offense of conviction. *U.S. v. Purchess*, 107 F.3d 1261, 1271 (7th Cir. 1997). See also *U.S. v. Muzingo*, 999 F.2d 361, 363 (8th Cir. 1993) (affirming departure under §§5K2.2, 5K2.3, and 5K2.8 for conduct that was punished by state sentence but related to federal offenses of conviction); *U.S. v. Sanders*, 982 F.2d 4, 9–10 (1st Cir. 1992) (same, for physical injury departure under §5K2.2).

The Fourth Circuit held that "an upward departure under §5K2.1, p.s. is permitted even when the decedent was an active participant in the activity that resulted in his death." Thus, although it remanded for reconsideration of the extent, the court affirmed a departure based on the death of one driver who died in a crash after engaging in a lengthy reckless driving duel with the defendant driver. *U.S. v. Terry*, 142 F.3d 702, 708 (4th Cir. 1998).

Note that it has been held that departure for extreme conduct may be warranted even if the victim was dead or unconscious during the conduct. The section "fo-

cuses on the defendant's conduct, not the characteristics of the victim." *U.S. v. Quintero,* 21 F.3d 885, 893–94 (9th Cir. 1994) (affirming departure was authorized for acts that occurred after child had died). Accord *U.S. v. Hanson,* 264 F.3d 988, 998–99 (10th Cir. 2001) (remanded: district court should have considered departure for extreme conduct even though victim was no longer alive when defendant committed acts in question).

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

U.S. v. Regueiro, 240 F.3d 1321, 1324–25 (11th Cir. 2001) (large-scale Medicaid fraud); *U.S. v. Velez*, 113 F.3d 1035, 1039 (9th Cir. 1997) (filing large number of false immigration applications to disrupt INS policing process); *U.S. v. Baird*, 109 F.3d 856, 871 (3d Cir. 1997) (police officer whose participation in large-scale police misconduct forced city to reopen "innumerable criminal cases, . . . set aside more than one hundred and fifty . . . convictions," and left city open to civil lawsuits seeking millions of dollars in damages); *U.S. v. Khan*, 53 F.3d 507, 518 (2d Cir. 1995) (large-scale Medicaid fraud); *U.S. v. Heckman*, 30 F.3d 738, 743 (6th Cir. 1994) ("substantial disruption" to IRS by false tax filings); *U.S. v. Root*, 12 F.3d 1116, 1120–21 (D.C. Cir. 1994) (fraud connected with radio licenses at FCC); *U.S. v. Flinn*, 987 F.2d 1497, 1505 (10th Cir. 1993) (defendant convicted of fraudulent phone-card use falsely reported hostage situation at hotel, causing SWAT team to be dispatched); *U.S. v. Sarault*, 975 F.2d 17, 19–21 (1st Cir. 1992) (extortionate acts disrupted city's public works bidding process); *U.S. v. Kramer*, 943 F.2d 1543, 1550 (11th Cir. 1991) (attempted prison escape causing helicopter crash, delayed airlift of prisoners, lockdown of prison, and extra prisoner count); *U.S. v. Roth*, 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, caused military morale to deteriorate by selling stolen military equipment) [4#4]; *U.S. v. Hatch*, 926 F.2d 387, 397 (5th Cir. 1991) (fraudulent payments depleting sheriff's operating budget causing disruption in services); *U.S. v. Pulley*, 922 F.2d 1283, 1289 (6th Cir. 1991) (disruption of governmental function by persuading others to commit perjury and codefendant to retract confession) [3#19]; *U.S. v. Murillo*, 902 F.2d 1169, 1174 (5th Cir. 1990) (disruption of governmental function by helping illegal aliens fraudulently apply for amnesty program) [3#8]; *U.S. v. Garcia*, 900 F.2d 45, 48–49 (5th Cir. 1990) (large-scale mail theft by government employee).

The Eleventh Circuit held that causing a loss of confidence in the judicial system can warrant departure under §5K2.7. Affirming a departure for a magistrate who embezzled funds from a county court system, the court reasoned that courts "cannot operate effectively without the respect of the people. If the people do not respect the judiciary, the people will disobey its edicts and flout its commands. . . . Court personnel who cause people to question the integrity and impartiality of the judiciary therefore undermine the rule of law and disrupt the functioning of the courts. . . . The district court did not abuse its discretion in concluding that guideline section 5K2.7 encompasses this loss of confidence in government." *U.S. v. Gunby*, 112 F.3d 1493, 1502–03 (11th Cir. 1997).

The Fifth Circuit rejected a defendant's claim that, although her submission to a state agency of a false application for a video poker license renewal may have disrupted a government function, it did so "in an 'ordinary' sense" not meriting departure. "The appropriateness of a departure turns on the importance of the government function impacted, not the degree of the impact." Her application "thwarted Louisiana's video poker regulatory and licensing scheme designed to investigate the honesty and integrity of prospective license holders. Based upon the importance of that regulatory scheme, we find that the district court did not abuse its discretion in imposing a section 5K2.7 upward departure." *U.S. v. Bankston,* 182 F.3d 296, 316 (5th Cir. 1999).

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

U.S. v. Leahy, 169 F.3d 433, 443–44 (7th Cir. 1999) (possession of enough deadly toxin to kill over a hundred people); *U.S. v. Brown*, 9 F.3d 907, 912–13 (11th Cir. 1993) (illegal possession of weapon by §4B1.4 armed career criminal); *U.S. v. Hicks*, 996 F.2d 594, 598–99 (9th Cir. 1993) (series of "terroristic" attacks on IRS, "potential destructiveness" of bombings); *U.S. v. Dempsey*, 957 F.2d 831, 834 (11th Cir. 1992) (homemade pipe bombs and hand grenade posed significant public safety risk, §5K2.14); *U.S. v. Johnson*, 952 F.2d 565, 583–84 (1st Cir. 1991) ("cool, deliberative, calculated" conversations about terrorist weapons, §5K2.8; endangering public welfare, §5K2.14; and "planning and sophistication," "multiple occurrences," and threat to national security in relation to arms exporting, §§2M5.2, 5K2.0); *U.S. v. Roth*, 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, danger to national security, §5K2.14) [4#4]; *U.S. v. Kikumura*, 918 F.2d 1084, 1114–15 (3d Cir. 1990) (terrorism) [3#15]; *U.S. v. Carpenter*, 914 F.2d 1131, 1135 (9th Cir. 1990) (giving weapon to juveniles, risk to others) [3#13]; *U.S. v. Schular*, 907 F.2d 294, 298 (2d Cir. 1990) (knowingly selling illegal firearms to drug traffickers and other criminals, risk to public safety under §5K2.14). Cf. *U.S. v. Moses*, 106 F.3d 1273, 1277–81 (6th Cir. 1997) (departure for defendant's potential future dangerousness due to mental illness improper—under §5K2.14, court must "look at the offense committed and the dangerousness of the defendant at the time of the crime, not the future dangerousness of the defendant") [9#5].

Note: A Nov. 1995 amendment deleted §5K2.15 and replaced it with new §3A1.4, which provides offense level and criminal history category increases for "a felony that involved, or was intended to promote, international terrorism."

h. Failure to return proceeds of crime

U.S. v. Merritt, 988 F.2d 1298, 1310–11 (2d Cir. 1993) (defendant's "elaborate fraudulent manipulation . . . designed to preserve the huge benefits of his crime after service of jail time," which went beyond simple failure to pay restitution and concealment of assets) [5#10]; *U.S. v. Bryser*, 954 F.2d 79, 89–90 (2d Cir. 1992) (departure

may be appropriate for failure to return stolen money, but court must find defendants still controlled money); *U.S. v. Valle*, 929 F.2d 629, 631–32 (11th Cir. 1991) (refusal to return almost $17 million from robbery) [4#3]. But cf. *U.S. v. Bennett*, 252 F.3d 559, 563–65 (2d Cir. 2001) (error to base departure on defendant's wife's refusal to surrender properties and insistence on challenging forfeiture, at least absent evidence that defendant was actually controlling her actions; such a departure should be limited "to a defendant's own egregious conduct in concealing the proceeds of his crimes, leaving the Government free to use its ample resources to obtain forfeitable property held by others").

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

i. Specific offender characteristics, §5H1

U.S. v. Hines, 26 F.3d 1469, 1477–78 (9th Cir. 1994) (under §§5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state" and resulting "significant likelihood he will commit additional serious crimes") [6#17]; *U.S. v. Richison*, 901 F.2d 778, 781 (9th Cir. 1990) (remanded: alcohol and drug abuse only if "extraordinary," §5H1.4) [3#8]; *U.S. v. Guarin*, 898 F.2d 1120, 1122–23 (6th Cir. 1990) (extent of cocaine dealing and dependence on it for livelihood, §5H1.9) [3#5]. But cf. *U.S. v. Moses*, 106 F.3d 1273, 1277–81 (6th Cir. 1997) (disagreeing with *Hines* and remanding departure based on potential future dangerousness based on defendant's mental illness) [9#5].

j. Immigration offenses

(Note that §2L1.1 was amended Nov. 1, 1992, to account for offenses involving large numbers of aliens. Application Note 5 states that upward departure may be warranted if the offense "involved dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or substantially more than 100 aliens.")

U.S. v. Fan, 36 F.3d 240, 245–46 (2d Cir. 1994) (inhumane and dangerous conditions in smuggling 150 aliens on fishing vessel ill-equipped for passengers; also, likelihood that, had scheme succeeded, illegal aliens would have been subject to "involuntary servitude" to pay off debts to smugglers) [7#3]; *U.S. v. Trinidad-Lopez*, 979 F.2d 249, 253 (1st Cir. 1992) (transporting 104 aliens without food, life jackets, or navigation equipment in wooden boat designed for 15 passengers); *U.S. v. Cruz-Ventura*, 979 F.2d 146, 147 (9th Cir. 1992) (dangerous high-speed chase with four aliens locked in trunk); *U.S. v. Huang*, 977 F.2d 540, 544 (11th Cir. 1992) (smuggled

approximately 100 aliens); *U.S. v. Lara*, 975 F.2d 1120, 1124–27 (5th Cir. 1992) (extortionate behavior toward illegal aliens, inhumane treatment, use of firearm); *U.S. v. Hernandez-Rodriguez*, 975 F.2d 622, 625–27 (9th Cir. 1992) (§3C1.2 does not preclude upward departure for three-hour high-speed chase while transporting illegal aliens); *U.S. v. Martinez-Gonzalez*, 962 F.2d 874, 876 (9th Cir. 1992) (smuggled large number of aliens, §2L1.1); *U.S. v. Murillo*, 902 F.2d 1169, 1174 (5th Cir. 1990) (disruption of governmental function, §5K2.7, by helping illegal aliens fraudulently apply for amnesty program) [3#8]; *U.S. v. Gomez*, 901 F.2d 728, 729 (9th Cir. 1990) (dangerous and inhumane treatment of illegal aliens being transported) [3#7]; *U.S. v. Lopez-Escobar*, 884 F.2d 170, 173 (5th Cir. 1989) (unusually large number of aliens in illegal immigration offense) [2#13]; *U.S. v. Rodriguez*, 882 F.2d 1059, 1067–68 (6th Cir. 1989) (illegal entry into United States while serving foreign sentence, dependence on criminal activity) [2#12]; *U.S. v. Velasquez-Mercado*, 872 F.2d 632, 637–38 (5th Cir. 1989) (transported unusually large number of illegal aliens, molested female passengers) [2#6].

But cf. *U.S. v. Torres-Lopez*, 13 F.3d 1308, 1312 (9th Cir. 1994) (remanded: flight from arrest by defendant transporting illegal aliens "was only a few minutes and less than five miles long, . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2," and defendant did not otherwise treat alien passengers in dangerous or inhumane manner so as to warrant departure under §2L1.1, comment. (n.5)—"In sum, there is nothing here, aside from the bare presence of illegal aliens, to suggest that Torres-Lopez's flight from authority was in any way extraordinary") [6#10].

k. Influencing family members to commit crimes

U.S. v. Trigg, 119 F.3d 493, 502 (7th Cir. 1997) (involving family members in past and current offenses not accounted for by §4A1.3 or by leadership adjustment under §3B1.1); *U.S. v. Jagim*, 978 F.2d 1032, 1042 (8th Cir. 1992) (partly for influencing nephew to join tax fraud conspriracy); *U.S. v. Ledesma*, 979 F.2d 816, 822 (11th Cir. 1992) (upward departure or abuse of position of trust enhancement proper for parent who involved adult daughter in drug trade); *U.S. v. Porter*, 924 F.2d 395, 399 (1st Cir. 1991) (defendant urged son to rob bank); *U.S. v. Christopher*, 923 F.2d 1545, 1556 (11th Cir. 1991) (drug dealer involved own children in drug offenses); *U.S. v. Shuman*, 902 F.2d 873, 875–76 (11th Cir. 1990) (defendant's drug trafficking business allowed son easy access to drugs and caused his drug dependency) [3#8]. Cf. *U.S. v. Legarda*, 17 F.3d 496, 502 (1st Cir. 1994) (affirmed for defendant who involved his children by having them present during drug transaction). But cf. *U.S. v. Monaco*, 23 F.3d 793, 800–01 (3d Cir. 1994) (small downward departure was appropriate for defendant's extreme anguish and remorse at having involved his otherwise law-abiding son in fraud offense) [6#13].

l. Other appropriate upward departures

U.S. v. Philiposian, 267 F.3d 214, 217–18 (3d Cir. 2001) (affirming two-level upward departure under §5K2.17 for use of high-capacity semi-automatic weapon, even though defendant only fired two shots, rejecting argument that high-capacity nature of weapon must increase likelihood of death or injury); *U.S. v. Martin,* 195 F.3d 1018, 1019–20 (8th Cir. 1999) (departure appropriate for defendant convicted of illegal weapon possession who had duct tape, handcuffs, box of ammunition, and list of names and addresses in his car and who had been arrested under similarly threatening circumstances several years earlier); *U.S. v. Arce,* 118 F.3d 335, 340–43 (5th Cir. 1997) (making videotape showing others how to construct silencer, falsely claiming he had sold weapons in response to manufacturer's notice they were about to become illegal and should be returned; although such actions were not illegal, "a district court can consider conduct that is not itself criminal . . . in determining whether an upward departure is warranted") [10#1]; *U.S. v. Hardy*, 99 F.3d 1242, 1251–52 (1st Cir. 1996) ("three 'unusual' offense-related characteristics cumulatively adequate" for departure in weapons possession case, namely "gang members indiscriminately shooting and discarding particularly dangerous firearms in crowded inner-city residential areas"); *U.S. v. Hines*, 26 F.3d 1469, 1477–78 (9th Cir. 1994) (defendant's "extremely dangerous mental state" and resulting "significant likelihood he will commit additional serious crimes," §§5K2.0 and 4A1.3) [6#17]; *U.S. v. Merritt*, 988 F.2d 1298, 1305–11 (2d Cir. 1993) (defendant's "profound corruption and dishonesty," combined with other factors) [5#10]; *U.S. v. Barnes*, 910 F.2d 1342, 1345 (6th Cir. 1990) (guideline sentence would be less than that received for prior conviction for same offense) [3#12]; *U.S. v. Reeves*, 892 F.2d 1223, 1229 (5th Cir. 1990) (intended bribe to be much larger than amount actually paid) [3#2].

2. Upward Departure Not Warranted

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

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

Offense level: *U.S. v. Velez,* 168 F.3d 1135, 1141 (9th Cir. 1999) (by specifying increase for 100 or more falsified immigration documents, §2L2.1(b)(2) precludes departure based on large number of documents); *U.S. v. Corrigan,* 128 F.3d 330, 334–36 (6th Cir. 1997) (amount of loss, number of victims, number of fraudulent schemes are accounted for in §2F1.1); *U.S. v. Stein,* 127 F.3d 777, 780 (9th Cir. 1997) (combination of more than minimal planning and multiple victims accounted for in §2F1.1(b)(2)); *U.S. v. Price*, 65 F.3d 903, 911 (11th Cir. 1995) (risk to innocent bystanders accounted for in §2K1.4, property damage by explosives); *U.S. v. Thomas*, 62 F.3d 1332, 1346–47 (11th Cir. 1995) (consequential damages of fraud

adequately considered in §2F1.1 so §5K2.5 does not apply); *U.S. v. Cherry*, 10 F.3d 1003, 1012 (3d Cir. 1993) (§5K2.9 not applicable because unlawful flight was committed to avoid prosecution, not conceal murder; also, underlying crime accounted for by §2J1.6(b)(1) adjustment); *U.S. v. Kelly*, 1 F.3d 1137, 1141 (10th Cir. 1993) (premeditation cannot support departure on second-degree murder conviction); *U.S. v. Roston*, 986 F.2d 1287, 1293 (9th Cir. 1993) (§5K2.1 not applicable to defendant convicted of second-degree murder); *U.S. v. Medina-Gutierrez*, 980 F.2d 980, 983 (5th Cir. 1992) (using §5K2.6, for transportation of firearms offense) [5#7]; *U.S. v. Riviere*, 924 F.2d 1289, 1307–09 (3d Cir. 1991) (disruption in marshal's duties inherent in offense of assaulting federal marshal); *U.S. v. Kikumura*, 918 F.2d 1084, 1116 (3d Cir. 1990) (§5K2.7 not applicable to attempt to influence American anti-terrorist policies by bombing federal building); *U.S. v. Singleton*, 917 F.2d 411, 414 (9th Cir. 1990) (same, for fleeing arrest and causing police to search for defendant twice); *U.S. v. Barone*, 913 F.2d 46, 51 (2d Cir. 1990) (same—disruption of government inherent in perjury conviction); *U.S. v. Colon*, 905 F.2d 580, 586–87 (2d Cir. 1990) (for drugs in relevant conduct—must be used to calculate base offense level instead) [3#8]; *U.S. v. McDowell*, 902 F.2d 451, 453–54 (6th Cir. 1990) (dangers of crack house; conduct in dismissed count was relevant conduct so use in offense level) [3#6]; *U.S. v. Chiarelli*, 898 F.2d 373, 381 (3d Cir. 1990) ("magnitude of the thievery" accounted for in offense guideline) [3#5]; *U.S. v. Uca*, 867 F.2d 783, 787–90 (3d Cir. 1989) (number of guns, traceability, unlawful purpose) [2#1].

Adjustments: *U.S. v. Valentine*, 100 F.3d 1209, 1211–13 (6th Cir. 1996) ("we conclude, as a matter of law, that 7 units are not "significantly more than 5," so as to permit departure" under §3D1.4, comment. (backg'd)); *U.S. v. Torres-Lopez*, 13 F.3d 1308, 1312 (9th Cir. 1994) (flight from arrest that "was only a few minutes and less than five miles long [and] was not unusually fast or reckless" was "within the boundaries of 3C1.2") [6#10]; *U.S. v. Cherry*, 10 F.3d 1003, 1010–11 (3d Cir. 1993) ("victim" of unlawful flight offense was government, which does not warrant §3A1.2 increase—may not use official victims of underlying offense for departure by analogy to §3A1.2); *U.S. v. Eagan*, 965 F.2d 887, 892–93 (10th Cir. 1992) ("special skill" included in §3B1.3 enhancement; amount of precursor drugs already used in setting base offense level); *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1081–82 (9th Cir. 1990) (bank robber part of organized group—implicitly accounted for in §3B1) [3#13]; *U.S. v. Cox*, 921 F.2d 772, 774 (8th Cir. 1990) (escape charge merged into bank robbery sentence—multiple convictions accounted for in §3D1) [3#17]; *U.S. v. Zamarippa*, 905 F.2d 337, 340–41 (10th Cir. 1990) (abuse of trust enhancement should be applied to baby-sitter who sexually abused children); *U.S. v. Miller*, 903 F.2d 341, 350–51 (5th Cir. 1990) (several convictions consolidated for sentencing under §§3D1.4 and 5G1.3) [3#8].

Otherwise considered in formulating the guidelines: *U.S. v. Hanson,* 264 F.3d 988, 997 (10th Cir. 2001) (cannot depart for murder in facilitation of robbery when defendant convicted of second-degree murder); *U.S. v. Wong,* 127 F.3d 725, 728 (8th Cir. 1997) (cost of lengthy sentence of imprisonment); *U.S. v. White,* 118 F.3d 739, 742 (11th Cir. 1997) (concerns expressed by Congress in Senior Citizens Against

Marketing Scams Act of 1994, 18 U.S.C. §2326); *U.S. v. Bristow*, 110 F.3d 754, 758 (11th Cir. 1997) (§5K2.12 precludes departure on basis of economic hardship for illegal possession of weapon); *U.S. v. Gray*, 982 F.2d 1020, 1023–24 (6th Cir. 1993) (greed and danger to society from drug distribution) [5#9]; *U.S. v. Klotz*, 943 F.2d 707, 710 (7th Cir. 1991) (refusal to assist authorities—§5K1.2 precludes departure but judge may consider failure to assist when selecting sentence within guideline range); *U.S. v. Enriquez-Munoz*, 906 F.2d 1356, 1359–62 (9th Cir. 1990) (to equalize sentence with codefendant's; for type and number of weapons; greed) [3#9]; *U.S. v. Hawkins*, 901 F.2d 863, 864–66 (10th Cir. 1990) (false claim of weapon; threat to harm bank teller) [3#7]; *U.S. v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990) (immigration defendant's anticipated deportation) [3#1]; *U.S. v. Coe*, 891 F.2d 405, 409–11 (2d Cir. 1989) (short time span in which robberies were committed; false claim to have weapon) [2#18]; *U.S. v. Missick*, 875 F.2d 1294, 1301–02 (7th Cir. 1989) (for weapon possessed by others when defendant not present or charged as coconspirator) [2#9].

b. Charges dismissed or not brought

U.S. v. Cross, 121 F.3d 234, 239–40 (6th Cir. 1997) (uncharged conduct was not sufficiently related to offense of conviction to be considered as relevant conduct for departure purposes) [10#2]; *U.S. v. Thomas*, 961 F.2d 1110, 1122 (3d Cir. 1992) (defendant could have been charged with more serious crime) [4#25]; *U.S. v. Faulkner*, 952 F.2d 1066, 1069–70 (9th Cir. 1991) (charges dismissed and not brought as part of plea agreement) (amending 934 F.2d 190) [4#8]; *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1081 (9th Cir. 1990) (charges dismissed under plea agreement). See also *U.S. v. Robinson*, 898 F.2d 1111, 1117–18 (6th Cir. 1990) (incriminating information provided during plea negotiations and prohibited by §1B1.8) [3#4].

c. Mental health status or chemical addictions

U.S. v. Moses, 106 F.3d 1273, 1277–81 (6th Cir. 1997) (future potential dangerousness due to mental illness) [9#5]; *U.S. v. Fonner*, 920 F.2d 1330, 1334 (7th Cir. 1991) (mental health, §5H1.3) [3#19]; *U.S. v. Doering*, 909 F.2d 392, 395 (9th Cir. 1990) (need for psychiatric treatment, §§5H1.3, and 5K2.13) [3#11]; *U.S. v. Miller*, 903 F.2d 341, 350–51 (5th Cir. 1990) (alcohol dependency, §5H1.4) [3#8]; *Hawkins*, 901 F.2d at 864–66 (drug addiction) [3#7]; *U.S. v. Lopez*, 875 F.2d 1124, 1126–27 (5th Cir. 1989) (drug addiction) [2#8].

d. Community sentiment/local conditions

U.S. v. Barbontin, 907 F.2d 1494, 1498–99 (5th Cir. 1990) (local community's intolerance toward drug trafficking); *U.S. v. Thomas*, 906 F.2d 323, 327 (7th Cir. 1990) (degree of violence in community); *U.S. v. Aguilar-Pena*, 887 F.2d 347, 351–53 (1st Cir. 1989) ("community sentiment" against drug trafficking, local airport's inadequate security) [2#15]. See also *U.S. v. Hadaway*, 998 F.2d 917, 920–21 (11th Cir.

1993) (in context of downward departure, agreeing with *Barbontin* and *Aguilar-Pena* that "departures based on 'community standards' are not permitted") [6#4].

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

U.S. v. Pelkey, 29 F.3d 11, 15–16 (1st Cir. 1994) (fraud victims' "feelings of lack of trust, frustration, shock, and depression" were not "so far beyond the heartland of fraud offenses as to constitute psychological harm" under §5K2.3 or §2F1.1, comment. (n.10(c))); *U.S. v. Mandel*, 991 F.2d 55, 58–59 (2d Cir. 1993) (factual findings of harm insufficient); *U.S. v. Lara*, 975 F.2d 1120, 1128 (5th Cir. 1992) (same); *U.S. v. Fawbush*, 946 F.2d 584, 586 (8th Cir. 1991) (harm to victim was not "much more serious" than that normally resulting from offense); *U.S. v. Morin*, 935 F.2d 143, 144–45 (8th Cir. 1991) (same); *U.S. v. Zamarripa*, 905 F.2d 337, 340–41 (10th Cir. 1990) (same); *U.S. v. Hoyungawa*, 930 F.2d 744, 747 (9th Cir. 1991) (for extreme psychological injury to family of murder victim—§5K2.3 applies only to direct victims of offense) [4#2].

The Tenth Circuit stated that "[b]oth the text of §5K2.3 and logic mandate that before a sentencing court may depart upwards under this section, there must be some evidence of: (1) the nature of the injury actually suffered by the victims in this case, *and* (2) the psychological injury 'normally resulting from the commission of the offense.' U.S.S.G. 5K2.3 p.s. These requirements flow from the fact that in enacting §5K2.3, the Commission did not authorize sentencing courts to depart upwards for *any* psychological injury to the victim, but rather, only allowed a departure based on a finding of 'extreme' psychological injury. Thus, there must be some evidence of both of these elements in order to enable the sentencing court to determine whether the injury actually suffered is sufficiently serious, relative to the normal injury incurred, to warrant a departure." *U.S. v. Okane*, 52 F.3d 828, 835–36 (10th Cir. 1995) (remanded: "record is devoid of any findings as to the normal level of injury that results from" armed bank robbery and "district court's finding that the victims suffered 'extreme' psychological injury is unsupported by the record").

The Third Circuit reached a similar conclusion in remanding a departure for more specific findings. Although the district court, using language from the second part of §5K2.3, found that the victim suffered "'a substantial impairment of her psychological emotional function,' that this 'impairment will be of an extended and continuous duration,' and that this 'impairment manifests itself by physical or psychological symptoms or changes in behavioral pattern' (i.e., anxiety, depression, sleeplessness)," it did not find "that the victim's psychological injury was 'much more serious than that normally resulting from the commission' of the crime of aggravated assault. Nor is such a finding compelled by the current record. Such a finding is a prerequisite for a departure under §5K2.3." *U.S. v. Jacobs,* 167 F.3d 792, 799–801 (3d Cir. 1999) (remanded: also holding that, in setting the extent of departure under §5K2.3, court should analogize to other guidelines when possible, and suggesting use of §2A2.2(b)(3) here).

f. Other circumstances not meeting upward departure criteria

U.S. v. Cross, 121 F.3d 234, 239–40 (6th Cir. 1997) (uncharged torture incident was not sufficiently related to offense of conviction to be considered as relevant conduct for departure under §§5K2.2 and 5K2.8) [10#2]; *U.S. v. Harrington,* 82 F.3d 83, 87–89 (5th Cir. 1996) (without more, defendant's status as attorney and finding that his "actions perverted the system"); *U.S. v. Zamora,* 37 F.3d 531, 533–34 (9th Cir. 1994) ("danger of violence associated with a fraudulent drug sale" already accounted for in conviction for possessing firearm during drug trafficking offense and should not also be reflected in sentence on drug distribution charge) [7#4]; *U.S. v. Schweitzer,* 5 F.3d 44, 48 (3d Cir. 1993) (media interviews and appearing on "The Oprah Winfrey Show," calling attention to how easy it was to obtain confidential information from government) [6#5]; *U.S. v. Ferra,* 900 F.2d 1057, 1061 (7th Cir. 1990) (fact that fencing operation involved drugs and stolen weapons should be taken into account in relevant conduct) [3#7]; *U.S. v. Rivalta,* 892 F.2d 223, 231–33 (2d Cir. 1989) ("death of victim," §5K2.1, requires explicit finding) [2#20]; *U.S. v. Hernandez-Vasquez,* 884 F.2d 1314, 1316 (9th Cir. 1989) (high-speed chase where defendant was not driver) [2#13]; *U.S. v. Rodriguez,* 882 F.2d 1059, 1066 (6th Cir. 1989) (affirmed: national origin, inability to speak English improper grounds, but other grounds provided sufficient basis for departure) [2#12]; *U.S. v. Lopez,* 875 F.2d 1124, 1126–27 (5th Cir. 1989) (sentencing court's opinion that guideline is "weak and ineffectual" for the offense) [2#8].

C. Mitigating Circumstances

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

See also the discussion of *Koon v. U.S.*, 116 S. Ct. 2035, 2051 (1996) [8#7], in sections VI.C.3 and X.A.1.

1. Personal Circumstances

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

When downward departure permissible: The majority of the circuits have held that a downward departure based on defendant's family ties and responsibilities and community ties may be proper, but only in "extraordinary" circumstances. The First Circuit stated that it may not be unusual, for example, for a drug offender to be a single mother with family responsibilities, "but at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the 'ordinary' case . . . into a case that is

not at all ordinary." *U.S. v. Rivera,* 994 F.2d 942, 948 (1st Cir. 1993) (remanded) [5#14]. See also *U.S. v. Galante,* 111 F.3d 1029, 1033–37 (2d Cir. 1997) (using *Rivera* analysis, as adopted by *Koon*, to affirm family circumstances departure); *U.S. v. Dyce,* 91 F.3d 1462, 1466 (D.C. Cir. 1996) (citing *Rivera* approvingly and holding that "district court's determination that extraordinary family circumstances exist will be entitled to considerable respect on appeal," but also concluding that "departures on such a basis should be rare"). Note that under the *Koon* analysis, departure for family or community ties and "prior good works" are "discouraged" because the Guidelines deem those factors are "not ordinarily relevant" to the decision whether to depart.

The Seventh Circuit noted that the case law has "generally indicated that the disintegration of existing family life or relationships is insufficient to warrant a departure, as that is to be expected when a family member engages in criminal activity that results in a period of incarceration. . . . To warrant a departure, therefore, the courts have required a showing that the period of incarceration set by the Guidelines would have an effect on the family or family members beyond the disruption to family and parental relationships that would be present in the usual case." *U.S. v. Canoy,* 38 F.3d 893, 907 (7th Cir. 1994) (remanding for clearer explanation of why departure warranted) [7#4]. Previously, the Seventh Circuit had rejected family responsibilities as a ground for departure and held such responsibilities may only be considered when probation or determination of a fine or restitution is at issue. *U.S. v. Thomas,* 930 F.2d 526, 529–30 (7th Cir. 1991) (remanded: sole parent of three mentally disabled adult children and custodian of four-year-old grandson should not receive departure) [4#1]. See also *U.S. v. Sweeting,* 213 F.3d 95, 99–112 (3d Cir. 2000) (in vacating §5H1.6 departure, extensive discussion of case law).

After *Koon*, however, some circuits, including the Seventh, have noted that whether departure for extraordinary family circumstances is warranted "is largely for the district court to answer" and its decision is entitled to considerable deference on appeal. Examining the specific circumstances of an individual defendant's family situation shows the "difficulty, if not impossibility, of conducting a systematic weighing of such detailed facts at the appellate level[, which] is the reason district courts are granted such broad discretion in making the determination. . . . [T]he district court has the qualifications for making the departure decision in the greatest measure, and the appellate court should not lightly supplant the judgment." *U.S. v. Gauvin,* 173 F.3d 798, 807–09 (10th Cir. 1999) (affirming extraordinary family circumstances departure of three offense levels for defendant who had four children and wife who depended on him and family would face severe financial and other problems without defendant). See also *U.S. v. Owens,* 145 F.3d 923, 928 (7th Cir. 1998) ("a district court judge may have a better feel for what is or is not unusual or extraordinary and that when a district court clearly explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal").

Some circuits have held that, for extraordinary family circumstances, there must be something unique or irreplaceable about the defendant's contribution to or po-

sition in the family in order to warrant departure. See, e.g., *U.S. v. Pereira,* 272 F.3d 76, 81–83 (1st Cir. 2001) (remanded: to warrant §5H1.6 departure, "the case law requires a showing that the defendant is irreplaceable before his circumstances are considered extraordinary," and here there was ample evidence others could care for defendant's parents) [11#5]; *Sweeting,* 213 F.3d at 105 (in vacating §5H1.6 departure based partly on defendant's care of a son with Tourette's Syndrome, stating "there simply is nothing about the type of care that he requires that suggests to us that it is so unique or burdensome that another responsible adult could not provide the necessary supervision and assistance in Sweeting's absence") [11#5]; *U.S. v. Faria,* 161 F.3d 761, 762 (2d Cir. 1998) (remanded: departure for extraordinary family circumstances under §5H1.6 is only warranted where "the family [is] uniquely dependent on the defendant's ability to maintain existing financial and emotional commitments"). Cf. *U.S. v. Dominguez,* 296 F.3d 192, 195–200 (3d Cir. 2002) (remanded: distinguishing *Sweeting* in holding that district court could have departed for defendant whose elderly and infirm parents "were physically and financially dependent upon her" and there was "no [other] family member who could help and there are no funds to employ outside assistance").

Along these lines, some circuits have held that departure may be warranted for a defendant who plays a crucial role in the care of someone with severe mental or emotional problems. See, e.g., *U.S. v. Haversat*, 22 F.3d 790, 797–98 (8th Cir. 1994) (remanded: proper to depart downward for "truly exceptional family circumstances"—defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening," and his presence was crucial to her treatment; however, court abused its discretion by imposing only a fine and declining to impose any kind of confinement or probation, including intermittent confinement or home detention) [6#14]; *U.S. v. Sclamo*, 997 F.2d 970, 973–74 (1st Cir. 1993) (defendant's special relationship with young boy, who had psychological and behavioral problems and "would risk regression and harm if defendant were incarcerated") [6#2]; *U.S. v. Gaskill*, 991 F.2d 82, 84–86 (3d Cir. 1993) (remanded: district court may consider departure for defendant who is sole caretaker of seriously mentally ill wife and other factors indicated benefits of noncustodial sentence and lack of any threat to community) [5#12]. The Sixth Circuit noted that an important factor in this type of departure is that "a defendant *personally* is required to take care of a seriously ill spouse or family member." The court remanded a departure for specific findings on defendant's involvement with the care of his ill wife and whether she had other sources of assistance. *U.S. v. Tocco,* 200 F.3d 401, 435–36 (6th Cir. 2000). Cf. *U.S. v. Wright,* 218 F.3d 812, 815–16 (7th Cir. 2000) (in finding that departure from 235 months to 170 months was not likely to help problems of defendant's seven-year-old son, apart from the fact that his problems were not "extraordinary" for a child whose mother is imprisoned, court remanded and concluded "that a downward departure for extraordinary family circumstances cannot be justified when, even after reduction, the sentence is so long that release will come too late to promote the child's welfare").

The Second and Fourth Circuits remanded cases where it was unclear if the dis-

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

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

The Sixth Circuit concluded that, when considering a departure for defendant's community service or good works, a court must distinguish between contributions of time and energy versus simply money. If mostly the latter, "then the factor could really be considered one involving [defendant's] socio-economic status, i.e., his wealth and his ability to donate to various civic and charitable causes. Consideration of that factor is prohibited by the guidelines. *See* USSG §5H1.10." *U.S. v. Tocco,* 200 F.3d 401, 434 (6th Cir. 2000). See also *U.S. v. Serafini,* 233 F.3d 758, 775 (3d Cir. 2000) (agreeing with *Tocco* but concluding that, although defendant was a wealthy man and many of his "good works" involved giving money, he also gave much of himself and his time so that his contributions may be considered exceptional).

The following cases are examples of "extraordinary" situations where departure was affirmed: *U.S. v. Aguirre,* 214 F.3d 1122, 1127 (9th Cir. 2000) (affirming four-level departure for defendant whose common-law husband died while she was in prison awaiting sentencing, leaving their eight-year-old son without a custodial parent); *U.S. v. Woods,* 159 F.3d 1132, 1136–37 (8th Cir. 1998) (affirming one-level departure for defendant who "brought into her own home two troubled young women," paid for private high school and helped turn them into "productive members of society," and also cared for an elderly friend); *U.S. v. Owens,* 145 F.3d 923, 926, 929 (7th Cir. 1998) (affirming forty-eight-month departure for atypical crack dealer who took active role in raising and supporting his three children and also spent time with brother with Downs Syndrome); *U.S. v. Rioux,* 97 F.3d 648, 663 (2d Cir. 1996) (combination of serious health problems and prior "charitable and civic good deeds"); *U.S. v. Monaco,* 23 F.3d 793, 800–01 (3d Cir. 1994) (small downward departure—which might allow for probation—was appropriate for defendant's

extreme anguish and remorse at having involved, perhaps unintentionally, his otherwise law-abiding son in fraud offense) [6#13]; *U.S. v. One Star,* 9 F.3d 60, 61 (8th Cir. 1993) (combination of factors for Indian defendant—strong family ties, employment record, community support) [6#8]; *U.S. v. Johnson,* 964 F.2d 124, 128–30 (2d Cir. 1992) (sole responsibility for raising four young children) [4#23]; *U.S. v. Alba,* 933 F.2d 1117, 1122 (2d Cir. 1991) (twelve-year marriage, two children, living with disabled, dependent father and grandmother) [4#5]; *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991) (single parent of infant and sole supporter of sixteen-year-old daughter and daughter's infant); *U.S. v. Big Crow,* 898 F.2d 1326, 1331–32 (8th Cir. 1990) (solid family and community ties, and "consistent efforts to lead a decent life in [the] difficult environment" of an Indian reservation) [3#4]. Cf. *U.S. v. Jones,* 158 F.3d 492, 500–01 (10th Cir. 1998) (affirmed: proper to partly base "combination of circumstances" departure on defendant's "long history of community service, and his strong support in the community, even among the family of the victim").

Downward departure held improper: In the following cases, the appellate court reversed or remanded a downward departure for family circumstances or community ties: *U.S. v. Sprei,* 145 F.3d 528, 535–36 (2d Cir. 1998) (that incarceration of Orthodox Jew might make arranging marriages for his children more difficult); *U.S. v. Tomono,* 143 F.3d 1401, 1404 (11th Cir. 1998) ("claimed ignorance, presumably arising from 'cultural differences,' of the consequences of his actions under United States law" by Japanese animal importer); *U.S. v. Rodriguez-Velarde,* 127 F.3d 966, 968–69 (10th Cir. 1997) (defendant with three minor children whose wife was killed in car accident after his arrest); *U.S. v. Rybicki,* 96 F.3d 754, 759 (4th Cir. 1996) ("highly decorated Vietnam war veteran" with previously unblemished record and responsibilities for wife and son, both of whom had medical problems) [9#2]; *U.S. v. Allen,* 87 F.3d 1224, 1225–26 (11th Cir. 1996) (defendant primary caretaker for seventy-year-old father with Alzheimer's and Parkinson's diseases); *U.S. v. Dyce,* 78 F.3d 610, 616–19 (D.C. Cir. 1996) (single mother with three young children, totality of circumstances), *as amended on denial of rehearing,* 91 F.3d 1462, 1470 (D.C. Cir. 1996); *U.S. v. Londono,* 76 F.3d 33, 36–37 (2d Cir. 1996) (to allow chance to have children when husband's sentence would otherwise last beyond wife's childbearing years), *mandate recalled for other reasons,* 100 F.3d 236 (2d Cir. 1996); *U.S. v. Kohlbach,* 38 F.3d 832, 837–39 (6th Cir. 1994) (not unusual for white-collar defendant to be leader in community charities, civic organizations, church efforts, and have performed prior good works) [7#3]; *U.S. v. White Buffalo,* 10 F.3d 575, 577 (8th Cir. 1993) (facts not sufficient to support departure under *Big Crow* analysis, but affirmed on other grounds) [6#9]; *U.S. v. Mogel,* 956 F.2d 1555, 1565 (11th Cir. 1992) (two minor children to support and mother who lives with defendant); *U.S. v. O'Brien,* 950 F.2d 969, 971 (5th Cir. 1991) (community ties and "redeeming characteristics"); *U.S. v. Berlier,* 948 F.2d 1093, 1096 (9th Cir. 1991) (defendant's efforts to keep family together); *U.S. v. Carr,* 932 F.2d 67, 72 (1st Cir. 1991) (codefendants were parents of young child); *U.S. v. Prestemon,* 929 F.2d 1275, 1277–78 (8th Cir. 1991) (adopted, biracial child); *U.S. v. Shoupe,* 929 F.2d 116, 121 (3d Cir.

1991) (father who frequently spoke with young son living with ex-wife, regularly made child support payments); *U.S. v. McHan,* 920 F.2d 244, 248 (4th Cir. 1990) (drug dealer's extensive contributions to town); *U.S. v. Deane,* 914 F.2d 11, 14 (1st Cir. 1990) (exemplary employee and father) [3#14]; *U.S. v. Brand,* 907 F.2d 31, 33 (4th Cir. 1990) (sole custodial parent of two young children) [3#10]; *U.S. v. Neil,* 903 F.2d 564, 566 (8th Cir. 1990) (stable family life); *U.S. v. Pozzy,* 902 F.2d 133, 139 (1st Cir. 1990) (husband's imprisonment) [3#5]; *U.S. v. Brewer,* 899 F.2d 503, 508–09 (6th Cir. 1990) (family ties, mothers of young children) [3#5].

Appellate courts affirmed a refusal to grant a downward departure in the following cases: *U.S. v. Cacho,* 951 F.2d 308, 311 (11th Cir. 1992) (mother of four small children); *U.S. v. Headley,* 923 F.2d 1079, 1083 (3d Cir. 1991) (mother of five children); *U.S. v. Johnson,* 908 F.2d 396, 398–99 (8th Cir. 1990) (single mother of infant). Finding it could be considered "akin to the factor of 'family and community ties," the Ninth Circuit affirmed on the facts the denial of a departure for an illegal reentry defendant for "cultural assimilation," i.e., longstanding and significant family, cultural, and community ties to the U.S. that may have motivated the illegal reentry. *U.S. v. Lipman,* 133 F.3d 726, 730–32 (9th Cir. 1998).

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

A Nov. 1998 amendment significantly changed §5K2.13. It removed the language about non-violent offenses that had caused some disagreement in the circuits, and provided some definition of "significantly reduced mental capacity." Most of the cases that follow were decided under the earlier version of §5K2.13. Because the amendment is not listed as retroactive and it "substantially altered the guideline rather than merely clarifying it," the Ninth Circuit held that it cannot be applied retroactively. *U.S. v. Timbana,* 222 F.3d 688, 708 (9th Cir. 2000).

i. "Reduced mental capacity"

The amended §5K2.13 states that departure may be warranted if defendant "committed the offense while suffering from a significantly reduced mental capacity," and defines that term in an application note to mean "a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power to reason; or (B) control behavior that the defendant knows is wrongful." The definition is largely adopted from *U.S. v. McBroom,* 124 F.3d 533, 540–51 (3d Cir. 1997) [10#3], which remanded a case for a determination of whether defendant met either prong of the test. The two prongs of the definition are sometimes referred to as cognitive impairment and volitional impairment.

In *McBroom*, a defendant convicted of possessing child pornography requested a departure based on his inability to control his urges to view pornography because of childhood sexual abuse. The district court refused to depart because it found that defendant had the ability to reason and therefore his mental capacity was not significantly reduced. The appellate court found this definition too narrow, and held that "a defendant's ability to control his or her own conduct is [also] a relevant

consideration when determining the defendant's eligibility for a downward departure pursuant to section 5K2.13."

The Third Circuit added that, "although a defendant must be suffering from something greater than mere 'emotional problems' to obtain a downward departure, . . . certain emotional conditions may be the cause of a defendant's significantly reduced mental capacity." The court agreed with *U.S. v. Cantu,* 12 F.3d 1506, 1512 (9th Cir. 1993), that §5K2.13 "applies to both mental defects and emotional disorders . . . . As the court concluded in *Cantu*, '[t]he focus of the guideline provision is reduced mental *capacity*, not the cause—organic, behavioral, or both—of the reduction.'" Thus, although the district court had properly refused to consider defendant's "troubled childhood" as a reason for departure in and of itself, on remand it should "look to that childhood to inform its determination regarding whether McBroom suffered from a significantly reduced mental capacity at the time of the offense. . . . McBroom's childhood experiences serve to place his volitional incapacity argument in context" and may help explain how a compulsion to view pornography may have originated. See also *U.S. v. Sadolsky,* 234 F.3d 938, 942–43 (6th Cir. 2000) (in affirming departure for compulsive gambler who committed fraud to pay off debts, noting that amended §5K2.13 allows departure for volitional impairment and circuit precedent to the contrary was no longer valid).

Previously, some courts had focused on the inability to reason prong, rejecting departures based on an inability to control behavior or emotional problems. The Eleventh Circuit rejected a departure for a defendant convicted of transporting child pornography via computer. The district court held that defendant had an impulse control disorder that contributed to his offense, but the appellate court held that, because "[m]any offenders commit crimes because they have poor impulse control, . . . [a]n impulse control disorder is not so atypical or unusual that it separates this defendant from other defendants." The court also found that, because defendant merely gathered the child pornography to trade it for types of adult pornography that he really wanted, the impulse disorder "contributed to" viewing adult pornography, not to the child pornography offense of conviction as required by §5K2.13. *U.S. v. Miller,* 146 F.3d 1281, 1285–86 (11th Cir. 1998). See also *U.S. v. Withers,* 100 F.3d 1142, 1148 (4th Cir. 1996) (remanded: §5K2.13 departure requires inability "to reason or process information"—emotional problems or difficulties are insufficient).

ii. "Contributed to the commission of the offense"

Amended §5K2.13 does not, by its terms, require that defendant's reduced mental capacity contribute to the commission of the offense before departure may be considered. See, e.g., *U.S. v. Sadolsky,* 234 F.3d 938, 943 (6th Cir. 2000) ("§5K2.13 does not require a direct causal link between the [significantly reduced mental capacity] and the crime charged," and departure was permissible where gambling disorder was "a likely cause of his criminal behavior" of computer fraud). However, it does state that "the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." Some circuits had

essentially followed this rule. See, e.g., *U.S. v. Leandre,* 132 F.3d 796, 803–04 (D.C. Cir. 1998) ("plain language of section 5K2.13, permitting departures, 'to reflect the extent to which reduced mental capacity contributed to the commission of the offense,' makes clear that the defendant's diminished capacity need be only a contributing factor" and that "once some nexus is shown, to any degree, the district court may depart downwardly to reflect the extent of that contribution"); *U.S. v. Cantu,* 12 F.3d 1506, 1515 (9th Cir. 1993) (remanded to consider departure: "degree to which the impairment contributed to . . . the offense constitutes the degree" of departure that may be appropriate) [6#9].

The old language stated that "a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense." Some circuits concluded that the reduced mental capacity must be a contributing, but not the sole, cause of the offense in order to warrant a downward departure. See, e.g., *U.S. v. Soliman,* 954 F.2d 1012, 1014 (5th Cir. 1992) (but affirmed district court conclusion that condition did not warrant departure); *U.S. v. Glick,* 946 F.2d 335, 338 (4th Cir. 1991) (affirmed departure) [4#11]; *U.S. v. Lauzon,* 938 F.2d 326, 331 (1st Cir. 1991) (but affirmed refusal to depart, holding person with borderline intelligence or mild retardation who is easily persuaded to follow others is not entitled to departure) [4#7]; *U.S. v. Ruklick,* 919 F.2d 95, 97–98 (8th Cir. 1990) (remanded to allow court to consider defendant's diminished capacity as contributing factor) [3#16].

The Seventh Circuit had required a finding that the defendant's reduced mental capacity contributed to the commission of the crime; the link cannot be assumed. *U.S. v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992) (remanded: no finding that defendant's "depressed mood" resulted in a significantly reduced mental capacity or contributed to the offense) [5#7]. Accord *U.S. v. Johnson,* 49 F.3d 766, 768 (D.C. Cir. 1995) (affirmed district court finding that there must be a "direct connection" between reduced mental capacity and offense—"requirement of a 'direct connection' was no more than a restatement of the express guideline language that reduced mental capacity must have 'contributed to the commission of the offense'").

iii. Voluntary use of drugs

Amended §5K2.13 retains the prohibition on departing if defendant's reduced capacity "was caused by the voluntary use of drugs or other intoxicants." Under the earlier version the Ninth Circuit affirmed a §5K2.13 departure even though defendant's diminished capacity during the first half of his criminal activity was caused in part by voluntary drug use; during the latter part of the activity defendant was drug-free and still experienced diminished capacity. *U.S. v. Lewinson*, 988 F.2d 1005, 1006–07 (9th Cir. 1993). The court also rejected the government's argument that the "qualifying mental disease be severe, [and] that it affect the defendant's ability to perceive reality." *Id.* at 1006 ("the plain language of this section authorizes departure on a showing of 'significantly reduced mental capacity' without qualification as to the nature or cause of the reduced capacity (except with respect to voluntary drug use)") [5#12]. See also *U.S. v. Cantu,* 12 F.3d 1506, 1512–14 (9th

Cir. 1993) (remanded to consider departure for veteran with post-traumatic stress disorder; also, alcohol use does not disqualify defendant for departure if reduced mental capacity was caused by other factor or caused the alcohol abuse) [6#9]; *U.S. v. Leandre,* 132 F.3d 796, 806 (D.C. Cir. 1998) (agreeing with *Cantu* and stating: "A departure under section 5K2.13 might remain available if a defendant's drug use contributed only in part to a crime, because his mental infirmity may have also played a role. Because a defendant's reduced mental capacity need not be the sole cause of the crime, both drug use and mental illness may contribute to the commission of an offense.").

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

iv. Violent offenses

The pre-Nov. 1998 version of §5K2.13 allowed for departure if defendant had committed a "non-violent offense," and the circuits, as discussed below, disagreed over how to define that term. Amended §5K2.13 instead prohibits departure if "the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence," or if "the defendant's criminal history indicates a need to incarcerate the defendant to protect the public." The Commission's "reason for amendment" states that the new provision is "a compromise approach to the circuit conflict." See also *U.S. v. Askari,* 159 F.3d 774, 780 (3d Cir. 1998) (holding that amendment is "clarifying" and should be applied to case on appeal).

Following the amendment, the Ninth Circuit concluded that there was no "serious threat of violence" in defendant's offense of sending a threatening letter to the President under the signature of a man defendant felt owed him money. "All of the evidence in this case shows that Walter did not possess any real intent to cause physical harm to the President or any other person." *U.S. v. Walter,* 256 F.3d 891, 895 (9th Cir. 2001) (remanded).

Previously, the circuits were split on how to define "non-violent offense" under §5K2.13. Several circuits used §4B1.2's definition of "crime of violence" as a reference, essentially holding that an offense that fit that definition could not be considered non-violent. See *U.S. v. Mayotte,* 76 F.3d 887, 889 (8th Cir. 1996); *U.S. v. Dailey,* 24 F.3d 1323, 1327 (11th Cir. 1994); *U.S. v. Cantu,* 12 F.3d 1506, 1513–14 (9th Cir. 1993); *U.S. v. Poff,* 926 F.2d 588, 592 (7th Cir. 1991) (en banc) [3#20]; *U.S. v. Maddalena,* 893 F.2d 815, 819 (6th Cir. 1989).

Other circuits held that courts should not refer to the definition of "crime of violence" in §4B1.2. The Guidelines do not equate the two and "significant policy concerns support the view that [the sections] should be interpreted independently." The sentencing court "should consider all the facts and circumstances surrounding the commission of the crime." *U.S. v. Chatman,* 986 F.2d 1446, 1448–53 (D.C. Cir. 1993) (citing other cases that used §4B1.2) [5#11]. Accord *U.S. v. Askari,* 140 F.3d

536, 543–49 (3d Cir. 1998) (en banc) (abrogating earlier decision using §4B1.2 definition); *U.S. v. Weddle,* 30 F.3d 532, 537–40 (4th Cir. 1994) (affirming departure) [7#1]. Cf. *U.S. v. Morin,* 124 F.3d 649, 653–54 (4th Cir. 1997) (remanded: in making "fact-specific investigation of the offense to determine whether it was non-violent," defendant's "reduced mental capacity *alone* was not sufficient to justify the court's conclusion that his murder-for-hire plot was non-violent" because other factors, such as numerous steps taken to complete the plot, led to potential for violence).

Several circuits have previously affirmed that there is no discretion to depart for diminished capacity under §5K2.13 in violent offenses. *U.S. v. Fairman,* 947 F.2d 1479, 1481–82 (11th Cir. 1991) [4#13]; *U.S. v. Sanchez,* 933 F.2d 742, 747 (9th Cir. 1991); *Poff,* 926 F.2d at 591; *U.S. v. Rosen,* 896 F.2d 789, 791 (3d Cir. 1990); *Maddalena,* 893 F.2d at 818–19.

v. "Defendant's criminal history indicates a need to incarcerate the defendant to, protect the public"

This aspect of §5K2.13 remained the same in the 1998 amendment. Before the amendment, two circuits held that "criminal history" has a broader meaning than the "criminal history" calculated in §4A1.1. A court's decision "must take into account any treatment the defendant is receiving or will receive while under sentence, the likelihood that such treatment will prevent the defendant from committing further crimes, the defendant's likely circumstances upon release from custody or its alternatives, the defendant's overall record, and the nature and circumstances of the [instant] offense." *U.S. v. Cantu,* 12 F.3d 1506, 1516 (9th Cir. 1993).

The D.C. Circuit agreed, concluding that §4A1.1, designed to impose greater punishment on repeat offenders, "should not control the meaning of 'criminal history' as used in" §5K2.13, whose purpose is lenity. "This is not to say, however, that anything is fair game. Rather, the sentencing court may consider only those factors that bear on whether 'the defendant's criminal history . . . indicate[s] a need for incarceration to protect the public,'" such as the four factors listed in *Cantu.* The court remanded a departure in this case, however, because the sentencing court "strayed far from these factors" and relied on inappropriate grounds in concluding that incarceration was not needed to protect the public. *U.S. v. Atkins,* 116 F.3d 1566, 1569–71 (D.C. Cir. 1997) [10#1].

"The text of the guideline plainly prohibits a sentencing court from departing downward if it first finds that . . . the defendant's criminal history demonstrates a need to protect the public." *U.S. v. Davis,* 264 F.3d 813, 815–16 (9th Cir. 2001) (rejecting defendant's claim that district court erred in holding it had no authority to depart under §5K2.13 once it made that finding).

vi. Procedural issues, pre-1998 amendment examples

Procedure: The Fourth Circuit rejected a defendant's claim that he had a due process right to a psychiatric evaluation as part of his claim to a §5K2.13 departure. However, the court also refused to adopt the government's contention "that it could never be reversible error for a court to refuse to order a psychiatric evaluation prior

to sentencing. It is important that judges make critical sentencing decisions with the benefit of all available and relevant evidence. It is also important that all defendants, even indigent ones, have an opportunity to gather necessary psychiatric evidence when the court, in the exercise of its discretion, determines that such evidence is relevant to determine the defendant's mental capacity." In this case, defendant did not present sufficient evidence to show that an evaluation was merited. *U.S. v. Cropp,* 127 F.3d 354, 362–63 (4th Cir. 1997).

Along similar lines, the Seventh Circuit affirmed a denial of defendant's request for authorization under 18 U.S.C. §3006A(e)(1) to obtain a psychiatric evaluation to support his motion for a §5K2.13 departure. The court concluded that he was not legally entitled to a downward departure even if he suffered from diminished mental capacity, so hiring a psychiatric expert would merely be a "fishing expedition" and not necessary for his defense. In so holding, the court rejected defendant's argument that expert testimony was necessary to establish whether defendant satisfied the three limiting factors in §5K2.13. The court held that, although expert testimony could be "particularly useful" in determining whether defendant's diminished capacity "was caused by the voluntary use of drugs or other intoxicants," it was not necessary to a court's decision whether defendant's offense involved violence or the threat of violence, or whether defendant's criminal history indicates a need for incarceration to protect the public. *U.S. v. Cravens,* 275 F.3d 637, 639–42 (7th Cir. 2001) (affirmed: district court properly found that defendant could not qualify for departure because it was prohibited by §5K2.13(2) and (3)).

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

The Ninth Circuit affirmed a departure that was based in part on defendant's mental condition—"panic disorder with agoraphobia"—under §§5H1.3 and 5K2.0, noting that it was not based on §5K2.13. "The language in section 5H1.3, 'Mental and emotional conditions are not *ordinarily* relevant' (emphasis supplied) indicates that the Commission intended these factors to play a part in some cases, albeit a limited number." *U.S. v. Garza-Juarez,* 992 F.2d 896, 913 (9th Cir. 1993) [5#12]. Cf. *U.S. v. Jones,* 158 F.3d 492, 503–04 (10th Cir. 1998) (affirmed: §5H1.3 did not bar consideration of defendant's unique situation—being employed at public health facility where he had daily contact with psychologist who had greatly helped defendant's rehabilitation—as one of several grounds for departure to home confinement instead of prison). But see *Cantu,* 12 F.3d at 1511 ("§5K2.13 is the proper policy statement under which to consider whether a mental ailment makes a defendant eligible for a downward departure").

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

The Ninth Circuit remanded a decision that defendant's severe childhood abuse was not so "extraordinary" as to warrant departure. *U.S. v. Roe,* 976 F.2d 1216, 1217–18 (9th Cir. 1992) (§5H1.3 covers "psychological effects of childhood abuse" but does not preclude departure in extraordinary circumstances) [5#4].Later, the court remanded a finding that defendant's childhood abuse was not extraordinary enough to warrant departure consideration under §§5H1.3 and 5K2.13. "The combination of brutal beatings by his [alcoholic] father, the introduction to drugs and alcohol by his mother, and, most seriously, the sexual abuse he faced at the hands of his cousin, appear to us to be the type of extraordinary circumstances that may justify the consideration of the psychological effects of childhood abuse." *U.S. v. Walter,* 256 F.3d 891, 894 (9th Cir. 2001). See also *U.S. v. Desormeaux,* 952 F.2d 182, 185–86 (8th Cir. 1991) (indicating spousal abuse is covered by §5H1.3). Cf. *U.S. v. Brown,* 985 F.2d 478, 481 (9th Cir. 1993) (may consider for career offender) [5#9]; *U.S. v. Vela,* 927 F.2d 197, 199 (5th Cir. 1991) (psychological effects of abuse covered by §5H1.3, so departure warranted only in extraordinary circumstances).

c. Single act of aberrant behavior

A Nov. 1, 2000, amendment added §5K2.20, p.s., which now controls departures for aberrant behavior. Departure "may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior." There are, however, five factors involving the instant offense or criminal history that would preclude departure. The commentary to the policy statement further defines "aberrant behavior" and lists other factors to consider in deciding whether to depart. The amendment replaces the "single act of aberrant behavior" language that had caused a split in the circuits, discussed below, and because it "does not adopt in toto either the majority or minority circuit view on this issue," the precedential value of many of the cases that follow is uncertain. Because it was a compromise between the different circuits' views, the amendment has been held to be substantive rather than clarifying and therefore should not to be applied retroactively. See *U.S. v. Spinello,* 265 F.3d 150, 160–62 (3d Cir. 2001); *U.S. v. Alvarez-Pineda,* 258 F.3d 1230, 1237 (10th Cir. 2001).

The Third Circuit rejected a defendant's claim that a court had to consider all five factors in Application Note 2 in determining whether defendant's case was "extraordinary." The court held that "the most natural reading of §5K2.20, in the context of the Guidelines as a whole, supports an analytical construct in which the sentencing court must conduct two separate and independent inquiries, both of

which the defendant must satisfy before a departure can be granted. That is, the court must determine whether the defendant's case is extraordinary and whether his or her conduct constituted aberrant behavior. Further, in determining whether a particular case is extraordinary, we hold that a sentencing court may, but is not obligated to, consider the five factors delineated in Application Note 2 of §5K2.20." *U.S. v. Castano-Vasquez,* 266 F.3d 228, 234–35 (3d Cir. 2001) (affirming denial of departure after district court considered "at least two of the five factors in Application Note 2," heard argument on the others, and decided defendant's case was not extraordinary).

Before the adoption of §5K2.20, downward departure could be proper when defendant's conduct is a "single act of aberrant behavior." USSG Ch.1, Pt.A.4(d). See also *U.S. v. Withrow,* 85 F.3d 527, 531 (11th Cir. 1996) (may depart if "defendant's conduct constituted a single, aberrant act"); *U.S. v. Duerson,* 25 F.3d 376, 380 (6th Cir. 1994) ("district court can give a first offender a prison sentence below the guideline range, as opposed to giving him probation, where the facts justify a finding that his crime truly was a single act of aberrant behavior"); *U.S. v. Tsosie,* 14 F.3d 1438, 1441–42 (10th Cir. 1994) (affirmed: aberrational conduct combined with steady employment and economic support of family warranted departure) [6#10]; *U.S. v. Andruska,* 964 F.2d 640, 644–46 (7th Cir. 1992); *U.S. v. Garlich,* 951 F.2d 161, 164 (8th Cir. 1991) [4#15]; *U.S. v. Ritchey,* 949 F.2d 61, 63 (2d Cir. 1991) (remanded: district court thought it had no discretion to consider aberrant behavior); *U.S. v. Glick,* 946 F.2d 335, 338 (4th Cir. 1991) [4#11]; *U.S. v. Takai,* 941 F.2d 738, 743–44 (9th Cir. 1991) (amending and superseding 930 F.2d 1427 [4#3]); *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991) (affirmed: extraordinary family responsibilities and aberrational nature of conduct); *U.S. v. Dickey,* 924 F.2d 836, 838–39 (9th Cir. 1991) (remanded: permissible for "aberrant behavior" by first-time offender) [3#18]; *U.S. v. Russell*, 870 F.2d 18, 20 (1st Cir. 1989) (remanded for district court to clarify whether it understood it had authority to depart).

The Eighth Circuit reexamined its earlier analysis of aberrant behavior departures in light of *Koon v. U.S.,* 116 S. Ct. 2035 (1996). The court first determined that "the Sentencing Commission only mentioned 'single acts of aberrant behavior' in discussing probation and split sentences. Thus, it is an *encouraged* factor only when considering crimes in which the offender might be eligible, with a departure, for those modest forms of punishment." Noting that limitation, and that the Commission did not discuss aberrant behavior in the general discussion of departures, the court found that "under *Koon*, 'aberrant behavior' in general is an unmentioned factor, and the task for the sentencing court is to analyze how and why specific conduct is allegedly aberrant, and whether the Guidelines adequately take into account aspects of defendant's conduct that are in fact aberrant." Thus, in those cases a district court should analyze "what aspects of [a defendant's] behavior [it] considered 'aberrant,' and why that particular kind of aberrant behavior falls outside the heartland *of the guidelines applicable in determining [defendant's] sentencing range*." *U.S. v. Kalb,* 105 F.3d 426, 428–30 (8th Cir. 1997) [9#5].

First-time offender status is not, by itself, sufficient. See, e.g., *U.S. v. Benally,* 215

F.3d 1068, 1074 (10th Cir. 2000) (remanded: "the factors supporting an aberrant behavior departure must involve something other than an act which is merely a first offense"); *U.S. v. Marcello,* 13 F.3d 752, 761 (3d Cir. 1994) ("no consideration is given to whether the defendant is a first-time offender") [6#10]; *U.S. v. Williams*, 974 F.2d 25, 26 (5th Cir. 1992) (without discussing whether such departure is appropriate for violent crimes, court stated aberrant behavior "requires more than an act which is merely a first offense or 'out of character' for the defendant"); *U.S. v. Mogel,* 956 F.2d 1555, 1565–66 (11th Cir. 1992) (may not depart downward for category I defendant based on a "troublefree past" because placement in category I already reflects that); *U.S. v. Bolden,* 889 F.2d 1336, 1339–41 (4th Cir. 1989) (remanded: lack of prior criminal record already accounted for) [2#17]. Cf. *U.S. v. Morales,* 972 F.2d 1007, 1011 (9th Cir. 1992) (lower court erred in (1) believing it had no authority to depart downward based on aberrant behavior for a first-time offender and (2) holding there were no facts supporting such a departure; remanded for court to consider evidence that drug courier had no criminal history, that he was convicted of one isolated criminal act, and that there was no evidence showing he was a regular participant in ongoing criminal enterprise) (amending 961 F.2d 1428).

On the other hand, the Ninth Circuit held that a prior offense need not preclude this departure. Defendant had three criminal history points "based upon the single traffic offense of driving without a license"—one point for the offense and two points for committing the instant offense during the one-year probation term he had received. Because the offense was minor, and defendant would have received no points if the probation had been even one day shorter, this criminal history "does not itself preclude a departure for aberrant conduct." *U.S. v. Lam,* 20 F.3d 999, 1004 (9th Cir. 1994) (remanded).

A "single act of aberrant behavior" has been defined by several circuits as an act that is "spontaneous and seemingly thoughtless," and as such cannot include extensive planning or a series of actions related to the criminal conduct. See, e.g., *Withrow,* 85 F.3d at 531 (affirmed: planning and attempting to steal car at gunpoint was not "a spontaneous and thoughtless act rather than one which was the result of substantial planning"); *U.S. v. Dyce,* 78 F.3d 610, 619 (D.C. Cir. 1996) (remanding for reconsideration under this definition), *as amended on rehearing,* 91 F.3d 1462, 1470 (D.C. Cir. 1996); *Marcello,* 13 F.3d at 760–61 (affirmed: "Aberrant behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless"); *Williams,* 974 F.2d at 26–27 (affirming denial of departure for act that "appears neither spontaneous nor thoughtless"); *Andruska,* 964 F.2d at 645–46 (remanded: continued efforts to help fugitive evade authority and refusal to acknowledge wrongful conduct was not "aberrant behavior"); *Glick,* 946 F.2d at 338–39 (remanded: conduct over ten-week period involving number of actions and extensive planning was not "single act of aberrant behavior"). See also *U.S. v. Winters,* 105 F.3d 200, 207 (5th Cir. 1997) (remanded: improper to depart for prison guard convicted on three counts related to beating an escapee and then attempting to cover it up—defendant's offenses "cannot be deemed a single act of aberrant be-

havior because he committed multiple infractions, one in assaulting the prisoner and a second in attempting to coerce a witness into altering his testimony"); *Garlich,* 951 F.2d at 164 (affirmed: fraud spanning one year and several transactions was not "single act of aberrant behavior"); *U.S. v. Carey,* 895 F.2d 318, 324–25 (7th Cir. 1990).

Other circuits accept a less restrictive view of aberrant behavior, holding that the "totality of the circumstances" should be considered. The First Circuit specifically rejected the cases above, stating that "determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances. . . . Spontaneity and thoughtlessness may also be among the factors considered, though they are not prerequisites for departure." *U.S. v. Grandmaison,* 77 F.3d 555, 562–64 (1st Cir. 1996) [8#8]. See also *Zecevic v. U.S. Parole Comm'n,* 163 F.3d 731, 734–36 (2d Cir. 1998) ("the best test by which to judge whether conduct is truly aberrant is the totality test," under which "the degree of spontaneity and amount of planning inherent in the defendant's actions are not dispositive but merely are among the several factors courts consider"); *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991) (looking to totality of circumstances, affirming departure for aberrant behavior). The Tenth Circuit later added that "the determination of whether an individual defendant's offense conduct is aberrational, like the decision to depart, requires consideration of unique factors not readily susceptible of useful generalization. The district court is in the better position to determine whether the defendant's offense conduct is out of character for that individual. Accordingly, the district court's resolution of this largely factual question is due substantial deference." *U.S. v. Jones,* 158 F.3d 492, 500 (10th Cir. 1998) (affirming departure based in part on aberrational conduct that included multiples acts but constituted single episode).

The Ninth Circuit held that multiple incidents occurring over a six-week period aimed at obtaining green cards for immigrant relatives and friends were "a single act of aberrant behavior" that warranted downward departure. *Takai,* 941 F.2d at 743–44. See also *Grandmaison,* 77 F.3d at 562–64 ("That aberrant behavior departures are available to first offenders whose course of criminal conduct involves more than one criminal act is implicit in our holding. . . . We think the Commission intended the word 'single' to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to 'single acts of aberrant behavior' to include multiple acts leading up to the commission of a crime.").

However, the Ninth Circuit later stated that "[o]nly very rarely do we permit aberrant behavior departures when the defendant committed more than one criminal act." For a defendant who committed at least a dozen bank robberies over eleven weeks, then fled the country for eight months while awaiting resentencing (after being given probation), "we believe no aberrant behavior departure was appropriate; not even close." *U.S. v. Colace,* 126 F.3d 1229, 1232 (9th Cir. 1997). And the First Circuit concluded that, even if a series of criminal acts with one purpose can be considered a single aberrant act, departure is inappropriate if defendant later commits another similar act. "[A] departure based on a finding that the relevant

criminal conduct was a single act of aberrant behavior is appropriate only where the conduct was isolated and is unlikely to recur. Yet one who testifies dishonestly after engaging in felonious dishonesty cannot credibly make either claim. One convicted of criminal dishonesty is therefore not entitled to an aberrant conduct departure if he has testified dishonestly about his criminal conduct." *U.S. v. Bradstreet,* 135 F.3d 46, 56–57 (1st Cir. 1998) (remanded: departure inappropriate for securities fraud defendant who gave false testimony during trial).

In another case, the Ninth Circuit ruled the lower court erred in (1) believing it had no authority to depart downward based on aberrant behavior for a first-time offender and (2) holding there were no facts supporting such a departure. *U.S. v. Morales,* 972 F.2d 1007, 1011 (9th Cir. 1992) (remanded for court to consider evidence that drug courier had no criminal history, that he was convicted of one isolated criminal act, and that there was no evidence showing he was a regular participant in ongoing criminal enterprise) (amending 961 F.2d 1428).

See also section VI.C.3

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

Extreme vulnerability: The Supreme Court affirmed that susceptibility to abuse in prison may warrant departure. In the Rodney King beating case, the district court departed in part because the extensive publicity surrounding the case made the police officer defendants more susceptible to being abused in prison. The Court accepted "the District Court's finding that '[t]he extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse' . . . . The District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts." *Koon v. U.S.,* 116 S. Ct. 2035, 2053 (1996) [8#7]. Cf. *U.S. v. Winters,* 174 F.3d 478, 485–86 (5th Cir. 1999) (remanding departure for corrections officer convicted of beating escaped prisoner: "*Koon* does not create a general rule that a defendant's status as a police officer can justify a downward departure," and here "the district court offered no compelling reasons why Winters is any more susceptible to abuse in prison than any other corrections officer sentenced to prison").

The Second Circuit has affirmed departures based on an extreme vulnerability to victimization in prison due to a male defendant's youthful and feminine appearance. See *U.S. v. Gonzalez,* 945 F.2d 525, 526–27 (2d Cir. 1991) (evidence of bisexuality or prior victimization not needed) [4#10]; *U.S. v. Lara,* 905 F.2d 599, 603–04 (2d Cir. 1990) (defendant was also bisexual) [3#9]. See also *U.S. v. Wilke,* 156 F.3d 749, 754 (7th Cir. 1998) (may consider defendant's "sexual orientation and demeanor" when assessing vulnerability to abuse). Note that a Nov. 1991 amendment to §5H1.4 clarified that "physique" is "not ordinarily relevant" to the decision to depart, and is thus a "discouraged" factor under the *Koon* analysis.

The Eighth Circuit similarly concluded that "an extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure." The

court affirmed a downward departure for an "extraordinary physical impairment" which would have left defendant "exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries" if incarcerated. *U.S. v. Long,* 977 F.2d 1264, 1277–78 (8th Cir. 1992). However, the Eighth Circuit later reversed a downward departure that was based on the possibility of victimization in prison—expert testimony at sentencing revealed that it is rare for a sixty-seven-year-old female inmate to be victimized and that her alleged dependent personality disorder was not confirmed. *U.S. v. Tucker*, 986 F.2d 278, 280 (8th Cir. 1993). See also *U.S. v. Belt,* 89 F.3d 710, 714 (10th Cir. 1996) (citing *Koon* and others, "In extraordinary and limited circumstances, vulnerability to victimization may be an appropriate consideration for discretionary departure.").

Other circuits have agreed that vulnerability to prison abuse may be ground for departure, but have stressed that the circumstances must be extreme. The Seventh Circuit added that "[m]ere membership in a particular class of offenders that may be susceptible to abuse in prison does not merit a departure for vulnerability to abuse in prison. . . . Instead, the district court must make an individualized determination." *U.S. v. Wilke,* 156 F.3d 749, 753–54 (7th Cir. 1998) (in remanding departure for defendant convicted of transporting child pornography, which was partly based on testimony that such offenders were often victimized by other inmates, adding that "a district court may not rely on the nature of a defendant's offense as a factor justifying a sentencing departure for vulnerability to abuse in prison"). See also *U.S. v. Graham,* 83 F.3d 1466, 1481 (D.C. Cir. 1996) (remanded: joining other circuits in "hold[ing] that extreme vulnerability to assault in prison may be a ground for departure. We emphasize that, to qualify for a downward departure, a defendant's vulnerability must be so extreme as to substantially affect the severity of confinement, such as where only solitary confinement can protect the defendant from abuse") [8#8]; *U.S. v. Maddox,* 48 F.3d 791, 797–98 (4th Cir. 1995) (remanded: agreeing with *Lara* that extreme vulnerability to victimization in prison may be ground for departure, but that "this ground for departure should be construed very narrowly" and was not present here—departure was improper "for a crime of violence involving a gun merely because the defendant appears to be meek, cautious, and easily led").

Physical impairment: "An extraordinary physical impairment" may warrant departure under §5H1.4, "e.g., in the case of a seriously infirm defendant." The Tenth Circuit held that departure under §5H1.4 is not limited to physical impairments so severe as to warrant a non-custodial sentence—an impairment may be "extraordinary" yet warrant only a reduction in, not elimination of, the term of imprisonment. *U.S. v. Slater,* 971 F.2d 626, 634–35 (10th Cir. 1992) (remanded) [5#4]. The court also set out a two-part test: "the district court should first make a factual finding to decide whether [the defendant's] physical and mental disabilities constitute 'an extraordinary physical impairment.' . . . [I]t should then consider whether the condition warrants a shorter term of imprisonment or an alternative to confinement." The court later held that the *Slater* test must also be followed when a requested §5H1.4 departure is denied and added that §5H1.4 "is concern[ed] about

costs of imprisonment, not just concern for fairness to the defendant." See *U.S. v. Fisher,* 55 F.3d 481, 485 (10th Cir. 1995) (remanded: "the court failed to comply with our unambiguous mandate in §5H1.4 cases as set out in *U.S. v. Slater*" by not making findings and explaining its reasoning before denying departure).

The Ninth Circuit agreed with *Slater*, and added that a court "may consider any number of circumstances," not just whether the Bureau of Prisons can accommodate defendant's disability. *U.S. v. Martinez-Guerrero,* 987 F.2d 618, 620–21 (9th Cir. 1993) (affirmed: departure properly denied—prison could accommodate legally blind defendant). See also *U.S. v. Russell,* 156 F.3d 687, 694 (6th Cir. 1998) ("We do not believe that deafness, without more, can ever serve as the basis for a §5H1.4 downward departure. . . . In this case, the district court specifically recommended that the United States Bureau of Prisons take Russell's disability into consideration and place him at a facility that is equipped to accommodate his needs. . . . Russell does not allege that the prison services have been inadequate to accommodate his disability, nor does he allege that the prison has failed to protect him against any attackers."). Cf. *U.S. v. Rioux,* 97 F.3d 648, 663 (2d Cir. 1996) (combination of serious health problems requiring ongoing monitoring plus prior "charitable and civic good deeds" sufficient to allow departure to level allowing home confinement, probation, and community service); *U.S. v. Greenwood,* 928 F.2d 645, 646 (4th Cir. 1991) (affirmed departure for double amputee whose required treatment at Veterans Administration Hospital would be jeopardized by incarceration).

The Seventh Circuit remanded a departure based on defendant's obesity and asthma because there was insufficient evidence to support a finding that defendant's impairment was "extraordinary." "In order to warrant such a departure, the court must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated. . . . Should the district court decide to grant a departure, it is required to detail findings of fact regarding Sherman's particular medical needs, at the time of sentencing, in relation to the conditions he would likely face if incarcerated. The court must rely on the testimony of competent expert medical witnesses, and must make a factual finding that the Bureau of Prisons is not able to care for Sherman's medical problems." *U.S. v. Sherman,* 53 F.3d 782, 787–88 (7th Cir. 1995). See also *U.S. v. Winters,* 105 F.3d 200, 208 (5th Cir. 1997) (remanding departure for defendant whose medical problem "does not need any particular type of treatment and requires only follow-up observation," noting that "this Circuit has ruled that an offender who suffers from cancer in remission, high blood pressure, a fused right ankle, an amputated left leg, and drug dependency does not justify a downward departure" and that the district court did not explain why defendant's case "should be treated as an exceptional one and taken out of the heartland of cases"); *U.S. v. Johnson,* 71 F.3d 539, 544–45 (6th Cir. 1995) (remanded: although "it [is] possible that an aged defendant with a multitude of health problems may qualify for a downward departure under §5H1.4," more evidence of impairment was required than letter from doctor of sixty-five-year-old defendant de-

tailing ailments and letter from psychiatrist that defendant has major depressive disorder).

The Sixth Circuit held that a defendant who is HIV-positive but otherwise in good health was properly refused a downward departure under §5H1.4. Defendant "would only be entitled to a departure if his HIV had progressed into advanced AIDS, and then only if his health was such that it could be termed as an 'extraordinary physical impairment.'" *U.S. v. Thomas,* 49 F.3d 253, 261 (6th Cir. 1995) (citing *U.S. v. DePew,* 751 F. Supp. 1195, 1199 (E.D. Va. 1990)). Accord *U.S. v. Rivera-Maldonado,* 194 F.3d 224, 235–36 (1st Cir. 1999); *U.S. v. Rabins,* 63 F.3d 721, 728–29 (8th Cir. 1995) (affirming denial of departure for defendant who had AIDS but was not yet ill—"Certainly AIDS is a basis for a departure under §5H1.4 when it 'has progressed to such an advanced stage that it could be characterized as an "extraordinary physical impairment."' . . . It was the District Court's duty . . . to assess Johnson's condition at the time of sentencing," and it properly concluded that "at the time of sentencing, Johnson's condition was not serious enough to justify a departure"); *U.S. v. Woody,* 55 F.3d 1257, 1275 (7th Cir. 1995) (affirmed).

e. Employment/restitution/economic harm

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

The Supreme Court ruled a departure for collateral employment consequences was improper under the circumstances, but noted that this factor cannot be categorically excluded as relating to socio-economic status under §5H1.10. Although "a defendant's career may relate to his or her socio-economic status, . . . socio-economic status and job loss are not the semantic or practical equivalences of each other." *Koon v. U.S.,* 116 S. Ct. 2035, 2052 (1996) (but in present case it was improper to depart for "collateral employment consequences" police officers faced after conviction for civil rights violations in beating of suspect) [8#7]. See also *U.S. v. Jones,* 158 F.3d 492, 498–99 (10th Cir. 1998) (affirming departure based in part on defendant's "employment history and the impact of incarceration on his prospects for future employment in light of the community in which he lives, an economically depressed area").

Other courts have held that departure is not warranted on the ground that incarceration would make future employment and/or restitution less likely. See *U.S. v. Crouse,* 145 F.3d 786, 790–91 (6th Cir. 1998) (remanded: defendant's "complete loss of the business" as result of conviction should have been expected and was not

unusual); *U.S. v. Hoffer,* 129 F.3d 1196, 1204 (11th Cir. 1997) (remanded: loss of medical license did not warrant departure); *U.S. v. Chastain,* 84 F.3d 321, 324–26 (9th Cir. 1996) (affirmed: improper to depart to facilitate defendant's ability to pay restitution); *U.S. v. Seacott,* 15 F.3d 1380, 1388–89 (7th Cir. 1994) (remanded: "a defendant's ability to make restitution is not grounds for a downward departure under the Guidelines"); *U.S. v. Harpst,* 949 F.2d 860, 863 (6th Cir. 1991) (reversed: incarceration would make restitution and future employment less likely) [4#14]; *U.S. v. Bolden,* 889 F.2d 1336, 1339–41 (4th Cir. 1989) (remanded: inter alia, possible loss of employment would make restitution more difficult) [2#17]. Cf. *U.S. v. Steele,* 178 F.3d 1230, 1239 (11th Cir. 1999) (remanded: loss of pharmacist's license "may not serve as a ground for departure when the offense for which the defendant is convicted reflects an abuse of the trust inherent in the granting of the license to the defendant," as was the case here where defendant illegally dispensed pharmaceutical drugs).

The First Circuit agreed that departure cannot be based on "the simple facts that restitution is desirable and that a prison term will make restitution harder." However, "a special need of a victim for restitution, and the surrounding practicalities, might, in an unusual case, justify departure." *U.S. v. Rivera,* 994 F.2d 942, 956 (1st Cir. 1993) (remanded: court should consider fact that defendant would lose job only if imprisoned more than one year, which would only require three-month departure) [5#14].

Similarly, it has been held that departure is not warranted where defendant's incarceration could cause economic harm to others. See, e.g., *U.S. v. Morken,* 133 F.3d 628, 630 (8th Cir. 1998) (remanded: "Although downward departure on this ground is not ruled out as a matter of law, . . . the mere fact a business faces likely failure and 'innocent others will . . . be disadvantaged' when its key person goes to jail is not by itself unusual enough to warrant a departure"); *U.S. v. Sharapan,* 13 F.3d 781, 784–85 (3d Cir. 1994) (remanded: §5H1.2 precludes departure on ground that imprisoning defendant "would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community"—"we see nothing extraordinary in the fact that the imprisonment of [the business's] principal for mail fraud and filing false corporate tax returns may cause harm to the business and its employees. The same is presumably true in a great many cases in which the principal of a small business is jailed for comparable offenses") [6#11]; *U.S. v. Rutana,* 932 F.2d 1155, 1158–59 (6th Cir. 1991) (remanded: imprisonment of employer could cause hardship on employees and their families). Cf. *U.S. v. Mogel,* 956 F.2d 1555, 1564 (11th Cir. 1994) (remanding departure partly based on fact that defendant had business "that might go under" if she were imprisoned).

However, the Second Circuit affirmed a one-level departure to allow probation and home confinement for an antitrust defendant whose imprisonment would have imposed "extraordinary hardship" on 150 to 200 employees. "While we agree with our sister circuits that business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate, . . . departure may be warranted where, as here, imprisonment would impose extraordinary hardship

on employees. As we have noted in similar circumstances, the Sentencing Guidelines 'do not require a judge to leave compassion and common sense at the door to the courtroom.'" *U.S. v. Milikowsky,* 65 F.3d 4, 6–9 (2d Cir. 1995) [8#2].

On the same issue, the First Circuit ruled that, first, "vocational skills" are a discouraged, not prohibited departure factor under §5H1.2, and second, that loss of employment to innocent third parties may or may not be related to a defendant's "vocational skills." Therefore, in light of *Koon*, the court held that "job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration" for departure. *U.S. v. Olbres,* 99 F.3d 28, 32–36 & n.12 (1st Cir. 1996) (remanded) [9#3].

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

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

f. Age, §5H1.1

Generally, defendant's age is not a proper ground for departure, §5H1.1. See, e.g., *U.S. v. Fierro,* 38 F.3d 761, 775 (5th Cir. 1994) (remanded: improper to depart from life sentence to twenty years for forty-three-year-old defendant because, in district court's opinion, "20 years is life"); *U.S. v. Jackson,* 30 F.3d 199, 202–03 (1st Cir. 1994) (remanded: fact that thirty-year sentence may be tantamount to life sentence for 40-year-old improper ground); *U.S. v. Anders,* 956 F.2d 907, 912 (9th Cir. 1992) (remanded: belief that drug rehab may be harder for forty-six-year-old who would not be released until over age fifty improper ground); *U.S. v. White,* 945 F.2d 100, 102 (5th Cir. 1991) (reversed: defendant's youth) [4#12]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (remanded: cumulative effect of personal characteristics, including old age) [2#20]; *U.S. v. Summers,* 893 F.2d 63, 69 (4th Cir. 1990) (reversed: departure for young age clear error).

However, the Tenth Circuit upheld a departure for a career offender down to the non-career offender guideline range based partly on defendant's age (sixty-four) and ill health, because those factors made it less likely that he would commit future crimes. *U.S. v. Collins,* 122 F.3d 1297, 1305–07 (10th Cir. 1997) [10#3]. See also *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) (affirmed downward departure for career offender based on "unique combination of factors," including defendant's youth) [4#7].

g. Other personal circumstances that may warrant downward departure

U.S. v. Floyd, 945 F.2d 1096, 1099–1102 (9th Cir. 1991) (affirmed: neither §5H1.6 nor §5H1.2 precludes downward departure for "youthful lack of guidance" based on lack of guidance and education, abandonment by parents, imprisonment at age seventeen—but see note below) [4#10]; *U.S. v. Lopez,* 938 F.2d 1293, 1298 (D.C. Cir. 1991) (remanded: limitation on "socio-economic status" in §5H1.10 does not preclude consideration of defendant's tragic personal history) [4#5]; *U.S. v. Alba,* 933 F.2d 1117, 1122 (2d Cir. 1991) (remanded on other grounds: "less than minimal" role in offense) [4#5]; *U.S. v. Jagmohan,* 909 F.2d 61, 65 (2d Cir. 1990) (affirmed: inter alia, naiveté displayed in committing offense) [3#10]. See also *U.S. v. Reed,* 167 F.3d 984, 994 (6th Cir. 1999) (citing *Koon* in noting that "[d]elay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure").

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

Other circuits have noted, before and after §5H1.12's enactment, that departure may be warranted for childhood *abuse* in extraordinary cases. See, e.g., *U.S. v. Rivera,* 192 F.3d 81, 84–85 (2d Cir. 1999) ("in extraordinary circumstances . . . , district courts may properly grant a downward departure [under §5H1.3] on the ground that extreme childhood abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense"); *U.S. v. Pullen,* 89 F.3d 368, 372 (7th Cir. 1996) ("Although we do not think that a history of being abused as a child is in general a proper ground for a departure from the applicable guidelines sentencing range, . . . departure is permissible, even on the basis of a factor disfavored (but not actually prohibited) by the Sentencing Commission, if the defendant is able to show that in his particular case the presence of the factor made his case an extraordinary one."); *U.S. v. Roe,* 976 F.2d 1216, 1218 (9th Cir. 1992) (under §5H1.3, "the psychological effects of childhood abuse may only be considered as a basis for departure in extraordinary circumstances"); *U.S. v. Vela,* 927 F.2d 197, 199 (5th Cir. 1991) (under §5H1.3, "defendant's family history of incest or related treatment which causes defendant to incur a mental or emotional condition that affects criminal conduct, may be a ground for departure in extraordinary cases").

h. Personal circumstances that do not warrant downward departure

U.S. v. Dominguez-Carmona, 166 F.3d 1052, 1057–59 (10th Cir. 1999) (remanded: fact that defendants were poor and desperate for money concerns "socio-economic status" precluded by §5H1.10; "lack of sophistication," considered in §3B1.2(a), would have to be extraordinary for departure); *U.S. v. Rybicki,* 96 F.3d 754, 757–59 (4th Cir. 1996) (remanded: imprisonment "more onerous" for law enforcement officers who "suffer disproportionate problems when they are incarcerated") [9#2]; *U.S. v. Walker,* 27 F.3d 417, 419 (9th Cir. 1994) (affirmed: "post-arrest emotional trauma") [6#17]; *U.S. v. Haversat,* 22 F.3d 790, 795 (8th Cir. 1994) (remanded: "good character" as demonstrated by charitable or volunteer activities, unless "those activities are truly exceptional"); *U.S. v. Talk,* 13 F.3d 369, 371 (10th Cir. 1993) (affirmed: "forcible rape is not a crime where sophistication or lack thereof would justify any departure"); *U.S. v. Baker,* 4 F.3d 622, 623–24 (8th Cir. 1993) (remanded: departure for substantial assistance in absence of §5K1.1 motion improper despite defendant's "subjective belief" that she complied with plea agreement by assisting investigation of close relatives, which "exposed her to 'ostracism' and 'suspicion' within her extended family") [6#7]; *U.S. v. Haynes*, 985 F.2d 65, 68–69 (2d Cir. 1993) (affirmed: youthful lack of guidance, §5H1.12); *U.S. v. Desormeaux,* 952 F.2d 182, 185–86 (8th Cir. 1991) (abused by different boyfriend three years earlier, §5H1.3; post-arrest attainment of GED, §5H1.2); *U.S. v. Harpst,* 949 F.2d 860, 863 (6th Cir. 1991) (reversed: suicidal tendencies—Bureau of Prisons must provide adequate facilities) [4#14]; *U.S. v. Prestemon,* 929 F.2d 1275, 1277–78 (8th Cir. 1991) (remanded: adopted, biracial child, §§5H1.6, 5H1.10) [4#5]; *U.S. v. Diegert,* 916 F.2d 916, 919 n.2 (4th Cir. 1990) (remanded: personal financial difficulty); *U.S. v. Pozzy,* 902 F.2d 133, 138–40 (1st Cir. 1990) (remanded: pregnancy, husband's incarceration, lack of nearby halfway house; may not use "totality of circumstances") [3#8]; *U.S. v. Brewer,* 899 F.2d 503, 508–10 (6th Cir. 1990) (remanded: inter alia, degree of remorse and promptness of restitution, victim's recommendation of clemency) [3#5]; *U.S. v. Rosen,* 896 F.2d 789, 791–92 (3d Cir. 1990) (affirmed: combination of typical factors, compulsive gambling) [3#3]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (remanded: cumulative effect of personal characteristics—age and physical condition, voluntary restitution, uncharacteristic nature of behavior) [2#20]; *U.S. v. Williams,* 891 F.2d 962, 965–66 (1st Cir. 1989) (remanded: cocaine addiction, desire to reform, lack of weapon, "ineffectiveness" as bank robber) [2#18]; *U.S. v. Natal-Rivera,* 879 F.2d 391, 393 (8th Cir. 1989) (affirmed: cultural heritage) [2#11].

2. Extraordinary Rehabilitation, Drug Addiction

Note: A Nov. 1, 2000, amendment added new §5K2.19, which prohibits departures for post-sentencing rehabilitative efforts. As noted below, most circuits to decide the issue have held that such efforts could warrant departure. The Commission's "reason for amendment" adds that the amendment does not restrict departures for extraordinary post-offense, pre-sentencing rehabilitation efforts.

a. Departure versus acceptance of responsibility

Several circuits have stated that the decision in *Koon v. U.S.,* 116 S. Ct. 2035 (1996), may allow departure for post-offense, pre-sentencing rehabilitation because that ground has not been forbidden by the Sentencing Commission. The Fourth Circuit, for example, concluded that "it is clear that our holding in *Van Dyke* that post-offense rehabilitation can never form a proper basis for departure has been effectively overruled by *Koon*. The Sentencing Commission has not expressly forbidden consideration of post-offense rehabilitation efforts; thus, they potentially may serve as a basis for departure. Because the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted." *U.S. v. Brock,* 108 F.3d 31, 33–35 (4th Cir. 1997) [9#6]. Accord *U.S. v. Pickering,* 178 F.3d 1168, 1174–75 (11th Cir. 1999) (however, because rehabilitation reflects "more strongly on the offender's rehabilitative potential and likelihood of recidivism," may only depart in criminal history category); *U.S. v. Whitaker,* 152 F.3d 1238, 1239 (10th Cir. 1998); *U.S. v. Rhodes,* 145 F.3d 1375, 1379–82 (D.C. Cir. 1998); *U.S. v. Kapitzke,* 130 F.3d 820, 823–24 (8th Cir. 1997); *U.S. v. Sally,* 116 F.3d 76, 79–82 (3d Cir. 1997). See also *U.S. v. Maier,* 975 F.2d 944, 946–49 (2d Cir. 1992) (before *Koon*, holding that post-offense drug rehabilitation was proper basis for departure) [5#4]. But cf. *U.S. v. Herman,* 172 F.3d 205, 209 (2d Cir. 1999) (remanded: "rarely, if ever, will drug rehabilitation undertaken *before* the commission of a crime constitute an appropriate predicate for a downward departure").

Before the addition of §5K2.19 resolved the issue, there was disagreement over whether *post-sentencing* rehabilitation may be considered for departure at a resentencing after remand. Most circuits to decide the issue have held that it may be considered, generally concluding that under *Koon* it could not be categorically excluded and that there was no significant difference with post-offense rehabilitation. The rehabilitation must be sufficiently extraordinary to be considered atypical and take the case out of the "heartland" of rehabilitation already taken into account in §3E1.1. See *U.S. v. Bradstreet,* 207 F.3d 76, 81–84 (1st Cir. 2000) (affirming departure for defendant's "extraordinary efforts toward rehabilitation, community service, and efforts at educating his fellow inmates"); *U.S. v. Rudolph,* 190 F.3d 720, 722–27 (6th Cir. 1999) (but noting that, although departure for post-sentencing rehabilitation may be considered on remand after successful, §2255 motion, it is not a ground for collateral attack of sentence under §2255); *U.S. v. Green,* 152 F.3d 1202, 1207–08 (9th Cir. 1998) [10#4]; *Rhodes,* 145 F.3d at 1379–84 [10#4]; *U.S. v. Core,* 125 F.3d 74, 77–79 (2d Cir. 1997) [10#4]. See also *Sally,* 116 F.3d at 80–82 (post-*conviction* rehabilitation may provide departure ground). Cf. *U.S. v. Maldonado,* 242 F.3d 1, 5 (1st Cir. 2001) (although amendment to Guidelines prospectively prohibited departures based on post-sentence rehabilitation, effective Nov. 1, 2000, this circuit had previously allowed such departures and, where original

sentencing occurred before amendment, defendant could argue for departure after successful 28 U.S.C. §2255 motion resulting in de novo resentencing).

The Eighth Circuit disagreed, however, concluding that post-offense rehabilitation should not be considered for departure at resentencing because it could increase sentencing disparity by providing a "windfall" for defendants "lucky" enough to be resentenced, interfere with the Bureau of Prisons authority to award good-time credits, and violate the circuit's general rule that only matters that could have been heard at the original sentencing should be heard at resentencing. *U.S. v. Sims,* 174 F.3d 911, 912–13 (8th Cir. 1999) [10#4]. For a time the court distinguished *Sims* in affirming a departure for post-sentencing rehabilitation when defendant was resentenced under 18 U.S.C. §3582(c) for a retroactive amendment. *U.S. v. Hasan,* 205 F.3d 1072, 1074–75 (8th Cir. 2000). However, the court later reversed *Hasan* and held that departure in a §3582(c) resentencing would only be available if departure was granted at the original sentencing, which excludes post-sentencing rehabilitation. See *U.S. v. Hasan,* 245 F.3d 682, 684–90 (8th Cir. 2001) (en banc) [11#4].

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

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

In the Second Circuit *Williams* case, by the time defendant was resentenced after remand he had completed a drug education program and been accepted into an intensive, pilot treatment program in federal prison, which he could only participate in if his sentence was reduced (inmates had to be eighteen to thirty-six months

from release). The district court found these changed circumstances warranted departure and imposed the same five-year sentence, and the appellate court affirmed. "[W]hen a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he has been admitted to a selective and intensive inmate drug treatment program, and when a sentence within the guideline range would effectively deprive him of his only opportunity to rehabilitate himself while incarcerated, we think a departure is within the district court's discretion." *U.S. v. Williams*, 65 F.3d 301, 303–09 (2d Cir. 1995) (remanded: departure affirmed, but court must impose stricter conditions of supervised release to ensure defendant completes program and stays drug free or faces lengthy prison term) [8#3].

Other courts have held that drug or alcohol addiction or recovery is never grounds for downward departure. See *Zeigler*, 1 F.3d at 1049; *U.S. v. Martin*, 938 F.2d 162, 163–64 (9th Cir. 1991) (§5H1.4) (1992); *U.S. v. Pharr*, 916 F.2d 129, 133–34 (3d Cir. 1990) (§5H1.4); *Van Dyke*, *supra* (adequately taken into consideration under §3E1.1). Relying on §5H1.4, the Eighth Circuit declined to review a district court's refusal to grant a downward departure for defendant's drug dependence and prospects for rehabilitation. *U.S. v. Laird*, 948 F.2d 444, 447 (8th Cir. 1991). But cf. *U.S. v. Carvell*, 74 F.3d 8, 9–12 (1st Cir. 1996) (remanded: may depart under §5K2.11 despite §5H1.4 where evidence showed that defendant grew marijuana only to smoke it as treatment for serious depression that legal medications had not helped) [8#6].

b. Downward departures proper under circumstances

U.S. v. Gee, 226 F.3d 885, 900–02 (7th Cir. 2000) (although defendant was ineligible for §3E1.1 after going to trial, he took many other actions that "demonstrated a 'non-heartland' acceptance of responsibility"); *U.S. v. DeShon,* 183 F.3d 888, 889–90 (8th Cir. 1999) (defendant "changed [his life] completely and . . . is now a different person," and pretrial services officer "testified that Mr. DeShon's post-offense efforts were 'extraordinary'"; departure was from range of 30–37 months to five months each of community confinement and home detention); *U.S. v. Workman,* 80 F.3d 688, 701 (2d Cir. 1996) (affirmed: for drug conspiracy defendant who, before arrest and after completing short prison sentence on unrelated charge, left conspiracy, rehabilitated himself, and completed stint in U.S. Army—"apparently complete *pre-arrest* rehabilitation" falls within *Maier*); *U.S. v. Carvell,* 74 F.3d 8, 9–12 (1st Cir. 1996) (remanded: may consider departure under §5K2.11 despite §5H1.4 for defendant who grew marijuana to smoke as treatment for serious depression that legal medication had not helped) [8#6]; *U.S. v. Maier*, 975 F.2d 944, 946–49 (2d Cir. 1992) (affirmed: post-offense progress in drug rehabilitation) [5#4]; *U.S. v. Whitehorse,* 909 F.2d 316, 319–20 (8th Cir. 1990) (affirmed: proper for escape defendant with alcohol problem because authorities should not have granted unsupervised furlough; alcoholism itself, however, not valid ground for departure) [3#12]; *U.S. v. Maddalena,* 893 F.2d 815, 818 (6th Cir. 1989) (remanded: may consider defendant's pre-arrest efforts to avoid drugs) [2#19]. Cf. *U.S. v. Ragan,* 952 F.2d

1049, 1049–50 (8th Cir. 1992) (affirmed: "not plain error" to grant downward departure to defendant who had stopped using drugs for over a year before indictment and maintained steady employment, where government failed to object).

c. Downward departures improper under circumstances

U.S. v. Webb, 135 F.3d 403, 406–07 (D.C. Cir. 1998) (remanded: that defendant's crack cocaine sales were motivated by his drug addiction is not legitimate ground for departure); *U.S. v. Rybicki,* 96 F.3d 754, 757–59 (4th Cir. 1996) (remanded: departure to probation for recovering alcoholic requiring counseling) [9#2]; *U.S. v. Chubbuck,* 32 F.3d 1458, 1461–62 (10th Cir. 1994) (remanded: post-offense drug rehabilitation combined with "significant change in the defendant's conduct and attitudes towards life" resulting from religious activities) [7#2]; *U.S. v. O'Brien,* 18 F.3d 301, 302–03 (5th Cir. 1994) (remanded: drug defendant's post-conviction community service) [6#13]; *U.S. v. Baker,* 965 F.2d 513, 516 (7th Cir. 1992) (affirmed: substantial progress in drug rehabilitation not ground for departure below mandatory minimum); *U.S. v. Anders,* 956 F.2d 907, 912 (9th Cir. 1992) (remanded: concern that drug treatment may be more difficult when forty-six-year-old defendant released after age fifty); *U.S. v. Williams,* 948 F.2d 706, 710–11 (11th Cir. 1991) (affirmed: partial drug recovery in court-ordered program); *U.S. v. Harrington,* 947 F.2d 956, 962–63 (D.C. Cir. 1991) (reversed, remanded for district court to consider acceptance of responsibility adjustment) [4#12]; *U.S. v. Bruder,* 945 F.2d 167, 173 (7th Cir. 1991) (en banc) (affirmed: acceptance of responsibility reduction already given for obtaining employment, changing associates, and reducing alcohol consumption post-offense); *U.S. v. Citro,* 938 F.2d 1431, 1440 (1st Cir. 1991) (affirmed: involuntary drug addiction, §§5H1.4, 5K2.13); *U.S. v. Martin,* 938 F.2d 162, 163–64 (9th Cir. 1991) (affirmed: post-arrest drug rehabilitation, §§5H1.3–1.4); *U.S. v. Page,* 922 F.2d 534, 535 (9th Cir. 1991) (affirmed: alcoholism, "irrespective of its extreme nature"); *U.S. v. McHan,* 920 F.2d 244, 247–48 (4th Cir. 1990) (remanded: charitable activities of drug dealer) [3#17]; *U.S. v. Sklar,* 920 F.2d 107, 115–16 (1st Cir. 1990) (reversed: post-offense drug rehabilitation was required by pretrial release agreement); *U.S. v. Pharr,* 916 F.2d 129, 132–33 (3d Cir. 1990) (remanded: effort to overcome heroin addiction, possibility incarceration would hinder rehabilitation, §5H1.4) [3#15]; *U.S. v. Goff,* 907 F.2d 1441, 1445–47 (4th Cir. 1990) (remanded: drug addiction and other factors) [3#10]; *U.S. v. Van Dyke,* 895 F.2d 984, 987 (4th Cir. 1990) (remanded: "rehabilitative conduct" after arrest and before sentencing—drug abuse treatment and counseling others against drug use) [3#2].

3. Combination of Factors or Totality of the Circumstances

A Nov. 1, 1994, addition to §5K2.0's commentary makes a limited allowance for a totality of circumstances departure: "The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics

or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare." For an example of such a departure involving many different factors, see *U.S. v. Jones,* 158 F.3d 492, 498–506 (10th Cir. 1998) (affirmed). See also *U.S. v. Coleman,* 188 F.3d 354, 361–62 (6th Cir. 1999) (en banc) (remanded because district court did not consider defendant's argument that a combination of circumstances warranted departure: "we hold that pursuant to *Koon*, the district court is required to consider the particular factors of the case as a whole, and any combination thereof, in determining whether there were sufficient extraordinary factors to take Coleman's case out of the 'heartland' of crack cocaine cases. Moreover, in the event that a defendant brings a downward departure claim in an attempt to abuse the aggregation paradigm set forth herein, we believe that district courts are perfectly equipped to handle such situations by granting appropriate procedural relief.").

The Sixth Circuit upheld a three-level downward departure based on the following combination of factors: "the death of Sabino's wife a few months before sentencing; Sabino's age (72) at the time of sentencing; his physical deficiencies and condition, particularly ailments with his eyes and ears; the absence of any physical threat to others; the absence of a risk of flight; and the conclusion that Sabino played a minor role in the conspiracy." Although the court reversed the minor role finding, it held that the district court did not abuse its discretion in departing three levels. *U.S. v. Sabino,* 274 F.3d 1053, 1078–79 (6th Cir. 2001).

Previously, the Tenth Circuit held that a "unique combination of factors," none of which "standing alone may have warranted departure," provided a proper basis for departure for a career offender. *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) [4#7]. The Ninth Circuit has also held "that a combination of factors [may] together constitute a 'mitigating circumstance.'" *U.S. v. Cook,* 938 F.2d 149, 153 (9th Cir. 1991) (remanded). The Eighth Circuit affirmed a departure based on a combination of factors and "the unusual mitigating circumstances of life on an Indian reservation." *U.S. v. One Star,* 9 F.3d 60, 61 (8th Cir. 1993) [6#8]. See also *U.S. v. Parham,* 16 F.3d 844, 848 (8th Cir. 1994) ("the factors warranting departure in a particular case do not exist in isolation. . . . The totality of those individual circumstances may well converge to create the unusual situation not contemplated by the Commission."). And in a "close case," the Second Circuit held that downward departure could be based in part on a "confluence of circumstances [that] was not taken into account by the Guidelines." *U.S. v. Broderson,* 67 F.3d 452, 458–59 (2d Cir. 1995) [8#4].

Before *Cook,* the Ninth Circuit held in *U.S. v. Takai,* 930 F.2d 1427 (9th Cir. 1991) [4#3], that a unique combination of factors "may together constitute a 'mitigating circumstance'" that warrants departure, but deleted that language in an amended opinion. See *U.S. v. Takai,* 941 F.2d 738, 743–44 (9th Cir. 1991). The amended opinion held a court may "look to the totality of circumstances in determining whether there were single acts of aberrant behavior . . . that justify depar-

ture." The Tenth Circuit upheld a similar analysis in *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991), holding that defendant's long-time employment, economic support for her family, and lack of substance abuse or prior involvement with drugs supported the conclusion that her conduct was aberrant behavior. See also *U.S. v. Tsosie,* 14 F.3d 1438, 1441–42 (10th Cir. 1994) (affirmed: same—"totality of circumstances must be viewed to see whether the offense fits within Tsosie's normal conduct or if it is a complete shock and out of character").

In an opinion that was later remanded by the Supreme Court, the Ninth Circuit later reaffirmed the principle of a departure for "a combination of factors that do not individually justify a departure," but also stated that some factors "should not be part of the consideration." The court rejected downward departures based on "personal and professional consequences that stem from a criminal conviction," "the vulnerability of a police officer in prison," "the fact that appellants are neither dangerous nor likely to commit crimes in the future," and "the 'spectre of unfairness'" of successive prosecutions in state and federal court. *U.S. v. Koon,* 34 F.3d 1416, 1452–57 (9th Cir. 1994) [7#2].

However, *Koon* was partially reversed by the Supreme Court, which held that, unless the Sentencing Commission explicitly prohibited it, any factor may be considered as a potential basis for departure. "[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline." *Koon v. U.S.,* 116 S. Ct. 2035, 2051 (1996) [8#7]. Cf. *U.S. v. Rybicki,* 96 F.3d 754, 757–59 (4th Cir. 1996) (applying *Koon* analysis in rejecting departure based on "the confluence of six factors") [9#2].

Before the 1994 amendment to §5K2.0 and the Supreme Court's decision in *Koon*, some circuits specifically rejected a totality of circumstances approach when the individual factors were not proper grounds for departure. See *U.S. v. Dyce,* 78 F.3d 610, 617 (D.C. Cir. 1996) (remanded: "factors already considered by the Sentencing Commission cannot be combined to form a 'unique combination' justifying departure"), *as amended on denial of rehearing,* 91 F.3d 1462, 1470 (D.C. Cir. 1996); *U.S. v. Dalecke,* 29 F.3d 1044, 1048 (6th Cir. 1994) (remanded: "district court erred by accumulating typical factors 'already taken into account' by the sentencing guidelines") [7#1]; *U.S. v. Minicone,* 26 F.3d 297, 302 (2d Cir. 1994) (remanded: "where independent factors have been adequately considered by the Sentencing Commission and each factor considered individually fails to warrant a downward departure, the sentencing court may not aggregate the factors in an effort to justify a downward departure under a 'totality of circumstances' test") [6#15]; *U.S. v. Mogel,* 956 F.2d 1555, 1566 (11th Cir. 1992) (remanded); *U.S. v. Goff,* 907 F.2d 1441, 1447 (4th Cir. 1990) (remanded: cumulation of typical factors does not warrant departure) [3#10]; *U.S. v. Pozzy,* 902 F.2d 133, 138–40 (1st Cir. 1990) (remanding departure based on totality of circumstances) [3#8]; *U.S. v. Rosen,* 896 F.2d 789, 791–92

(3d Cir. 1990) (affirmed: "combination of typical factors does not present an unusual case" warranting departure) [3#3]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (vacating downward departure partly based on "cumulative effect" of factors that individually would not justify departure) [2#20].

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

a. Coercion and duress, §5K2.12

"If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may [depart downward]." USSG §5K2.12. See also *U.S. v. Henderson-Durand,* 985 F.2d 970, 976 (8th Cir. 1993) (in dicta: "This ground for departure is broader than the defense of duress, as it does not require immediacy of harm or inability to escape, and allows the district court to consider the subjective mental state and personal characteristics of the defendant").

A jury's rejection of duress or coercion as a complete defense to the crime of conviction does not preclude their consideration in sentencing for downward departure under §5K2. See *U.S. v. Isom,* 992 F.2d 91, 94 (6th Cir. 1993) (affirmed); *U.S. v. Johnson,* 956 F.2d 894, 901–03 (9th Cir. 1992) (remanded) [4#16]; *U.S. v. Cheape,* 889 F.2d 477, 478–79 (3d Cir. 1989) (remanded) [2#16]. See also *U.S. v. Pinto,* 48 F.3d 384, 388 (9th Cir. 1995) ("standard for a §5K2.12 duress departure is *imperfect duress*, that is, duress which is not 'a complete defense'"). Similarly, the Eighth Circuit held that evidence of "battered woman syndrome" may be considered for downward departure even though the jury rejected it as a complete defense, §5K2.10. *U.S. v. Whitetail,* 956 F.2d 857, 862–64 (8th Cir. 1992) (remanded) [4#16]. See also *U.S. v. Amparo,* 961 F.2d 288, 292 (1st Cir. 1992) (in dicta, citing earlier cases above: "a jury's rejection of a duress defense does not necessarily preclude a . . . departure under section 5K2.12").

Section 5K2.12 allows departure "[i]f the defendant committed the offense *because of*" coercion or duress, and the D.C. Circuit stressed that this "require[s] some degree of causal connection" between the coercion or duress and the offense. The court affirmed a refusal to depart because, although defendant presented evidence that her husband was abusive, the district court reasonably found that there was no connection between the abuse and her offense. *U.S. v. Sammoury,* 74 F.3d 1341, 1345–46 (D.C. Cir. 1996) (although defendant claimed husband coerced her to embezzle funds to support his drug and alcohol addictions, evidence showed that defendant continued stealing for more than a year after they separated, paid off her car, and purchased second home in Colorado).

The Second Circuit affirmed a departure for duress for a defendant convicted of multiple, related counts even though the duress did not directly cause the most serious count that, under the grouping rules, controlled the offense level. Defendant was clearly under duress in relation to the less serious counts, and there was a sufficient "causal nexus" between that duress and the more serious offense for the

district court to conclude it was committed "because of" the duress as required by §5K2.12. *U.S. v. Amor,* 24 F.3d 432, 438–40 (2d Cir. 1994) ("there was a causally related chain of circumstances" connecting the duress to all counts) [6#17].

Note that the guideline states that "[o]rdinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency." Some courts have accordingly required some sort of physical coercion or threat to warrant departure under §5K2.12. See, e.g., *U.S. v. Russell,* 917 F.2d 512, 516 (11th Cir. 1990) (remanded: although defendant with "dependent personality disorder" may have been "talked into" robbery by accomplice, there was "no evidence that he was physically coerced into committing his offense or that he did so under threat of injury to his person or property"); *U.S. v. Pozzy,* 902 F.2d 133, 139 (1st Cir. 1990) (remanded: "nothing in the record to suggest that defendant was physically coerced by her husband into taking an active role in his cocaine business, or that she did so because of threats of physical violence" so as to qualify for §5K2.12 departure); *U.S. v. McCrary,* 887 F.2d 485, 488–89 (4th Cir. 1989) (affirmed: "no evidence whatsoever that his co-conspirators voiced threats of [sufficient] magnitude" to warrant §5K2.12 departure for defendant). Cf. *U.S. v. Hall,* 71 F.3d 569, 570–73 (6th Cir. 1995) (remanded: district court "must consider coercion as a basis for departure" in case where defendant "suffered serious physical and emotional abuse" by her husband) [8#5].

Section 5K2.12 also states that "personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence." The Fifth Circuit cited this passage in reversing a departure given to a sixty-year-old defendant that the district court found "was economically and psychologically pressured by fear of career loss into following the orders he was given." See *U.S. v. Moeller,* 80 F.3d 1053, 1063 (5th Cir. 1996) ("This is not the type of duress contemplated by §5K2.12").

b. Victim's conduct, §5K2.10

Victim's conduct warranted a downward departure under §5K2.10: *Koon v. U.S.,* 116 S. Ct. 2035, 2048–50 (1996) (district court properly departed for victim of police brutality because offense guideline did not account for victim's misconduct—resisting lawful arrest—in provoking offense) [8#7]; *U.S. v. Dailey,* 24 F.3d 1323, 1327–28 (11th Cir. 1994) (affirmed: for defendant convicted of extortion offense after making threat of harm to victim because the "victim had defrauded him out of tens of thousands of dollars. Dailey only threatened physical harm after he and his family came under financial distress.") [7#1]; *U.S. v. Tsosie,* 14 F.3d 1438, 1442–43 (10th Cir. 1994) (affirmed: victim's conduct "contributed significantly to provoking the offense behavior" and "was of a greater physical size and strength than the defendant"; also, defendant "attempted to provide aid and medical care to the victim" after fight, "a factor that is not considered by the guidelines") [6#10]; *U.S. v.*

Yellow Earrings, 891 F.2d 650, 653–55 (8th Cir. 1989) (affirmed: victim "substantially provoked" assault) [2#18].

Victim's conduct did not warrant departure: *U.S. v. Morin,* 80 F.3d 124, 127–28 (4th Cir. 1996) (remanded: cannot base departure on victim's *perceived* conduct—§5K2.10 "contemplates that the victim must actually have done something wrong"; also, murder-for-hire scheme was disproportionate and unreasonable response to alleged conduct); *U.S. v. Hatney,* 80 F.3d 458, 461–62 (11th Cir. 1996) (remanded: partial cooperation by underage victims in child pornography offense); *U.S. v. Desormeaux,* 952 F.2d 182, 186 (8th Cir. 1991) (remanded: defendant saw victim on back of defendant's boyfriend's motorcycle); *U.S. v. Shortt,* 919 F.2d 1325, 1328 (8th Cir. 1990) (remanded: adultery by victim did not warrant departure under §5K2.10 for explosives offense) [3#16]; *U.S. v. Bigelow,* 914 F.2d 966, 975 (7th Cir. 1990) (remanded: fact that victim refused to pay business debt could not excuse extortion and beating of victim).

Section 5K2.10 lists five factors to consider in determining the extent of a departure, and three of those factors have to do with the "danger" to defendant presented by the victim's conduct. The Third Circuit read this to mean that §5K2.10 "contemplates departures where the victim's conduct posed actual, or reasonably perceived, danger to the defendant, with emphasis on physical danger. . . . Generally only violent conduct, albeit wrongful, justifies a downward departure." Thus, departure was properly denied where the victim's conduct presented "no danger or reasonable perception of danger" to defendant. *U.S. v. Paster,* 173 F.3d 206, 211 (3d Cir. 1999). The court also concluded that defendant's response—violently stabbing his wife to death—was "grossly disproportionate" to the alleged provocation by the victim of revealing marital infidelities. *Id.* at 212. See also *U.S. v. Blankenship,* 159 F.3d 336, 339 (8th Cir. 1998) (affirming denial of departure in part because defendant's "response was disproportionate to the threat posed by the victim's conduct"); *Morin,* 80 F.3d at 128 (same, stating that §5K2.10 manifests a "concern for the proportionality of the defendant's response").

c. Government misconduct or entrapment

Effective Nov. 1, 1993, Application Note 17 to §2D1.1 (renumbered as Note 15, Nov. 1, 1995) allows for the possibility of a downward departure if, "in a reverse sting . . . , the court finds that the government agent set a price for the controlled substance that was substantially below the market value," thereby leading defendant to purchase "a significantly greater quantity" of the drug than was otherwise possible. Cf. *U.S. v. Gaviria,* 116 F.3d 1498, 1527 (D.C. Cir. 1997) (affirming denial of departure based on Note 15 because evidence did not show that government agent set artificially low price or that codefendant bought significantly more cocaine than he would have at higher price); *U.S. v. Hulett,* 22 F.3d 779, 782 (8th Cir. 1994) (rejecting entrapment claim, finding that although undercover agent offered four kilograms of cocaine to defendant at roughly half price, defendant was already

predisposed to buy large quantities of cocaine and Note 17 did not warrant departure).

The Ninth Circuit used Note 17 in finding that a departure for "sentencing entrapment" might be warranted in a "reverse sting" operation. The government informant pressured defendant to buy five kilograms of cocaine when defendant was interested in only one or two. Defendant only agreed to buy five (and there was some doubt that he actually did agree) after the informant said he would buy back three or four of the kilograms so that defendant could afford the deal. Finding defendant's "sentencing entrapment theory convincing," the appellate court remanded for more specific factual findings. *U.S. v. Naranjo,* 52 F.3d 245, 250–51 (9th Cir. 1995) [7#10]. Cf. *U.S. v. Stavig,* 80 F.3d 1241, 1246 (8th Cir. 1996) (affirmed: although government confidential informant offered defendant easier payment terms to induce purchase of kilogram of cocaine rather than lesser amount, this did not qualify as sentencing entrapment under Note 17—"This transaction fails to show that the government provided Stavig with a financial arrangement so attractive that he was able to purchase a significantly larger quantity than he would have otherwise purchased.").

The Ninth Circuit had previously held that a departure for "sentence factor manipulation" was warranted where defendant was pressured by a confidential informant and undercover agent to sell a far larger amount of LSD than he ever had. The court reasoned that although defendant "might have been predisposed to supply drugs 'only on a very small level for his friends,' he was not predisposed 'to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs.'" The court also noted that this was not a reverse sting that might warrant departure under §2D1.1, comment. (n.17) (Nov. 1993), but that its holding "in the instant case is motivated by the same concerns, and, as such, is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress." *U.S. v. Staufer,* 38 F.3d 1103, 1107–08 (9th Cir. 1994) (remanded).

Before Note 17 the Ninth Circuit upheld a departure under §5K2.12 for "coercive" government conduct during the investigation of the offense. A government agent initiated the illegal activity and persisted for several months to persuade defendants to commit the offenses. The appellate court affirmed that "[t]his sort of aggressive encouragement of wrongdoing, although not amounting to a complete defense, may be used as a departure under section 5K2.12," and noted that "threats of violence are not a prerequisite to application of the guidelines in cases of 'imperfect entrapment.'" *U.S. v. Garza-Juarez,* 992 F.2d 896, 910–12 & n.2 (9th Cir. 1993) [5#12]. See also *U.S. v. McClelland,* 72 F.3d 717, 725–26 (9th Cir. 1995) (affirming "imperfect entrapment" departure for defendant convicted in murder-for-hire attempt—although defendant initiated plan to kill his wife, he repeatedly expressed reluctance to proceed and only went forward after undercover informant that defendant had asked to do the killing "repeatedly pushed McClelland to go forward") [8#5].

In a later case, the court allowed a three-level departure after conviction at trial

where the government had entered into plea negotiations with defendant in the absence of his attorney. Noting that the district court "assumed it could not depart downward for governmental misconduct," the court upheld the departure for the "prejudice Lopez suffered as a result of the government's conduct. . . . As a result of the government's conduct, Lopez's opportunity for full and fair plea negotiations was seriously affected." *U.S. v. Lopez,* 106 F.3d 309, 311 (9th Cir. 1997) [9#5]. See also Jones v. U.S., 160 F.3d 473, 484 (8th Cir. 1998) (remanded: citing *Lopez* for principle that "where the government's conduct directly results in prejudice to a defendant, which is significant enough to take the case out of the heartland of the guidelines, the district court has the discretion to impose a downward departure").

The fact that a prosecutor offers defendant "an 'exploding' plea bargain with a short fuse . . . is entirely within his or her prosecutorial discretion and does not constitute—either alone or in combination with other factors—a valid ground for departure." *U.S. v. Pickering,* 178 F.3d 1168, 1174 (11th Cir. 1999) (remanded: where prosecutor in morning offered plea bargain that would expire at 5:00 p.m., and due to delay in defense attorney reaching defendant in prison he only had forty-five minutes to consider offer, "it was an abuse of discretion for the district court to rely on the timing of the Government's most lenient plea offer as a basis for its departure").

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

In a later case the Eighth Circuit upheld the principle of a departure for "sentencing entrapment" based on "impermissible conduct" by the government, but reversed on the facts and declined to "determine in the abstract what is permissible and impermissible conduct on the part of government agents." *U.S. v. Barth,* 990 F.2d 422, 424–25 (8th Cir. 1993) (defendant "failed to demonstrate that the government's conduct was outrageous or that the undercover officer's conduct overcame his predisposition to sell small quantities of crack cocaine") [5#11]. The court also stated that it "share[d] the confidence of the First Circuit that when a sufficiently egregious case arises, the sentencing court may deal with the situation by excluding the tainted transaction or departing." *Id.* at 425 (citing *U.S. v. Connell,* 960 F.2d 191, 196 (1st Cir. 1992), also noting that "sentencing entrapment" is more accurately called "sentencing factor manipulation")). See also *U.S. v. Bala,* 236 F.3d 87, 92 (2d Cir. 2000) (affirming refusal to depart on facts, but stating "we can find nothing in the guidelines to prohibit a district court from considering conduct by the government that does not give rise to an entrapment defense but that is nonetheless 'aggressive encouragement of wrongdoing.' . . . Moreover, the policy statement in Section 5K2.12 can reasonably be read to authorize such a departure in appropriate cases."). Cf. *U.S. v. Tremelling,* 43 F.3d 148, 151–52 (5th Cir. 1995)

(where government simply brought larger amount of marijuana to sell than originally requested and defendant stated he would take the extra to sell and pay for it later, it was proper to include that extra amount as part of defendant's relevant conduct—government agents exerted no pressure to take extra amount and merely bringing extra does not constitute "sentencing manipulation").

The First Circuit has stated that the authority of district courts to deal with possible sentencing entrapment or other government misconduct "applies to statutory minimums as well as to the guidelines." *U.S. v. Montoya,* 62 F.3d 1, 4 (1st Cir. 1995) ("garden variety manipulation claims are largely a waste of time. Nevertheless, where a defendant wants to argue that there has occurred a sentencing manipulation amounting to 'extraordinary misconduct,' we think that the claim need not be limited to a request for a discretionary departure, that it applies to statutory mandatory minimums as well as to guideline ranges"). The Ninth Circuit agreed, reasoning that district courts determine the amount of drugs attributable to a defendant, whether for guidelines or statutory minimum purposes. *U.S. v. Castaneda,* 94 F.3d 592, 594–96 (9th Cir. 1996) (remanded) [9#1]. See also *U.S. v. Riewe,* 165 F.3d 727, 729 (9th Cir. 1999) (in remanding for specific finding of whether defendant showed he was entrapped into selling just over statutory minimum amount, stating that remedy for entrapment would be application of penalty provision for lesser offense defendant was predisposed to commit). However, the D.C. Circuit held that an outrageous conduct defense cannot be used to reduce a statutorily mandated sentence. If the conduct is not so outrageous a violation of due process as to preclude prosecution, "if, in other words, there was no violation of the Due Process Clause—it follows that those actions cannot serve as a basis for a court's disregarding the sentencing provisions." *U.S. v. Walls,* 70 F.3d 1323, 1329–30 (D.C. Cir. 1995) [8#5].

In an en banc decision, the Sixth Circuit remanded a case where the district court refused to consider defendant's claim that the government used improper investigating techniques. "*Koon* makes clear that a court may not categorically exclude the consideration of any one factor. . . . Improper investigative techniques, used as a basis for departing downward, are not factors considered by the Guidelines. Thus, the district court was required to examine the structure and theory of the relevant Guidelines, and the Guidelines as a whole, to determine whether the grounds proffered by Coleman made the case sufficiently atypical to remove it from the 'heartland.'" *U.S. v. Coleman,* 188 F.3d 354, 358–59 (6th Cir. 1999) (en banc).

The Eleventh Circuit has completely rejected this defense. See *U.S. v. Williams,* 954 F.2d 668, 673 (11th Cir. 1992) (rejecting sentencing entrapment theory "as a matter of law"). See also *U.S. v. Miller,* 71 F.3d 813, 817–18 (11th Cir. 1996) (remanded: reiterating earlier holding "that sentencing entrapment is a defunct doctrine" and rejecting theory of "partial entrapment," holding district court could not sentence defendant as if he had sold powder instead of crack cocaine—defendant was clearly disposed to sell cocaine and arranged sale of crack after initial deal for powder fell through) [8#5]. Cf. *U.S. v. Sanchez,* 138 F.3d 1410, 1414 (11th Cir. 1998) (affirming denial of sentencing factor manipulation claim in government sting operation where no drugs were actually involved: "The fact that the government's

fictitious reverse sting operation involved a large quantity of drugs does not amount to the type of manipulative governmental conduct warranting a downward departure in sentencing.").

The D.C. Circuit appears to agree, expressing skepticism that sentencing entrapment could be a viable defense. "The main element in any entrapment defense is rather the defendant's 'predisposition'—'whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime.' . . . Persons ready, willing and able to deal in drugs—persons like [defendants]—could hardly be described as innocents. These defendants showed no hesitation in committing the crimes for which they were convicted. Alone, this is enough to destroy their entrapment argument." *Walls,* 70 F.3d at 1329 (government agent's insistence that cocaine be delivered in crack form is not "sentencing entrapment" warranting departure) [8#5].

Other circuits have acknowledged that sentencing entrapment could warrant departure, but rejected it on the facts of the case. See, e.g., *U.S. v. Washington,* 44 F.3d 1271, 1280 (5th Cir. 1995); *U.S. v. Raven,* 39 F.3d 428, 438 (3d Cir. 1994); *U.S. v. Jones,* 18 F.3d 1145, 1154 (4th Cir. 1994); *U.S. v. Rose,* 17 F.3d 1531, 1551 (2d Cir. 1994).

Before rejecting "sentence manipulation" entirely (see *Garcia* in next paragraph), the Seventh Circuit acknowledged that "[t]he 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." However, the court "decline[d] to extend the application of this doctrine any further than for the most outrageous governmental conduct." *U.S. v. Messino,* 55 F.3d 1241, 1256 (7th Cir. 1995) (affirmed: although continuing to use confidential informant [CI] after he made unauthorized drug purchase from defendant was against government policy, to warrant departure "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") [7#10]. See also *U.S. v. Wilson,* 129 F.3d 949, 951 (7th Cir. 1997) (error to sentence defendant for powder cocaine that he "preferred" to buy and convert to crack himself rather than for the crack he ultimately bought from government informant, even though government made only crack available); *U.S. v. Egemonye,* 62 F.3d 425, 427 (1st Cir. 1995) (stressing that only "extraordinary misconduct" by government would warrant such a departure). Note that the Seventh Circuit later iterated that sentencing manipulation "is distinct from a claim of sentencing entrapment, which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense." *U.S. v. Garcia,* 79 F.3d 74, 75 (7th Cir. 1996) [8#8].

Some defendants have argued that sentencing manipulation occurred when "the government stretched out its investigation after it had sufficient evidence to indict," thereby increasing quantities attributable to defendant for sentencing purposes. Courts have generally rejected such claims, however, finding that the gov-

ernment must be granted leeway in conducting investigations—"since the government bears the burden of proving its case beyond a reasonable doubt, it must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained." *U.S. v. Baker,* 63 F.3d 1478, 1500 (9th Cir. 1995) (affirmed: "we decline to adopt a rule that, in effect, would find 'sentencing manipulation' whenever the government, even though it has enough evidence to indict, opts instead to wait in favor of continuing its investigation"). Accord *U.S. v. Webb,* 135 F.3d 403, 408 (D.C. Cir. 1998) (remanded: "that the police did not arrest Webb after their first or second purchase cannot, without more, take this case out of the heartland of drug distribution cases. . . . Repeat purchases preceding an arrest are a common and legitimate law enforcement tactic."); *U.S. v. Garcia,* 79 F.3d 74, 75–76 (7th Cir. 1996) (affirmed: "We now hold that there is no defense of sentencing manipulation in this circuit. . . . Because the Constitution requires the government to prove a suspect is guilty of a crime beyond a reasonable doubt, the government 'must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.'") [8#8]; *U.S. v. Lacey,* 86 F.3d 956, 965 (10th Cir. 1996) (affirmed: "Law enforcement officials are entitled to buttress their cases with additional evidence, and the courts will not usurp the prosecutor's role in deciding when a particular case is strong enough to seek an indictment."); *U.S. v. Jones,* 18 F.3d 1145, 1155 (4th Cir. 1994) (affirmed: declining to adopt rule that "would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors" and require "justification for an extended investigation or for any particular step undertaken as part of an investigation"); *U.S. v. Calva,* 979 F.2d 119, 123 (8th Cir. 1992) (affirmed: "Police must be given sufficient leeway to construct cases built on evidence that proves guilt beyond a reasonable doubt [and] to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to [probe] deeper into the distribution hierarchy.").

The Tenth Circuit held that such arguments, "whether presented as 'sentencing factor manipulation' or otherwise, should be analyzed under our established outrageous conduct standard. . . . [T]he relevant inquiry is whether, considering the totality of the circumstances in any given case, the government's conduct is so shocking, outrageous and intolerable that it offends 'the universal sense of justice.'" The court rejected a defendant's claim that the government manipulated his sentence by arranging a fourth, significantly larger purchase of cocaine after three half-kilogram purchases, concluding that the last buy "was in furtherance of legitimate law enforcement objectives and not, as a matter of law, outrageous." *U.S. v. Lacey,* 86 F.3d 956, 963–66 (10th Cir. 1996) [8#8].

Following the principle that *Koon* "would appear to prohibit courts from categorically excluding any departure factor not expressly prohibited by the Guidelines," the Third Circuit concluded that "departures based on investigative misconduct unrelated (or only tangentially related) to the guilt of the defendant are not expressly precluded from consideration for departure by the Guidelines, and should not be categorically proscribed." *U.S. v. Nolan-Cooper,* 155 F.3d 221, 242–43 (3d

Cir. 1998) (remanded: district court could consider whether undercover agent's sexual relationship with defendant during sting operation warranted departure).

Note that some early cases rejected government entrapment or misconduct claims at sentencing because defendants pled guilty to the offense they wanted to mitigate. However, these claims were more that the government conduct influenced defendants to *commit* the offense of conviction rather than that it made the offense more serious in order to increase the sentence. See, e.g., *U.S. v. Dickey,* 924 F.2d 836, 839 (9th Cir. 1991) (rejecting "imperfect entrapment"—defendant claimed government informant "talked him into" printing counterfeit money—as ground for downward departure where defendant pled guilty) [3#18]; *U.S. v. Riles,* 928 F.2d 339, 342 (10th Cir. 1991) (because defendant pled guilty to charge of distributing crack cocaine he "could not argue at sentencing that he was entrapped into the distribution or that he lacked the predisposition to distribute 'crack'"); *U.S. v. Streeter,* 907 F.2d 781, 786–87 (8th Cir. 1990) (rejecting claim that "outrageous conduct" by government informant induced defendant to sell drugs because conduct was not extreme and defendant pled guilty—"We see no warrant for the argument that governmental or prosecutorial misconduct should mitigate the sentence of an admittedly guilty defendant").

The Third Circuit affirmed a departure on the basis of "inappropriate manipulation of the indictment." *U.S. v. Lieberman,* 971 F.2d 989, 995–96 (3d Cir. 1992) (charging embezzlement and tax evasion for the same funds resulted in unusual situation because offenses could not be grouped) [5#1]. The Ninth Circuit concluded that, after *Koon*, departure was not prohibited where an "entirely arbitrary" delay in charging and sentencing defendant deprived him of the opportunity to serve more of a prior state sentence concurrently with the instant federal sentence and thus reduce his total prison time. *U.S. v. Sanchez-Rodriguez,* 161 F.3d 556, 563–64 (9th Cir. 1998) (en banc).

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

Although it was not an instance of governmental misconduct, the Tenth Circuit upheld a downward departure for a career offender that was partly based on a delay in the prosecution of the oldest of defendant's predicate offenses. Had that offense been prosecuted in a timely manner, it might have been too old to qualify as a predicate offense and defendant would not have been a career offender. *U.S. v. Collins,* 122 F.3d 1297, 1308 (10th Cir. 1997) [10#3].

5. Other Circumstances

a. Downward departure may be warranted

Guidelines do not account for circumstances: *U.S. v. Allery,* 175 F.3d 610, 613 (8th Cir. 1999) (defendant's use of "virtually the least amount of force" that could sustain conviction for abusive sexual contact "almost necessarily falls outside the heart-

land of cases that the applicable guideline covers"); *U.S. v. Threadgill,* 172 F.3d 357, 376–78 (5th Cir. 1999) (affirmed: defendants were convicted of gambling and money laundering charges, but money laundering played only small part in offenses and laundered funds were not used for further criminal activity); *U.S. v. Hemmingson,* 157 F.3d 347, 360–63 (5th Cir. 1998) (affirmed: sentencing under §2F1.1 rather than §2S1.1 proper because prosecution for campaign financing violation under money laundering statute was atypical); *U.S. v. Mendoza,* 121 F.3d 510, 513–15 (9th Cir. 1997) (lack of knowledge of unusually high purity of methamphetamine) [10#2]; *U.S. v. Lombard,* 72 F.3d 170, 174–87 (1st Cir. 1995) (remanded: when enhancement based on acquitted conduct mandates life sentence for firearms offense) [8#5]; *U.S. v. Broderson,* 67 F.3d 452, 458–59 (2d Cir. 1995) (affirmed: loss overstated seriousness of fraud, combination of other circumstances) [8#4]; *U.S. v. Rodriguez,* 64 F.3d 638, 642–43 (11th Cir. 1995) (remanded: when sentencing to statutory maximum under §5G1.1(a) would effectively negate three-level reduction for acceptance of responsibility) [8#3]; *U.S. v. Lara,* 47 F.3d 60, 63–67 (2d Cir. 1995) (affirmed: focus in guidelines on total quantity of drugs overrepresents culpability of defendants who distribute small amounts over long period of time, the "quantity/time factor") [7#8]; *U.S. v. Monaco,* 23 F.3d 793, 798–99 (3d Cir. 1994) (amount of loss under §2F1.1 overstated defendant's culpability) [6#13]; *U.S. v. Stuart,* 22 F.3d 76, 83–84 (3d Cir. 1994) (remanded: departure may be considered if amount of loss under §2B1.1 overstates culpability of defendant who was paid $2000 to deliver $129,000 in stolen bonds); *U.S. v. Tsosie,* 14 F.3d 1438, 1442–43 (10th Cir. 1994) (affirmed: attempting to assist victim of offense) [6#10]; *U.S. v. Miller,* 991 F.2d 552, 554 (9th Cir. 1993) (remanded: departure may be considered for "time erroneously served") [5#12]; *U.S. v. Concepcion,* 983 F.2d 369, 389 (2d Cir. 1992) (use of acquitted conduct to increase sentence from maximum of three years to almost twenty-two years was not adequately considered by Commission); *U.S. v. Valdez-Gonzalez,* 957 F.2d 643, 648–50 (9th Cir. 1992) (affirmed: solo drug-smuggling "mules" who were ineligible for §3B1.2 mitigating role adjustment) [4#18]; *U.S. v. Restrepo,* 936 F.2d 661, 667 (2d Cir. 1991) (affirmed: nine-level enhancement under §2S1.1(b)(2)(J) for $18.3 million in money laundering offense so overstated culpability of defendants who merely loaded boxes of money that departure beyond four-level minimal participant reduction was warranted); *U.S. v. Garcia,* 926 F.2d 125, 127–28 (2d Cir. 1991) (affirmed: assistance to judicial system beyond that contemplated in §3E1.1 or §5K1.1) [3#20]; *U.S. v. Bierley,* 922 F.2d 1061, 1068–69 (3d Cir. 1990) (remanded: for defendant who could not qualify as minor participant, §3B1.2, because other "participant" was government agent) [3#18].

Other: *Koon v. U.S.,* 116 S. Ct. 2035, 2053 (1996) (affirmed: effect of federal prosecution after lengthy state trial for same conduct—"the District Court did not abuse its discretion in determining that a 'federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants'"); *U.S. v. Carty,* 264 F.3d 191, 196 (2d Cir. 2001) (remanded: "pre-sentence confinement conditions may in appropriate cases be a permissible basis for downward departures"); *U.S. v. Lipman,* 133 F.3d 726, 730–32 (9th Cir. 1998) (properly denied

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

"[A] district court has the same discretion to depart downward when §5G1.1(a) renders the statutory maximum the guideline sentence as it has when the guideline sentence is calculated without reference to §5G1.1(a). Section 5G1.1(a) is simply the guidelines' recognition that a court lacks authority to impose a sentence exceeding the statutory maximum. Section 5G1.1(a) was not intended to transform the statutory maximum into a minimum sentence from which a court may not depart in appropriate circumstances." *U.S. v. Rodriguez,* 64 F.3d 638, 642 (11th Cir. 1995) [8#3]. Accord *U.S. v. Cook,* 938 F.2d 149, 152 (9th Cir. 1991); *U.S. v. Sayers,* 919 F.2d 1321, 1324 (8th Cir. 1990); *U.S. v. Martin,* 893 F.2d 73, 76 (5th Cir. 1990).

b. Downward departure not warranted

Guidelines account for circumstances: *U.S. v. Grosenheider,* 200 F.3d 321, 332–34 (5th Cir. 2000) (guideline and statute adequately distinguish simple possession of child pornography from more serious offenses); *U.S. v. Steele,* 178 F.3d 1230, 1240 (11th Cir. 1999) (very small profit made by pharmacist who illegally sold pharmaceutical drugs that had very high street value); *U.S. v. Winters,* 174 F.3d 478, 483–84 (5th Cir. 1999) (mandatory consecutive 60-month sentence on gun charge "thoroughly considered" in guidelines for the underlying crime); *U.S. v. Pennington,* 168 F.3d 1060, 1068 (8th Cir. 1999) (fraud defendant had civil judgment against him for same conduct); *U.S. v. Dominguez-Carmona,* 166 F.3d 1052, 1057–59 (10th Cir. 1999) ("mule" bringing marijuana into U.S. with others accountable for all marijuana, not just amount carried individually, §1B1.3, comment. (n.2(c)(8)); that defendants were poor and desperate for money concerns "socio-economic status" precluded by §5H1.10; "lack of sophistication," considered in §3B1.2(a), would have to be extraordinary for departure); *U.S. v. Hoffer,* 129 F.3d 1196, 1205–06 (11th Cir. 1997) ("defendant who receives a §3B1.3 enhancement for abusing a position of trust cannot then receive a downward departure from the sentencing guidelines for losing that same position of trust" as a result of the offense); *U.S. v. Weaver,* 126 F.3d 789, 792–94 (6th Cir. 1997) (for alleged disparity in white-collar theft or fraud guidelines—relatively high sentences for low-level offenders compared with those who took significantly more money was intentional) [10#4]; *U.S. v. Rybicki,* 96 F.3d

754, 757–59 (4th Cir. 1996) (scheme to defraud did not involve "real fraud") [9#2]; *U.S. v. Watson,* 57 F.3d 1093, 1096 (D.C. Cir. 1995) (affirmed: exposure to danger during unsuccessful attempt to provide substantial assistance was adequately considered in §5K1.1) [7#11]; *U.S. v. Clark,* 8 F.3d 839, 842 (D.C. Cir. 1993) (remanded: "unique status of the District of Columbia" and U.S. Attorney's control of prosecution in local or federal court) [6#7]; *U.S. v. Thornbrugh,* 7 F.3d 1471, 1474 (10th Cir. 1993) (remanded: cannot depart downward to lessen effect of added consecutive sentences under 18 U.S.C. §924(c)(1), which here added forty-five years to career offender's sentence); *U.S. v. Benish,* 5 F.3d 20, 27 (3d Cir. 1993) (affirmed: age and sex of marijuana plants accounted for) [6#4]; *U.S. v. Costales,* 5 F.3d 480, 486 (11th Cir. 1993) (remanded: may not depart by analogy to §3B1.2 where only other participants in child pornography offense were government agents); *U.S. v. Upthegrove,* 974 F.2d 55, 56 (7th Cir. 1992) (affirmed: poor quality of marijuana); *U.S. v. Rutana,* 932 F.2d 1155, 1158–59 (6th Cir. 1991) (remanded: concern that fines were "harsh" in combination with guideline range); *U.S. v. Medeiros,* 884 F.2d 75, 78–79 (3d Cir. 1989) (affirmed: "walking away" from non-secure facility versus escape from secure prison, §2P1.1) [2#12].

Forfeiture: Note that several courts have held that forfeiture of a defendant's assets as a result of the instant offense of conviction is not a valid basis for departure because the Guidelines expressly considered forfeiture in §5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute."). See, e.g., *U.S. v. Hoffer,* 129 F.3d 1196, 1203 (11th Cir. 1997); *U.S. v. Coddington,* 118 F.3d 1439, 1441 (10th Cir. 1997); *U.S. v. Weinberger,* 91 F.3d 642, 644 (4th Cir. 1996); *U.S. v. Crook,* 9 F.3d 1422, 1426 (9th Cir. 1993) [6#8]; *U.S. v. Shirk,* 981 F.2d 1382, 1397 (3d Cir. 1992). Other circuits found that, unlike extraordinary restitution, "[f]orfeiture is not a voluntary act and cannot be a ground for finding extraordinary acceptance of responsibility" that would warrant departure. *U.S. v. Hendrickson,* 22 F.3d 170, 175 (7th Cir. 1994). Accord *Crook,* 9 F.3d at 1426. But cf. *U.S. v. Faulks,* 143 F.3d 133, 138 (3d Cir. 1998) ("voluntary surrender of meritorious defenses to forfeiture" may be evidence of extraordinary acceptance of responsibility, but only if "it can be established that meritorious defenses have indeed been foregone under circumstances that reflect an extraordinary sense of contrition and desire to make amends for the offense").

> Note: Cases relating to alien status and other departure issues concerning alien defendants are now in new subsection g.

Other invalid reasons: *U.S. v. Yeaman,* 248 F.3d 223, 232–33 (3d Cir. 2001) (absent extraordinary circumstances, reincarceration following release from improperly lenient sentences cannot justify departure); *U.S. v. Meacham,* 115 F.3d 1488, 1497–98 (10th Cir. 1997) (remanded: district court doubts about witness testimony and strength of government's case; also, "utter forgiveness" by twelve-year-old victim of sexual abuse "carries no legal consequence"); *U.S. v. Haut,* 107 F.3d 213, 218–23 (3d Cir. 1997) (remanded: district court doubts about veracity of witnesses

that led to guilty verdict); *U.S. v. Zeigler,* 39 F.3d 1058, 1063 (10th Cir. 1994) (remanded: prison overcrowding) [7#4]; *U.S. v. Newby,* 11 F.3d 1143, 1148–49 (3d Cir. 1993) (affirmed: loss of good time credits as administrative sanction for same conduct underlying offense) [6#8]; *U.S. v. Hadaway,* 998 F.2d 917, 920–21 (11th Cir. 1993) (downward departure based on "community standards" is not permitted) [6#4]; *U.S. v. Deitz*, 991 F.2d 443, 447–48 (8th Cir. 1993) (affirmed: disparity between theoretical state and actual federal sentence for same crime); *U.S. v. Haynes*, 985 F.2d 65, 69–70 (2d Cir. 1993) (same); *U.S. v. Frazier*, 979 F.2d 1227, 1231 (7th Cir. 1992) (remanded: district court opinion that there was "nothing to be gained" by imprisonment) [5#7]; *U.S. v. Brooks,* 966 F.2d 1500, 1505 (D.C. Cir. 1992) (remanded: weakness in government's case despite guilty verdict); *U.S. v. Mason,* 966 F.2d 1488, 1495–98 (D.C. Cir. 1992) (remanded: defendant apprehended after being shot by gunmen, injury was "punishment"); *U.S. v. Wright,* 924 F.2d 545, 548–49 (4th Cir. 1991) (remanded: delay in parole date for earlier, unrelated crimes) [3#19]; *U.S. v. Deane,* 914 F.2d 11, 13–14 (1st Cir. 1990) (remanded: degree of seriousness of child pornography offense, lack of counseling program in prison) [3#14].

Some circuits have held that ineffective assistance of counsel is not an appropriate basis for departure, even in light of *Koon*. See *U.S. v. Basalo,* 258 F.3d 945, 950–51 (9th Cir. 2001) (remanded: following reasoning of *Bicaksiz* in holding that court could not simultaneously uphold defendant's conviction and depart downward); *U.S. v. Bicaksiz,* 194 F.3d 390, 397–98 (2d Cir. 1999) (affirmed: "Ineffective assistance of counsel is not a basis for a downward departure at sentencing . . . because it simultaneously assumes the validity of a defendant's conviction and conspicuously calls its validity into doubt."); *U.S. v. Martinez,* 136 F.3d 972, 980 (4th Cir. 1998) (affirmed: alleged ineffective assistance of counsel in leading defendant to reject plea offer is not proper ground for departure).

c. Extraordinary acceptance of responsibility

Several circuits have held that downward departure may be warranted for "unusual" or "extraordinary" acceptance of responsibility. See, e.g., *U.S. v. Evans,* 49 F.3d 109, 114–15 (3d Cir. 1995) (remanded: court may determine whether departure warranted for defendant who voluntarily disclosed real identity and it was unlikely authorities would have discovered it otherwise); *U.S. v. Gaither,* 1 F.3d 1040, 1043 (10th Cir. 1993) (remanded: departure possible if "the district court finds the acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by U.S.S.G. §3E1.1") [6#2]; *U.S. v. Brown,* 985 F.2d 478, 482–83 (9th Cir. 1993) (remanded: "The mere existence of section 3E1.1(a) does not preclude . . . an additional departure [for] an extraordinary acceptance of responsibility") [5#9]; *U.S. v. Rogers,* 972 F.2d 489, 494 (2d Cir. 1992) (remanded: consider defendant's voluntary surrender, confession, desire for drug rehabilitation) [5#4]; *U.S. v. Lieberman,* 971 F.2d 989, 995–96 (3d Cir. 1992) (affirmed: extraordinary, post-offense restitution and other ameliorative conduct) [5#1]; *U.S. v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991) (remanded: "extraordinary restitution" may warrant departure) [4#15];

U.S. v. Brewer, 899 F.2d 503, 509 (6th Cir. 1990) (remanded: only "unusual" restitution may warrant departure); *U.S. v. Carey,* 895 F.2d 318, 323–24 (7th Cir. 1990) (same).

But cf. *U.S. v. O'Kane,* 155 F.3d 969, 975 (8th Cir. 1998) (remanded: although fraud defendant made complete restitution before adjudication, admitted his crime immediately, and cooperated with authorities, he also disputed the amounts involved, did not disclose the largest purchaser of his stolen goods, and much of his restitution was returning goods he had stolen); *U.S. v. Aslakson*, 982 F.2d 283, 284 (8th Cir. 1992) (affirmed: willingness to cooperate and testify against codefendant is not extraordinary acceptance of responsibility and can be awarded only by §5K1.1 motion) [5#7]; *U.S. v. Arjoon,* 964 F.2d 167, 171 (2d Cir. 1992) (remanded: partial return of property before embezzlement discovered is covered by §3E1.1). See also *U.S. v. Bennett,* 60 F.3d 902, 905 (1st Cir. 1995) (remanded: civil suit settlement to pay back victims of fraud that was not "genuinely voluntary" on defendant's part cannot support departure for extraordinary restitution).

The Third Circuit held that "a voluntary surrender of meritorious defenses to forfeiture" can be evidence of extraordinary acceptance of responsibility warranting departure. However, it must "be established that meritorious defenses have indeed been foregone under circumstances that reflect an extraordinary sense of contrition and desire to make amends for the offense." *U.S. v. Faulks,* 143 F.3d 133, 138 (3d Cir. 1998) (remanded to allow defendant to present evidence). The court agreed with other circuits that "the mere payment of restitution or mandated forfeitures cannot, in and of itself, be the basis for departing from the Guidelines." See *U.S. v. Hendrickson,* 22 F.3d 170, 176 (7th Cir. 1994) (remanded: payment of mandatory forfeiture can never be ground for departure for extraordinary acceptance of responsibility); *U.S. v. Weinberger,* 91 F.3d 642, 644 (4th Cir. 1996) (agreeing with *Hendrickson*); *U.S. v. Crook,* 9 F.3d 1422, 1426 (9th Cir. 1993) [6#8].

In light of the new *Koon* standard for reviewing departures, the Fourth Circuit analyzed whether extraordinary restitution can be a proper ground for departure. The court concluded that "restitution, although taken into account in the guideline permitting a reduction for acceptance of responsibility, can provide a basis for a departure when present to such an exceptional degree that it cannot be characterized as typical or 'usual.' Defendant did not meet this test: although she paid $250,000 in restitution, it was less than half the amount she embezzled." Moreover, she did not pay it "until after she had been criminally indicted, in order to settle her civil liability, and in the hope of receiving a reduced sentence. The timing of the restitution payment, after criminal proceedings had begun, does not suggest an exceptional acceptance of responsibility, . . . nor does her motive." *U.S. v. Hairston,* 96 F.3d 102, 108–09 (4th Cir. 1996) (remanded).

Two circuits have found that extreme or exceptional remorse may warrant departure even though remorse is considered under §3E1.1. See *U.S. v. Fagan,* 162 F.3d 1280, 1284–85 (10th Cir. 1998) (remanded: an accounted for factor such as remorse can still be "a permissible factor for departure if it is present to some exceptional degree") [10#5]; *U.S. v. Jaroszenko,* 92 F.3d 486, 490–91 (7th Cir. 1996)

(remanded: "Although the guidelines may discourage the consideration of a defendant's remorse in most decisions about downward departures, they do not contain an absolute ban on a district court's indulging in such a consideration.").

See also section VI.C.2 on drug rehabilitation

d. Lesser harms, §5K2.11

Where "conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the conduct at issue . . . a reduced sentence might be warranted." USSG §5K2.11. See *U.S. v. Bernal,* 90 F.3d 465, 467 (11th Cir. 1996) (affirming departure for defendants who violated two animal protection statutes where evidence showed they did not intend harm sought to be prevented by those statutes); *U.S. v. Carvell,* 74 F.3d 8, 9–12 (1st Cir. 1996) (remanded: may consider departure under §5K2.11 despite §5H1.4 for defendant who grew marijuana to smoke as treatment for serious depression that legal medication had not helped) [8#6]; *U.S. v. White Buffalo,* 10 F.3d 575, 576–77 (8th Cir. 1993) (affirmed: under the circumstances, defendant's unlawful possession of unregistered firearm was "not the kind of misconduct or danger sought to be prevented by the gun statute") [6#9]; *U.S. v. Hadaway,* 998 F.2d 917, 919–20 (11th Cir. 1993) (remanded to consider whether departure may be warranted for possession of unregistered sawed-off shotgun) [6#4]. Cf. *U.S. v. Barajas-Nunez,* 91 F.3d 826, 832 (6th Cir. 1996) (affirming departure under plain error review for defendant who illegally returned to U.S. to help ill girlfriend because he "perceived that his girlfriend was in grave danger of physical harm and that he was responsible for making sure she received medical care"; court indicated, however, that under ordinary review facts would "not support a lesser harms departure, which applies only in narrow, extreme circumstances such as mercy killing").

But cf. *U.S. v. Salemi,* 26 F.3d 1084, 1087 (11th Cir. 1994) (remanding departure for defendant who helped wife kidnap baby because "no evidence existed that the defendant helped kidnap the baby to protect her from an unsafe environment"); *U.S. v. Rojas,* 47 F.3d 1078, 1081–82 (11th Cir. 1995) (remanded: transporting weapons to Cuba to aid resistance movement falls within "harm or evil sought to be prevented" by statute prohibiting knowing possession of unregistered firearms; also, departure for defendant who acts to "avoid a perceived greater harm" does not apply "to 'loose cannons' like Rojas because society has a significant interest in deterring 'one-man state departments'"); *U.S. v. Lam,* 20 F.3d 999, 1004–05 (9th Cir. 1994) (remanded: "reluctant to agree" that possessing illegal weapon to protect self and family is lesser harm under §5K2.11, but it may be considered with other factors in determining whether departure warranted for aberrant behavior); *U.S. v. Marcello,* 13 F.3d 752, 759–60 (3d Cir. 1994) (affirmed: because defendant intentionally evaded reporting requirements by structuring financial deposits, he did not qualify for departure under §5K2.11 even though he was not illegally laundering money or avoiding taxes, the harms sought to be prevented by the statute of conviction).

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

e. Voluntary disclosure of offense, §5K2.16

Section 5K2.16 states that if a defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted." The Seventh Circuit held that the discovery of the offense must have objectively been unlikely in order to warrant a §5K2.16 departure. The court should make an objective inquiry into the actual likelihood of discovery rather than a subjective inquiry into the defendant's belief as to the likelihood of discovery. *U.S. v. Besler,* 86 F.3d 745, 747–48 (7th Cir. 1996) (remanded: district court should have made findings regarding actual likelihood of discovery, not relied on fact that defendant confessed from remorse rather than fear of discovery) [8#9]. But cf. *U.S. v. Jones,* 158 F.3d 492, 502 (10th Cir. 1998) (affirmed: defendant's voluntary disclosure of offense "appears to fall between the express provisions of the Guidelines, i.e., his disclosure does not appear to have been motivated by fear of detection, but the offense was likely to be discovered. While not falling squarely within the departure provision, we cannot conclude the inevitable discovery of Mr. Jones' offense somehow transforms his nonetheless voluntary disclosure into an impermissible basis for departure," and it could be used along with other factors to support departure).

Section 5K2.16 also states that it "does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct." See *U.S. v. Adams,* 996 F.2d 75, 79 (5th Cir. 1993) (affirmed: proper to refuse departure where discovery of confessed offenses "was at least likely, if not imminent").

Two circuits have concluded that §5K2.16 does not apply when a defendant discloses that he or she was the perpetrator of a known crime; rather, the *offense* must be unknown. See *U.S. v. Aerts,* 121 F.3d 277, 280 (7th Cir. 1997) (affirmed: "section 5K2.16, by its plain terms, authorizes a departure for the voluntary disclosure of undiscovered 'offenses,' not offenders"); *U.S. v. Brownstein,* 79 F.3d 121, 122–23 (9th Cir. 1996) (affirmed: "plain language" of §5K2.16 shows that it does not apply to bank robber who voluntarily notified police and confessed—offenses were already known to authorities even if identity of robber was not).

The Seventh Circuit held that "discloses to authorities" means discloses to "legal authorities," and defendant who disclosed his crime to his company's officials rather than police or some other governmental agency did not qualify for departure. *U.S. v. Ekeland,* 174 F.3d 902, 905 (7th Cir. 1999).

f. Defendant's culpability overrepresented, §2D1.1, comment. (n.14)

Note 14 (formerly Note 16) allows a downward departure under certain circumstances if "(A) the amount of the controlled substance for which defendant is accountable under §1B1.3 . . . results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2."

The Ninth Circuit rejected a claim that whether the offense level "overrepresents the defendant's culpability" is determined solely by qualifying for a §3B1.2 adjustment. "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." *U.S. v. Pinto,* 48 F.3d 384, 387–88 (9th Cir. 1995) (affirming denial of departure for defendants who received §3B1.2 adjustments—their culpability was not overrepresented because they "were only charged at a level reflecting drugs that they actually transported or handled") [7#7].

g. Departures for alien defendants

Alien status, possible deportation: Generally, courts have found that a defendant's status as a deportable alien, and the possible collateral consequences of that status, do not warrant downward departure, though some courts have left open the possibility of departure in extraordinary cases. See, e.g., *U.S. v. Lopez-Salas,* 266 F.3d 842, 846–51 (8th Cir. 2001) (remanded: holding that "alien status and the collateral consequences flowing therefrom may be an appropriate basis for departure," but that factors mentioned here—cannot be assigned to minimum security facilities, ineligible for early release following completion of drug treatment program, and cannot serve last six months in halfway house—did not warrant departure); *U.S. v. Charry Cubillos,* 91 F.3d 1342, 1344–45 (9th Cir. 1996) (remanding departure for district court to follow *Koon* analysis and explain why defendant's case is "out of the Guideline's heartland"); *U.S. v. Veloza,* 83 F.3d 380, 382 (11th Cir. 1996) (status as deportable alien, following *Restrepo* below); *U.S. v. Mendoza-Lopez,* 7 F.3d 1483, 1487 (10th Cir. 1993) (affirmed: "unduly harsh consequences of imprisonment for deportable aliens"); *U.S. v. Nnanna,* 7 F.3d 420, 422 (5th Cir. 1993) (affirmed: collateral consequences, such as deportation, that defendant may face due to alien status); *U.S. v. Restrepo,* 999 F.2d 640, 644 (2d Cir. 1993) (remanded: same, but "alienage" may, in extraordinary case, warrant departure) [6#2]; *U.S. v. Soto,* 918 F.2d 882, 884–85 (10th Cir. 1990) (affirmed: possible deportation); *U.S. v. Alvarez-Cardenas,* 902 F.2d 734, 737 (9th Cir. 1990) (affirmed: same) [3#7]. Cf. *U.S. v. Smith,* 27 F.3d 649, 651–55 (D.C. Cir. 1994) (remanded: downward departure based on deportable alien's severity of confinement may be proper, but "difference in severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence [and] that the greater severity is undeserved") [7#1].

In determining whether status as a deportable alien may warrant departure, some

circuits have distinguished cases where defendants are sentenced for an offense that, by its nature, is committed only by deportable aliens and thus departure is not warranted, with cases where defendant's status as an alien was irrelevant. Compare *U.S. v. Cardosa-Rodriguez,* 241 F.3d 613, 614 (8th Cir. 2001) (because "the Commission clearly considered deportable-alien status when formulating section 2L1.2," departure not permitted) and *U.S. v. Garay,* 235 F.3d 230, 234 (5th Cir. 2000) (alienage impermissible basis for departure when status as deportable alien has already been accounted for in offense level) and *U.S. v. Martinez-Ramos,* 184 F.3d 1055, 1057–59 (9th Cir. 1999) (defendant's "status as a deportable alien cannot be a ground for downward departure because deportable alien status is an element of the crime that was necessarily taken into account by the Sentencing Commission in crafting the offense level for a §1326 violation") and *U.S. v. Gonzalez-Portillo,* 121 F.3d 1122, 1124–25 (7th Cir. 1997) ("Because deportable alien status is an inherent element of the crimes to which [USSG §2L1.2] applies, this factor was clearly 'taken into consideration by the Sentencing Commission in formulating the guideline'" and would therefore be an inappropriate basis for departure) [10#2] and *U.S. v. Ebolum,* 72 F.3d 35, 38–39 (6th Cir. 1995) (for status as deportable alien when offense of conviction, by its nature, is committed only by deportable aliens) with *U.S. v. Farouil,* 124 F.3d 838, 847 (7th Cir. 1997) (remanded: after *Koon*, "we have no reason to believe that the Guidelines have accounted for a defendant's status as a deportable alien in setting the level for [importing heroin] offense. The district court is thus free to consider whether Farouil's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement.").

Seriousness of aggravated felony, §2L1.2(b)(1)(A): As of Nov. 1, 2001, USSG §2L1.2 was substantially revised. In place of a 16-level increase for defendants who had previously committed a broadly defined "aggravated felony," the new guideline has four incremental increases from 4 to 16 levels, depending on the seriousness of the prior offense. The amendment also deleted Application Note 5, which had allowed for a departure from the 16-level increase under some circumstances. The cases below were decided under the pre-amendment guideline.

Under the earlier version of the guideline, a defendant convicted of unlawfully entering the U.S. faced a 16-level increase in offense level under USSG §2L1.2(b)(1)(A) if the defendant was previously deported after a criminal conviction for "an aggravated felony," which has been broadly defined. The Second Circuit held that district courts may not depart downward even if the "aggravated felony" was, in fact, relatively minor in nature. *U.S. v. Amaya-Benitez,* 69 F.3d 1243, 1247–49 (2d Cir. 1995). The Ninth Circuit originally agreed, see *U.S. v. Rios-Favela,* 118 F.3d 653, 657–59 (9th Cir. 1997) (remanded: cannot consider underlying facts of felony conviction used for 16-level increase in §2L1.2; however, those facts may be considered for §4A1.3 departure), but the en banc court overruled that opinion, holding that, following *Koon*, "section 2L1.2, as drafted in 1995 and as applied to [defendant], does not preclude a district court from considering the nature of the aggravated offense when deciding whether to depart from the Guidelines' sentencing range." *U.S. v. Sanchez-Rodriguez,* 161 F.3d 556, 562–63 (9th Cir. 1998) (en banc).

Beginning in Nov. 1997 until it was deleted four years later, Application Note 5 stated that, under certain circumstances, "a downward departure may be warranted based on the seriousness of the aggravated felony." See also *U.S. v. Tappin,* 205 F.3d 536, 540–42 (2d Cir. 2000) (affirming denial of departure for defendant who failed to satisfy one of Note 5's criteria; also finding that Note 5 could be applied retroactively); *Sanchez-Rodriguez,* 161 F.3d at 560–63 (in affirming departure because defendant's prior felony was only a $20 heroin sale, overruling *Rios-Favela* and holding that, regardless of Note 5, after *Koon* courts are not categorically excluded from considering seriousness of prior felony); *U.S. v. Diaz-Diaz,* 135 F.3d 572, 580–82 (8th Cir. 1998) (affirming departure after concluding that Note 5 may be applied retroactively). Cf. *U.S. v. Alfaro-Zayas,* 196 F.3d 1338, 1342–43 (11th Cir. 1999) (although affirming denial of departure because defendant did not qualify under Note 5 and district court did not indicate it found other grounds for departure, indicating that, after *Koon*, court could have considered small amount of drugs in prior offense as basis for departure).

Several courts held that a defendant had to satisfy all three criteria of Note 5 and that Note 5 was the only way to depart on this issue; there was no discretion to depart under §5K2.0. *U.S. v. Machicha-Duarte,* 286 F.3d 1153, 1156–58 (9th Cir. 2002); *U.S. v. Alejo-Alejo,* 286 F.3d 711, 715–16 (4th Cir. 2002); *U.S. v. Palomino-Rivera,* 258 F.3d 656, 659–60 (7th Cir. 2001); *U.S. v. Marquez-Gallegos,* 217 F.3d 1267, 1270–71 (10th Cir. 2000); *U.S. v. Yanez-Huerta,* 207 F.3d 746, 750 n.3 (5th Cir. 2000); *Tappin,* 205 F.3d at 540–41.

However, the First Circuit held that Note 5 did not control or preclude downward departure under §4A1.3 based on criminal history. "Nothing in that note refers to the criminal history category; by its terms, note 5 applies only to the offense level calculation under Guideline 2L1.2. . . . Thus, a defendant who is not qualified for a vertical departure because he fails to satisfy the requisites of application note 5 still may be entitled to a horizontal departure if the district court finds that the assigned criminal history category significantly over-represents the seriousness of defendant's prior convictions." *U.S. v. Delgado-Reyes,* 245 F.3d 20, 22–23 (1st Cir. 2001) (remanded).

Stipulation to deportation: May a stipulation to be deported, including a waiver of a hearing and appeal, warrant downward departure? A 1995 memo from the Attorney General authorized U.S. Attorneys to recommend departure under these circumstances, and the Eighth Circuit held that a district court "erred as a matter of law by incorrectly believing that it could not depart downward . . . on the basis of defendant's waiver and consent to administrative deportation upon the filing of a joint motion by the parties . . . . Whether a downward departure should be granted lies within the sound discretion of the district court." *U.S. v. Cruz-Ochoa,* 85 F.3d 325, 325–26 (8th Cir. 1997). See also *U.S. v. Zapata,* 135 F.3d 844, 848 (2d Cir. 1998) (affirming denial of departure and rejecting defendants' argument that the 1995 memo established a "uniform policy that *must* be applied to all defendants who consent to deportation and that individual mitigating factors are not to be considered"); *U.S. v. Hernandez-Reyes,* 114 F.3d 800, 802–03 (8th Cir. 1997)

(affirming denial of departure and rejecting defendant's argument for "a rule creating at least a preference for granting downward departures when a defendant has consented to an administrative deportation. . . . We leave the decision to depart to the district courts' sound discretion."). Cf. *U.S. v. Young,* 143 F.3d 740, 743–44 (2d Cir. 1998) (departure was improperly given to naturalized citizen on basis that he was disadvantaged compared with alien defendants in not being able to stipulate to deportation: "a defendant's status as a United States citizen is not a permissible basis for departure. . . . Young is not similarly situated to alien defendants because he will not be deported for his criminal conviction" and he will not receive harsher treatment because of his U.S. citizenship).

The First Circuit, however, held that, because most alien defendants convicted of unlawful reentry "almost certainly would be deported again," an agreement to be deported was neither a mitigating circumstance "of a kind" nor mitigation "to a degree" that was not adequately contemplated by the Sentencing Commission. The court concluded that, "at least in the absence of a colorable, nonfrivolous defense to deportation" or specific facts showing that the stipulation "make[s] the case *meaningfully* atypical," departure is not warranted. *U.S. v. Clase-Espinal,* 115 F.3d 1054, 1056–60 (1st Cir. 1997) (affirming denial of departure) [9#8]. Accord *U.S. v. Mignott,* 184 F.3d 1288, 1290–91 (11th Cir. 1999) ("Requiring defendants to proffer a nonfrivolous defense to deportation before recognizing consent to deportation as a ground for departure appears sound."). Cf. *U.S. v. Flores-Uribe,* 106 F.3d 1485, 1487–88 (9th Cir. 1997) (affirming denial of departure: because district court lacked authority to order deportation, absent request by U.S. Attorney and concurrence of INS Commissioner, defendant's stipulation "had no practical or legal effect" and did not warrant departure).

Following the reasoning of *Clase-Espinal* and *Flores-Uribe,* the Third Circuit concluded that "(1) a defendant without a nonfrivolous defense to deportation presents no basis for downward departure under section 5K2.0 by simply consenting to deportation and (2) in light of the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the United States Attorney." Because the government in this case had not requested a departure, "the district court did not err in refusing to depart downward. Such departure was beyond its authority. We note that, even if the prosecution had requested downward departure on this basis, the district court still would have had the discretion not to depart downward." *U.S. v. Marin-Castaneda,* 134 F.3d 551, 555–56 (3d Cir. 1998).

The Second Circuit, while following the requirement of a "colorable, nonfrivolous defense to deportation," declined to follow the Third Circuit's rule that the U.S. Attorney must request a departure. "[W]e will not read into §5K2.0 a further requirement that the government move for, or otherwise support, a departure on the basis of a defendant's consent to deportation before a district court has the authority to depart." *U.S. v. Galvez-Falconi,* 174 F.3d 255, 260 (2d Cir. 1999) (remanded). Accord *U.S. v. Rodriguez-Lopez,* 198 F.3d 773, 777–78 (9th Cir. 1999) ("reject[ing] the government's argument that a district court may never consider granting a de-

parture on the basis of an alien's stipulation to deportation unless the government has given its consent").

On a related issued, the Second Circuit concluded that "a period of time during which an alien is incarcerated solely due to the federal government's delay in transferring him to federal custody and for which the alien does not receive credit toward his sentence provides a valid ground for departing from the Guidelines, at least to the degree that the departure approximately compensates the alien for the uncredited time of confinement." *U.S. v. Montez-Gaviria,* 163 F.3d 697, 701–02 (2d Cir. 1998).

"Cultural assimilation": Although it ultimately concluded that the district court had exercised its discretion not to depart, the Ninth Circuit recognized as a potential ground for departure "cultural assimilation," which may consist of longstanding and significant family, cultural, and community ties. However, because it is "akin to the factor of 'family and community ties,'" cultural assimilation is a "discouraged factor" and departure would be appropriate only in "extraordinary circumstances." *U.S. v. Lipman,* 133 F.3d 726, 730–31 (9th Cir. 1998). Accord *U.S. v. Rodriguez-Montelongo,* 263 F.3d 429, 433–34 (5th Cir. 2001) (remanded so court could consider whether departure was warranted). See also *U.S. v. Sanchez-Valencia,* 148 F.3d 1273, 1274 (11th Cir. 1998) (finding district court was aware of its authority to depart on this ground and affirming denial).

Other invalid departure grounds: *U.S. v. Dominguez-Carmona,* 166 F.3d 1052, 1057–59 (10th Cir. 1999) ("mule" bringing marijuana into U.S. with others accountable for all marijuana, not just amount carried individually, §1B1.3, comment. (n.2(c)(8)); also, that defendants were poor and desperate for money concerns "socio-economic status" precluded by §5H1.10; and, "lack of sophistication," considered in §3B1.2(a), would have to be extraordinary for departure); *U.S. v. Pacheco-Osuna,* 23 F.3d 269, 272 (9th Cir. 1994) (remanded: possibility that immigration defendant's arrest was invalid because he "may have been stopped because he was Mexican looking" rather than for good cause not proper ground for departure) [6#14].

Note that several circuits have held that downward departure is not permitted for illegal reentry defendants who face a guideline sentence greater than the maximum penalty of two years mistakenly listed in the INS Form I-294 given to deported aliens. Although the courts agreed that the Sentencing Commission did not take into consideration the Form I-294 mistake when formulating the guidelines, they held that defendants were well aware that it was illegal to reenter the United States and allowing departures in such circumstances would be contrary to the guidelines' goals of deterring criminal conduct and promoting respect for the law. See, e.g., *U.S. v. Agubata,* 60 F.3d 1081, 1084 & n.4 (4th Cir. 1995); *U.S. v. Gomez-Villa,* 59 F.3d 1199, 1202–03 (11th Cir. 1995); *U.S. v. Cruz-Flores,* 56 F.3d 461, 463–64 (2d Cir. 1995); *U.S. v. Ullyses-Salazar,* 28 F.3d 932, 938 (9th Cir. 1994); *U.S. v. Smith,* 14 F.3d 662, 666 (1st Cir. 1994). Other courts have rejected similar challenges based on estoppel, due process, or entrapment. See, e.g., *U.S. v. Denis-Lamarchez,* 64 F.3d 597, 598 (11th Cir. 1995); *U.S. v. McCalla,* 38 F.3d 675, 679 (3d Cir. 1994); *U.S. v.*

Meraz-Valeta, 26 F.3d 992, 996 (10th Cir. 1994); *U.S. v. Shaw,* 26 F.3d 700, 701–02 (7th Cir. 1994); *U.S. v. Troncoso,* 23 F.3d 612, 615–16 (1st Cir. 1994); *U.S. v. Perez-Torres,* 15 F.3d 403, 407–08 (5th Cir. 1994).

D. Extent of Departure for Aggravating or Mitigating Circumstances

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

The Supreme Court stated that "[t]he reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing. In assessing reasonableness . . . a court of appeals [should] examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence." *Williams v. U.S.,* 112 S. Ct. 1112, 1121 (1992) (remanded to determine whether district court would have imposed same sentence if it had not relied on invalid factor). See also *U.S. v. Perkins,* 963 F.2d 1523, 1527 (D.C. Cir. 1992) ("The Sentencing Reform Act and the Supreme Court say clearly that trial judges must give reasons explaining the extent as well as the nature of their decisions to depart.").

The Supreme Court's decision in *Koon v. U.S.,* 116 S. Ct. 2035 (1996), set a general abuse of discretion standard for reviewing departures, but did not specifically address review of the extent of departure. The Seventh Circuit held that *Koon* did not remove the circuit's requirement to explain the extent of a departure by analogy to the Guidelines. "[I]n computing the degree of an upward departure, the district court is 'required to articulate the specific factors justifying the extent of [the] departure and to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the . . . sentence.' . . . Although *Koon* changed the standard of review with respect to the[decision whether to depart], . . . and adopted a unitary abuse of discretion standard for the review of departure decisions, . . . we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review." *U.S. v. Horton,* 98 F.3d 313, 319 (7th Cir. 1996) (remanded because district court used inappropriate analogy for upward departure) [9#3]. See also *U.S. v. Jacobs,* 167 F.3d 792, 800–01 (3d Cir. 1999) (when appropriate, "District Court must undertake the 'analogic reasoning' that" earlier cases call for, which "consists of fixing

the extent of the departure by reference to an applicable counterpart in the Guidelines"); *U.S. v. Barajas-Nunez,* 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure and the extent thereof still remains.").

However, the Ninth Circuit held that *Koon* effectively overruled its earlier holding in *U.S. v. Lira-Barraza,* 941 F.2d 745, 747–51 (9th Cir. 1991) (en banc), that required the extent of departures to be determined by reference to "the structure, standards and policies" of the Guidelines and "be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines," and that courts "should include a reasoned explanation of the extent of the departure" with reference to these principles. "In light of *Koon*, we now reject such a mechanistic approach to determining whether the extent of a district court's departure was unreasonable, and hold that where, as here, a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. . . . An analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential." *U.S. v. Sablan,* 114 F.3d 913, 916–19 (9th Cir. 1997) (en banc), *rev'g* 90 F.3d 362 [9#3]. See also *U.S. v. Hardy,* 99 F.3d 1242, 1253 (1st Cir. 1996) (affirming upward departure: "A sentencing court is not required to 'dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic choice made.' . . . Similarly, the reasonableness *vel non* of the degree of departure need 'not [ ] be determined by rigid adherence to a particular mechanistic formula, but by an evaluation of "the overall aggregate of known circumstances."'"); *U.S. v. Taylor,* 88 F.3d 938, 947–48 (11th Cir. 1996) (need not consider each level in making vertical departure by offense level).

Although the Ninth Circuit had, in *Lira-Barraza*, required the use of analogies, it later held that "it is neither possible nor necessary in every case for the district court to point to an analogous Guideline provision. Nor is the district court required in every case to extrapolate mechanically from the relevant provision." *U.S. v. Vargas,* 67 F.3d 823, 826 (9th Cir. 1995). An earlier case had held that district courts should be guided by analogy to relevant guidelines when possible, although the court added that it did "not imply that a departure by analogy always must be on a strict proportional basis to the guidelines sentence." That court also held that courts should *not* analogize to pre-guideline sentences. *U.S. v. Pearson,* 911 F.2d 186, 189–90 (9th Cir. 1990) (multiple counts guideline provides specific enhancements for up to six additional offenses—departures for more than six should be based on the same incremental increase of one offense level per additional offense) [3#6]. See also *U.S. v. MacDonald,* 992 F.2d 967, 971 (9th Cir. 1993) (an analogous guideline need not be rigidly applied). Cf. *U.S. v. Landry,* 903 F.2d 334, 340–41 (5th Cir. 1990) (link extent of departure to analogous guideline—extent of departure for involving juvenile in drug offense should be based on §2D1.2, which enhances the offense level for drug offenses involving minors) [3#8]; *U.S. v. Shuman,* 902 F.2d 873, 877 (11th

Cir. 1990) (finding extent of departure reasonable as compared with guideline enhancements for similar aggravating factors) [3#8].

When making an upward departure by analogy to another guideline, "one measure of the reasonableness of the departure is to treat the aggravating factor as a separate crime and ask how the defendant would be sentenced if convicted of that crime. We have previously observed that a departure which results in a sentence greater than the sentence the defendant would have received if he had been convicted of the additional crimes 'create[s] more distortion than the regular guideline procedure.'" *U.S. v. Mathews,* 120 F.3d 185, 188–89 (9th Cir. 1997) (remanded: although district court may choose different method to determine extent of departure, where it analogized aggravating conduct to particular offense and then increased sentence more than if defendant had been convicted of that conduct, extent of departure was unreasonable). See also *U.S. v. Pittman,* 55 F.3d 1136, 1139–40 (6th Cir. 1995) (holding extent of departure reasonable where sentence did not exceed term defendant could have received if convicted of conduct underlying departure). Cf. *U.S. v. Paster,* 173 F.3d 206, 219–21 (3d Cir. 1999) (for defendant who pled guilty to second-degree murder, remanding nine-level upward departure that more than doubled guideline sentence and was in range for first degree murder—"This lack of disparity between Paster's actual sentence and one he could have received had he pleaded guilty to, or been convicted of, a more serious crime distorts proportionality, a critical objective of the Sentencing Guidelines.").

The Sixth Circuit agrees that strict use of analogies is not required, but has said that "[t]he extent of any departure must be tied to the structure of the Guidelines" and indicated that analogies are especially useful with upward departures. The court added that "[a]lthough a district court may not be able to determine the extent of a downward departure through the same type of analogies, it should be guided by the structure of the Guidelines in its determination of the scope of a departure." *U.S. v. Crouse,* 145 F.3d 786, 792 (6th Cir. 1998) (remanded: "In this case, the district court made no reference to the Guidelines in determining the scope of its downward departure. In effect, it determined the result it wanted to reach . . . then departed downward to a level that would allow that result. . . . Such an approach is an abuse of discretion and, in this case, resulted in a departure that was unreasonable in scope."). Cf. *U.S. v. LeMaster,* 54 F.3d 1224, 1233 (6th Cir. 1995) ("[I]t is for the sentencing court to determine the extent of the departure based upon the totality of the circumstances. The trial judge's determination should be given great deference unless we can say that there is no basis for the departure.").

The Seventh Circuit's earlier opinion stated that a district court must "link the extent of departure to the structure of the guidelines. . . . In departing the judge should compare the seriousness of the aggravating factors at hand with those the Commission considered," and should consider two approaches for calculating the length of departures based on the seriousness of the offense. Courts could analogize to guideline factors that are similar to the factor warranting departure: for example, buying a gun with drugs—not covered by the Guidelines—could be compared with possession of a gun during a drug sale and the offense level adjusted accordingly.

The court could also "treat the aggravating factor as a separate crime and ask how the defendant would be treated if convicted of it." In that case, the departure should not exceed the sentence a defendant would receive if convicted of the analogous offense. *U.S. v. Ferra,* 900 F.2d 1057, 1062–63 (7th Cir. 1990) [3#7]. The court later noted that, in analogizing to other guidelines factors, a district court may "consider later versions of the Guidelines to supply the appropriate analogy." *U.S. v. Hogan,* 54 F.3d 336, 342 (7th Cir. 1995).

The Second Circuit agrees that "the court should not arrive at a penalty that exceeds the penalty that would have been imposed had the defendant been sentenced under other Guidelines provisions that do take the same or similar conduct into account. This goal is accomplished when the court looks to analogous Guidelines provisions to determine the extent of departure." *U.S. v. Rodriguez,* 968 F.2d 130, 140 (2d Cir. 1992). Courts are also advised to use the multiple counts procedure in §3D1 to guide departures that are based on criminal activity that did not result in conviction. Sentencing courts are not strictly bound by that computation, however, and may sentence above or below the resulting range. See *U.S. v. Baez,* 944 F.2d 88, 90–91 (2d Cir. 1991) ("multi-count analysis is to provide only guidance . . . [it is] not a rigid formula") [4#11]. Generally, for upward departures under §5K, courts "should consider the next higher [offense] levels in sequence to determine if they adequately reflect the seriousness of the defendant's conduct." *U.S. v. Kim,* 896 F.2d 678, 683–85 (2d Cir. 1990) [3#3]. Note that the procedure in *Kim* is not an absolute requirement: "*Kim* quite carefully indicated that district courts 'should' use this procedure; *Kim* did not mandate it. . . . [F]or §5K2.0 departures, the district courts need not make talismanic reference to the *Kim* procedures, so long as there is careful explanation in the record of the reasons for the extent of the departure. . . . *Williams* indicates that once the district court has done so, the only question that remains is whether the departure is reasonable in light of the justification given." *U.S. v. Campbell,* 967 F.2d 20, 25–27 (2d Cir. 1992). See also *U.S. v. Pergola,* 930 F.2d 216, 220 (2d Cir. 1991) (sentencing court should make clear it has considered lesser departures first, but "the requirement of a specific step-by-step calculation and comparison is not particularly apt where, as here, (a) harm to the victim is at issue, and (b) the type of harm at issue is psychological rather than physical, making observation difficult and quantification nearly impossible") [4#2]. But cf. *U.S. v. Alter,* 985 F.2d 105, 107–08 (2d Cir. 1993) (remanded: *Kim* grouping analysis must be applied at least initially—district court must provide specific reasons for not using the result).

The Third Circuit has endorsed the use of analogies to calculate the extent of departures for aggravating circumstances, while recognizing that this method cannot always be "mechanically applied" and that analogies to guidelines "are necessarily more open-textured than applications of the guidelines." *U.S. v. Kikumura,* 918 F.2d 1084, 1113 (3d Cir. 1990) [3#15]. See also *U.S. v. Baird,* 109 F.3d 856, 872 (3d Cir. 1997) (although review of extent of departure "is deferential . . . , there are 'objective standards to guide the determination of reasonableness' . . . in the Guidelines themselves, which provide analogies to which sentencing courts must look

when making their determinations"); *U.S. v. Bierley,* 922 F.2d 1061, 1068–69 (3d Cir. 1990) (for defendant who could not technically qualify for mitigating role adjustment, departure should be made and limited by analogy to §3B1.2) [3#18]. Cf. *U.S. v. MacLeod,* 80 F.3d 860, 867–69 (3d Cir. 1996) (remanded: for departure based on number of victims in pornography offenses beyond the six accounted for under §3D1.4 calculation, incremental increase in sentence for each additional offense should *decrease* because Chapter 3 "indicates that the amount of additional punishment should decline as the number of offenses increase"—thus, where increase for victims under §3D1.4 averaged eleven months, departure that increased sentence by average of twenty-one months per victim was unreasonable).

The Tenth Circuit has declined to require use of analogies, but has stressed that "courts should look to the Guidelines for guidance in characterizing the seriousness of the aggravating circumstances to determine the proper degree of departure," and recommended the approach outlined in *Ferra, supra. U.S. v. Jackson,* 921 F.2d 985, 990–91 (10th Cir. 1990) (en banc) (also agreeing that sentence cannot exceed that which could be imposed if defendant had been convicted of aggravating conduct as separate crime). See also *U.S. v. Peña,* 930 F.2d 1486, 1496 (10th Cir. 1991) ("The issue is not whether we would have departed to the exact extent that the sentencing judge did, but whether the judge's statement reflects a reasoned, persuasive review of the statutory considerations."). In a later case the court indicated that use of analogies may be necessary in order for the appellate court to review the extent of a departure for reasonableness. See *U.S. v. Roth,* 934 F.2d 248, 252 (10th Cir. 1991). See also *U.S. v. Whiteskunk,* 162 F.3d 1244, 1254 (10th Cir. 1998) ("We do not require the district court to justify the degree of departure with mathematical exactitude, but we do require the justification to include 'some method of analogy, extrapolation or reference to the sentencing guidelines.'").

The First Circuit has held that a court should always explain the extent of a departure, but it is not necessary to "dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic choice made in arriving at the precise sentence. . . . [W]hen the court has provided a reasoned justification for its decision to depart, and that statement constitutes an adequate summary from which an appellate tribunal can gauge the reasonableness of the departure's extent, it has no obligation to go further and attempt to quantify the impact of each incremental factor on the departure sentence." *U.S. v. Emery,* 991 F.2d 907, 913 (1st Cir. 1993). See also *U.S. v. Aymelek,* 926 F.2d 64, 70 (1st Cir. 1991) ("where a departure is warranted, the emphasis should be on ascertaining a fair and reasonable sentence, not on subscribing slavishly to a particular formula"). "The bottom line is that we eschew a purely mechanical test—one that merely asks whether or not the sentencing court has made findings explaining the degree of departure—in favor of a practical one—one that asks more broadly whether or not the sentencing court has supplied the appellate panel with sufficient information to enable it to determine the reasonableness of the departure." *U.S. v. Rostoff,* 53 F.3d 398, 408 (1st Cir. 1995). See also *U.S. v. Quinones,* 26 F.3d 213, 219 (1st Cir. 1994) (departure lacking

explicit explanation of extent may be affirmed "if the reasons for the judge's choice are obvious or if an explanation can fairly be implied from the record as a whole").

Some circuits have reviewed departures for reasonableness, without imposing particular requirements on the district courts. See, e.g., *U.S. v. Gunby,* 112 F.3d 1493, 1502 (11th Cir. 1997) (review whether extent of departure "was reasonable under the circumstances"); *U.S. v. Otto,* 64 F.3d 367, 371 (8th Cir. 1995) ("we consider whether the upward departure was reasonable, giving due deference to the fact that the district court has a 'superior feel' for the case"); *U.S. v. Moore,* 997 F.2d 30, 36–37 & n.10 (5th Cir. 1993) ("Once reasons for making a departure are given, the district court should, but generally need not, also give reasons for the extent of the departure. . . . The district court has wide discretion in determining the extent of the departure.").

Note that the guideline range for the offense of conviction is the point of reference for any departure and therefore must be correctly calculated. *U.S. v. Emery,* 991 F.2d 907, 910 (1st Cir. 1993); *U.S. v. Rosado-Ubiera,* 947 F.2d 644, 646 (2d Cir. 1991) [4#13]; *U.S. v. Kirby,* 921 F.2d 254, 257 (10th Cir. 1990); *U.S. v. McCall,* 915 F.2d 811, 813–16 (2d Cir. 1990); *U.S. v. Talbott,* 902 F.2d 1129, 1134 (4th Cir. 1990); *U.S. v. Roberson,* 872 F.2d 597, 608 (5th Cir. 1989) [2#6]. Cf. *U.S. v. Waskom,* 179 F.3d 303, 312 (5th Cir. 1999) (although final sentence after departure was below properly calculated guideline range, remanded because "[w]e cannot discern from the record whether the sentencing judge would have imposed the same sentence had he been departing from the" proper range instead of incorrect higher range); *U.S. v. Burnett,* 66 F.3d 137, 138–40 (7th Cir. 1995) (defendant may appeal extent of departure with claim that original guideline range was incorrectly calculated—even if departure sentence was below range that would result if appeal was successful, error may have influenced extent of departure); *U.S. v. Hayes,* 49 F.3d 178, 182 (6th Cir. 1995) ("defendant may appeal his sentence even when the sentence imposed fell within the range advocated by him so long as he can identify a specific legal error") [7#9]. But cf. *U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (although defendant challenged role in offense enhancement that had resulted in higher guideline range from which district court made substantial assistance departure to "fifty percent of that called for under the guidelines," appellate court will not review extent of departure because even if it upheld defendant's challenge the sentence "would still represent a downward departure from the [adjusted] guideline range").

The First Circuit held that "the proper starting point from which a departure is to be subtracted or to which it must be added is the greater of the guideline range or the mandatory minimum." Thus, a court properly used the mandatory minimum as the point of departure where that was greater than the otherwise applicable guideline range. *U.S. v. Li,* 206 F.3d 78, 89 (1st Cir. 2000).

See discussion in VI.F.2 regarding proper starting point for departures under §5K1.1.

E. Disparity in Sentences of Codefendants

Disparate sentences among codefendants, without more, are not a proper basis for departure. See *U.S. v. Ives*, 984 F.2d 649, 650–51 (5th Cir. 1993); *U.S. v. Williams*, 980 F.2d 1463, 1467 (D.C. Cir. 1992); *U.S. v. Higgins*, 967 F.2d 841, 845 (3d Cir. 1992) [4#24]; *U.S. v. Mejia*, 953 F.2d 461, 467–68 (9th Cir. 1991); *U.S. v. Jackson*, 950 F.2d 633, 637–38 (10th Cir. 1991); *U.S. v. Edwards*, 945 F.2d 1387, 1398 (7th Cir. 1991); *U.S. v. Wogan*, 938 F.2d 1446, 1448–49 (1st Cir. 1991) [4#6]; *U.S. v. Joyner*, 924 F.2d 454, 459–61 (2d Cir. 1991); *U.S. v. Hendrieth*, 922 F.2d 748, 752 (11th Cir. 1991); *U.S. v. Torres*, 921 F.2d 196, 197 (8th Cir. 1990); *U.S. v. Parker*, 912 F.2d 156, 158 (6th Cir. 1990) [3#12]; *U.S. v. Goff*, 907 F.2d 1441, 1445–47 (4th Cir. 1990) [3#10]. See also *U.S. v. Nelson*, 918 F.2d 1268, 1272–73 (6th Cir. 1990) (courts "are not precluded *as a matter of law* from departing . . . in order to generally conform one conspirator's sentence" to coconspirators' sentences, but such departure would be permitted only in "the unusual case" to avoid "unreasoned disparity") [3#16]; *U.S. v. Carpenter*, 914 F.2d 1131, 1135–36 (9th Cir. 1990) (no right to equal sentences among codefendants—court may depart upward for one to create disparity if circumstances warrant departure); *U.S. v. Schular*, 907 F.2d 294, 299 (2d Cir. 1990) ("A co-defendant's sentencing range is irrelevant in determining the defendant's sentence where there are differing circumstances.").

It has been held that departure is not appropriate for a defendant who is sentenced more severely under the guidelines than a coconspirator or "co-accused" who was tried and sentenced in state court. See, e.g., *U.S. v. Hall*, 977 F.2d 861, 864 (4th Cir. 1992) (affirmed); *U.S. v. Vilchez*, 967 F.2d 1351, 1353–55 (9th Cir. 1992) (remanded) [4#24]; *U.S. v. Reyes*, 966 F.2d 508, 509–10 (9th Cir. 1992) (affirmed) [4#24]. Departure is also not appropriate on the ground that defendant may have received a shorter sentence if prosecuted in state court. See, e.g., *U.S. v. Snyder,* 136 F.3d 65, 68–70 (1st Cir. 1998) (remanded: fact that defendant would have received lower sentence if prosecuted in state court is not valid basis for departure—"federal/state sentencing disparity is not a feature that can justify a departure"); *U.S. v. Searcy,* 132 F.3d 1421, 1422 (11th Cir. 1998) (affirmed: same); *U.S. v. Minicone*, 26 F.3d 297, 302 (2d Cir. 1994) (remanded: "any disparity between the sentence a defendant would receive pursuant to the Guidelines and the sentence he would receive for the same offense under a state law sentencing scheme cannot be a basis for departure"); *U.S. v. Deitz,* 991 F.2d 443, 447–48 (8th Cir. 1993) (affirmed: no departure for disparity between theoretical state and actual federal sentence for same crime); *U.S. v. Sitton*, 968 F.2d 947, 961–62 (9th Cir. 1992) (affirmed: departure not warranted because defendants might have received shorter sentences had they been tried in state court) [4#24].

Prosecutorial decisions that may result in disparity, absent abuse, are not grounds for departure. See, e.g., *U.S. v. Williams,* 282 F.3d 679, 681–83 (9th Cir. 2002) (cannot depart for disparity between state and federal sentences or prosecutor's decision to charge in federal instead of state court); *U.S. v. Contreras*, 108 F.3d 1255, 1272 (10th Cir. 1996) (remanded: "trial judge may not reduce a defendant's sen-

tence on the mere basis that a co-defendant who engaged in similar conduct but agreed to plead guilty to lesser charges received a lighter sentence"); *U.S. v. Epley*, 52 F.3d 571, 584 (6th Cir. 1995) (remanded: cannot depart downward "simply because [another defendant] made a good deal with the authorities"); *U.S. v. Haynes*, 985 F.2d 65, 69–70 (2d Cir. 1993) (affirmed: prosecutor's decision to bring case in federal rather than state court not grounds for departure); *U.S. v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992) (remanded: "absent proof of actual prosecutorial misconduct . . . district court may not depart downward based upon the disparity of sentences among co-defendants"); *U.S. v. Dockery*, 965 F.2d 1112, 1117–18 (D.C. Cir. 1992) (reversed: may not depart because U.S. Attorney dropped charges brought in D.C. Superior Court and then recharged defendant in federal court to take advantage of harsher penalties) [4#24]; *U.S. v. Butt*, 955 F.2d 77, 90 (1st Cir. 1992) (affirming refusal to depart to correct alleged disparity between codefendants resulting from prosecutorial charging decisions); *U.S. v. Stanley*, 928 F.2d 575, 582–83 (2d Cir. 1991) (reversed: departure may not be based on disparities that may result from prosecutorial plea-bargaining practices) [4#2]. But cf. *U.S. v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991) (remanded for court to determine if "gross disparities between defendants similarly situated as a result of differences in the government's performance of its obligation to move for a downward departure under plea agreement" were inappropriate).

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

Although several courts have found that "unwarranted" disparity between codefendants may allow for departure, they have not agreed on what is unwarranted. The Tenth Circuit has stated that, because the Sentencing Reform Act "seeks to eliminate not all sentencing disparities, but only 'unwarranted' disparities, our cases establish that sentencing disparity between co-defendants is an impermissible departure factor when the defendants being compared either (1) pled to or were convicted of different offenses or (2) played significantly different roles in the commission of the same offense." *U.S. v. Contreras,* 180 F.3d 1204, 1210 (10th Cir. 1999). See also *U.S. v. Gallegos,* 129 F.3d 1140, 1143 (10th Cir. 1997) ("the purpose of the guidelines is to 'eliminate disparities [in sentencing] nationwide,' . . . not to eliminate disparity between co-defendants"). The Ninth Circuit held that "[d]ownward

departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances," *U.S. v. Daas,* 198 F.3d 1167, 1180–81 (9th Cir. 1999), but only when "the co-defendant used as a barometer for judging the disparity was convicted of the same offense," *U.S. v Caperna,* 251 F.3d 827, 831–32 (9th Cir. 2001) (but refusing to rule that court may not depart if codefendant cooperated with government and defendant did not, leaving it to sentencing court to determine if circumstances may warrant departure). See also *U.S. v. Wright,* 211 F.3d 233, 238–39 (5th Cir. 2000) (remanding district court's conclusion that it could not consider downward departure "based on discrepancies in sentences among co-defendants"—after *Koon*, such a departure should not be considered categorically prohibited).

The Seventh Circuit concluded that "the sentencing court should consider only an 'unjustified disparity' in the sentencing of co-defendants when the sentence imposed on the appellant co-defendant is 'unjustified' in length in comparison to the sentences imposed on all other individuals appropriately sentenced under the Guidelines for similar criminal conduct." The court also stated that "when an unjustified disparity is created by the abuse of prosecutorial discretion, . . . the sentencing court may consider the disparity as a factor in the determination whether to depart from the sentence of a co-defendant." *U.S. v. McMutuary,* 217 F.3d 477, 488–90 (7th Cir. 2000) ("In addition, a sentencing court abuses its discretion by deciding to depart from the applicable sentencing range for the sentence of any defendant, whenever such departure creates an unjustified disparity between the sentence of that defendant and the sentences of all other similarly situated individuals nationwide.") [11#1]. Cf. *U.S. v. Martin,* 221 F.3d 52, 57–58 (1st Cir. 2000) (remanded: "perceived disparity between the defendant's [sentencing range] and the national median sentence for persons convicted of federal drug-trafficking offenses" is improper ground for departure).

Disparity that may arise because of differing prosecutorial practices does not warrant departure. The Ninth Circuit concluded that a defendant could not receive a departure based on his claim that other illegal entry defendants in a different district in California were eligible for a "fast-track" plea-bargaining program that allowed them to plead to a lesser offense. "Nothing about the . . . 'fast-track' program lessens the severity of Defendant's conduct or makes his criminal or personal history more sympathetic." Nothing about defendant or his conduct were "atypical" or outside "the heartland of his offense of conviction." The court also concluded that, absent abuse, "sentencing disparities arising from the charging and plea bargaining decisions of different United States Attorneys is not a proper ground for departing from an otherwise applicable Guideline range." *U.S. v. Banuelos-Rodriguez,* 215 F.3d 969, 973–78 (9th Cir. 2000) (en banc) [11#1]. Accord *U.S. v. Armenta-Castro,* 277 F.3d 1255, 1257–60 (10th Cir. 2000) (affirming denial of departure in similar case, concluding that "the governing provisions of the United States Code and the Sentencing Guidelines categorically proscribe the consideration of sentencing disparities flowing from the exercise of prosecutorial discretion in charging and plea bargaining practices"); *U.S. v. Bonnet-Grullon,* 212 F.3d 692,

705–10 (2d Cir. 2000) (affirming district court's ruling that it did not have authority to consider downward departure for §1326 defendants who claimed that similarly situated defendants in some California districts receive significantly lower sentences; such departures are "categorically excluded by the terms of §§2L1.2 and 5K2.0, by the structure and theory of the Guidelines as a whole, and by the policy statements stating that the courts' sentencing decisions are not to intrude on discretionary prosecutorial charging decisions except as the Guidelines provide").

The Eighth Circuit held that departure was not warranted for an interdistrict sentencing disparity based on one district's blanket refusal to enter into §1B1.8 agreements. The court concluded that it was "within the government's proper exercise of prosecutorial discretion" to refuse to enter into §1B1.8 agreements and therefore, following the principle that "disparities resulting from proper exercises of the discretion by prosecutors cannot be said to be 'unusual' or 'atypical' enough to warrant departure under section 5K2.0," a refusal by one district was not grounds for departure. *U.S. v. Buckendahl,* 251 F.3d 753, 758–63 (8th Cir. 2001) (although "unjustified disparities may warrant a departure," such as from prosecutorial misconduct, "disparities in sentences among codefendants resulting from a routine exercise of prosecutorial discretion are unsuitable for departure") [11#4].

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

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

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

The Sixth Circuit held that departure could not be based on what defendant claimed was a relatively high sentence for her "relatively minor white-collar" offenses of mail theft and credit card fraud (twelve to eighteen month range for $13,000 loss) compared with what a more serious bank fraud offense would receive (thirty months for $360,000 loss). The court concluded that the Sentencing Commission deliberately chose a "progressive margin of increase" rather than a uniform margin. "That this arrangement produces disproportionate results between high and low-level offenders cannot serve as the legal basis for a downward departure absent un-

usual circumstances in the particular situation." *U.S. v. Weaver,* 126 F.3d 789, 792–94 (6th Cir. 1997) [10#4].

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

1. Requirement for Government Motion

a. Generally

Departures for substantial assistance pursuant to §3553(e) and §5K1.1 may not be made absent a motion by the government. See, e.g., *U.S. v. Spears*, 965 F.2d 262, 281 (7th Cir. 1992) (both); *U.S. v. Kelley*, 956 F.2d 748, 751–57 (8th Cir. 1992) (en banc) (5K1.1) [4#16]; *U.S. v. Romolo*, 937 F.2d 20, 23 (1st Cir. 1991) (5K1.1); *U.S. v. Brown*, 912 F.2d 453, 454 (10th Cir. 1990) (5K1.1); *U.S. v. Levy*, 904 F.2d 1026, 1034–35 (6th Cir. 1990) (5K1.1); *U.S. v. Ortez,* 902 F.2d 61, 64 (D.C. Cir. 1990) (5K1.1); *U.S. v. Bruno*, 897 F.2d 691, 694–95 (3d Cir. 1990) (both) [3#4]; *U.S. v. Alamin*, 895 F.2d 1335, 1337 (11th Cir. 1990) (both) [3#4]; *U.S. v. Francois*, 889 F.2d 1341, 1343–45 (4th Cir. 1989) (both) [2#17]; *U.S. v. Huerta*, 878 F.2d 89, 91 (2d Cir. 1989) (both); *U.S. v. Justice*, 877 F.2d 664, 666–69 (8th Cir. 1989) (both) [2#8]; *U.S. v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989) (both) [2#7]; *U.S. v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (both) [2#3]. Some courts have specifically held that the motion requirement in §5K1.1 does not conflict with 21 U.S.C. §994(n). See, e.g., *U.S. v. Doe*, 934 F.2d 353, 358–60 (D.C. Cir. 1991) [4#4]; *U.S. v. Gutierrez*, 908 F.2d 349, 350–52 (8th Cir. 1990); *U.S. v. Lewis*, 896 F.2d 246–47 (7th Cir. 1990) [3#3]; *Ayarza*, 874 F.2d at 653 n.2.

Several circuits have rejected the claim that *Koon v. U.S.,* 518 U.S. 81 (1996), provides authority for district courts to depart for substantial assistance under §5K2.0 in the absence of a government motion. See, e.g., *U.S. v. Fountain,* 223 F.3d 927, 928 (8th Cir. 2000) ("agree[ing] with every other circuit to consider the issue" that *Koon* cannot be read to allow substantial assistance departure under §5K2.0); *U.S. v. Maldonado-Acosta,* 210 F.3d 1182, 1184 (10th Cir. 2000) ("Even after *Koon*, however, a departure for substantial assistance pursuant to §5K2.0 is not permissible because departures for substantial assistance are already 'adequately taken into consideration by'" §5K1.1); *U.S. v. Cruz-Guerrero,* 194 F.3d 1029, 1032 (9th Cir. 1999) (same—"Sentencing Commission clearly intended to limit such departures to situations in which the government requests a departure"); *U.S. v. Alegria,* 192 F.3d 179, 189 (1st Cir. 1999) (same—"a defendant's assistance to the prosecutor cannot serve as the basis for a section 5K2.0 departure"); *In re Sealed Case,* 181 F.3d 128, 131–42 (D.C. Cir. 1999) (en banc) (reversing panel opinion at 149 F.3d 1198, reasoning that "if we read section 5K1.1 as saying that a substantial assistance departure is permissible only upon motion of the government, then we cannot read section 5K2.0 as countermanding that injunction") [10#6]; *U.S. v. Solis,* 169 F.3d 224, 227 (5th Cir. 1999) (reversing prior decision at 161 F.3d 281 and holding that "§5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion") [10#6]; *U.S. v. Abuhouran,*

161 F.3d 206, 210–17 (3d Cir. 1998) ("district courts have no more authority to grant substantial assistance departures under §5K2.0 in the absence of a government motion than they do under §5K1.1") [10#6].

Two circuits have held that assistance to state authorities is covered by §5K1.1 and that a departure for such assistance may not be made absent a motion by the government. See *U.S. v. Emery*, 34 F.3d 911, 913 (9th Cir. 1994) (assistance to state authorities not ground for departure under §5K2.0); *U.S. v. Love*, 985 F.2d 732, 734–36 (3d Cir. 1993) (same) [5#10]. The Second Circuit, however, vacated an earlier decision agreeing with those cases and held that "the term 'offense' in Section 5K1.1 is properly interpreted to refer only to federal offenses and that Section 5K1.1 addresses assistance only to federal authorities." Thus, assistance to state or local authorities may be considered for departure under §5K2.0. *U.S. v. Kaye*, 140 F.3d 86, 88–89 (2d Cir. 1998) (remanded), *vacating* 65 F.3d 240 (2d Cir. 1995).

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

In the absence of a government motion, a defendant's cooperation may still be considered for sentencing within the guideline range. *Doe*, 934 F.2d at 357 [4#4]; *U.S. v. LaGuardia*, 902 F.2d 1010, 1013 n.4 (1st Cir. 1990); *Bruno*, 897 F.2d at 693 (must consider it) [3#4]; *Alamin*, 895 F.2d at 1338 [3#4]. Similarly, if a defendant has provided assistance but no motion is filed, and there is an upward departure for other reasons, defendant's cooperation should be considered in fixing the extent of the upward departure. *U.S. v. Ocasio*, 914 F.2d 330, 337–38 (1st Cir. 1990). And if a motion is filed but the court decides not to depart, it may consider whatever assistance defendant rendered in choosing the sentence within the guideline range. *U.S. v. Faulks,* 143 F.3d 133, 136–37 (3d Cir. 1998).

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

b. Possible exceptions

i. Assistance outside scope of §5K1.1

Some circuits have determined that §5K1.1 is limited "by its plain language" to assistance in the investigation or prosecution of another; therefore, departures from the guideline range for other forms of assistance are not prohibited by §5K1.1. See *U.S. v. Sanchez*, 927 F.2d 1092, 1093–94 (9th Cir. 1991) (upheld decision not to depart, but affirmed that the "district court correctly concluded that assistance provided in a civil forfeiture proceeding is not 'substantial assistance' within the meaning of Section 5K1.1. . . . [B]y its plain language, Section 5K1.1 applies only to assistance provided in the investigation or prosecution of another."); *U.S. v. Garcia*, 926 F.2d 125, 127–28 (2d Cir. 1991) ("As written, §5K1.1 focuses on assistance that a defendant provides to the government, rather than to the judicial system"; affirming downward departure absent government motion for defendant whose cooperation with authorities "broke the log jam in a multi-defendant case" and thereby helped the district court's "seriously overclogged docket," thus providing assistance to the judicial system beyond that contemplated in §3E1.1 or §5K1.1) [3#20]. Accord *U.S. v. Dethlefs*, 123 F.3d 39, 44–45 (1st Cir. 1997) (remanded: although facts of case did not support departure, "Post *Koon*, it would be folly to conclude that a timely guilty plea which conserves judicial resources and thereby facilitates the administration of justice must not be considered under any circumstances in the departure calculus."). See also *U.S. v. Khan*, 920 F.2d 1100, 1106–07 (2d Cir. 1990) (while "theoretically possible" to depart under §5K2.0 for substantial assistance absent a §5K1.1 motion, the Sentencing Commission clearly considered a situation where defendant cooperates; "only exception" is where defendant shows evidence of assistance "which could not be used by the government to prosecute other individuals . . . but which could be construed as a 'mitigating circumstance'"). Cf. *U.S. v. Kaye*, 140 F.3d 86, 88–89 (2d Cir. 1998) (remanded: assistance to state or local authorities is outside scope of §5K1.1 and may be considered for departure under §5K2.0). Contra *U.S. v. Emery*, 34 F.3d 911, 913 (9th Cir. 1994); *U.S. v. Love*, 985 F.2d 732, 734–36 (3d Cir. 1993) [5#10].

Other circuits have rejected such departures for other assistance. See, e.g., *U.S. v. White*, 71 F.3d 920, 928 (D.C. Cir. 1995) ("our analysis of section 5K1.1 leads us to conclude that the circumstances surrounding a defendant's cooperation with the government can never be of a kind or degree not adequately contemplated by the Commission"); *U.S. v. Dorsey*, 61 F.3d 260, 262–63 (4th Cir. 1995) (rejecting reasoning and holding of *Garcia*); *U.S. v. Haversat*, 22 F.3d 790, 795 (8th Cir. 1994) (remanded: early nolo plea and assistance in settling related civil suit relate to acceptance or responsibility and do not warrant §5K2.0 departure for substantial assistance outside scope of §5K1.1); *U.S. v. Shrewsberry*, 980 F.2d 1296, 1298 (9th Cir. 1992) ("we decline to follow *Garcia*"); *U.S. v. Lockyer*, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (affirmed: downward departure for "substantial assistance to the judiciary" not warranted for defendant who pled guilty at initial appearance and waived

pretrial motions—conduct only demonstrated acceptance of responsibility, §3E1.1; distinguished *Garcia*) [5#2].

Departure could be considered for a defendant who had agreed to and tried to assist the government but was prohibited from doing so by order of the district court. The Fourth Circuit held, first, that it was "a clear abuse of discretion" under the circumstances of this case to prohibit defendant's cooperation and, second, that "the Sentencing Commission did not consider the possibility that a district court might affirmatively prohibit a defendant from cooperating with law enforcement authorities in an effort to qualify for a departure based upon substantial assistance. . . . Accordingly, we conclude that on remand the district court should determine whether, under the circumstances of this case, this factor is sufficiently important such that a sentence outside the guideline range should result." *U.S. v. Goossens*, 84 F.3d 697, 699–704 (4th Cir. 1996) [8#8].

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

Similarly, the D.C. Circuit held that exposure to danger during an unsuccessful attempt to provide substantial assistance does not warrant §5K2.0 departure. The 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." *U.S. v. Watson*, 57 F.3d 1093, 1096 (D.C. Cir. 1995) (affirmed) [7#11]. See also *U.S. v. White*, 71 F.3d 920, 928 (D.C. Cir. 1995) (following *Watson* and adding that Commission's inclusion of "any" danger or risk of injury "is strong evidence that section 5K1.1 contemplates all kinds and degrees of danger and risk").

ii. Violation of plea agreement

In general, the district court may not inquire into the government's refusal to file a motion for departure. However, if the plea agreement contains a commitment by the government to file a motion in return for the defendant's cooperation, the defendant may be able to seek specific performance of the agreement. See *U.S. v. De la Fuente*, 8 F.3d 1333, 1340–41 (9th Cir. 1993); *U.S. v. Watson*, 988 F.2d 544, 551–53 (5th Cir. 1993); *U.S. v. Wade*, 936 F.2d 169, 173 (4th Cir. 1991) [4#5], *aff'd on other grounds*, 112 S. Ct. 1840 (1992) [4#22]; *U.S. v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991) (agreement contained in cover letter to plea agreement) [4#5]; *U.S. v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) [3#2]. See also *U.S. v. Isaac,* 141 F.3d 477, 481 (3d Cir. 1998) ("when a defendant has entered into a plea agreement expressly requiring the government to make a §5K1.1 motion, a district court has broad powers to enforce the terms of the plea contract"); *U.S. v. Smith*, 953 F.2d 1060, 1066 (7th Cir. 1992) (dicta: "if the prosecutor makes and does not keep a

promise to file a §5K1.1 motion, and the promise is material to the plea, the court must allow the defendant to withdraw the plea"); *U.S. v. Romolo*, 937 F.2d 20, 23 n.3 (1st Cir. 1991) (noting possibility of judicial review when plea agreement involved); *U.S. v. Conner*, 930 F.2d 1073, 1075–76 (4th Cir. 1991) ("Where the bargain represented by the plea agreement is frustrated, the district court is best positioned to determine whether specific performance, other equitable relief, or plea withdrawal is called for. We perceive no reason why this same principle should not apply with respect to a conditional promise to make a §5K1.1 motion").

The Tenth Circuit stated that plea agreements are governed by contract principles, "and if any ambiguities are present, they will be resolved against the drafter, in this case the government." *U.S. v. Massey*, 997 F.2d 823, 824 (10th Cir. 1993) (but affirmed refusal to make motion because agreement plainly did not obligate government). See also *U.S. v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993) (holding that government breached plea agreement to inform court of defendant's assistance, even though it had not promised to make §5K1.1 motion, and stating that it "hold[s] the government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements"). The Ninth Circuit resolved an ambiguity against the government in affirming a §5K1.1 departure below the statutory minimum. It was uncertain whether the plea agreement required the government to move for departure below the statutory minimum or only the guideline range, but "the government 'ordinarily must bear responsibility for any lack of clarity'" in a plea agreement. *De la Fuente*, 8 F.3d at 1337–39 [6#6]. The court was also persuaded by the fact that accepting the government's argument would mean concluding that defendant agreed to cooperate in exchange for no benefit. Id. at 1339–40. See also *Hernandez* below.

The Second Circuit has held that a plea agreement giving the government discretion to move for a substantial assistance departure may be reviewed for bad faith and enforced by the court. *U.S. v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990) [3#3]. Cf. *U.S. v. Lee*, 989 F.2d 377, 380 (10th Cir. 1993) ("When a Defendant asserts that the government breached an agreement that leaves discretion to the prosecutor, the district court's role is limited to deciding whether the government made the determination in good faith."). In a later case the Second Circuit remanded for such a review. Even though the plea agreement gave the government "sole and unfettered discretion" to determine whether defendant's cooperation was satisfactory, defendant appeared to have fulfilled his part of the bargain and the government had not presented any legitimate reasons for refusing the §5K1.1 motion. *U.S. v. Knights*, 968 F.2d 1483, 1487–88 (2d Cir. 1992) ("The district court is of course obligated in most cases to allow considerable deference to the government's evaluation of a defendant's cooperation. But where the contemplated cooperation involves solely in-court testimony, as it apparently did here, the district court is well-situated to review the defendant's performance of his obligations under the plea agreement.") [4#24].

If a defendant is entitled to a hearing, "[a]t a minimum . . . the district court should consider any evidence with a significant degree of probative value, and should

rest its findings on evidence that provides a basis for this court's review." *U.S. v. Leonard*, 50 F.3d 1152, 1157–58 (2d Cir. 1995) (remanded: evidentiary hearing required to resolve inconsistencies between defendant's and government's versions of events and determine whether government was justified in not making §5K1.1 motion). Cf. *U.S. v. Brechner*, 99 F.3d 96, 99–100 (2d Cir. 1996) (remanded: government could refuse to make motion after defendant violated plea agreement by lying, however briefly, which put his credibility and future usefulness as witness in doubt).

Because contract principles apply, and ambiguities will be read against the government, the exact wording of a cooperation agreement may determine the limits of the government's ability to refuse to file a motion, especially for reasons unrelated to substantial assistance. For example, the Second Circuit refused to allow the government to withdraw a previously filed §5K1.1 and §3553(e) motion after defendant failed to appear for sentencing and committed further crimes. The cooperation agreement provided that the government did not have to file a motion if defendant "has not provided substantial assistance" or "has violated any provision of this Agreement," and included a provision obligating defendant to refrain from committing further crimes. "The agreement, however, is silent with regard to the *withdrawal* of a Section 5K1.1 and 18 U.S.C. §3553(e) motion. Further, it specifically recites the consequences if Padilla committed further crimes or otherwise violated the agreement, but the right to withdraw the . . . motion is not enumerated as one of such consequences . . . Reading the agreement strictly against the Government, as our precedent requires, we conclude that it prohibits the Government from withdrawing the Section 5K1.1 and 18 U.S.C. §3553(e) motion because it failed to enumerate specifically the right to withdraw the motion in the several specific and serious consequences that would follow if Padilla committed further crimes or otherwise violated the agreement." *U.S. v. Padilla,* 186 F.3d 136, 141–42 (2d Cir. 1999) [10#5]. Cf. *U.S. v. Medford,* 194 F.3d 419, 423 (3d Cir. 1999) (affirmed: where agreement required government to make motion "to allow the Court to depart" under §5K1.1, "the plea agreement did not require the government to recommend a downward departure at the sentencing hearing; nor did it prohibit the government from stating at the sentencing hearing that it did not recommend departure—by filing the motion government fulfilled its obligation under agreement and did not act in bad faith).

The Eighth Circuit also found that the terms of an agreement, as well as the express terms of the statute and guideline, prevented the government from refusing to file a §5K1.1 motion. Defendant provided substantial assistance, but the government refused to file a motion because he violated the plea agreement provision to "not commit any additional crimes whatsoever." The court remanded, concluding that because under §5K1.1 and §3553(e) "the prosecutor's virtually unfettered discretion . . . is limited to the substantial assistance issue," the government cannot deny a motion "based entirely upon a reason unrelated to the quality of Anzalone's assistance in investigating and prosecuting other offenders." The government "should make the downward departure motion and then advise the sentencing court

if there are unrelated factors . . . that in the government's view should preclude or severely restrict any downward departure relief. The district court may of course weigh such alleged conduct in exercising its downward departure discretion." The plea agreement did provide that the government could refuse to make a motion "which it is otherwise bound by this agreement to make" if defendant violated the agreement, but that provision "does not apply to a substantial assistance downward departure motion, because the government was never 'bound' to make such a motion," having agreed to merely "consider" any cooperation by defendant. *U.S. v. Anzalone,* 148 F.3d 940, 941–42 (8th Cir. 1998) [10#5]. Cf. *U.S. v. Wilkerson,* 179 F.3d 1083, 1086 (8th Cir. 1999) (rejecting *Anzalone* claim by defendant who provided information to government and agreed to testify as part of agreement, but failed to appear for drug testing and tested positive for cocaine—defendant's agreement "created a *continuing* duty to provide substantial assistance," and his actions "undermined his usefulness as a potential witness" and thus related to the quality of his substantial assistance) [10#5].

The Third Circuit also held that contract principles governed plea agreements and that a government refusal to file the motion could be reviewed for bad faith even when the prosecutor retains "sole discretion" to determine whether defendant's assistance merited a motion. The court agreed with *U.S. v. Imtiaz*, 81 F.3d 262, 264 (2d Cir. 1996), that the defendant must first allege that the government is acting in bad faith, and then the government must be given an opportunity to explain its reasons for refusing to file the motion. The defendant must make a showing of bad faith to trigger a hearing on the issue, but unless the government's reasons are "wholly insufficient," no hearing is required. *U.S. v. Isaac*, 141 F.3d 477, 481–84 (3d Cir. 1998) (remanding to allow prosecutor to provide reasons for refusal to make §5K1.1 motion). In a later case where the agreement did not specify a standard under which the government was to make its decision, the court determined that the government effectively retained "sole discretion." Because the agreement contemplated that any departure motion must be made "pursuant to" §3553(e) and §5K1.1, "the plea agreement was implicitly subject to the statute and the Sentencing Guidelines and both expressly lodge the decision to make the motion in the Government's discretion, regardless of whether the Government expressly reserved such decision in the plea agreement. . . . [T]he Government's decision not to move for a departure is reviewable only for bad faith or an unconstitutional motive." *U.S. v. Huang,* 178 F.3d 184, 187–89 (3d Cir. 1998) [10#5].

An Eighth Circuit defendant's motion to compel the government to move for a substantial assistance departure required an evidentiary hearing where defendant had an agreement, plus additional oral assurances, cooperated with the government, and had been told that his cooperation aided a case against a coconspirator. The government had based its refusal on a "conclusory letter" from the prosecutor in the coconspirator's case claiming that defendant had not been altogether truthful. Although "the general statement of a prosecutor or law enforcement officer that a defendant was unbelievable or unreliable is normally a sufficient reason to deny a defense motion to compel the government to file a motion for downward

departure, . . . [u]nder these circumstances, particularly the lack of any concrete explanation for the Oklahoma prosecutor's decision, the district court should have conducted an evidentiary hearing to determine whether the Nebraska prosecutor's failure to file a downward departure motion was irrational." *U.S. v. Pipes,* 125 F.3d 638, 641–42 (8th Cir. 1997). Cf. *U.S. v. Licona-Lopez,* 163 F.3d 1040, 1042–44 (8th Cir. 1998) (affirmed: neither irrational nor in bad faith for government to refuse to file motion when defendant was untruthful with authorities in debriefings and hurt case against coconspirator, despite fact that defendant testified at ultimately successful prosecution of coconspirator; request for evidentiary hearing properly denied).

The D.C. Circuit agrees that a plea agreement giving the government discretion to file a §5K1.1 motion "includes an implied obligation of good faith and fair dealing." Because the U.S. Attorney uses a "Departure Committee" to decide whether a defendant's assistance merits a §5K1.1 motion, the agreement "explicitly oblig[ed] the prosecutor to present the Departure Committee with accurate information as to the nature and extent of [defendant's] cooperation, [and] the agreement implicitly required the Committee to consider that evidence and, if it believed the assistance to be 'substantial,' to so find." *U.S. v. Jones*, 58 F.3d 688, 691–92 (D.C. Cir. 1995) (affirmed: although defendant provided what assistance he could, plea agreement specifically left final decision on §5K1.1 motion to Departure Committee and, absent allegation of bad faith, its decision to deny motion must be affirmed).

The Fifth Circuit has held that if a defendant relied on the government's promise and "accepted the government's offer and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obligated to move for a downward departure." *Melton*, 930 F.2d at 1098–99 (remanded for consideration of departure) [4#5]. See also *U.S. v. Laday*, 56 F.3d 24, 25–26 (5th Cir. 1995) (remanded: government breached plea agreement when it gave defendant no opportunity to provide assistance) [7#11]; *Watson*, 988 F.2d at 553 (when plea agreement does not reserve discretion for government to determine whether defendant's cooperation merits motion, "district court has authority to determine whether a defendant has satisfied the terms of his plea agreement"). See also *U.S. v. Ringling*, 988 F.2d 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 interviewing defendant and providing opportunity to cooperate). Cf. *U.S. v. Goossens*, 84 F.3d 697, 699–704 (4th Cir. 1996) (remanded: departure may be considered where plea agreement called for defendant to cooperate in exchange for §5K1.1 motion, and he tried to, but government did not move for departure because district court order prohibited defendant from assisting government) [8#8].

However, the Fifth Circuit later distinguished the cases above, where the government "unequivocally obligated itself to move for a downward departure," and held that, absent an unconstitutional motive, defendant need not be provided an oppor-

tunity to assist the government if the plea agreement expressly states that the government retains sole discretion to file the motion. *U.S. v. Price,* 95 F.3d 364, 368–69 (5th Cir. 1996). See also *U.S. v. Courtois,* 131 F.3d 937, 938–39 (10th Cir. 1997) (affirmed: where government retained sole discretion whether to file motion, and investigation was not terminated for impermissible or irrational reasons, it was not obligated to give defendant opportunity to provide substantial assistance); *U.S. v. Lockhart,* 58 F.3d 86, 88 (4th Cir. 1995) (affirmed: where plea agreement "clearly granted the Government discretion in determining whether to seek assistance . . . and whether to move for a downward departure," and defendant did not allege impermissible or irrational reasons for not doing so, government did not breach plea agreement by not giving defendant opportunity to provide assistance); *U.S. v. Garcia-Bonilla*, 11 F.3d 45, 47 (5th Cir. 1993) (when plea agreement "expressly provides that the government retains absolute discretion to move for a downward departure under §5K1.1 . . . the defendant is not entitled to relief . . . unless the government's refusal to file a §5K1.1 motion was based on an unconstitutional motive"); *Sullivan v. U.S.*, 11 F.3d 573, 575 (6th Cir. 1993) (affirmed refusal to make motion where qualified promise was made in plea agreement: "In the absence of any specific requirement, made on the record, obliging the government under any circumstances to make a departure request, and absent an allegation that the government was acting out of unconstitutional motives, petitioner's request for relief was properly denied").

The Fifth Circuit remanded a refusal to file a §5K1.1 motion where "significant ambiguities" in the plea agreement required a determination of the intent of the parties, in this case "the parties' interpretation of what might constitute substantial assistance." On remand, the district court should consider, in light of *Melton*, whether defendant provided all the assistance he could and whether the value of that assistance was diminished by the government's failure to follow up on the information provided. *U.S. v. Hernandez*, 17 F.3d 78, 81–82 (5th Cir. 1994) (replacing opinion at 996 F.2d 62 [6#1]). See also *De la Fuente* above. Cf. *U.S. v. Amaya*, 111 F.3d 386, 388–89 (5th Cir. 1997) (remanded: defendant may withdraw plea after government did not file §5K1.1 motion because district court had erroneously promised defendant that it could independently review any government refusal to file motion).

The Fourth Circuit held that the government breached a plea agreement by refusing to file a §5K1.1 motion until defendant assisted in a future trial. The agreement provided that defendant would assist in the investigation or prosecution of another, and the government "repeatedly conceded" that defendant substantially assisted the investigation; the government "has no right to insist on assistance in both investigation and prosecution under the plea agreement." *U.S. v. Dixon*, 998 F.2d 228, 230–31 (4th Cir. 1993) (also noting: "Though plea agreements are generally interpreted under the law of contracts, the constitutional basis of the defendant's 'contract' right and concerns for the honor and integrity of the government require holding the government responsible for imprecisions or ambiguities in the agreement") [6#1]. The Fourth Circuit has also held that, where the government agreed during the sentencing hearing that defendant had rendered substantial assistance

and effectively promised to make a substantial assistance motion "within the next year," this was "tantamount to and the equivalent of a modification of the plea agreement." The government wanted to defer a decision on §5K1.1 and file a Rule 35(b) motion later, but since this is not permitted (see section VI.F.3 & 4 below) defendant "is entitled to specific performance of the government's promise to reward him for his presentence substantial assistance." *U.S. v. Martin*, 25 F.3d 211, 216–17 (4th Cir. 1994) (remanded) [6#14]. Accord *U.S. v. Johnson,* 241 F.3d 1049, 1053–54 (8th Cir. 2001) (remanded: once government acknowledged that defendant had provided substantial assistance, plea agreement clearly required it to make motion and it could not substitute promise to file a Rule 35(b) motion after defendant provided more assistance).

On the other hand, if defendant violates the plea agreement the government may refuse to make the motion. See, e.g., *U.S. v. David*, 58 F.3d 113, 114–15 (4th Cir. 1995) (affirmed: although plea agreement was otherwise fulfilled, government properly refused to make §5K1.1 motion after defendant jumped bail and did not appear for sentencing—"we are of opinion that implicit in every such plea agreement is the defendant's obligation to appear for sentencing at the time appointed by the district court. By jumping bail and failing to appear, David violated the plea agreement and the government's obligation to move for a downward departure based on substantial assistance ended."). See also *U.S. v. Vernon,* 187 F.3d 884, 887 (8th Cir. 1999) (affirmed: government properly refused to file §3553(e) motion for defendant who refused to testify at another's sentencing hearing—defendant's plea agreement specifically provided that he "shall truthfully testify, if subpoenaed, . . . at any trial or other court proceeding regarding any matters about which the United States Attorney's Office may request his testimony," and "given his promise to testify against his co-defendants at any type of proceeding, he was not entitled to assert a blanket privilege and refuse to take the stand at the sentencing hearing"); *U.S. v. Resto,* 74 F.3d 22, 27 (2d Cir. 1996) (affirmed: although defendant did provide some assistance, where he "repeatedly lied about his past criminal history, both before and after entering into the cooperation agreement, in violation of his promise to 'provide truthful, complete and accurate information,'" and also committed further crimes, "the prosecutor had ample, good faith grounds to decline to move for a downward departure").

The Sixth Circuit held that, like other sentencing factors, a defendant's alleged breach of the plea agreement must be adequately proved by the government before it can refuse to file a promised §5K1.1 motion. The court remanded a case where defendant's agreement required that he not commit any further criminal acts, he was a suspect in a homicide, and the government refused to file the motion based on its belief he participated in the homicide. "However, . . . the district court found that, while the government had 'at least probable cause' to believe that Benjamin breached the plea agreement, the level of proof did not rise to a preponderance of the evidence. . . . Because the government failed to meet its evidentiary burden, it was not free to decline to make the substantial assistance motion." *U.S. v. Benjamin,* 138 F.3d 1069, 1073–74 (6th Cir. 1998). Cf. *U.S. v. El-Gheur,* 201 F.3d 90, 92

(2d Cir. 2000) (affirmed: where defendant's plea agreement stated that he "must not commit any further crimes whatsoever," but he then escaped after pleading guilty and before sentencing and remained at large for several years, defendant "forfeited any [right to compel the government to file a §5K1.1 motion] when he jumped bail and became a fugitive, in violation of the express terms of his cooperation agreement").

Even if the government does move for departure, it can still violate the plea agreement if it does not otherwise perform as promised. The Eighth Circuit remanded a case where the government had agreed to file a §5K1.1 motion and recommend a departure "of up to 50%," but then told the court that it had "no specific recommendation as to the sentence" and that defendant had already benefited from a lesser charge, and introduced victim-impact statements that influenced the court to deny the motion. *U.S. v. Mitchell,* 136 F.3d 1192, 1194 (8th Cir. 1998) (government's actions "violated the spirit of the promise and ultimately the plea agreement"). See also section IX.A.4. Stipulations.

The D.C. Circuit held that "review by the district court remains available in cases where the government's refusal to move for departure violates the terms of a cooperation agreement, is intended to punish the defendant for exercising her constitutional rights, or is based on some unjustifiable standard or classification such as race." *U.S. v. Doe*, 934 F.2d 353, 358 (D.C. Cir. 1991) [4#4]. Note that the district courts have discretion to reject a plea agreement that is unsatisfactory and allow defendant to withdraw the guilty plea. USSG §§6B1.2, 6B1.3; Fed. R. Crim. P. 11(e).

iii. Violation of constitutional rights or bad faith

The Supreme Court held that district courts "have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." *Wade v. U.S.*, 504 U.S. 181, 185–86 (1992) [4#22]. The Court gave as an example of a constitutional violation the refusal to file the motion "because of the defendant's race or religion." Also, a defendant would be entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." The Ninth Circuit has held that a sentencing court had the authority to review sua sponte a prosecutor's decision not to file the motion. *U.S. v. Delgado-Cardenas*, 974 F.2d 123, 125–26 (9th Cir. 1992) (remanded for clarification of constitutional violations) [5#2].

The *Wade* Court also indicated that "a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'" *Id.* at 1844. (Note: The Supreme Court affirmed the lower court ruling, *U.S. v. Wade*, 936 F.2d 169 (4th Cir. 1991) [4#5], because the defendant failed to raise and support a claim that the government's failure to file the motion violated his constitutional rights.) The Fifth Circuit affirmed a district court's refusal to hold an evidentiary hearing on defendant's assistance to the government where the defendant claimed the government's failure to make a §5K1.1 motion was arbitrary but defendant did not make "a substantial threshold showing of . . . a constitutionally improper motive." *U.S. v. Urbani*, 967 F.2d 106, 108–10 (5th Cir. 1992) [5#1].

The Eighth Circuit held that *Wade* foreclosed a claim that defendant's "assistance was so valuable that the government's refusal to file a §5K1.1 motion amounted to bad faith and violated due process." Defendant must show an enforceable promise or that the government's refusal was motivated by "constitutionally impermissible concerns." *U.S. v. Favara*, 987 F.2d 538, 540 (8th Cir. 1993). See also *U.S. v. Duncan,* 242 F.3d 940, 946–47 (10th Cir. 2001) (remanded: "*Wade* eliminated any exception to the government motion requirement that focuses on the level of the defendant's assistance," or the "egregious case exception" identified in a pre-*Wade* case); *U.S. v. Forney*, 9 F.3d 1492, 1502 (11th Cir. 1993) (defendant must make "an allegation and a substantial showing that the prosecution failed to file a substantial assistance motion because of a constitutionally impermissible motivation"); *U.S. v. Bagnoli*, 7 F.3d 90, 92 (6th Cir. 1993) (must make "substantial threshold showing of an unconstitutional motive"); *U.S. v. Romsey*, 975 F.2d 556, 558 (8th Cir. 1992) ("bare assertion" insufficient); *U.S. v. Egan*, 966 F.2d 328, 332 (7th Cir. 1992) (burden is on defendant to show that government acted arbitrarily in refusing to make motion).

However, the Eighth Circuit later remanded a case for an evidentiary hearing where defendant made a sufficient threshold showing that the government acted irrationally or in bad faith in refusing to file a §3553(e) motion. Her plea agreement merely stated that the government would consider filing the motion if she cooperated in the prosecution of her brother, which she did. The government filed a §5K1.1 motion but not the §3553(e) motion, leaving defendant with a twenty-year sentence. The district court strongly disagreed with the government's decision, but concluded it could not order an evidentiary hearing. The appellate court remanded, finding that there was evidence that a government attorney had indicated to defendant she would face only seven to ten years if she cooperated, and that the government's stated reasons for declining the motion lacked merit, seemed irrational, and may have been based on factors other than the defendant's assistance. On the latter issue, the court noted that, "when contemplating filing a §3553(e) motion, the government cannot base its decision on factors other than the substantial assistance provided by the defendant." *U.S. v. Rounsavall,* 128 F.3d 655, 667–69 (8th Cir. 1999). Cf. *U.S. v. Vernon,* 187 F.3d 884, 887 (8th Cir. 1999) (affirmed: government did not abuse discretion in filing motion under §5K1.1 but not §3553(e) based on defendant's refusal to testify at sentencing hearing).

The Ninth Circuit remanded a case where the government's improper behavior authorized the district court to grant §5K1.1 departure in the absence of a government motion. Before and during the plea proceedings, defendant's counsel attempted to negotiate a plea agreement to have defendant testify against codefendants in exchange for a §5K1.1 departure. The government refused the offer, but then, without notifying defendant's counsel, subpoenaed defendant to testify at a grand jury hearing and did not return the counsel's phone calls. Counsel could not contact defendant either, because the government had moved defendant to another prison. Assuming a deal had been reached, defendant testified before the grand jury. At defendant's sentencing the government refused to file a §5K1.1 motion, but it did

file one for a codefendant who testified before the same grand jury. The appellate court held that the government's "potentially unconstitutional *behavior*" (interfering with defendant's Sixth Amendment rights) was an "unconstitutional motive" within the meaning of *Wade*. The defendant "has shown that he provided substantial assistance, and that the government's improper conduct deprived him of an opportunity to negotiate a favorable bargain before testifying." *U.S. v. Treleaven*, 35 F.3d 458, 461–62 (9th Cir. 1994) [7#3].

The Third Circuit held that denying a §5K1.1 motion to penalize a defendant for exercising the right to trial would be an unconstitutional motive, and remanded a case to allow defendant to try to show government vindictiveness. *U.S. v. Paramo*, 998 F.2d 1212, 1219–21 (3d Cir. 1993) (however, government gave other, legitimate reasons for its refusal, so defendant "must prove actual vindictiveness" by showing that government's stated reasons are pretextual and "that the prosecutor withheld a §5K1.1 motion solely to penalize him for exercising his right to trial") [6#1]. The Ninth Circuit followed *Paramo* in a case where defendant had been sentenced after receiving a §5K1.1 departure. Defendant was allowed to withdraw his plea and go to trial, where he was convicted. The government refused to move for a §5K1.1 departure and the district court sentenced defendant within the guideline range. Because the government could point to "no intervening circumstances that diminished the usefulness of what they previously considered to be substantial assistance," the appellate court concluded that defendant "has made the 'substantial threshold showing' [of an unconstitutional motive] required by *Wade*" and that on remand the district court should "exercise its discretion and consider the appropriate Guideline factors relating to a §5K1.1 motion." *U.S. v. Khoury*, 62 F.3d 1138, 1140–42 (9th Cir. 1995). However, the Ninth Circuit later held that, absent other evidence of vindictiveness or arbitrariness, the government may threaten to withhold the motion if a defendant rejects a proposed plea agreement—"like the government's enforcement of its plea bargain threat to deny a reduced charge, the government's enforcement of its plea bargain threat to withhold a §5K1.1 motion does not demonstrate unconstitutional retaliation against the defendant's exercise of his right to trial" *U.S. v. Murphy*, 65 F.3d 758, 762–63 (9th Cir. 1995).

The Fourth Circuit held that the government did not act improperly by offering a substantial assistance departure to whichever one of two codefendants first agreed to plead guilty and testify against the other. The offer was "rationally related to the legitimate ends of securing two convictions, expediting plea negotiations, and avoiding the expense of at least one trial. . . . We conclude that because the government's offer employed rational means to further legitimate government objectives," the district court should not have given a downward departure to the defendant who did not take the offer and plead guilty. *U.S. v. Maddox*, 48 F.3d 791, 796–97 (4th Cir. 1995) (remanded). Cf. *U.S. v. Butler,* 272 F.3d 683, 687–88 (4th Cir. 2001) (affirmed: rejecting defendant's claim that government's refusal to file motion, based on fact that he threatened two codefendants after he had provided substantial assistance, was not rationally related to legitimate government end).

The Tenth Circuit dismissed a defendant's claim that the government refused to

file a §5K1.1 motion because he was the only conspirator to request a jury trial. Because defendant did not raise his claim in the district court it is reviewed for plain error, but plain error review is not appropriate when the error involves factual disputes, i.e., whether defendant in fact provided substantial assistance and the prosecutor's motive in refusing to file the motion. *U.S. v. Easter*, 981 F.2d 1549, 1555–56 (10th Cir. 1992) [5#7].

Before *Wade*, some courts had suggested that the government's refusal may be reviewed for constitutional violations, bad faith, and/or arbitrariness. See, e.g., *U.S. v. Drown*, 942 F.2d 55, 59–60 (1st Cir. 1991) (if refusal to file motion "is based on unacceptable standards, such as the infringement of protected statutory or constitutional rights, a federal court is empowered to intervene") [4#8]; *U.S. v. Doe*, 934 F.2d 353, 358 (D.C. Cir. 1991) (review available if refusal to move "is intended to punish the defendant for exercising her constitutional rights, or is based on some unjustifiable standard or classification such as race") [4#4]; *U.S. v. Mena*, 925 F.2d 354, 356 (9th Cir. 1991) (noting possibility of "extreme situations in which the defendant's reliance on the government's inducements may permit a downward departure in the absence of a government motion"); *U.S. v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (suggesting in dicta that refusal may be reviewable "to ensure that the prosecutor did not base a decision on prohibited criteria such as race or speech"); *U.S. v. Khan*, 920 F.2d 1100, 1106 (2d Cir. 1990) (outlining procedure for alleging bad faith by government) [3#18]; *U.S. v. Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990) (in "egregious case" court might "be justified in taking some corrective action"); *U.S. v. Smitherman*, 889 F.2d 189, 191 (8th Cir. 1989) (indicating question of prosecutorial bad faith or arbitrariness may present due process issue).

Other circuits have held that review for bad faith is not available. See *U.S. v. Smith*, 953 F.2d 1060, 1063–64 (7th Cir. 1992) (no review for bad faith or arbitrariness); *U.S. v. Romolo*, 937 F.2d 20, 24 (1st Cir. 1991) (without government motion court cannot depart "despite meanspiritedness, or even arbitrariness, on the government's part"). Cf. *U.S. v. Goroza*, 941 F.2d 905, 909 (9th Cir. 1991) (reversing departure under §5K2.0 for defendant's cooperation after government refused to file §5K1.1 motion because it believed defendant made false statements despite acquittal on perjury charge based on those statements: "cooperation with the government . . . is a circumstance that has been adequately taken into account," and "so long as the government does not exceed the bounds of its discretion, departure under §5K2.0 for cooperation with the government is inappropriate") [4#7]. Note that the Fourth Circuit had held in *Wade* that "the defendant may not inquire into the government's reasons and motives." 936 F.2d at 172.

2. Extent of Departure

Several circuits have held that there is no lower limit on a departure under §3553(e), and a court may impose a term of probation as long as the sentence is "reasonable." See *U.S. v. Baker*, 4 F.3d 622, 624 (8th Cir. 1993); *U.S. v. Snelling*, 961 F.2d 93, 96–97 (6th Cir. 1992); *U.S. v. Pippin*, 903 F.2d 1478, 1485 (11th Cir. 1990); *U.S. v. Wilson*,

896 F.2d 856, 858–60 (4th Cir. 1990) [3#3]. The Fourth Circuit also held that probation for Class A and B felonies may be imposed under §3553(e), despite the prohibition in 18 U.S.C. §3561(a)(1). *U.S. v. Daiagi*, 892 F.2d 31, 32–33 (4th Cir. 1989) [2#18]. The Seventh Circuit agreed with these principles, but held that probation may not be imposed if the statute of conviction specifically prohibits it. *U.S. v. Thomas*, 930 F.2d 526, 528 (7th Cir. 1991) (probation prohibition in 18 U.S.C. §841(b) serves to "trump" §3553(e)) [4#1]. Accord *U.S. v. Roth*, 32 F.3d 437, 440 (9th Cir. 1994); *Snelling*, 961 F.2d at 96–97 (cannot disregard "a statutory ban on probation").

The Thomas court also stated that the extent of substantial assistance departures "must be linked to the structure of the guidelines," courts should use analogies to other guideline provisions, and the government's recommended sentence "should be the starting point." *Id.* at 530–31. Also, "only factors relating to a defendant's cooperation" may be considered—it was improper to factor in family responsibilities when choosing the extent of departure. 930 F.2d at 529–30. Accord *U.S. v. Pearce,* 191 F.3d 488, 492–93 (4th Cir. 1999) (remanded: "any factor considered by the district court on a §5K1.1 motion must relate to the 'nature, extent, and significance' of the defendant's assistance"); *U.S. v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994); *U.S. v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993); *U.S. v. Rudolph*, 970 F.2d 467, 470 (8th Cir. 1992); *U.S. v. Chestna*, 962 F.2d 103, 106–07 (1st Cir. 1992); *U.S. v. Valente*, 961 F.2d 133, 134–35 (9th Cir. 1992) (affirmed departure below mandatory minimum on basis of substantial assistance but held no authority to further depart for aberrant behavior where guideline range was below mandatory minimum) [4#20]; *Snelling*, 961 F.2d at 97. Cf. *U.S. v. Hall*, 977 F.2d 861, 865 (4th Cir. 1992) (affirmed: district court properly refused to consider invalid departure factors when determining extent of substantial assistance departure).

Note, however, that some courts have allowed consideration of factors not related to substantial assistance to *limit* the extent of the downward departure or to deny any departure at all. See, e.g., *U.S. v. Casiano*, 113 F.3d 420, 430–31 (3d Cir. 1997) (court could "take into account the nature and circumstances of the offense in limiting the extent of §5K1.1 departure"); *U.S. v. Luiz*, 102 F.3d 466, 470 (11th Cir. 1996) ("district court may consider other factors in addition to substantial assistance that militate against granting a departure"); *U.S. v. Alvarez*, 51 F.3d 36, 39–41 & n.5 (5th Cir. 1995) (affirmed: court could limit departure to avoid disparity in sentences compared with those of less culpable coconspirators—"decision as to the extent of the departure is committed to the almost complete discretion of the district court") [7#11]; *U.S. v. Mariano*, 983 F.2d 1150, 1156–57 (1st Cir. 1993) (remanded: "district court retains broad discretion to exhume factors unrelated to substantial assistance" when deciding "to forgo or curtail a downward departure" under §5K1.1); *U.S. v. Carnes*, 945 F.2d 1013, 1014 (8th Cir. 1991) (affirmed: proper to consider benefit to defendant of prosecutor's decision not to press weapons charge in limiting extent of departure). But see *U.S. v. Wallace*, 114 F.3d 652, 656 (7th Cir. 1997) (remanded: in light of §5K1.1, comment. (n.2), may not reduce departure by

two levels because defendant got "tremendous break" in receiving §3E1.1 reduction).

Two circuits have held that, when a defendant is subject to a sixty-month mandatory minimum sentence under 18 U.S.C. §924(c)(1), that sentence is the proper starting point for a §3553(e) departure. See *U.S. v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994) (because departure under §3553(e) should only reflect defendant's substantial assistance, district court properly used sixty-month mandatory minimum term as starting point for departure, rather than offense level—including mitigating adjustments—that would have applied absent the minimum); *U.S. v. Schaffer*, 110 F.3d 530, 533–34 (8th Cir. 1997) (affirmed: "We agree with the Eleventh Circuit that the mandatory minimum sentence of §924(c)(1) is the proper departure point following a §3553(e) motion").

The Eleventh Circuit later held that *Aponte* is not limited to cases involving §924(c)(1), agreeing with a Seventh Circuit case addressing the same issue under Rule 35(b) "that U.S.S.G. §5G1.1(b), which addresses the implementation of statutory minimum sentences under the Guidelines, made the statutory minimum sentence the guideline sentence" that is the starting point for departure. *U.S. v. Head,* 178 F.3d 1205, 1207–08 (11th Cir. 1999) (citing *U.S. v. Hayes,* 5 F.3d 292, 294–95 (7th Cir. 1993)). The Fourth Circuit reached the same conclusion, finding that "§3553(e) allows for a departure from, not the removal of, a statutorily required minimum sentence," and a district court was correct in using the mandatory minimum as the starting point for a §3553(e)/§5K1.1 departure. *U.S. v. Pillow,* 191 F.3d 403, 407–08 (4th Cir. 1999) (affirmed: also distinguished §3553(f), which allows for a sentence "without regard" for mandatory minimum, rather than a departure from minimum). Cf. *U.S. v. Webster*, 54 F.3d 1, 4 (1st Cir. 1995) (affirmed: court could properly limit extent of §5K1.1 departure from 63–78-month range defendant faced on seven counts so as not to "offset" impact of mandatory sixty-month consecutive sentence defendant faced on eighth count).

Most circuits have held that, once the motion is made, the decision of whether or to what extent to depart is the district court's, not the government's. See, e.g., *U.S. v. Hashimoto,* 193 F.3d 840, 843 (5th Cir. 1999) ("District courts have almost complete discretion to determine the extent of a departure under §5K1.1."); *U.S. v. Foster*, 988 F.2d 206, 208 (D.C. Cir. 1993) ("sentencing judge is not required to grant a departure just because the government requests one"); *Mariano*, 983 F.2d at 1156 (after motion is made, "it remains the district judge's decision—not the prosecutor's—whether to depart, and if so, to what degree"); *U.S. v. Spiropoulos*, 976 F.2d 155, 162–63 (3d Cir. 1992) (affirmed departure below government recommendation because defendant's cooperation proved unhelpful—"Having set the section 5K1.1 downward departure process in motion, the government cannot dictate the extent to which the court will depart.") [5#3]; *U.S. v. Udo*, 963 F.2d 1318, 1319 (9th Cir. 1992) (remanded: district court erred in concluding it had no authority to depart below government recommendation—"government has no control over the extent of the departure"); *U.S. v. Munoz*, 946 F.2d 729, 730 (10th Cir. 1991) (decision to depart "rests in the sound discretion" of court); *U.S. v. Carnes*,

945 F.2d 1013, 1014 (8th Cir. 1991) (extent of departure within court's discretion); *U.S. v. Richardson*, 939 F.2d 135, 139 (4th Cir. 1991) (affirmed refusal to depart—decision is within discretion of court); *U.S. v. Hayes*, 939 F.2d 509, 511–12 (7th Cir. 1991) (same); *U.S. v. Damer*, 910 F.2d 1239, 1241 (5th Cir. 1990) (after motion, court retains discretion whether to depart) [3#13]; *U.S. v. Pippin*, 903 F.2d 1478, 1485–86 (11th Cir. 1990) (affirmed: government cannot limit §5K1.1 motion to depart only for fine portion of sentence and not for length or type of incarceration—"Once it has made a 5K1.1 motion, the government has no control over whether and to what extent the district court departs from the Guidelines, except that if a departure occurs, the government may argue on appeal that the sentence imposed was 'unreasonable.'").

The Second and Ninth Circuits follow this general principle, but hold that when there is a binding plea agreement under Fed. R. Crim. P. 11(e)(1)(C) that limits the extent of a substantial assistance departure, the district court is bound by that limitation once the agreement is accepted. See *U.S. v. Mukai*, 26 F.3d 953, 955–56 (9th Cir. 1994) (remanded: error to make §5K1.1 departure below minimum sentence in Rule 11(e)(1)(C) plea agreement—must accept or reject agreement in its entirety); *U.S. v. Cunavelis*, 969 F.2d 1419, 1422–23 (2d Cir. 1992) (affirmed: district court properly departed four offense levels required by plea agreement). See also cases in section IX.A.4 discussing how binding plea agreements limit district courts' discretion to depart.

The Fifth Circuit stressed that district courts are not limited by the government's recommended sentence but must make an independent determination of the extent of a §5K1.1 departure. "The court is charged with conducting a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence. While giving appropriate weight to the government's assessment and recommendation, the court must consider all other factors relevant to this inquiry." *U.S. v. Johnson*, 33 F.3d 8, 10 (5th Cir. 1994) (remanded) [7#3]. Accord *U.S. v. King*, 53 F.3d 589, 590–92 (3d Cir. 1995) (departure under §5K1.1 requires "individualized, case-by-case consideration of the extent and quality of a defendant's cooperation") [7#10].

The Third Circuit emphasized that "cooperation need not result in a prosecution or conviction to justify a large downward departure. In some cases, assistance to an investigation may be sufficient in and of itself." *Spiropoulos*, 976 F.2d at 162.

3. Procedure

a. Separate motions for §5K1.1 and §3553(e)

The Supreme Court resolved a split among the circuits by holding that a §5K1.1 motion does not authorize a departure below the statutory minimum without an accompanying motion under 18 U.S.C. §3553(e); consequently, the government may make a motion only under §5K1.1 for a guideline departure while leaving the statutory minimum sentence in effect. "[N]othing in §3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect

a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range. . . . Moreover, we do not read §5K1.1 as attempting to exercise this nonexistent authority." *Melendez v. U.S.,* 116 S. Ct. 2057, 2061–63 (1996) [8#7].

Previously, several circuits held that a §5K1.1 motion by itself allowed departure below the statutory minimum, not just the guideline range, because that policy statement simply implemented the statutory directive of 18 U.S.C. §3553(e) and 28 U.S.C. §994(n). Thus, a separate motion under §3553(e) was not necessary. See *U.S. v. Wills,* 35 F.3d 1192, 1194–96 (7th Cir. 1994); *U.S. v. Beckett,* 996 F.2d 70, 72–75 (5th Cir. 1993) (even if government specifies motion is made under §5K1.1 and not §3553(e)) [6#1]; *U.S. v. Ah-Kai,* 951 F.2d 490, 492–94 (2d Cir. 1991); *U.S. v. Keene,* 933 F.2d 711, 715 (9th Cir. 1991) [4#3]. See also *U.S. v. Wade,* 936 F.2d 169, 171 (4th Cir. 1991) (agreeing with *Keene* in dicta) [4#5], *aff'd on other grounds,* 112 S. Ct. 1840 (1992) [4#22].

However, the Third and Eighth Circuits disagreed, holding that the two motions are distinct and that the government can make a §5K1.1 motion without moving for departure below the mandatory minimum under §3553(e). See *U.S. v. Melendez,* 55 F.3d 130, 135–36 (3d Cir. 1995) (affirmed: "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") [7#10], *aff'd,* 116 S. Ct. 2057 (1996); *U.S. v. Rodriguez-Morales,* 958 F.2d 1441, 1442–47 (8th Cir. 1992) (disagreeing with *Keene* and *Ah-Kai* and reversing departure below mandatory minimum where only §5K1.1 motion was made, holding that §5K1.1 motion is not equivalent to §3553(e) motion) [4#19].

Without deciding this issue, the First Circuit held that a district court has discretion to take into account the effect of a mandatory consecutive sentence on one count when determining the extent of a departure under §5K1.1 from the guideline range on other counts. "Should the district court think that the latter has some role along with other factors in fixing the extent of a guideline departure in a particular case, that is within its authority; and should that court decline to consider the mandatory minimum in fixing the other sentence, that too is within its authority." *U.S. v. Webster,* 54 F.3d 1, 4 (1st Cir. 1995) (affirmed: for defendant facing additional sixty-month mandatory consecutive sentence, district court had discretion to consider only 63–78-month guideline sentence in determining extent of departure).

On a related issue, the Eighth Circuit has held that when a defendant is convicted of multiple counts that require mandatory minimum sentences, the government may make a substantial assistance motion on only some of the counts, leaving other mandatory sentences intact. However, the government cannot so limit §3553(e) motions for improper reasons, such as a desire to control the length of the final sentence. See *U.S. v. Stockdall,* 45 F.3d 1257, 1260–61 (8th Cir. 1995) (remanded because there was evidence that government limited its motions "at least in part . . . to reduce the district court's discretion to depart from the government's notion of the appropriate total sentences . . . . 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).") [7#7].

b. Timing

The First Circuit held that the government may not defer consideration of whether to file a §5K1.1 motion until after sentencing because the defendant's cooperation was not yet complete; such a strategy would "impermissibly merge" the boundaries of §5K1.1, designed to recognize and reward cooperation before sentencing, and Fed. R. Crim. P. 35(b), which covers cooperation after sentencing. "At the time of sentencing, a yes-or-no decision must be made on whether to file a section 5K1.1 motion; and that decision must be based on a good faith evaluation of the assistance rendered to that date." *U.S. v. Drown,* 942 F.2d 55, 59–60 & n.7 (1st Cir. 1991) [4#8]. Accord *U.S. v. Martin,* 25 F.3d 211, 216 (4th Cir. 1994) (remanded: where defendant had already rendered what government conceded was substantial assistance, government could not defer decision on §5K1.1 motion on ground it would later make Rule 35(b) motion if defendant provided further assistance; furthermore, assistance given *before* sentencing cannot be considered for Rule 35(b) reduction) [6#14].

Similarly, a court may not postpone a ruling on a §5K1.1 motion, but must rule on it at the sentencing hearing. *U.S. v. Bureau,* 52 F.3d 584, 595 (6th Cir. 1995) (remanded: error to consider possibility of later Rule 35(b) motion in setting extent of §5K1.1 departure—"sentencing judge has an obligation to respond to a §5K1.1 motion and to then state the grounds for action at sentencing without regard to future events"); *U.S. v. Mittelstadt*, 969 F.2d 335, 337 (7th Cir. 1992) [5#2]; *U.S. v. Mitchell,* 964 F.2d 454, 461–62 (5th Cir. 1992) [4#25]; *U.S. v. Howard,* 902 F.2d 894, 896–97 (11th Cir. 1990) [3#9]. And the sentencing judge must specifically rule on a §5K1.1 motion before imposing sentence, even one that includes a downward departure. *U.S. v. Robinson,* 948 F.2d 697, 698 (11th Cir. 1991) (vacating and remanding sentence) [4#13].

Following these principles, the Eleventh Circuit held that the government improperly forced a defendant to choose whether he wanted the government to file either a §5K1.1 motion at sentencing or, because his cooperation was ongoing, a Rule 35(b) motion after his assistance was complete. The government advised defendant that the Rule 35(b) motion would take into account his presentence assistance, but that was erroneous: "Section 5K1.1 is used at sentencing to reflect substantial assistance *rendered up until that moment*. . . . Rule 35(b) is used *after* sentencing to reflect substantial assistance rendered *after* sentencing. . . . Thus, Rule 35(b) cannot be used to reflect substantial assistance rendered prior to sentencing as the Government suggested to Alvarez in this case." The proper procedure in this situation is for the government to "determine whether to make a §5K1.1 motion at the sentencing hearing based on the defendant's cooperation up to that point. If a defendant continues to cooperate after sentencing the Government may elect to file a Rule 35(b) motion for reduction of the defendant's sentence. However, this mo-

tion may only reflect assistance rendered after imposition of the sentence. The court specifically disagreed with *White*, following. *U.S. v. Alvarez,* 115 F.3d 839, 841–42 (11th Cir. 1997).

In contrast, the D.C. Circuit held that where defendant's cooperation was ongoing and incomplete, and the government concluded that a motion under §5K1.1 was not merited at the time of sentencing, the district court properly denied defendant's request for a §5K1.1 departure. The government is not obligated to decide at the time of sentencing whether defendant has provided substantial assistance in such a case, but may wait to see if defendant's cooperation, when completed, warrants a Rule 35(b) departure. "[T]he government could rationally conclude that the premature filing of a substantial assistance motion might remove the very incentive driving the defendant's cooperation in the first instance, thereby frustrating the government's ability to obtain the remaining assistance it might need for a successful prosecution. It is also rational for the government to assume that if it keeps the carrot dangling in front of the defendant, the defendant will continue to cooperate and complete his assistance even after sentencing, at which point . . . the government can file a rule 35(b) motion and let the court consider the totality of the defendant's cooperation, both pre- and post-sentence." *U.S. v. White,* 71 F.3d 920, 922–27 (D.C. Cir. 1995) (defendant does not have absolute, "fundamental right" to require government to decide at sentencing whether it will make §5K1.1 motion).

Note that an amendment to Rule 35(b), effective Dec. 1, 1998, may resolve some of the timing problems in the preceding cases. The rule now states that, "[i]n evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance." The advisory committee notes specify that the amendment "is intended to fill a gap in current practice," whereby "a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either [Rule 35(b) or §5K1.1] because each provision requires 'substantial assistance'" that was rendered within distinct "temporal boundaries." The committee cautioned that defendants may not receive a "double benefit"—presentencing assistance that results in a §5K1.1 reduction may not be counted again under Rule 35(b). Cf. *U.S. v. Johnson,* 241 F.3d 1049, 1053–54 (8th Cir. 2001) (remanded: when government admits defendant provided substantial assistance and plea agreement requires it to move for departure, it cannot substitute promise to file Rule 35(b) motion after further assistance; although amendment does resolve one problem it "is not a mechanism to string a defendant along once the government has concluded he has already satisfied his obligation under a plea agreement—indefinitely holding a departure motion over his head like Damocles' sword").

The Eighth Circuit held that a §3553(e) motion has no time limit and may be made by the government in conjunction with a defendant's §3582(c)(2) motion. The defendant had received a §5K1.1 reduction and then a reduction under Rule 35(b) for his ongoing cooperation. In light of a retroactive guideline amendment that would have reduced his original guideline range, he later moved for a sentence reduction under §3582(c)(2). The government urged the court to grant a similar percentage reduction from the revised guideline range as from the original. Because

this would result in a sentence below the mandatory minimum, the government filed a §3553(e) motion. The district court granted a reduction but denied the §3553(e) motion, and the appellate court remanded. "In order that a defendant may receive the full benefit of both a change in sentencing range and the assistance the defendant has previously rendered, we conclude that the government may seek a section 3553(e) reduction below the statutory minimum in conjunction with a section 3582(c)(2) reduction. Section 3553(e) contains no time limitation foreclosing such a conclusion." *U.S. v. Williams,* 103 F.3d 57, 58 (8th Cir. 1996) [9#4].

c. Other issues

The Third Circuit requires an "individualized, case-by-case consideration of the extent and quality of a defendant's cooperation in making downward departures under §5K1.1." 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." *U.S. v. King,* 53 F.3d 589, 590–92 (3d Cir. 1995) (remanded: it was not clear whether district court properly evaluated defendant's assistance or merely departed three levels because that was its "practice" in §5K1.1 cases) [7#10]. Accord *U.S. v. Johnson,* 33 F.3d 8, 10 (5th Cir. 1994) (remanded: under §5K1.1 "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") [7#3]. The Third Circuit later added that a court "must, at the very minimum, indicate his or her consideration of §5K1.1's five factors in determining whether and to what extent to grant a sentencing reduction. Further, a sentencing judge must indicate his or her consideration of any factors outside those listed in §5K1.1. We strongly urge sentencing judges to make specific findings regarding each factor and articulate thoroughly whether and how they used any proffered evidence to reach their decision." *U.S. v. Torres,* 251 F.3d 138, 145–47 (3d Cir. 2001) (also noting that a §5K1.1 departure sentence falls under §3553(c)(2), which requires a court to state "the specific reason for the imposition of a sentence" that is outside the guideline range).

The Eighth Circuit held that "when contemplating filing a §3553(e) motion, the government cannot base its decision on factors other than the substantial assistance provided by the defendant." *U.S. v. Rounsavall,* 128 F.3d 665, 669 (8th Cir. 1997) (remanded: once defendant fulfilled her agreement by cooperating with the government against her brother, it could not deny motion because the brother went to trial rather than accepting plea agreement as government had hoped).

The First Circuit held that "the legal standard for departure is materially different under U.S.S.G. §5K1.1 than under §5K2.0." The §5K2.0 requirement for factors not adequately considered by the Commission does not apply to departures under §5K1.1, and "the limitations on the variety of considerations that a court may mull in withholding or curtailing a substantial assistance departure are not nearly so strin-

gent as those which pertain when a court in fact departs downward." *U.S. v. Mariano*, 983 F.2d 1150, 1154–57 (1st Cir. 1993) (remanded: district court improperly used more restrictive standard governing §5K2.0 departures in refusing to depart after government's §5K1.1 motion).

The Fourth Circuit held that a substantial assistance motion may not be denied based on statements made by a defendant while assisting the government under a plea agreement which provided that any self-incriminating evidence revealed as part of his cooperation would not be used against him in any further criminal proceedings, §1B1.8(a). *U.S. v. Malvito,* 946 F.2d 1066, 1067–68 (4th Cir. 1991) (reversing district court) [4#12]. However, a 1992 amendment effectively negated that decision. Section 1B1.8(b) states that "subsection (a) shall not be applied to restrict the use of information: . . . (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1."

The Seventh Circuit held that it was not a violation of the ex post facto clause to apply the stricter version of §5K1.1 that was in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than the earlier version in effect when defendant committed her offenses. "Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted. Thus, the retroactivity analysis turns on which version of 5K1.1 was in effect when she participated in the numerous briefings with federal agents—not when she committed the unlawful conduct to which she pled guilty." *U.S. v. Gerber,* 24 F.3d 93, 97 (10th Cir. 1994) [6#13].

4. Fed. R. Crim. P. 35(b)

A government motion is a prerequisite to lowering a defendant's sentence for substantial assistance under Rule 35(b). *U.S. v. Perez,* 955 F.2d 34, 35 (10th Cir. 1992) (comparing Rule 35(b) with §5K1.1 and 18 U.S.C. §3553(e)). The Eighth Circuit affirmed a district court's refusal to grant a government's Rule 35(b) motion for a further reduction in defendant's sentence, based on defendant's post-sentence testimony before a grand jury, on the grounds that the district court had already anticipated further cooperation when it granted the government's §5K1.1 motion at sentencing. The court also noted that it is "within the discretion of the district court to decide whether it will grant or deny" a Rule 35(b) motion. *Goff v. U.S.,* 965 F.2d 604, 605 (8th Cir. 1992). However, if the court accepted a plea agreement that obligated the government to move for a Rule 35(b) reduction, it may not foil the purpose of the plea agreement by rejecting the motion without hearing evidence. *U.S. v. Hernandez,* 34 F.3d 998, 1000–01 & n.6 (11th Cir. 1994) (remanded: under circumstances here, refusal to grant evidentiary hearing on Rule 35(b) motion "effectively prevented the government from presenting its Rule 35 motion [and] forced a breach of the plea agreement"; however, whether a hearing is needed depends on facts of case and "a written motion outlining the defendant's cooperation may suffice to satisfy the plea agreement") [7#4].

Several courts have noted that Rule 35(b) is designed to recognize assistance rendered *after* the defendant is sentenced. See, e.g., *U.S. v. Martin,* 25 F.3d 211, 216 (4th Cir. 1994) [6#14]; *U.S. v. Robinson*, 948 F.2d 697, 698 (11th Cir. 1991); *U.S. v. Drown*, 942 F.2d 55, 58 (1st Cir. 1991). See also *U.S. v. Mittelstadt*, 969 F.2d 335, 337 (7th Cir. 1992) (Rule 35(b) is not a substitute for a §5K1.1 motion) [5#2]. See also section VI.F.3.b. However, note that Rule 35(b), as amended Dec. 1, 1998, now allows for an exception to that limitation. The rule now states that, "[i]n evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance." The advisory committee notes specify that the amendment "is intended to fill a gap in current practice," whereby "a defendant who has provided, on the whole, substantial assistance may not be able to benefit from either [Rule 35(b) or §5K1.1] because each provision requires 'substantial assistance'" that was rendered within distinct "temporal boundaries." The committee cautioned that defendants may not receive a "double benefit"—presentencing assistance that results in a §5K1.1 reduction may not be counted again under Rule 35(b).

The Seventh Circuit upheld the extent of a Rule 35(b) departure that was calculated by giving a two-level departure from the lowest offense level that encompassed defendant's mandatory sixty-month sentence and criminal history category I. *U.S. v. Hayes,* 5 F.3d 292, 294–95 (7th Cir. 1993) ("this departure is entirely consistent with the method we endorsed in *U.S. v. Thomas,* 930 F.2d 526 (7th Cir. 1991)," for §3553(e) departures; rejecting defendant's argument that resulting sentence must be within guideline range that would apply absent mandatory sentence).

As several circuits have held for §5K1.1 (see section VI.F.2), the Eleventh Circuit held that it was error to consider mitigating factors other than defendant's substantial assistance in departing under Rule 35(b). "The plain language of Rule 35(b) indicates that the reduction shall reflect the assistance of the defendant; it does not mention any other factor that may be considered." *U.S. v. Chavarria-Herrara,* 15 F.3d 1033, 1037 (11th Cir. 1994) [6#12]. The Seventh Circuit reached a similar conclusion for a denial of a Rule 35(b) motion, holding that the denial was improperly based on factors unrelated to defendant's substantial assistance. See *U.S. v. Lee,* 46 F.3d 674, 677–81 (7th Cir. 1995) (remanded: district court improperly focused on government's misconduct rather than defendant's cooperation) [7#8].

However, the Eleventh Circuit distinguished both *Chavarria-Herrara* and *Lee* in holding that other factors could be considered in granting a smaller reduction than requested by the government. Under the language of Rule 35(b), "the only factor that may militate *in favor* of a Rule 35(b) reduction is the defendant's substantial assistance. Nothing in the text of the rule purports to limit what factors may militate *against* granting a Rule 35(b) reduction. Similarly, the rule does not limit the factors that may militate in favor of granting a smaller reduction." *U.S. v. Manella,* 86 F.3d 201, 204 (11th Cir. 1996) (affirmed: district court could consider seriousness of offense and perceived lenience of original sentence in reducing sentence by seven months instead of sixty-month recommendation). See also *U.S. v. Neary,* 183 F.3d 1196, 1198 (10th Cir. 1999) (affirmed: citing *Manella* in dismissing appeal of

reduction of twenty-three months, which was lower than specifically recommended thirty-three month reduction because of defendant's "pivotal role in the offense"—sentence was within the same guideline range after recommended two-level reduction in offense level, and role in offense was legitimate factor to consider).

The Second Circuit held that a Rule 35(b) motion cannot be denied without affording defendant some opportunity to be heard. "[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) (remanded: error to summarily deny government's Rule 35(b) motion when defendant did not even have notice it had been filed, let alone opportunity to respond) [7#7].

The Fifth Circuit held that a defendant does not have a right to counsel "during negotiations leading up to and proceedings attending the Government's Rule 35(b) motion" to reduce sentence. *U.S. v. Palomo,* 80 F.3d 138, 140–42 (5th Cir. 1996).

The Tenth Circuit held that a defendant's fine may be reduced under a Rule 35(b) motion. "Rule 35(b) allows a district court to reduce a sentence to reflect a defendant's substantial assistance in the prosecution of others in accordance with the Sentencing Guidelines and policy statements. The Sentencing Guidelines clearly include fines as a type of criminal sentence." *U.S. v. McMillan,* 106 F.3d 322, 324 (10th Cir. 1997) (remanded: error to hold that district court has authority to remit fine only after petition under 18 U.S.C. §3573).

One-year time limit: For a Rule 35(b) motion made more than a year after sentencing, the First Circuit held that the requirement that defendant's assistance must involve information "not known" by defendant until a year or more after sentencing should not necessarily be read literally. "If . . . a defendant had not disclosed information simply because she was not asked, or was otherwise unaware of its value, there is no reason she should be restricted; nothing would be served by rejecting later use when a value became apparent. Rather, to deny a benefit to late disclosure in such circumstances would be contrary to the rule's purpose. . . . This appears to be a novel question, but we hold that until becoming aware of its value, or being specifically asked, a defendant cannot be said to 'know' useful information." *U.S. v. Morales,* 52 F.3d 7, 8 (1st Cir. 1995) (remanded).

Other circuits, however, have ruled that the one-year limit is a jurisdictional rule that cannot be waived. "Rule 35(b) unequivocally requires the government to make its motion within one year of sentencing. . . . We believe that Rule 35(b)'s timing requirement acts as a constraint on the district court's power to modify a previously imposed sentence and that it consequently may not be ignored by an appellate court, even when the parties have failed to raise it." The court also held that, for the only exception to this requirement—when "the defendant's substantial assistance in-

volves information or evidence not known by the defendant until one year or more after imposition of sentence"—a district court "would be required to conduct an inquiry, beyond a perusal of the docket sheet, to satisfy itself that it possessed authority to grant a Rule 35(b) motion." In this case, the appellate court remanded for such an inquiry. *U.S. v. McDowell,* 117 F.3d 974, 978–80 (7th Cir. 1997) ("district court lacks the power to grant a Rule 35(b) motion where the government has not filed the motion within the one-year period and there is no indication that the exception to the one-year rule has been satisfied"). See also *U.S. v. Carey,* 120 F.3d 509, 511–13 (4th Cir. 1997) (affirmed: Rule 35(b)'s "unambiguous text" dictates that motion cannot be made after one year if, before the deadline, defendants knew the information they supplied after the deadline, even if government's investigation that they assisted did not, and could not, begin until after deadline); *U.S. v. Orozco,* 160 F.3d 1309, 1314–15 (11th Cir. 1998) (agreeing with *McDowell* and *Carey* that Rule 35(b) must be read literally and could not be applied to defendant who supplied previously known information at the trial of a codefendant over five years after defendant was sentenced).

Appeals: The First Circuit held that defendants may appeal the extent of a reduction made pursuant to Fed. R. Crim. P. 35(b). The court reasoned that Rule 35 appeals are governed by 28 U.S.C. §1291, which allows appeals of post-judgment motions, rather than 18 U.S.C. §3742, which controls sentencing appeals. On the merits, however, the appellate court upheld the extent of the reduction and the district court's decision not to hold an evidentiary hearing. *U.S. v. McAndrews,* 12 F.3d 273, 276–80 (1st Cir. 1993). The Eleventh Circuit disagreed with *McAndrews*, finding that a "ruling on a Rule 35 motion readily falls within the meaning of the concept of imposition of sentence" and the parties "may appeal that remaining sentence if it satisfies one of the four criteria set out in §3742(b)." *U.S. v. Chavarria-Herrara,* 15 F.3d 1033, 1035–36 (11th Cir. 1994) (allowing government appeal that district court considered improper factors in making reduction after Rule 35(b) motion) [6#12]. Other circuits have agreed that §3742 controls appeals of sentencing under Rule 35(b), and have also held that complaints about the extent of a downward departure under Rule 35(b) are not appealable under §3742. See, e.g., *U.S. v. Coppedge,* 135 F.3d 598, 599 (8th Cir. 1998) (dismissing appeal as not within §3742); *U.S. v. McDowell,* 117 F.3d 974, 977 (7th Cir. 1997) (no jurisdiction to hear defendant's appeal of extent of departure: "section 3742, by its plain language, applies to appeals such as this, in which a party challenges the extent of a sentence reduction granted pursuant to Rule 35(b)"); *U.S. v. Doe,* 93 F.3d 67, 68 (2d Cir. 1996) (same, appeal dismissed); *U.S. v. Pridgen,* 64 F.3d 147, 149 (4th Cir. 1995) (affirmed: discretionary denial of Rule 35(b) motion "should be governed by §3742" and appeal is dismissed; claim that district court abused discretion in failing to conduct evidentiary motion on Rule 35(b) motion may be appealed under §3742(a)(1), but fails here on the merits); *U.S. v. Arishi,* 54 F.3d 596, 598–99 (9th Cir. 1995) (holding that only §3742, not §1291, governs Rule 35 appeals and defendant's claim that district court erred by refusing to hold an evidentiary hearing where defendant would argue he deserved larger reduction under Rule 35(b) is not appealable).

G. Notice Required Before Departure

The Supreme Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, [Fed. R. Crim. P.] 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure." *Burns v. U.S.,* 501 U.S. 129, 135–39 (1991) [4#4], *rev'g* 893 F.2d 1343 (D.C. Cir. 1990) [3#1]. See also *U.S. v. Hinojosa-Gonzalez,* 142 F.3d 1122, 1123 (9th Cir. 1998) (rejecting government's argument that defendant had adequate notice if he knew factual grounds for departure but not legal basis—"Both factual and legal grounds for departure are within Rule 32's reach."); *U.S. v. Moore,* 37 F.3d 169, 175 (5th Cir. 1994) (although record shows court notified defendants that it contemplated upward departure on fines, there is no evidence that it gave notice of the basis for such departure).

The Court left "the question of the *timing* of the reasonable notice . . . to the lower courts." Id. at 139 n.6. Some courts have concluded that notice must be given before the sentencing hearing. See, e.g., *U.S. v. Morris,* 204 F.3d 776, 778 (7th Cir. 2000) (remanded: "a recommendation *at* the hearing does not fulfill the requirement of warning *in advance of* the hearing"); *U.S. v. Valentine,* 21 F.3d 395, 397–98 (11th Cir. 1994) (remanded: departing on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns*: "Contemporaneous—as opposed to advance—notice of a departure, at least in this case, is 'more a formality than a substantive benefit,' . . . and therefore is inherently unreasonable") [6#17]; *U.S. v. Wright,* 968 F.2d 1167, 1173–74 (11th Cir. 1992) (remanded: opportunity to object to sua sponte departure at sentencing hearing was not sufficient—*Burns* and Rule 32 make clear that defendant must receive "both an opportunity to comment upon the departure, and *reasonable notice* of the contemplated decision to depart"). Cf. *U.S. v. Lowenstein,* 1 F.3d 452, 454 (6th Cir. 1993) (affirmed: defendant did not receive notice prior to sentencing hearing of district court's intention to depart, but he failed to object—appellate court reviews for plain error and defendant failed to show prejudice from lack of notice); *U.S. v. Milton,* 147 F.3d 414, 420–21 (5th Cir. 1998) (affirmed: same); *U.S. v. Andrews,* 948 F.2d 448, 449 (8th Cir. 1991) (citing *Burns,* holding notice was sufficient because factors warranting departure were expressly noted in PSR and government request for departure).

The Ninth Circuit, however, found it was not clear error to give notice at the start of the sentencing hearing where counsel did not object. The court also stated that "it is incumbent upon counsel to object and seek a continuance in circumstances where counsel believes that the district court provided inadequate notice to permit preparation for the proposed departure. . . . If notice of an intended departure is first given at the outset of a sentencing hearing and an objection is then made requesting additional time, we trust that the district court will give the request careful consideration." The court affirmed because counsel for defendant "did not object to the district court's failure to provide notice of the upward departure in advance

of the sentencing hearing and did not request a continuance to address the departure at issue in this appeal." *U.S. v. Hernandez,* 251 F.3d 1247, 1251–52 (9th Cir. 2001).

Note that the guidelines were amended to reflect the holding in *Burns*—if the court intends to depart "on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure." §6A1.2, comment. (n.1) (Nov. 1991). Several circuits had already held that defendants must receive some form of notice and opportunity to comment before an upward departure is imposed, and that this requirement is satisfied when notice is given at the sentencing hearing. See, e.g., *U.S. v. Jordan,* 890 F.2d 968, 975–76 (7th Cir. 1989) [2#18]; *U.S. v. Cervantes,* 878 F.2d 50, 56 (2d Cir. 1989) [2#8]; *U.S. v. Nuno-Para,* 877 F.2d 1409, 1415 (9th Cir. 1989) [2#9]; *U.S. v. Otero,* 868 F.2d 1412, 1415 (5th Cir. 1989) [2#3].

Several circuits have held that the government must receive notice before the district court departs downward on grounds not raised by either party. *U.S. v. Pankhurst,* 118 F.3d 345, 357 (5th Cir. 1997); *U.S. v. Green,* 105 F.3d 1321, 1322 (9th Cir. 1997) [9#5]; *U.S. v. Maddox,* 48 F.3d 791, 799 (4th Cir. 1995); *U.S. v. Edelin,* 996 F.2d 1238, 1245 (D.C. Cir. 1993); *U.S. v. Andruska,* 964 F.2d 640, 643–44 (7th Cir. 1992) [4#22]; *U.S. v. Jagmohan,* 909 F.2d 61, 64 (2d Cir. 1990) [3#10]. See also *Burns,* 111 S. Ct. at 2185 n.4 ("Under Rule 32, it is clear that the defendant and the Government enjoy equal procedural entitlements"). In *Jagmohan*, however, "the failure of the district court to give the government notice of its intention to depart was harmless error," because the government's arguments against departure would have been unavailing.

Some courts have held that the court need not personally notify the defendant that departure is under consideration—sufficient notice is given when the factors warranting departure are identified in the presentence report and the defendant receives the report before sentencing, or the defendant receives notice at the sentencing hearing and opportunity to comment. See, e.g., *U.S. v. Saunders,* 973 F.2d 1354, 1364 (7th Cir. 1992); *U.S. v. Hill,* 951 F.2d 867, 868 (8th Cir. 1992); *U.S. v. Contractor,* 926 F.2d 128, 131–32 (2d Cir. 1991); *U.S. v. Anders,* 899 F.2d 570, 575–77 (6th Cir. 1990) [3#6]; *U.S. v. Hernandez,* 896 F.2d 642, 644 (1st Cir. 1990) [3#3]; *U.S. v. Acosta,* 895 F.2d 597, 600–01 (9th Cir. 1990) [3#2]. The Third Circuit, citing *Burns,* held that the reference in the PSR to the government's implied request for upward departure did not provide adequate notice that the court would depart on similar grounds where the PSR did not endorse the departure and the court adopted the PSR's findings. *U.S. v. Barr,* 963 F.2d 641, 655–56 (3d Cir. 1992) (remanded).

H. Statement of Reasons for Departure

Several circuits require district courts to clearly identify the factors warranting departure and give specific reasons for the extent of the departure. See *U.S. v. Brady,* 928 F.2d 844, 848–49 (9th Cir. 1991) [4#1]; *U.S. v. Jackson,* 921 F.2d 985, 989–90

(10th Cir. 1990) (en banc); *U.S. v. Ocasio,* 914 F.2d 330, 336 & n.1 (1st Cir. 1990); *U.S. v. Gayou,* 901 F.2d 746, 749–50 (9th Cir. 1990) [3#1]; *U.S. v. Cervantes,* 878 F.2d 50, 54 (2d Cir. 1989) [2#8]. But see *U.S. v. Huddleston,* 929 F.2d 1030, 1031 (5th Cir. 1991) (not required to give specific reasons for extent of departure). Others have required courts at least to specify the reasons for departure. See *U.S. v. Perkins,* 963 F.2d 1523, 1527–28 (D.C. Cir. 1992); *U.S. v. Thomas,* 961 F.2d 1110, 1118–19 (3d Cir. 1992); *U.S. v. Suarez,* 939 F.2d 929, 933 (11th Cir. 1991); *U.S. v. Fields,* 923 F.2d 358, 361 (5th Cir. 1990); *U.S. v. Newsome,* 894 F.2d 852, 856–57 (6th Cir. 1990) [3#2]; *U.S. v. Kennedy,* 893 F.2d 825, 828–29 (6th Cir. 1990) [3#1] (and must explain reason for going beyond next higher criminal history category).

The court should state its reasons in open court at the time of sentencing. *U.S. v. Carey,* 895 F.2d 318, 325–26 (7th Cir. 1990) [2#20]; *Newsome,* 894 F.2d at 857. See also *U.S. v. Feinman,* 930 F.2d 495, 501 (6th Cir. 1991) (court must provide "specific reason" in a "short clear written statement or a reasoned statement from the bench"). Accord *U.S. v. Rusher,* 966 F.2d 868, 882 (4th Cir. 1992).

The reasons for departure must be supported by evidence in the record, *U.S. v. Michael,* 894 F.2d 1457, 1459 (5th Cir. 1990) [3#2], and it has been held that the court may base its departure solely on the basis of information contained in the presentence report, *U.S. v. Terry,* 916 F.2d 157, 160 (4th Cir. 1990); *U.S. v. Murillo,* 902 F.2d 1169, 1172 (5th Cir. 1990) [3#8]. See also *U.S. v. Ramirez-Jiminez,* 967 F.2d 1321, 1328–29 (9th Cir. 1992) (remanded: court relied only on proposed amendment that was subsequently withdrawn).

VII. Violation of Probation and Supervised Release

Several provisions of the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "1994 Crime Bill"), effective Sept. 13, 1994, affect revocation of probation and supervised release. Most are discussed below in the appropriate section. Courts should be aware of possible ex post facto problems.

The 1994 Crime Bill amended 18 U.S.C. §3553(a)(4) by adding subsection (B), which requires courts to consider "the kinds of sentence and the sentencing range established for . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to" 28 U.S.C. §994(a)(3).

After the addition of §3553(a)(4)(B), some defendants argued that courts were now required to follow the sentencing range in §7B1.4(a) and could not impose a longer sentence. However, every circuit to rule on this issue has held that the Chapter 7 policy statements remain advisory rather than binding. See *U.S. v. Bruce,* 285 F.3d 69, 73–74 (D.C. Cir. 2002) (agreeing with all other circuits that have found §7B1.4 remains non-binding); *U.S. v. George,* 184 F.3d 1119, 1121–22 (9th Cir. 1999) ("the 1994 amendments do not make the policy statements mandatory with respect to sentences imposed upon revocation of supervised release"); *U.S. v. Schwegel,* 126 F.3d 551, 553 (3d Cir. 1997) ("the sentencing ranges set out in U.S.S.G. §7B1.4 remain merely advisory"); *U.S. v. Cohen,* 99 F.3d 69, 71 (2d Cir. 1996) ("while §3553(a) demands that a court consider both guidelines and policy statements, §3553(b) makes mandatory only the ranges set out in the guidelines themselves"); *U.S. v. Hofierka,* 83 F.3d 357, 361 (11th Cir. 1996) (statute requires courts to follow *guidelines*, but only to consider policy statements); *U.S. v. Escamilla,* 70 F.3d 835, 835 (5th Cir. 1995) ("Unless and until the Sentencing Commission issues guidelines for Chapter 7 or changes the policy statements to guidelines or Congress unequivocally legislates that the policy statements in Chapter 7 are binding, this court will not reduce the flexibility of the district courts in sentencing supervised release violators."); *U.S. v. West,* 59 F.3d 32, 35–36 (6th Cir. 1995) (under §3553(a) and (b), courts are required to follow *guidelines*—Chapter 7 contains policy statements, which must only be considered). See also *U.S. v. Brown,* 203 F.3d 557, 558 (8th Cir. 2000) (not plain error to continue to treat §7B1.4(a) as advisory after enactment of §3553(a)(4)(B)); *U.S. v. Plunkett,* 94 F.3d 517, 519 (9th Cir. 1996) (rejecting claim that amended language makes policy statements mandatory—"because section 3553 incorporates policy statements by name, policy statements are independently mandatory. However, the new language names the policy statements in the disjunctive: a sentencing court may consider the guidelines *or* the policy statements"); *U.S. v. Davis,* 53 F.3d 638, 640–41 (4th Cir. 1995) ("The statutes now provide . . . that district courts are required merely to 'consider' the Chapter 7 policy statements."). Cf. *U.S. v. Olabanji,* 268 F.3d 636, 639 (9th Cir. 2001) (remanded: after revocation of probation, if district court rejects range prescribed by policy statements it must

"consider the sentencing guidelines range for the underlying offense as part of the calculus for imposing an appropriate term of incarceration")

Previously, only the Seventh Circuit had held that the Chapter 7 policy statements are binding and must be followed "unless they contradict a statute or the Guidelines." See *U.S. v. Lewis,* 998 F.2d 497, 499 (7th Cir. 1993) (following statement in *Stinson v. U.S.,* 113 S. Ct. 1913, 1917 (1993), that indicates policy statements are binding) [6#1]. See also section I.G. Policy Statements. However, the Seventh Circuit later overruled *Lewis* and joined other circuits in holding that the Chapter 7 policy statements are not binding because, unlike the policy statement at issue in *Williams v. U.S.,* 112 S. Ct. 1112 (1992), upon which *Stinson* relied, they "are neither guidelines nor interpretations of guidelines. . . . Such policy statements are entitled to great weight . . . , but they do not bind the sentencing judge. Although they are an element in his exercise of discretion and it would be an abuse of discretion for him to ignore them, they do not replace that discretion by a rule." *U.S. v. Hill,* 48 F.3d 228, 230–32 (7th Cir. 1995) [7#7]. Accord *U.S. v. Hurst,* 78 F.3d 482, 484 (10th Cir. 1996); *U.S. v. Davis,* 53 F.3d 638, 640–42 (4th Cir. 1995); *U.S. v. Milano,* 32 F.3d 1499, 1503 (11th Cir. 1994) (reaffirming pre-*Stinson* holding that Chapter 7 is not binding); *U.S. v. Mathena,* 23 F.3d 87, 93 (5th Cir. 1994); *U.S. v. Forrester,* 19 F.3d 482, 484 (9th Cir. 1994) [6#10]; *U.S. v. Sparks,* 19 F.3d 1099, 1101 n.3 (6th Cir. 1994) (reaffirming pre-*Stinson* holding) [6#12]; *U.S. v. Anderson,* 15 F.3d 278, 285–86 & n.6 (2d Cir. 1994) [6#11]; *U.S. v. O'Neil,* 11 F.3d 292, 301 n.11 (1st Cir. 1993); *U.S. v. Levi,* 2 F.3d 842, 845 (8th Cir. 1993) (in context of whether a Chapter 7 policy statement is a "law" for ex post facto purposes); *U.S. v. Hooker*, 993 F.2d 898, 900–02 (D.C. Cir. 1993).

Before *Stinson* and *Williams,* most circuits held that Chapter 7 had to be considered, but was not binding. See *U.S. v. Thompson,* 976 F.2d 1380, 1381 (11th Cir. 1992) (sentence on revocation of supervised release above maximum range in §7B1.4, p.s. was proper—Chapter 7 policy statements are advisory, not binding); *U.S. v. Bermudez,* 974 F.2d 12, 14 (2d Cir. 1992) (remanded: although not mandatory, court should have considered Chapter 7 after revocation of supervised release even though defendant was originally sentenced before guidelines took effect) [5#4]; *U.S. v. Cohen,* 965 F.2d 58, 60–61 (6th Cir. 1992) (affirmed sentence where district court considered, then rejected, §7B1.4, p.s., sentence) [4#22]; *U.S. v. Headrick,* 963 F.2d 777, 780 (5th Cir. 1992) (same); *U.S. v. Lee,* 957 F.2d 770, 773 (10th Cir. 1992) (affirmed: should have considered Chapter 7 policy statements but not doing so was harmless error in this case) [4#16]; *U.S. v. Fallin,* 946 F.2d 57, 58 (8th Cir. 1991) (harmless error not to consider Chapter 7 where it was defendant's second identical violation and, given blatant defiance of release terms, sentence imposed was appropriate) [4#10]. Cf. *U.S. v. Baclaan,* 948 F.2d 628, 630–31 (9th Cir. 1991) (remanded for district court to consider §7B1.4(b)(2) after revocation of supervised release for drug possession under 18 U.S.C. 3583(g)) (see summary in sec. VII.B.2).

Departures: Because the Chapter 7 policy statements are considered non-binding, several circuits have held that a "departure" from the range in §7B1.4 is not subject to the strict rules governing guideline departures. See, e.g., *U.S. v. Marvin,*

135 F.3d 1129, 1142 (7th Cir. 1998) ("any upward deviations from the *advisory* sentencing ranges in §7B1.4(a) are not 'departures,' and therefore, a district court is not required to give defendants prior notice of such deviations"); *U.S. v. Pelensky,* 129 F.3d 63, 70–71 (2d Cir. 1997) ("notice requirement does not apply to deviations from the non-binding policy statements found in Chapter Seven"); *U.S. v. Burdex,* 100 F.3d 882, 885 (10th Cir. 1996) (because "[a] sentence in excess of the Chapter 7 range is not a 'departure' from a binding guideline, . . . sentencing court is not required to give notice of its intent to exceed th[at] range"); *U.S. v. Hofierka,* 83 F.3d 357, 362 (11th Cir. 1996) (same); *U.S. v. Davis,* 53 F.3d 638, 642 n.15 (4th Cir. 1995) ("It is well established that '[a] sentence which diverges from advisory policy statements is not a departure,'" quoting *Mathena, infra*); *U.S. v. Mathena,* 23 F.3d 87, 93 n.13 (5th Cir. 1994) ("A sentence which diverges from advisory policy statements is not a departure such that a court has to provide notice or make specific findings normally associated with departures"); *U.S. v. Anderson,* 15 F.3d 278, 285–86 (2d Cir. 1994) (need not follow usual departure procedures, sentence will be affirmed "provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable") [6#11]; *U.S. v. Jones,* 973 F.2d 605, 607–08 (8th Cir. 1992) ("court is not required to make the explicit, detailed findings required when it departs upward from a binding guideline"); *U.S. v. Blackston,* 940 F.2d 877, 893 (3d Cir. 1991) (court did not have to justify departure when sentencing above §7B1.4, p.s. range, but merely give general reasons for higher sentence—Chapter 7 policy statements "are merely advisory" and need only be "considered").

If defendant's original probation sentence was the result of a downward departure, Note 1 to §7B1.4 advises that an upward departure may be warranted. See, e.g., *U.S. v. Forrester,* 19 F.3d 482, 484–85 (9th Cir. 1994) (affirmed: after considering Chapter 7 and recommended range of 3–9 months, district court properly relied on Note 4 to sentence defendant, who was originally subject to 33–41-month guideline range but received five years' probation after departure, to thirty-three months after revocation) [6#10]. Cf. *U.S. v. Denard,* 24 F.3d 599, 602 (4th Cir. 1994) (remanded: for defendant subject to 15–21 month range before departure to probation, court may impose sentence above 3–9-month range in §7B1.4; appellate court stated this is not a departure because Chapter 7 is not binding).

Other: Some circuits have held that the amended Chapter 7 policy statements can be used for defendants who were sentenced before Nov. 1990, but whose violation of supervised release occurred after that date. See, e.g., *U.S. v. Schram,* 9 F.3d 741, 742–43 (9th Cir. 1993) [6#4]; *U.S. v. Levi,* 2 F.3d 842, 844–45 (8th Cir. 1993) [6#4]; *Bermudez,* 974 F.2d at 13–14.

For defendants originally sentenced under pre-guidelines law, the Second and Eleventh Circuits have held that the guidelines do not apply to sentencing for probation revocation after Nov. 1, 1987. See *U.S. v. Hurtado-Gonzalez,* 74 F.3d 1147, 1149–50 (11th Cir. 1996); *U.S. v. Vogel,* 54 F.3d 49, 50–51 (2d Cir. 1995).

Note that many of the cases discussed below involved revocations before the Nov. 1990 amendments.

A. Revocation of Probation

1. Sentencing

Note: The 1994 Crime Bill amended the "available . . . at the time of initial sentencing" language in 18 U.S.C. §3565(a)(2) discussed below. Now, after revocation of probation a defendant should be resentenced under 18 U.S.C. §§3551–3559, indicating that courts are no longer limited to the guideline range that applied at defendant's original sentencing, as most circuits have held. See, e.g., *U.S. v. Hudson,* 207 F.3d 852, 853 (6th Cir. 2000) (after revision to §3565(a)(2), "when assessing the penalty for a probation violation, the district court is not restricted to the range applicable at the time of the initial sentencing"); *U.S. v. Pena,* 125 F.3d 285, 287 (5th Cir. 1997) (same). Cf. *U.S. v. Olabanji,* 268 F.3d 636, 639 (9th Cir. 2001) (remanded: after revocation of probation, if district court rejects range prescribed by policy statements it must "consider the sentencing guidelines range for the underlying offense as part of the calculus for imposing an appropriate term of incarceration"). Ex post facto problems, or the savings clause at 1 U.S.C. §109, may limit the application of this change for defendants whose original offense occurred before the effective date of the amendment, Sept. 13, 1994. See, e.g., *U.S. v. Schaefer,* 120 F.3d 505, 507–08 (4th Cir. 1997) (because amended §3565(a)(2) did not expressly repeal penalties available under earlier version, "§109 prevents the district court from applying the amended provisions of §3565(a)(2) to impose a sentence lower than that allowed under the former version of §3565(a)(2)" for defendant originally sentenced in 1993) [10#3]. Most of the cases in this section were decided before the amendment.

Before the 1990 amendments to §7B1, four circuits held that when probation was revoked under former §3565(a)(2), any sentence of imprisonment is limited by the guideline range that applied to the original offense of conviction. The conduct that caused the revocation may be considered only in deciding whether to continue or revoke probation and in determining the appropriate sentence within the applicable guideline range. The court may also consider whether to depart from the guideline sentence, but only if the facts supporting a departure were present at the initial sentencing. *U.S. v. Alli,* 929 F.2d 995, 998 (4th Cir. 1991) [4#3]; *U.S. v. White,* 925 F.2d 284, 286–87 (9th Cir. 1991) [3#20]; *U.S. v. Von Washington,* 915 F.2d 390, 391–92 (8th Cir. 1990) [3#14]; *U.S. v. Smith,* 907 F.2d 133, 135 (11th Cir. 1990) [3#11]. See also *U.S. v. Tellez,* 915 F.2d 1501, 1502 (11th Cir. 1990) (revocation sentence limited by guideline range for original offense even though defendant was sentenced under pre-guidelines law when district court held guidelines unconstitutional) [3#15]. In cases involving imposition and revocation of probation after the 1990 amendments were in effect, the Third and Fifth Circuits agreed with this interpretation. *U.S. v. Williams,* 961 F.2d 1185, 1187 (5th Cir. 1992) (remanded: departure may not be based on conduct that occurred after original sentencing); *U.S. v. Boyd,* 961 F.2d 434, 437–39 (3d Cir. 1992) (twelve-month sentence improper where guideline maximum at original sentencing was six months) [4#21].

The Fourth Circuit held that a defendant could not receive a downward depar-

ture for substantial assistance at his revocation sentencing, after having received a sentence of probation after such a departure originally, because the government did not make a new §5K1.1 motion. Although the earlier version of §3565(a)(2) would normally allow a court to consider departure at a revocation sentencing for a ground that was present at the original sentencing, "a departure under §5K1.1, p.s. is different from the typical basis for departure, and this difference dictates a different result. . . . Thus, although a sentence based on substantial assistance may have been available at the initial sentencing based on the Government's motion, it cannot be considered to be available at resentencing following a probation revocation absent a renewed motion by the Government." *Schaefer,* 120 F.3d at 508–09.

Note that, because a sentence following probation revocation must be one that was "available . . . at the time of the original sentencing" pursuant to §3565(a)(2), §7B1 may not be used for defendants sentenced before Nov. 1, 1990, even if revocation was after that date. See *U.S. v. Maltais,* 961 F.2d 1485, 1486–87 (10th Cir. 1992) [4#21]; *U.S. v. Williams,* 943 F.2d 896, 896 (8th Cir. 1991) [4#10].

The Ninth Circuit held that to the extent that §7B1.4, p.s. conflicts with the plain language of the earlier version of §3565(a)(2) by directing the sentencing court to take into account the conduct that violated probation, the policy statement is invalid. *U.S. v. Dixon,* 952 F.2d 260, 261–62 (9th Cir. 1991) (remanding 15-month sentence for resentencing within original range of 4–10 months) [4#16]. The Third Circuit, rather than invalidating §7B1.4, reconciled the policy statement with the statute. It held that where the original guideline range was 0–6 months, and the Revocation Table prescribed 3–9 months, the appropriate resentencing range is 3–six months. *Boyd,* 961 F.2d at 438–39 (remanded).

District courts may impose a term of supervised release to follow imprisonment after revocation of probation. See *U.S. v. McCullough,* 46 F.3d 400, 402 (5th Cir. 1995) (affirmed); *U.S. v. Donaghe,* 50 F.3d 608, 614–15 (9th Cir. 1994) (replacing withdrawn opinion at 37 F.3d 477); *U.S. v. Hobbs,* 981 F.2d 1198, 1199 (11th Cir. 1993) (affirmed); USSG §7B1.3(g)(1) ("Where probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release."). See also *U.S. v. Gallo,* 20 F.3d 7, 15 (1st Cir. 1994) (no error in imposing term of supervised release to follow imprisonment after revocation of probation).

Time served in home detention as part of probation is not credited toward and does not limit the maximum prison sentence that may be imposed after revocation of probation. See *U.S. v. Iverson,* 90 F.3d 1340, 1345 (8th Cir. 1996) (defendant, originally subject to sentence of 0–6 months, properly sentenced to six months imprisonment even though she spent three months in home detention before probation was revoked). See also *U.S. v. Horek,* 137 F.3d 1226, 1229–30 (10th Cir. 1998) (affirmed: revocation sentence did not have to be reduced by four months defendant had spent in community confinement as part of probation sentence); USSG §7B1.5(a) ("Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.").

The Fifth Circuit affirmed a revocation sentence of twenty-four months, rather than the 3–9 months calculated under §§7B1.1(a)(3) and 7B1.4(a), that was imposed to give defendant time to overcome his apparent drug addiction. "Not only was Pena's need for drug rehabilitation an appropriate consideration, it falls within 18 U.S.C. §3553(a)(2)(D)'s mandate that the court shall consider the need for 'medical care or other correctional treatment in the most effective manner.'" *U.S. v. Pena,* 125 F.3d 285, 288 (5th Cir. 1997). Accord *U.S. v. Dunham,* 240 F.3d 1328, 1330 (11th Cir. 2001) (affirming sentence of 24 months on revocation of probation in order to provide for rehabilitative treatment).

2. Revocation for Drug Possession

Note: The amendment to 18 U.S.C. §3565(a) discussed above will also affect sentences imposed after mandatory revocation for drug possession, which is now in §3565(b). In addition, the "not less than one-third of the original sentence" language has been deleted from §3565(a). Now a "term of imprisonment" is required under §3565(b), and probation must also be revoked for possession of firearms or refusal of required drug testing, but no minimum term is specified. Again, ex post facto problems may arise and, except as noted, the following caselaw predates these changes.

The "time of the original sentencing" rule noted above also applies when probation is revoked for drug possession under 18 U.S.C. §3565(a), which requires that defendant be sentenced "to not less than one-third of the original sentence." The Supreme Court resolved a circuit split by holding that "original sentence" should be read to mean the original guideline range. Thus, the minimum revocation sentence under this provision "is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum." *U.S. v. Granderson,* 114 S. Ct. 1259, 1263–69 (1994) [6#11]. Note that this ruling also applies when the term of probation resulted from a downward departure. See *U.S. v. Redmond,* 69 F.3d 979, 981 (9th Cir. 1995) (affirmed: for defendant who had received departure to probation, revocation sentence was limited by original 33–41-month range, not maximum sentence under guidelines—six months—that would allow probation absent departure); *U.S. v. Denard,* 24 F.3d 599, 601–02 (4th Cir. 1994) (remanded: for defendant subject to 15–21 month range before departure, minimum required sentence under §3565(a) is seven months, not one third of thirty-six-month probation). After the 1994 amendments, the Fifth Circuit held that, under §3565(b)(1), the sentencing court is not limited to the post-departure guideline range from the original sentencing and retains discretion whether to depart at the revocation sentencing. *U.S. v. Byrd,* 116 F.3d 770, 774 (5th Cir. 1997) (affirmed).

Before *Granderson,* most circuits to decide the issue held that "original sentence" refers to the maximum original guideline sentence. See *U.S. v. Penn,* 17 F.3d 70, 74 (4th Cir. 1994) [6#10]; *U.S. v. Alese,* 6 F.3d 85, 86–87 (2d Cir. 1993) [6#5]; *U.S. v. Diaz,* 989 F.2d 391, 392–93 (10th Cir. 1993) (reversed) [5#11]; *U.S. v. Clay,* 982

F.2d 959, 962–63 (6th Cir. 1993) (remanded) [5#8]; *U.S. v. Granderson,* 969 F.2d 980, 983–84 (11th Cir. 1992) (vacated); *U.S. v. Gordon,* 961 F.2d 426, 430–33 (3d Cir. 1992) (remanded) [4#21]. Three circuits had held that it included the term of probation that was imposed. See *U.S. v. Sosa,* 997 F.2d 1130, 1133 (5th Cir. 1993) [6#2]; *U.S. v. Byrkett,* 961 F.2d 1399, 1400–01 (8th Cir. 1992) (affirming eight-month prison term where original guideline range was 0–6 months but original sentence was two years' probation) [4#23]; *U.S. v. Corpuz,* 953 F.2d 526, 528–30 (9th Cir. 1992) (affirming one-year sentence imposed on defendant originally sentenced to three-year term of probation; also noting that one-year sentence was supported by district court's use of §§7B1.1, 7B1.3, and 7B1.4, p.s., which called for 12–18-month term) [4#15].

B. Revocation of Supervised Release

1. Sentencing

A sentence imposed upon revocation of supervised release is *not* limited by the original guideline sentence—the court may impose the full term of imprisonment allowed under 18 U.S.C. §3583(e)(3), which may be less than the term of release. See also *U.S. v. Mandarelli*, 982 F.2d 11, 12–13 (1st Cir. 1992); *U.S. v. Smeathers,* 930 F.2d 18, 19 (8th Cir. 1991) [4#3]; *U.S. v. Scroggins,* 910 F.2d 768, 769–70 (11th Cir. 1990) [3#13]; *U.S. v. Lockard,* 910 F.2d 542, 544 (9th Cir. 1990) [3#11]; *U.S. v. Dillard,* 910 F.2d 461, 466–67 (7th Cir. 1990). (Note: In *Dillard,* the Seventh Circuit originally held that the maximum term that may be imposed is the term of supervised release minus any time served on the original sentence. See 3#12. The opinion was subsequently amended.)

a. Reimposition of release

The 1994 Crime Bill, effective Sept. 13, 1994, amended 18 U.S.C. §3583(e)(3) and added new §3583(h), which authorizes the reimposition of a term of supervised release to follow imprisonment after revocation. "The length of such term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation." This essentially codifies the position of a minority of the circuits, which had held that supervised release may be reimposed, provided that the combined length of the prison sentence for the revocation and the new term of release does not exceed the length of the original term of release. See *U.S. v. O'Neil,* 11 F.3d 292, 293–302 (1st Cir. 1993) (error to impose two-year prison term plus new three-year term of release after revoking original three-year term) [6#7]; *U.S. v. Stewart,* 7 F.3d 1350, 1352 (8th Cir. 1993) (error to impose eighteen-month prison term and two-year release term after revoking original three-year term); *U.S. v. Schrader,* 973 F.2d 623, 625 (8th Cir. 1992) (after revoca-

tion, court may reimpose term that will end on date original term of release would have ended) [5#6].

However, note that §3583(h) uses statutory maximums for its limits, so even in the First and Eighth Circuits the ex post facto clause may limit the reimposed term of release if less than the maximum was originally imposed. See, e.g., *U.S. v. St. John,* 92 F.3d 761, 765–67 (8th Cir. 1996) (no ex post facto violation to apply §3583(h) retroactively "because, given our interpretation of §3583(e)(3) in [earlier cases], the maximum period of time that a defendant's freedom can be restrained upon revocation of supervised release under the new law is either the same as, or possibly less than, under the prior law"). Cf. *U.S. v. Samour,* 199 F.3d 821, 824–25 (6th Cir. 1999) (under §3583(h), maximum term of reimposed release is governed by maximum allowed under original offense of conviction; for defendant sentenced under §841(b)(1)(C), allowing term of "at least three years," it was not error to impose revocation sentence of eighteen months plus new three-year term of release) Note also that the maximum term of imprisonment allowed under §3583(e)(3) may be less than the maximum release term, and if the maximum term of imprisonment is given no release term may be reimposed under §3583(h). See, e.g., *U.S. v. Davis,* 187 F.3d 528, 532–33 (6th Cir. 1999) (remanded: although maximum term of release was three years, §3583(e)(3) limited term of imprisonment after revocation to two years; also, under §3583(h), it was error to impose additional one-year term of release after court imposed maximum term of imprisonment after revocation).

Note that, when release has been revoked more than once, terms of imprisonment are added together to calculate the maximum allowed under §3583(h). "We conclude that the plain meaning of the reference to 'any term of imprisonment' includes the prison term in the current revocation sentence together with all prison time served under any prior revocation sentence(s)." *U.S. v. Brings Plenty,* 188 F.3d 1051, 1053–54 (8th Cir. 1999) (defendant who was initially given three years of supervised release and received six-month prison term after first revocation, could not be sentenced to 12-month prison term plus additional two years of release—combined prison and release terms may not exceed 30 months). Accord *U.S. v. Maxwell,* 285 F.3d 336, 339–41 (4th Cir. 2002) (remanded: after already receiving one 11-month prison term after revocation of 36-month term of release, defendant sentenced at second revocation to prison term of 10 months could not be sentenced to new term of release longer than 15 months); *U.S. v. Merced,* 263 F.3d 34, 37–38 (2d Cir. 2001) (remanded: defendant whose maximum sentence for violation of release was 24 months could not be sentenced to 24 months after second revocation when he had already received prison term of six months and eight days after first revocation).

Previously, most circuits had held that when supervised release is revoked, 18 U.S.C. §3583(e) did not allow a court to impose a new term of supervised release to follow completion of the revocation sentence. See *U.S. v. Malesic,* 18 F.3d 205, 206–07 (3d Cir. 1994) [6#12]; *U.S. v. Truss,* 4 F.3d 437, 438 (6th Cir. 1993) [6#3]; *U.S. v. Tatum,* 998 F.2d 893, 895 (11th Cir. 1993) [6#3]; *U.S. v. Rockwell,* 984 F.2d 1112,

1115–17 (10th Cir. 1993) (overruling *U.S. v. Bolling,* 947 F.2d 1461 (10th Cir. 1991)) [5#8]; *U.S. v. McGee,* 981 F.2d 271, 273–75 (7th Cir. 1992) [5#6]; *U.S. v. Koehler,* 973 F.2d 132, 133–36 (2d Cir. 1992) [5#4]; *U.S. v. Cooper,* 962 F.2d 339, 341 (4th Cir. 1992) [4#23]; *U.S. v. Holmes,* 954 F.2d 270, 272 (5th Cir. 1992) [4#23]; *U.S. v. Behnezhad,* 907 F.2d 896, 898–900 (9th Cir. 1990) (nor may it impose a fine or restitution) [3#11]. See also *U.S. v. Williams*, 958 F.2d 337, 338–39 (11th Cir. 1992) (may not reimpose supervised release when maximum term was previously imposed).

The circuits were split on whether §3583(h) could be applied retroactively, but the Supreme Court recently resolved this issue by ruling that reimposition of supervised release was authorized by pre-1994 Crime Bill §3583(e)(3). It also ruled that revocation does not impose punishment for the violation of the conditions of supervised release, as some circuits have held, but rather for the original offense. The Court then found that it did not have to determine whether applying §3583(h) retroactively would violate the ex post facto clause because, absent express Congressional intent to apply §3583(h) retroactively, it should only be applied to defendants whose initial offense occurred after Sept. 13, 1994. Thus, penalties for violation of supervised release for defendants who committed their offenses before that date are covered by pre-amendment §3583(e). *Johnson v. U.S.,* 120 S. Ct. 1795, 1800–07 (2000) [10#8].

The Court's holding that §3583(h) should not be applied retroactively should resolve possible ex post facto problems for defendants who committed their offenses before the effective date of new §3583(h), Sept. 13, 1994. Previously, the Third Circuit held that §3583(h) could not be applied retroactively when the original offense was a class B, C, or D felony because the new penalty is greater than that previously available, but could be applied if the original offense was a class A felony because the maximum penalties are the same. Compare *U.S. v. Dozier,* 119 F.3d 239, 242–45 (3d Cir. 1997) (remanded: cannot be applied retroactively) [10#1] with *U.S. v. Brady,* 88 F.3d 225, 228–29 (3d Cir. 1996) (affirmed: can be applied) [8#9]. Note, however, that *Brady* did not attempt to account for additional time under supervision that could result from subsequent violations of supervised release.

The Fourth Circuit agreed that punishment for violating supervised release is punishment for the original offense, that "an increase in the *possible* penalty is *ex post facto* regardless of the length of the sentence actually imposed," and that §3583(h) could not be applied retroactively when the original offense was a Class B, C, or D felony. However, for class A or E felonies, or misdemeanors, there is no disparity in the maximum terms of release versus imprisonment "and the application of §3583(h) cannot disadvantage defendants guilty of these crimes by increasing the possible sanction imposed after a *single* revocation of supervised release." *U.S. v. Lominac,* 144 F.3d 308, 312–15 & n.9 (4th Cir. 1998) [10#1]. See also *U.S. v. Collins,* 118 F.3d 1394, 1397–98 (9th Cir. 1997) (same, remanding use of §3583(h) on defendants whose original offenses were Class C or D felonies, also concluding that even if a more severe punishment is not initially given under §3583(h), an ex post facto problem arises "from the possibility of repeated violations of the conditions of succes-

sive supervised releases" that could lead to greater total punishment) [10#1]. Cf. *U.S. v. Meeks,* 25 F.3d 1117, 1120–22 (2d Cir. 1994) (same, in finding that retroactive application of §3583(g) was ex post facto violation) [6#15].

The Seventh Circuit, unlike *Brady* above, did account for the possible additional time from subsequent violations of release, and initially concluded that retroactive application of §3583(h) violated the Ex Post Facto Clause because it could result in greater punishment than the old law. See *U.S. v. Beals,* 87 F.3d 854, 858–60 (7th Cir. 1996) [8#9]. However, the court later overruled *Beals*, finding that the "theoretical and speculative nature of any potential prejudice" to a defendant does not violate the Ex Post Facto Clause. See *U.S. v. Withers,* 128 F.3d 1167, 1170–72 (7th Cir. 1997) [10#1].

Other circuits had concluded that §3583(h) does not increase the penalty a defendant is subject to or held that the punishment is for the violation of supervised release, not the original offense, and if the violation occurred after Sept. 13, 1994, it is properly punished under §3583(h). See, e.g., *U.S. v. Page,* 131 F.3d 1173, 1175–76 (6th Cir. 1997) (affirmed: 'section 3583(h) does not alter the punishment for defendants' original offenses; section 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release—offenses they committed after section 3583(h) was passed") [10#1]; *U.S. v. Evans,* 87 F.3d 1009, 1010–11 (8th Cir. 1996) (affirmed: district court properly imposed new term of release in 1995 on defendant originally convicted in 1992—"The amended statute applied to his case in 1995 because the district court did not increase the sentence for his original crime but merely punished him for violating his supervised release, an event that occurred after the amendment became effective.").

b. Consecutive sentences

A sentence of imprisonment imposed upon revocation of supervised release "shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving," including a sentence for the conduct that formed the basis for the revocation. See §7B1.3(f) & comment. (n.5). However, the Sixth Circuit held that the district court erred in concluding that, under §7B1.3(f), a revocation sentence *must* be consecutive to state sentences previously imposed for the conduct that caused the revocation. The Chapter 7 policy statements regarding post-revocation sentencing must be considered, but they are not binding. *U.S. v. Sparks,* 19 F.3d 1099, 1100–01 (6th Cir. 1994) (remanded) [6#12].

Section 5G1.3(c), comment. (n.4), specifies, and several circuits have held, that consecutive sentences are also required when the revocation sentence was imposed before the other sentence. See discussion in section V.A.3 and *U.S. v. Gondek,* 65 F.3d 1, 2–4 (1st Cir. 1995); *U.S. v. Bernard,* 48 F.3d 427, 431–32 (9th Cir. 1995); *U.S. v. Flowers,* 13 F.3d 395, 397 (11th Cir. 1994); *U.S. v. Glasener,* 981 F.2d 973, 975–76 (8th Cir. 1992) (affirmed: had the order of sentencing hearings been reversed, §7B1.3(f), would have required consecutive sentences) [5#8]. See also *U.S. v. Mayotte,* 249 F.3d 797, 799 (8th Cir. 2001) (affirmed: court may impose revoca-

tion sentence to run consecutively to yet-to-be-imposed state sentence that was part of reason for revocation).

The Eighth Circuit upheld consecutive sentences of imprisonment after two concurrent terms of supervised release were revoked at the same time. Although multiple supervised release terms must be imposed to run concurrently, "we conclude that the District Court retains discretion to impose either concurrent or consecutive sentences after revocation of a defendant's supervised release" under 18 U.S.C. §3584(a). *U.S. v. Cotroneo,* 89 F.3d 510, 513 (8th Cir. 1996). Accord *U.S. v. Gonzalez,* 250 F.3d 923, 926–29 (5th Cir. 2001); *U.S. v. Rose,* 185 F.3d 1108, 1111–12 (10th Cir. 1999); *U.S. v. Jackson,* 176 F.3d 1175, 1177–78 (9th Cir. 1999); *U.S. v. Johnson,* 138 F.3d 115, 118–19 (4th Cir. 1998); *U.S. v. Quinones,* 136 F.3d 1293, 1295 (11th Cir. 1998).

In agreeing that district courts have discretion whether to impose consecutive sentences, the Tenth Circuit held that the court must state its reasons for doing so. A court need not, as defendant argued, "expressly weigh each of the §3553(a) factors on the record. Instead, the district court need only 'consider 18 U.S.C. §3553(a) en masse and state its reasons for imposing a given sentence'" pursuant to §3553(c). *Rose,* 185 F.3d at 1111–12.

c. Need for rehabilitation

As noted above, the usual procedures for departure have been held not to apply when sentencing above the range recommended in §7B1.4, p.s. The Second Circuit also held that the prohibition in 18 U.S.C. §3582(a), "that imprisonment is not an appropriate means of promoting correction and rehabilitation," see also 28 U.S.C. §994(k), does not apply to sentences under §3583(e). Defendant was subject to a range of 6–12 months under Chapter 7, but the district court sentenced defendant to seventeen months because she needed "intensive substance abuse and psychological treatment in a structured environment." Because "a district court may consider such factors as the medical and correctional needs of an offender" in determining the length of the period of supervised release, "and because a district court may require a person to serve in prison the period of supervised release, the statute contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation . . . . We conclude, therefore, that a court may consider an offender's medical and correctional needs when requiring that offender to serve time in prison upon the revocation of supervised release." *U.S. v. Anderson,* 15 F.3d 278, 282–83 (2d Cir. 1994) [6#11]. Accord *U.S. v. Brown,* 224 F.3d 1237, 1239–40 (11th Cir. 2000) (in affirming maximum sentence of two years for rehabilitation purposes, where guideline maximum was eleven months, "we hold that a court may consider a defendant's rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release"); *U.S. v. Thornell,* 128 F.3d 687, 688 (8th Cir. 1997) (neither unreasonable nor abuse of discretion to consider defendant's need for drug treatment when imposing revocation sentence).

The Fifth Circuit reached the same conclusion in affirming a sentence under §3583(g). "We now hold that the language of 18 U.S.C. §3583(g), and the purposes and intent behind the statute, is best served by permitting a district judge to consider a defendant's need for rehabilitation in arriving at a specific sentence of imprisonment upon revocation of supervised release. While we do not decide whether rehabilitative needs can be used to determine whether to *impose* imprisonment as an initial matter, once imprisonment is mandated by 18 U.S.C. §3583(g) rehabilitative needs may be considered to determine the length of incarceration within the sentencing range." *U.S. v. Giddings,* 37 F.3d 1091, 1096–97 (5th Cir. 1994) (may impose maximum permissible sentence because of need for drug rehabilitation) [7#4]. The Sixth Circuit also affirmed that "a district court may properly consider a defendant's rehabilitative needs in setting the length of imprisonment within the range prescribed by statute," but held that defendant could not be ordered to participate in an intensive drug treatment program in prison. *U.S. v. Jackson,* 70 F.3d 874, 877–81 (6th Cir. 1995) [8#4]. Cf. *U.S. v. Burdex,* 100 F.3d 882, 885–86 (10th Cir. 1996) (rejecting defendant's argument "that the sentencing court failed to adequately consider his need for post-incarceration drug treatment, and thus imposed a sentence which was excessive and greater than necessary, in violation of 18 U.S.C. §3553(a)(2)(D)"—court's "failure to discuss drug treatment specifically is not sufficient to invalidate the sentence under 18 U.S.C. §3553(a) and (c)").

d. Other issues

The Ninth Circuit affirmed a reduction in the revocation sentence of a defendant who could not benefit under §1B1.10 from a retroactive guideline amendment that became effective after he had already completed his original sentence. His original guideline range of 51–63 months would have been 27–33 months under the amended guideline. The amendment was enacted while he was serving a seven-month revocation sentence, and he had moved, under 18 U.S.C. §3582(c)(2), to reduce it to time served. "The seven months imprisonment is not punishment for a new substantive offense, rather 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of . . . supervised release.' . . . [W]e interpret the statute's directive that 'the court may reduce the term of imprisonment' as extending to the entirety of the original sentence, including terms of imprisonment imposed upon revocation of supervised release." *U.S. v. Etherton,* 101 F.3d 80, 81 (9th Cir. 1996) [9#4]. However, a Nov. 1997 amendment adding Application Note 4 to §1B1.10 states that "[o]nly a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release." The amendment was designed to "make[] clear that, contrary to the holding in [*Etherton*], a reduction in the term of imprisonment imposed upon revocation of supervised release is not authorized by [§1B1.10]."

The Seventh Circuit originally held that "the actual conduct a district court may consider in determining the grade of a violation of supervised release pursuant to

§7B1.1(a) does not include sentence enhancements for habitual or recidivist offenders." See *U.S. v. Lee,* 78 F.3d 1236, 1240–41 (7th Cir. 1996) (error for district court to consider enhanced sentence of three years—which would be a Grade B violation—that defendant could receive for his state conviction instead of the normal nine-month maximum sentence—a Grade C violation.). However, the court later overruled *Lee* and held that prior convictions may be considered. Thus, defendant's marijuana possession while on release, which would have been a Grade C violation, turned into a Grade B violation because he had a prior drug conviction. *U.S. v. Trotter,* 270 F.3d 1150, 1154–56 (7th Cir. 2001) (affirmed). Accord *U.S. v. Crace*, 207 F.3d 833, 837–38 (6th Cir. 2000); *U.S. v. Boisjolie*, 74 F.3d 1115, 1116–17 (11th Cir. 1996).

The Sixth Circuit held that the obligation to pay restitution as a condition of supervised release does not end if release is revoked. Restitution is "an independent term of the sentence of conviction, without regard to whether incarceration, probation, or supervised release were ordered," and "a district court's decision to revoke supervised release does not affect the obligation to pay restitution if such obligation was authorized under 18 U.S.C. §§3551, 3556." *U.S. v. Webb,* 30 F.3d 687, 689–91 (6th Cir. 1994) [7#2].

Note that courts must give some explanation for the length of sentence imposed after revocation. See, e.g., *U.S. v. Vallejo,* 69 F.3d 992, 995 (9th Cir. 1995) (remanded: "district court failed to explain its ruling as required by 18 U.S.C. §3553(c) . . . . The court simply said 'based on all the papers . . . the sentence will be twelve months.' This is not enough to permit meaningful review.").

2. Revocation for Drug Possession

Note: 18 U.S.C. §3583(g) has been revised by the 1994 Crime Bill. Revocation is now required for possession of firearms or refusal of required drug testing as well as for drug possession. While a term of imprisonment is still required in these situations, the requirement for a prison term of "not less than one-third of the term of supervised release" was deleted. See also Nov. 1995 amendments to §7B1.4, comment. (nn.5–6). Note that §3583(d), enacted at the same time, provides a possible exception to mandatory imprisonment for releasees who fail a drug test and may benefit from treatment rather than imprisonment. See also *U.S. v. Pierce,* 132 F.3d 1207, 1208 (8th Cir. 1997) (remanded: district court should have considered whether to provide treatment under §3583(d) rather than imprisonment under §3583(g)). The Second Circuit concluded that amended §§3583(d) and (g) cannot be applied when the original criminal conduct occurred before their enactment. See *U.S. v. Wirth,* 250 F.3d 165, 170 (2d Cir. 2001) (following reasoning of *Johnson v. U.S.,* 529 U.S. 694, 702 (2000), which held that §3583(h), also added in 1994, should not be applied retroactively).

The Seventh Circuit held that it does not matter that §3583(g) used the words "terminate" release before and "revoke" release after the crime bill amendment—"there appears to be no significance to the use of 'terminate' [before the amend-

ment] and 'revoke' [after]. The courts have treated 'termination' of supervised release under [pre-amendment] §3583(g) as if it were 'revocation.' The guidelines themselves anticipate termination and revocation falling within the revocation table set forth in §7B1.4(a), p.s." *U.S. v. McGee,* 60 F.3d 1266, 1269–70 (7th Cir. 1995) (affirmed: revocation table in §7B1.4 applies to "termination" of release under earlier version of §3583(e)).

Under the prior law, the Ninth Circuit held that the Nov. 1990 amendments to §7B1.4, p.s. must be considered in sentencing after revocation. Defendant was originally sentenced to a three-year term of release before the amendments, but he had his release revoked and was resentenced after them. The district court did not use the 4–10-month range in §7B1.4(a) because it was less than the one-year term required by statute, and actually sentenced defendant to two years after finding one year was not adequate. The Ninth Circuit remanded, holding that §7B1.4(b)(2) "mandates a prison term of one year" because it substitutes the statutory minimum when the guideline range is smaller. *U.S. v. Baclaan,* 948 F.2d 628, 630–31 (9th Cir. 1991).

The Ninth Circuit also upheld the finding that defendant's positive drug tests and admission of drug use constituted "possession" under §3583(g), and it noted that the guidelines "explicitly gave the courts discretion to determine whether positive drug tests constitute 'possession.'" *Id.* at 630 (citing §7B1.4, comment. (n.5)). Accord *Wirth,* 250 F.3d at 169–70; *U.S. v. Hancox,* 49 F.3d 223, 225 (6th Cir. 1995); *U.S. v. Young,* 41 F.3d 1184, 1186 (7th Cir. 1994); *U.S. v. Battle*, 993 F.2d 49, 50 (4th Cir. 1993); *U.S. v. Almand,* 992 F.2d 316, 318 (11th Cir. 1993); *U.S. v. Dow,* 990 F.2d 22, 24 (1st Cir. 1993); *U.S. v. Rockwell*, 984 F.2d 1112, 1114 (10th Cir. 1993) [5#8]; *U.S. v. Courtney*, 979 F.2d 45, 49–50 (5th Cir. 1992) (but evidence must show positive test did not result from passive inhalation). See also *U.S. v. Blackston,* 940 F.2d 877, 891 (3d Cir. 1991) (possession adequately evidenced by three positive tests and admission of use). Some of these circuits have also held that proof of knowing and voluntary use equals possession and supervised release must be revoked under §3583(g). See *Hancox,* 49 F.3d at 225; *Young,* 41 F.3d at 1186; *U.S. v. Clark,* 30 F.3d 23, 26 (4th Cir. 1994); *Rockwell,* 984 F.2d at 1114; *Courtney,* 979 F.2d at 50.

In setting the length of sentence after revocation for drug possession, the Fifth and Sixth Circuits held that a defendant's need for rehabilitation may be considered. *U.S. v. Jackson,* 70 F.3d 874, 877–81 (6th Cir. 1995) (however, court may not order defendant to participate in drug treatment program while in prison) [8#4]; *U.S. v. Giddings,* 37 F.3d 1091, 1096–97 (5th Cir. 1994) (may impose maximum permissible sentence because of need for drug rehabilitation) [7#4].

Some circuits have held that the mandatory term under 18 U.S.C. §3583(g) may not be required if the original offense was committed before the original effective date of §3583(g), Dec. 31, 1988. See *U.S. v. Meeks,* 25 F.3d 1117, 1121–23 (2d Cir. 1994) [6#15]; *U.S. v. Paskow,* 11 F.3d 873, 877 (9th Cir. 1993) [6#7]; *U.S. v. Parriett,* 974 F.2d 523, 526–27 (4th Cir. 1992). However, the Sixth Circuit held that §3583(g) applied as long as the conduct that caused the revocation occurred after Dec. 31, 1988. "Because supervised release, unlike the previous parole system, is a form of

punishment that is separate from the maximum incarceration period that attaches to the original offense, a violation of that supervised release also results in a separate punishment that does not implicate the Ex Post Facto Clause." *U.S. v. Reese,* 71 F.3d 582, 585–90 (6th Cir. 1995) (affirmed: although defendant committed offense and was sentenced before Dec. 31, 1988, he "had 'fair warning' in December 1988 that he would face a statutory minimum of twenty months of imprisonment if found in possession of a controlled substance while on the supervised release that did not even begin until April 8, 1991).

VIII. Sentencing of Organizations

The Ninth Circuit held that a fine imposed on an organization does not have to be reduced to avoid jeopardizing the continued viability of the organization. Section 8C3.3(a) requires a fine to be reduced below that otherwise called for "to the extent that imposition of such fine would impair [the] ability to make restitution to victims." Subsection (b) states that a court "may impose a fine below that otherwise required . . . if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required." An unnumbered paragraph adds that any such reduction "shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization." Reading these sections together, the appellate court concluded that §8C3.3 "does not prohibit a court from imposing a fine that jeopardizes an organization's continued viability. It permits, but does not require, a court in such circumstances and in its discretion, to reduce the fine. The only time a reduction is mandated under section 8C3.3 is if the fine imposed, without reduction, would impair the defendant's ability to make restitution to victims. *See* USSG §8C3.3(a). Thus, even if the district court's fine would completely bankrupt (the organization), neither section 8C3.3(a) nor section 8C3.3(b) precluded the court from imposing such a fine so long as the fine did not impair [the] ability to make restitution." The court added that §§8C2.2 and 8C3.3 "do not require a sentencing court to consider whether the defendant can pay a fine, so long as the ability to pay restitution is not impaired," and that nothing in 18 U.S.C. §3572 precludes a fine that could jeopardize an organization's viability. *U.S. v. Eureka Laboratories, Inc.*, 103 F.3d 908, 912–14 (9th Cir. 1996) [9#3]. Cf. *U.S. v. Electrodyne Systems Corp.,* 147 F.3d 250, 254–55 (3d Cir. 1998) (remanded: sentencing court must resolve factual matter of ability to pay fine under Fed. R. Crim. P. 32(c)(1); however, court is not limited to financial records corporate defendant chooses to provide, but has "power to require production of necessary financial documents so as to have a basis in fact for any fine which is to be imposed").

IX. Sentencing Procedure

A. Plea Bargaining

1. Dismissed Counts

[**Note:** A proposed amendment that would take effect Nov. 1, 2000, would add new §5K2.21 as follows:

> The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

The Background Commentary of §1B1.4 would also be amended to specify that a dismissed count may be considered for departure, and §6B1.2 would be amended to include a reference to §5K2.21. Enactment of this policy statement would resolve the circuit split regarding use of dismissed charges for upward departure discussed below.]

Most circuits have held that the sentencing court may take into account criminal conduct in counts that were dismissed as part of a plea bargain. See, e.g., *U.S. v. Fine,* 975 F.2d 596, 601–04 (9th Cir. 1992) (en banc) (to determine base offense level) [5#2]; *U.S. v. Quintero,* 937 F.2d 95, 97 (2d Cir. 1991); *U.S. v. Rodriguez-Nunez,* 919 F.2d 461, 464 (7th Cir. 1990); *U.S. v. Williams,* 917 F.2d 112, 114 (3d Cir. 1990); *U.S. v. Rutter,* 897 F.2d 1558, 1562 (10th Cir. 1990); *U.S. v. Alston,* 895 F.2d 1362, 1371–72 (11th Cir. 1990); *U.S. v. Blanco,* 888 F.2d 907, 909–11 (1st Cir. 1989); *U.S. v. Smith,* 887 F.2d 104, 106–07 (6th Cir. 1989) [2#14]; *U.S. v. Williams,* 880 F.2d 804, 805 (4th Cir. 1989); *U.S. v. Taplette,* 872 F.2d 101, 106–07 (5th Cir. 1989). See also §6B1.2(a) ("*Provided*, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3") (added November 1992). The Eighth Circuit held that a calculation of loss could not be based on an unwritten plea agreement that incorporated by reference a large number of cars sold with altered odometers that had been charged in a dismissed count, but remanded for the court to make factual findings on relevant conduct that might include those cars. *U.S. v. Morton,* 957 F.2d 577, 579–80 (8th Cir. 1992) [4#18].

However, two circuits have held that counts dismissed as part of a plea bargain may not be used as the basis for departure. The Ninth Circuit concluded that the "plain implication" of USSG §6B1.2(a) "is that if the sentencing court believes that the remaining charges do not adequately reflect the seriousness of the defendant's behavior, the court should not accept the plea agreement." Thus, "the sentencing court should reject a plea bargain that does not reflect the seriousness of the defendant's behavior and should not accept a plea bargain and then later count dismissed charges in calculating the defendant's sentence." *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1082 (9th Cir. 1990) (reversing departure based in part on five rob-

beries admitted to by defendant but dismissed as part of plea bargain) (amending and superseding opinion at 911 F.2d 222). See also *U.S. v. Lawton,* 193 F.3d 1087, 1091 (9th Cir. 1999) ("A court may accept a plea agreement only if it determines 'that the remaining charges adequately reflect the seriousness of the actual offense behavior.' USSG §6B1.2(a). If a district court believes the charges included in a plea agreement are insufficient, §6B1.2(a) requires the court to reject the plea agreement. This procedure adequately takes into consideration conduct dismissed or not charged as part of a plea bargain. There is no need for departures under §5K2.0."); *U.S. v. Faulkner,* 952 F.2d 1066, 1069–71 (9th Cir. 1991) (may not depart on basis of charges dismissed or not brought pursuant to plea agreement) (amending 934 F.2d 190 [4#8]).

Citing *Castro-Cervantes*, the Eighth Circuit held that "[t]he sentencing court erred in considering conduct from the dismissed count as the basis for an upward departure under section 5K2.0 in clear opposition to the intentions of the parties as embodied in their plea agreement. A contrary rule would allow the sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration." The court limited its holding to upward departures under §5K2.0, noting that "courts may consider conduct from uncharged or dismissed counts for [other] purposes under the guidelines," such as adjustments, specific offense characteristics, and criminal history departures under §4A1.3(e). *U.S. v. Harris*, 70 F.3d 1001, 1003–04 (8th Cir. 1995) [8#4]. Note that *Castro-Cervantes* and *Faulkner* were decided before the addition to §6B1.2(a) of the "provided" language quoted in paragraph one of this section.

Other circuits have specifically held that conduct from dismissed counts may be used as the basis for an upward departure. See *U.S. v. Barber,* 119 F.3d 276, 283–84 (4th Cir. 1997) (en banc) ("we reject Appellant's argument that the guidelines proscribe reliance on uncharged or dismissed conduct in determining whether a departure from the guideline range is warranted and align this circuit with those that have adopted the better reasoned rule to the contrary"); *U.S. v. Baird,* 109 F.3d 856, 862–70 (3d Cir. 1997) (distinguishing *Thomas* below and holding sentencing court "may consider conduct underlying counts dismissed pursuant to a plea agreement, provided that such conduct is related to the conduct forming the basis of the remaining counts and that such conduct is proved by at least a preponderance of the evidence"); *U.S. v. Kim,* 896 F.2d 678, 682–84 (2d Cir. 1990) (counts dismissed as part of plea bargain may be used for departure if they "relate in some way to the offense of conviction, even though not technically covered by the definition of relevant conduct") [3#3]; *U.S. v. Zamarippa,* 905 F.2d 337, 341–42 (10th Cir. 1990) (following *Kim*).

The Third Circuit cited *Faulkner* in holding that departure cannot be based on criminal conduct that the government agreed not to charge as part of the plea bargain, *U.S. v. Thomas,* 961 F.2d 1110, 1120–22 (3d Cir. 1992) [4#25], but this holding has been limited by *Baird*, *supra*. A panel of the Fifth Circuit followed *Castro-Cervantes,* see *U.S. v. Ashburn,* 20 F.3d 1336 (5th Cir. 1994) [6#13], but on rehearing en banc the full court vacated that opinion and held that prior criminal conduct

in counts dismissed as part of a plea bargain may be used to justify an upward departure. *U.S. v. Ashburn,* 38 F.3d 803, 807–08 (5th Cir. 1994) (en banc) [7#5].

While affirming that a departure could be based on conduct from a dismissed count, the Sixth Circuit rejected the use of a dismissed count's relevant conduct to impose an enhancement and a departure because that conduct did not have sufficient connection to the offense of conviction. Defendant was part of a cocaine-selling operation, during the course of which he participated in the torture of someone that was thought to have stolen crack from the group. However, conspiracy charges were dismissed against defendant and he was convicted solely on one count of crack distribution that occurred before the torture incident. He received a §3A1.3 enhancement for restraint of victim and a departure under §§5K2.2 and 5K2.8, both based on the torture. In remanding, the appellate court held that the torture did not fall within the bounds of relevant conduct as defined in §1B1.3, and that section's "detailed definition of 'relevant conduct' demonstrates that the Commission has considered and rejected the notion that conduct completely unrelated to the offense of conviction should factor into the calculation of the Guideline range." The court specifically rejected defendant's argument that departure could not be based on conduct in a dismissed count. *U.S. v. Cross,* 121 F.3d 234, 238–44 (6th Cir. 1997) [10#2].

2. Estimate of Sentence Before Accepting Plea

Does a sentencing court have an obligation to give a defendant an estimate of the likely guideline sentence before accepting a guilty plea? The appellate courts have said no, holding that informing defendant of the statutory maximum and, if applicable, minimum sentences satisfies due process and Fed. R. Crim. P. 11. See, e.g., *U.S. v. Watley*, 987 F.2d 841, 846 (D.C. Cir. 1993); *U.S. v. DeFusco,* 949 F.2d 114, 118 (4th Cir. 1991); *U.S. v. DeFusco,* 930 F.2d 413, 415 (5th Cir. 1991); *U.S. v. Rhodes,* 913 F.2d 839, 843 (10th Cir. 1990); *U.S. v. Salva,* 902 F.2d 483, 487–88 (7th Cir. 1990) (amending 894 F.2d 225 [3#1]); *U.S. v. Thomas,* 894 F.2d 996, 997 (8th Cir. 1990); *U.S. v. Henry*, 893 F.2d 46, 48–49 (3d Cir. 1990); *U.S. v. Turner,* 881 F.2d 684, 685–86 (9th Cir. 1989) [2#12]; *U.S. v. Fernandez,* 877 F.2d 1138, 1142–43 (2d Cir. 1989) [2#9]. See also *U.S. v. Selfa,* 918 F.2d 749, 752 (9th Cir. 1990) (government not obligated to compute sentencing range in advance). Cf. *U.S. v. Watch,* 7 F.3d 422, 426–29 (5th Cir. 1993) (remanded: although district court is not required to calculate sentence before accepting plea, it violated Rule 11 by not informing defendant at the plea colloquy that he could be subject to mandatory minimum, even though the indictment purposely omitted alleging drug quantity in order to avoid a mandatory minimum) [6#6].

The Second Circuit recommended, however, that "where feasible" courts should advise defendants of the likely sentence before accepting the plea, *Fernandez,* 877 F.2d at 1144, and the Seventh Circuit recommended withholding acceptance of a guilty plea until after the release of the presentence report, *Salva,* 902 F.2d at 488. Note that USSG §6B1.1(c), p.s., cited approvingly in *Salva,* states: "The court shall

defer its decision to accept or reject [a plea agreement] until there has been an opportunity to consider the presentence report." One court has suggested that plea agreements should "explicitly address" the possibility of departure, even if departure is not recommended by the government or probation officer. *U.S. v. Burns,* 893 F.2d 1343, 1349 (D.C. Cir. 1990) [3#1], *rev'd on other grounds*, 111 S. Ct. 2182 (1991) [4#4].

Courts have held that a defense attorney's underestimation of the probable guideline range is generally not grounds for withdrawal of a guilty plea. See *U.S. v. Lambey,* 974 F.2d 1389, 1393–96 (4th Cir. 1992) (en banc); *U.S. v. Jones,* 905 F.2d 867, 868 (5th Cir. 1990); *Turner,* 881 F.2d at 686–87; *U.S. v. Sweeney,* 878 F.2d 68, 69–70 (2d Cir. 1989) [2#9]. Cf. *U.S. v. Martinez,* 136 F.3d 972, 980 (4th Cir. 1998) (affirmed: downward departure based on alleged counsel's ineffective assistance—underestimating defendant's possible sentence that led defendant to reject plea offer—is not proper ground for departure). However, in a case where all parties firmly agreed that the maximum sentence would be less than ten years, and defendant based his guilty plea on that, he was allowed to withdraw his plea when an unexpectedly high offense level resulted in a *minimum* sentence of ten years. *Watley,* 987 F.2d at 846–48. See also *U.S. v. Toothman,* 137 F.3d 1393, 1400–01 (9th Cir. 1998) (withdrawal of plea warranted where defendant "was misinformed by the court, government counsel and his own counsel that the basic guideline range for all counts would be ten to sixteen months," but PSR called for 168–210 months).

The D.C. Circuit held that a defense counsel's failure to properly estimate a career offender sentence was "constitutionally deficient" so as to allow withdrawal of a plea. Counsel (and the government) estimated defendant would receive a sentence of 188–235 months. However, that failed to account for the increased offense level required by §4B1.1(A), and the actual range was 262–327 months. The court agreed with defendant's claim that, under all the circumstances, there was a "reasonable probability" that he would not have pled guilty but for the mistake. *U.S. v. McCoy,* 215 F.3d 102, 108–09 (D.C. Cir. 2000).

3. Deferring Acceptance of Plea Agreement

Fed. R. Crim. P. 11(e)(2) allows the court to accept a plea agreement immediately or defer acceptance pending consideration of the presentence report. USSG §6B1.1(c), p.s., however, states that the court "shall defer its decision to accept or reject" plea agreements or nonbinding recommendations "until there has been an opportunity to consider the presentence report." The Sixth Circuit held that when a court accepts a plea agreement before the PSR is available, the acceptance is contingent on the court's consideration of the report. *U.S. v. Kemper,* 908 F.2d 33, 36 (6th Cir. 1990). Accord *U.S. v. Foy,* 28 F.3d 464, 471 (5th Cir. 1994) ("We conclude that section 6B1.1(c) makes a district court's acceptance of a guilty plea contingent upon the court's review of the PSR. . . . Even so, the better practice would certainly be for the district court to expressly point out at the Rule 11 hearing that although the plea met all the requirements for acceptance under Rule 11(e)(1)(B), or in the

absence of an agreement, and was provisionally accepted, final acceptance was contingent on the court's review of the PSR"). See also Commentary to §6B1.1: "Section 6B1.1(c) reflects the changes in practice required by §6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report."

The Seventh Circuit noted §6B1.1(c), p.s., favorably in dicta in *U.S. v. Salva,* 902 F.2d 483, 488 (7th Cir. 1990) (amending 894 F.2d 225 [3#1]). But the circuit later clarified that *Salva* did not set forth a "procedural rule" requiring that the defendant see his PSR before the district court accepts his guilty plea. *U.S. v. Elmendorf,* 945 F.2d 989, 992–93 (7th Cir. 1991). In a similar vein, the D.C. Circuit "recommend[ed] that, wherever feasible, the district courts make their presentence reports available to defendants before taking their pleas," but noted that this is not a requirement and confers no right on defendants. *U.S. v. Horne,* 987 F.2d 833, 839 (D.C. Cir. 1993).

The Fourth Circuit held that §§6B1.1–1.3, p.s., do not change the standards by which a defendant may withdraw a guilty plea. Once the court accepts the plea, even if it delays acceptance of the plea agreement, Rules 11 and 32(d) (now Rule 32(e), effective Dec. 1, 1994) still control withdrawal of the plea. *U.S. v. Ewing,* 957 F.2d 115, 117–19 (4th Cir. 1992) (defendant could not withdraw guilty plea accepted by court, even though court had deferred acceptance of plea agreement pending PSR—§6B1.1(c) applies to plea agreements, not guilty pleas) [4#18]. The Supreme Court agreed, holding that Rule 32(e) governs the withdrawal of a plea when the district court accepts the plea but defers a decision on the plea agreement. *U.S. v. Hyde,* 117 S. Ct. 1630, 1632–36 (1997) (reversing 92 F.3d 779, 781 (9th Cir. 1996), which held that a defendant can withdraw his plea if the court has deferred acceptance of either the plea or the plea agreement).

Note that the circuits are split over whether Rule 32(e) limits withdrawal of a guilty plea when the court defers acceptance of *both* the plea and plea agreement. See *U.S. v. Mader,* 251 F.3d 1099, 1104–05 (6th Cir. 2001) (under Rule 32(e) "defendant must provide a fair and just reason to support withdrawal of his guilty plea, even when that plea has not yet been accepted by the district court"); *U.S. v. Payton,* 168 F.3d 1103, 1105 (8th Cir. 1999) (same); *U.S. v. Grant,* 117 F.3d 788, 790–92 (5th Cir. 1997) (same). Contra *U.S. v. Shaker,* 279 F.3d 494, 497–98 (7th Cir. 2002) ("Rule 32 applies only to *accepted* guilty pleas," so "Rule 32(e) is triggered only when the district court completes the plea process by accepting the plea"); *U.S. v. Alvarez-Tautimez,* 160 F.3d 573, 576–77 (9th Cir. 1998) (same). See also *U.S. v. Persico,* 164 F.3d 796, 806 (2d Cir. 1999) (where plea and plea agreement had not yet been accepted, "[a] Rule 32(e) plea withdrawal motion was technically not available").

4. Stipulations and Plea Agreements

The parties may make a binding sentencing recommendation under Fed. R. Crim. P. 11(e)(1)(C), which the court may accept or reject and allow withdrawal of the plea. USSG §6B1.2(c). See, e.g., *U.S. v. Moure-Ortiz,* 184 F.3d 1, 3–4 (1st Cir. 1999) (remanded: district court could not accept 11(e)(1)(C) plea agreement and then sentence defendant below the agreed term without first giving government opportunity to withdraw from agreement); *U.S. v. Gilchrist,* 130 F.3d 1131, 1134 (3d Cir. 1997) ("An 11(e)(1)(C) plea agreement, once accepted, binds the district court notwithstanding departures from the applicable guidelines."); *U.S. v. Veri,* 108 F.3d 1311, 1315 (10th Cir. 1997) ("if a sentencing court accepts a Rule 11(e)(1)(C) agreement, it is bound by the agreement and may not modify it" by departing downward). *U.S. v. Mukai,* 26 F.3d 953, 955–56 (9th Cir. 1994) (remanded: district court could not sentence below minimum agreed to in Rule 11(e)(1)(C) plea agreement without allowing government to withdraw from agreement). See also *U.S. v. Barnes,* 83 F.3d 934, 941 (7th Cir. 1996) (affirmed: if plea agreement is valid, defendant may not challenge Rule 11(e)(1)(C) agreement solely because agreed-upon sentence exceeded later-computed guideline range—"Plea agreements can retain their authority to bind the government, the defendant and the district court even when they provide for sentences that depart from the prescriptions of the guidelines."). Cf. USSG §6B1.2, comment. ("the court should accept a recommended sentence or plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons").

Effective Dec. 1, 1999, Rule 11(e)(1)(B) and (C) were amended. Under subsection (B), the government can "recommend, or agree not to oppose the defendant's request for a particular sentence *or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case*." Under subsection (C), the government can "agree that a specific sentence *or sentencing range* is the appropriate disposition of the case, *or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case*." (Amended language highlighted.)

Some circuits had already held that agreement to a sentencing range is specific enough to satisfy Rule 11(e)(1)(C). See, e.g., *U.S. v. Veri,* 108 F.3d 1311, 1313–15 (10th Cir. 1997) (finding agreement to 21–27 months was binding: "a plea agreement specifying a sentence at a particular guideline range is specific enough to fall within the language of 11(e)(1)(C)") [9#6]; *U.S. v. Nutter,* 61 F.3d 10, 11–12 (2d Cir. 1995) (range of 155–181 months specific enough to satisfy 18 U.S.C. §3742(c)(1) and Rule 11(e)(1)(C)); *Mukai,* 26 F.3d at 954–55 (plea agreement providing for five to seven years' imprisonment was Rule 11(e)(1)(C) agreement); *U.S. v. Lambey,* 974 F.2d 1389, 1396 (4th Cir. 1992) (indicating that specifying a sentencing range would satisfy Rule 11(e)(1)(C)); *U.S. v. Kemper,* 908 F.2d 33, 36 (6th Cir. 1990) (agreement that assumed sentence within range of 27–33 months was binding un-

der Rule 11(e)(1)(C)). Such an agreement also limits the district court's power to depart. See, e.g., *Veri,* 108 F.3d at 1315 (affirmed: "Based on the clear language of Rule 11(e)(1)(C) and the applicable case law, Veri had no reason to believe the district court would entertain a motion for downward departure when the plea agreement specified a disposition at offense level sixteen and included no provision for downward departure."); *Mukai,* 26 F.3d at 956–57 (where agreement allowed for downward departure only within sentencing range specified in Rule 11(e)(1)(C) agreement, district court could not depart below that range); *U.S. v. Cunavelis,* 969 F.2d 1419, 1422 (2d Cir. 1992) (district court had no authority to go beyond four-level reduction specified in Rule 11(e)(1)(C) agreement in making departure under §5K1.1). *Cf. U.S. v. Swigert,* 18 F.3d 443, 445–46 (7th Cir. 1994) (where Rule 11(e)(1)(C) agreement called for specific "term of imprisonment," district court could not impose split sentence of imprisonment and community confinement or home detention under §5C1(d)(2)).

Before the 1999 amendments there was no provision in Rule 11(e)(1) or the guidelines for binding *factual* stipulations. However, under some circumstances courts have held that a factual stipulation that affected the length of the sentence should have been followed or the defendant allowed to withdraw the plea. See *U.S. v. Torres,* 926 F.2d 321, 325–26 (3d Cir. 1991) (stipulation between defendant and government that kilogram of cocaine, which had been illegally seized and suppressed, would not be used in calculating the offense level should be honored by sentencing court or defendant allowed to withdraw plea because parties had relied on court's acceptance of agreement) [4#1]; *U.S. v. Kemper,* 908 F.2d 33, 36–37 (6th Cir. 1990) (construing stipulation to amount of drugs in offense as binding recommendation for specific sentence under Fed. R. Crim. P. 11(e)(1)(C), held district court could reject stipulation as incorrect but should have allowed withdrawal of plea); *U.S. v. Jeffries,* 908 F.2d 1520, 1525–27 (11th Cir. 1990) (plea agreement stipulated to thirteen grams of cocaine in offense; sentencing court must follow or allow withdrawal of plea agreement); *U.S. v. Mandell,* 905 F.2d 970, 971–73 (6th Cir. 1990) (plea agreement that "clearly state[d]" offense level would be twenty was violated when court sentenced defendant on basis of offense level of twenty-seven after it had accepted agreement, even though resulting sentence was within general range contemplated in agreement; defendant entitled to specific performance or withdrawal of plea).

In a case where the district court imposed a stiffer fine than that stipulated to in a plea agreement, the Second Circuit held remand was proper to either allow withdrawal of the guilty plea or enforcement of the fine stipulation. Because the court was free to impose a term of imprisonment on remand (the agreement was silent as to imprisonment), the appellate court gave the defendant the opportunity to withdraw the appeal and accept the original sentence that did not include imprisonment. *U.S. v. Bohn,* 959 F.2d 389, 394–95 (2d Cir. 1992) [4#20].

Otherwise, USSG §6B1.4(d) states that the sentencing court is not bound by stipulations in plea agreements, but is free to determine the facts relevant to sentencing. See also *U.S. v. Velez,* 1 F.3d 386, 389 (6th Cir. 1993) (court not bound by stipulation that relevant conduct was limited to defendant's activities in Iowa); *U.S. v.*

Bennett, 990 F.2d 998, 1002–03 (7th Cir. 1993) (not bound by stipulation that defendant was not career offender); *U.S. v. Lewis,* 979 F.2d 1372, 1374–75 (9th Cir. 1992) (same) [5#6]; *U.S. v. Westerman,* 973 F.2d 1422, 1426 (8th Cir. 1992) (not bound by stipulation that defendant was minimal participant); *U.S. v. Hernandez,* 967 F.2d 456, 459 (10th Cir. 1992) (not bound by stipulation that acceptance of responsibility reduction applied); *U.S. v. Telesco,* 962 F.2d 165, 167–68 (2d Cir. 1992) (not bound by inaccurate drug quantity stipulation—noting that inaccurate quantity in agreement violated §6B1.4(a)); *U.S. v. Mason,* 961 F.2d 1460, 1462 (9th Cir. 1992) (same); *U.S. v. McCann,* 940 F.2d 1352, 1357–58 (10th Cir. 1991) (remanded: court required to consider drugs even though stipulation indicated it should not); *U.S. v. Medina-Saldana,* 911 F.2d 1023, 1024 (5th Cir. 1990) (need not follow government recommendation to sentence at lower end of range); *U.S. v. Garcia,* 902 F.2d 324, 326–27 (5th Cir. 1990) (court may find larger quantity of drugs than stipulated); *U.S. v. Forbes,* 888 F.2d 752, 754 (11th Cir. 1989) (court not bound to find defendant played a "minor role" as stipulated).

Note, however, that the commentary to §6B1.4(d) states that a sentencing court "cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information." See also *U.S. v. Strevel,* 85 F.3d 501, 502 (11th Cir. 1996) (remanded: district court could not rely solely on stipulation in setting amount of loss).

A district court properly refused to accept a plea agreement because it concluded that the resulting sentence, which included a substantial downward departure, would have been too low compared with sentences of less culpable defendants. *U.S. v. LeMay,* 952 F.2d 995, 997 (8th Cir. 1991) [4#14].

Breach of plea agreement: Although courts are not bound by stipulations, the government's arguing a position contrary to that agreed upon may violate the plea agreement and defendant should be given the opportunity to withdraw his plea. For example, the First Circuit remanded a case for resentencing before a different judge where the government, although reciting the terms of the plea agreement to the court, argued for a longer sentence than it stipulated to and failed to inform the court of defendant's cooperation. *U.S. v. Canada,* 960 F.2d 263, 268–73 (1st Cir. 1992) (holding government violated terms of plea agreement, citing *Santobello v. New York,* 404 U.S. 257, 262–63 (1971)). See also *U.S. v. Lawlor,* 168 F.3d 633, 637 (2d Cir. 1999) (remanded: under terms of plea agreement government had no duty to object to PSR that applied §2A2.4 rather than §2A2.3 called for in agreement, but it breached agreement by telling court PSR "was appropriately scored"); *U.S. v. Mitchell,* 136 F.3d 1192, 1194 (8th Cir. 1998) (remanded: where government agreed to recommend to court §5K1.1 departure "of up to 50%," it could not then tell court that it had "no specific recommendation as to the sentence" and that defendant had already benefited from lesser charge, and also introduce victim-impact statements); *U.S. v. Taylor,* 77 F.3d 368, 370 (11th Cir. 1996) (remanded: where plea agreement said government would recommend maximum sentence of ten years,

it could not argue in support of PSI calculation that would result in longer term—"when the government's statements regarding the PSI are inconsistent with the plea agreement, the government has breached that agreement").

Similarly, the Fifth Circuit remanded for resentencing before a different judge a case where the government argued at sentencing that the acceptance of responsibility reduction should not be given, even though it had stipulated that defendant was entitled to it. *U.S. v. Valencia*, 985 F.2d 758, 760–61 (5th Cir. 1993). Accord *U.S. v. Clark,* 55 F.3d 9, 12–14 (1st Cir. 1995) (same); *U.S. v. Enriquez,* 42 F.3d 769, 771–73 (2d Cir. 1994) (same: government agreed to vacating sentence, remanding for new sentence before new judge, and new presentence report; however, government may argue in favor of obstruction of justice enhancement, even though that may lessen chance of §3E1.1 adjustment, because there was no stipulation on that issue). See also *U.S. v. Cooper,* 70 F.3d 563, 566–67 (10th Cir. 1995) (remanded: government breached agreement that required it to recommend sentence of probation by presenting—at the sentencing hearing—additional evidence that raised offense level beyond range that allowed probation); *U.S. v. Camper,* 66 F.3d 229, 232–33 (9th Cir. 1995) (remanded for resentencing before different judge where government requested upward departure despite express statement in plea agreement that it would not). But cf. *U.S. v. Ashurst,* 96 F.3d 1055, 1057 (7th Cir. 1996) (where agreement that defendant should receive §3E1.1 reduction was "based on the information presently available and known to the government," government did not breach plea agreement by arguing at sentencing that similar crime defendant committed after plea agreement should preclude reduction); *Morris v. U.S.,* 73 F.3d 216, 217–18 (8th Cir. 1996) (affirmed: government's agreement "to take no position" on motion for downward departure based on aberrant behavior did not preclude cross examination of defense psychologist who testified at sentencing hearing on matters beyond agreed facts).

The government also may not fail to honor a plea bargain by inaction, and a defendant may be entitled to specific performance of the agreement in that situation. In the Fourth Circuit, the government and defendant entered an oral agreement specifying that the government would recommend that defendant receive a two-level §3E1.1 reduction and a sentence of no more than sixty-three months. When the district court determined that a higher sentence was warranted, the government did not argue for the agreed terms. The appellate court held the government had breached the agreement, granted defendant's request for specific performance, and remanded for resentencing. *U.S. v. McQueen,* 108 F.3d 64, 66 (4th Cir. 1997). See also *U.S. v. Velez-Carrero,* 77 F.3d 11, 11–12 (1st Cir. 1996) (remanded: granting request for specific performance because government breached agreement to recommend against §3B1.1 enhancement by taking neutral position); *U.S. v. Myers,* 32 F.3d 411, 413 (9th Cir. 1994) (remanded: "It was insufficient that the court, by reading the presentence report and the plea agreement, was aware that the government had agreed to recommend a sentence at the low end of the guideline range"—government made no recommendation before sentencing and merely confirmed agreement when defendant objected after sentence was pronounced).

However, the Tenth Circuit held that when the agreement specifies that the government would "recommend" that defendant should receive certain reductions or not receive certain enhancements, it "does not require the prosecutor to allocute in favor of specific adjustments in the defendant's sentence if the recommendations are contained in the PSR and the prosecutor does not allocute against an agreed-upon adjustment." *U.S. v. Smith,* 140 F.3d 1325, 1327 (10th Cir. 1998) ("government fulfilled its obligation to recommend the sentencing adjustments when those recommendations were considered, although rejected, in the Presentence Report").

The government was held in breach of an agreement when it elicited damaging testimony at the sentencing hearing from one of defendant's victims of an unrelated offense. The government had agreed to recommend a sentence at the low end of the guideline range, but the appellate court "s[aw] no way to view the introduction of [the testimony] other than as an attempt by the prosecutor to influence the court to give a higher sentence than the prosecutor's recommendation." Because the court sentenced defendant at the highest end of the guideline range, the case was remanded for resentencing before a different judge. *U.S. v. Johnson,* 187 F.3d 1129, 1135–36 (9th Cir. 1999).

To determine whether the government breached the agreement, courts should "apply general principles of contract law to define the nature of the government's obligations in a plea agreement. . . . Accordingly, we determine the government's obligations by reviewing the express language used in the agreement. . . . We will not allow the government to rely 'upon a "rigidly literal construction of the language" of the agreement' to escape its obligations under the agreement. . . . As with the interpretation of any contract, we also apply the maxim that the agreement should be construed against its drafter." *U.S. v. Brye,* 146 F.3d 1207, 1210 (10th Cir. 1998). The court concluded that, where the government agreed to "defer" to the sentencing court's determination of whether defendant should receive a downward departure, it could not oppose defendant's motion "in any fashion." Because the sentencing court already had authority to make that decision, "defer" had to mean more than simply accepting the court's final decision. *Id.* at 1211. See also *U.S. v. Nolan-Cooper,* 155 F.3d 221, 239 (3d Cir. 1998) ("we must examine what the defendant reasonably understood she would be receiving from the government in return for her plea of guilty"—where agreement contemplated maximum sentence of fifty-one months, but court determined proper range was 63–78 months, government could not argue for sentence above sixty-three months).

The Third Circuit cautioned that "[t]he government cannot . . . rely on a general provision of the plea agreement permitting it to comment on the facts of the case to defeat the purpose of a specific provision requiring it not to oppose the defendant's position on the applicability of a particular adjustment." The court remanded a case where the government made references to facts that could have led the sentencing court to impose a §3B1.1 enhancement for use of a special skill, despite its agreement to "not oppose" defendant's position that the adjustment should not be applied. *U.S. v. Nolan-Cooper,* 155 F.3d 221, 237 (3d Cir. 1998). Cf. *U.S. v. Milner,* 155 F.3d 697, 700–01 (3d Cir. 1998) (affirmed: applying exception to *Nolan-Coo-*

per, government could recommend imposition of sentence at low end of 188–235-month range, despite agreement to recommend mandatory minimum sentence of sixty months, after court independently determined that higher range applied because defendant was career offender).

5. Waiver of Appeal in Plea Agreement

The Eleventh Circuit held that defendants may validly waive their right to appeal a guidelines sentence, but the waiver must be specifically addressed in the plea colloquy. The waiver "must be knowing and voluntary," which in most instances means that "the district court must have specifically discussed the sentence appeal waiver with the defendant during the Rule 11 hearing." The court also held that "the remedy for an unknowing and involuntary waiver is essentially severance"—the waiver "is severed or disregarded . . . while the rest of the plea agreement is enforced as written and the appeal goes forward." *U.S. v. Bushert,* 997 F.2d 1343, 1350–54 (11th Cir. 1993) (waiver invalid because record does not show that defendant clearly understood full significance of waiver, but sentence affirmed because defendant's claims of error were meritless) [6#3]. See also *U.S. v. Ready,* 82 F.3d 551, 557 (2d Cir. 1996) ("a waiver of the right to appeal should only be enforced by an appellate court if the record 'clearly demonstrates' that the waiver was both knowing (in the sense that the defendant fully understood the potential consequences of his waiver) and voluntary"); *U.S. v. Baty,* 980 F.2d 977, 978–80 (5th Cir. 1992) (waiver of appeal invalid because court did not adequately explain consequences to defendant; however, sentence affirmed because no error was made); *U.S. v. Wessells,* 936 F.2d 165, 168 (4th Cir. 1991) (where waiver was held invalid, appellate court addressed merits of appeal).

Note that, as amended Dec. 1, 1999, Rule 11(c)(6) now requires that the plea colloquy with the defendant include "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence."

The Fourth Circuit has stated that "a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." *U.S. v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992). The *Marin* court upheld a waiver where defendant received an upward departure—the possibility of departure was part of the plea agreement, and the final sentence was within the agreed upon range. See also *U.S. v. Michelsen,* 141 F.3d 867, 871–72 (8th Cir. 1998) (affirmed: "Although it might have been preferable for the court to have conducted a colloquy with Michelsen regarding his waiver of appeal, such a dialogue is not a prerequisite for a valid waiver of the right to appeal" when the record shows that the waiver was knowing and voluntary.); *U.S. v. Agee,* 83 F.3d 882, 886 (7th Cir. 1996) ("a specific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal, if there is other evidence in the record demonstrating a knowing and voluntary waiver"); *U.S. v. DeSantiago-Martinez,* 38 F.3d 394, 395 (9th Cir.

1992) ("a Rule 11 colloquy on the waiver of the right to appeal is not a prerequisite to a finding that the waiver is valid; rather, a finding that the waiver is knowing and voluntary is sufficient"); *U.S. v. Portillo,* 18 F.3d 290, 292–93 (5th Cir. 1994) ("when the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal"). Cf. *U.S. v. Michlin,* 34 F.3d 896, 898 (9th Cir. 1994) (affirmed waiver even though district court did not specifically advise defendant he was giving up right to appeal—prosecutor "read the plea agreement in open court, and the plea agreement clearly stated that Michlin waived his right to appeal. We have held that so long as the plea agreement contains an express waiver of appellate rights, a Rule 11 colloquy concerning the waiver is not required.").

Other circuits have also held that sentence appeal waivers made knowingly and voluntarily will be enforced. See, e.g., *U.S. v. Khattak,* 273 F.3d 557, 562–63 (3d Cir. 2001) (adding that "waivers of appeals should be strictly construed"); *U.S. v. Ashe,* 47 F.3d 770, 775–76 (6th Cir. 1995); *U.S. v. Schmidt,* 47 F.3d 188, 190–92 (7th Cir. 1995); *U.S. v. Melancon,* 972 F.2d 566, 567–68 (5th Cir. 1992); *U.S. v. Rutan,* 956 F.2d 827, 829 (8th Cir. 1992); *U.S. v. Navarro-Botello,* 912 F.2d 318, 321 (9th Cir. 1990); *U.S. v. Wiggins,* 905 F.2d 51, 53 (4th Cir. 1990). See also *U.S. v. Salcido-Contreras,* 990 F.2d 51, 51–53 (2d Cir. 1993) (upholding waiver of right to appeal sentence that was imposed within range specified in plea agreement).

However, a broad waiver of the right to appeal may require a more careful, fact-specific inquiry. The Second Circuit scrutinized a case where the plea agreement called for a waiver of the right to appeal a sentence within the guideline range determined by the sentencing court. As the appellate court noted, "[n]o provision for appeal exists simply because the ultimate sentence proves to be beyond, or even considerably beyond, the [agreement's] anticipated range. . . . An ordinary appeal waiver provision waives the defendant's right to appeal a sentence falling within a range explicitly stipulated within the agreement itself." Because this waiver agreement contained no such stipulation, "the defendant assumes a virtually unbounded risk of error or abuse by the sentencing court," leading the court to determine that such agreements require careful scrutiny. "A request for appeal arising from such a plea bargain will not be summarily denied, as are many such requests arising from standard plea agreements. Instead, such a request will cause us to examine carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it merits our review. In particular, . . . we will focus upon 1) the extent to which the defendant actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range, and 2) the extent of actual discrepancy between the predicted range and the ultimate sentence."

The court ultimately upheld the waiver, finding that defendant "secured considerable benefits" from the agreement, the final sentence was only six months above the top end of the predicted range, and, "although it is possible that Rosa did not

foresee what actually occurred at sentencing, we can see no fundamental unfairness in that result." *U.S. v. Rosa,* 123 F.3d 94, 99–102 (2d Cir. 1997) [10#3]. See also *U.S. v. Martinez-Rios,* 143 F.3d 662, 668–69 (2d Cir. 1998) (following *Rosa*, severing similarly worded waiver and allowing appeal where there was no colloquy concerning the waiver at the plea allocution and the judge indicated that at least some issues would not be covered by the waiver); *U.S. v. Goodman,* 165 F.3d 169, 174–75 (2d Cir. 1999) (same, for "even broader" waiver that only limited sentence to statutory maximum—defendant "received very little benefit in exchange for her plea of guilty" and during plea allocution judge suggested she would retain right to appeal in some circumstances, contrary to language of plea agreement). But cf. *U.S. v. Atterberry,* 144 F.3d 1299, 1301 (10th Cir. 1998) (upholding waiver of "right to appeal any sentence that does not exceed the maximum penalty provided by the statute of conviction on any ground" where nothing indicated waiver was not knowing and voluntary).

The Ninth Circuit held that a defendant could appeal, despite an otherwise valid waiver, where the sentencing court advised the defendant, without qualification and without objection from the government, that he had the right to appeal. *U.S. v. Buchanan,* 59 F.3d 914, 917–18 (9th Cir. 1995). However, where the sentencing court's advisement was qualified and the prosecutor promptly objected that there was a valid waiver, the Ninth Circuit upheld a waiver because defendant "was made aware . . . that the waiver of his right to appeal could preclude an appeal." *U.S. v. Schuman,* 127 F.3d 815, 817 (9th Cir. 1997). See also *Atterberry,* 144 F.3d at 1301 (affirmed: although district court made passing, "routine" reference to defendant's general right to appeal sentence, that "could not have affected Mr. Atterberry's waiver decision" and nothing indicated waiver was not knowing and voluntary).

The Second Circuit has held that defendants may validly waive the right to request a downward departure. *U.S. v. Braimah,* 3 F.3d 609, 611–13 (2d Cir. 1993). Cf. *U.S. v. Livingston,* 1 F.3d 723, 725 (8th Cir. 1993) (defendant waived right to challenge ten-year mandatory minimum by agreeing to it in plea agreement—"by consenting to a specific sentence in a plea agreement, the defendant waives the right to challenge that sentence on appeal").

The Fifth Circuit held that a valid waiver may be enforced in an appeal following a resentencing after remand. "We . . . hold that once a plea agreement has been accepted by the trial court, a provision thereof waiving appeal survives and is fully enforceable in proceedings on remand and, if it otherwise complies with controlling law, will be enforced on appeal." Thus, the court dismissed the appeal of a defendant who had a valid and enforceable waiver covering the sentencing issues he tried to appeal. *U.S. v. Capaldi,* 134 F.3d 307, 308 (5th Cir. 1998).

An otherwise valid unconditional waiver was upheld by the Ninth Circuit against a claim that a change in the law between the time of the plea agreement and sentencing warranted allowing defendant to appeal the district court's refusal to apply the change. "Although the sentencing law changed in an unexpected way, the possibility of a change was not unforeseeable at the time of the agreement. . . . The fact that Johnson did not foresee the specific issue that he now seeks to appeal does not

place that issue outside the scope of his waiver." *U.S. v. Johnson,* 67 F.3d 200, 202–03 (9th Cir. 1995) [8#2].

However, note that a waiver may not be enforceable if the sentence is based on an unconstitutional factor, is in violation of a statute, or is in some way illegal or if the plea itself is invalid. See, e.g., *U.S. v. Portillo-Cano,* 192 F.3d 1246, 1249–52 (9th Cir. 1999) (remanded: otherwise valid waiver did not preclude appeal that plea itself was invalid because district court did not explain nature of charges as required by Rule 11(c)(1)); *U.S. v. Phillips,* 174 F.3d 1074, 1076 (9th Cir. 1999) (restitution order that exceeded authority under VWPA equivalent to illegal sentence and defendant may appeal restitution despite waiver); *U.S. v. Broughton-Jones,* 71 F.3d 1143, 1147–49 (4th Cir. 1995) (remanded: because restitution order was illegal it did not fall within scope of defendant's otherwise valid waiver of appeal of sentence); *Schmidt,* 47 F.3d at 190 (defendant may appeal despite waiver if court relied on "constitutionally impermissible factor such as race" or sentenced defendant above statutory maximum); *U.S. v. Khaton,* 40 F.3d 309, 311 (9th Cir. 1994) (waiver of right to appeal "any sentence within the discretion of the sentencing judge" would allow appeal for "improper deviations" from guidelines, but none occurred here); *U.S. v. Jacobson,* 15 F.3d 19, 22–23 (2d Cir. 1994) ("Although an agreement not to appeal a sentence within the agreed Guidelines range is enforceable, . . . we see nothing in such an agreement that waives the right to appeal from an arguably unconstitutional use of naturalized status as the basis for a sentence"); *Marin,* 961 F.2d at 496 ("a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race"). See also *U.S. v. Attar,* 38 F.3d 727, 732 (4th Cir. 1994) ("Nor do we think such a defendant can fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations"). But cf. *U.S. v. Yemitan,* 70 F.3d 746, 748 (2d Cir. 1995) (where defendant was sentenced within range agreed to in plea agreement that waived right to appeal, affirming sentence despite sentencing court's failure to state reasons for imposing specific sentence where guideline range was greater than twenty-four months—the right to appeal a sentence that "was imposed in violation of law," 18 U.S.C. §3742(a)(1), "is not unwaivable under subsection 3742(c)(1), and . . . this defendant has waived it").

Similarly, the waiver is not valid if the sentence does not accord with or the government violates a plea agreement. See, e.g., *U.S. v. Ready,* 82 F.3d 551, 557 (2d Cir. 1996) (remanded: defendant did not waive right to appeal allegedly improper restitution award where plea agreement did not unambiguously state that even an illegal award would not be appealed); *U.S. v. Gonzalez,* 981 F.2d 1037, 1038 (9th Cir. 1992) (although defendant waived right to appeal, merits panel will consider whether government breached plea agreement by opposing reduction for acceptance of re-

sponsibility); *U.S. v. Rutan,* 956 F.2d 827, 829–30 (8th Cir. 1992) (despite appeal waiver, defendant can still appeal sentence not in accordance with negotiated agreement and can challenge illegal sentence under 28 U.S.C. §2255); *U.S. v. Navarro-Botello,* 912 F.2d 318, 321 (9th Cir. 1990) ("waiver of the right to appeal would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement). Cf. *U.S. v. Catherine,* 55 F.3d 1462, 1464–65 (9th Cir. 1995) (where plea agreement specified that defendant waived right to appeal sentence within certain offense level and criminal history range, waiver did not cover appeal of restitution order that is separately calculated).

The First Circuit agreed with the previous cases regarding when a waiver may be unenforceable, but allowed for other potential grounds: "[I]f denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. As a subset of this premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing." The court used as examples sentences tainted by constitutionally impermissible factors or ineffective assistance of counsel, and sentences that exceed the maximum lawful penalty or violate a material term of the plea agreement. The court added that this "general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver . . . will be applied sparingly and without undue generosity." *U.S. v. Teeter,* 257 F.3d 14, 25–26 (1st Cir. 2001) (appeal allowed because, although plea agreement contained waiver, the court never discussed waiver provision as required by Rule 11(c)(6) and, in fact, twice asked defendant if she understood she had a right to appeal sentence). See also *Khattak,* 273 F.3d at 563 (endorsing *Teeter* approach, which "provide[s] some guidelines for determining when a particular sentencing error may warrant vacating an otherwise valid waiver of appeal. But the governing standard to apply in these circumstances is whether the error would work a miscarriage of justice.").

Note that the Ninth Circuit held that if one aspect of the sentence is not in accordance with the plea agreement, a waiver of appeal is no longer valid and defendant may appeal the entire sentence, not just the one aspect. *U.S. v. Haggard,* 41 F.3d 1320, 1325 (9th Cir. 1994) (where defendant waived right to appeal sentence that was within guideline range but district court departed upward, defendant could appeal factors involved in calculation of guideline range as well as the departure).

Some circuits have held that a defendant can also waive the right to collaterally appeal a sentence under 28 U.S.C. §2255, although claims based on ineffective assistance of counsel or involuntariness of the waiver might still be brought. See, e.g., *Garcia-Santos v. U.S.,* 273 F.3d 506, 508 (2d Cir. 2001) ("The reasons for enforcing waivers of direct appeal . . . lead us to the same conclusion as to waivers of collateral attack under §2255."); *U.S. v. Cockerham,* 237 F.3d 1179, 1181–87 (10th Cir. 2001) (may be waived except for "the right to bring a §2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver"); *DeRoo v. U.S.,* 223 F.3d 919, 923 (8th Cir. 2000) (valid waiver will be upheld, but defendant cannot waive right to appeal a sentence that is illegal or violates the plea

agreement or to appeal on basis of ineffective counsel); *Jones v. U.S.,* 167 F.3d 1142, 1144–45 (7th Cir. 1999) ("waivers are enforceable as a general rule; the right to mount a collateral attack pursuant to §2255 survives only with respect to those discrete claims which relate directly to the negotiation of the waiver," such as ineffective assistance of counsel or involuntariness); *Watson v. U.S.,* 165 F.3d 486, 489 (6th Cir. 1999) ("we hold that a defendant's informed and voluntary waiver of the right to collaterally attack a sentence in a plea agreement bars such relief"); *U.S. v. Wilkes,* 20 F.3d 651, 653 (5th Cir. 1994) ("an informed and voluntary waiver of post-conviction relief is effective to bar such relief. Such a waiver may not always apply to a collateral attack based upon ineffective assistance of counsel," however); *U.S. v. Abarca,* 985 F.2d 1012, 1014 (9th Cir. 1993) ("Like the right to bring a direct appeal of his sentence, the right . . . [to bring] a collateral attack is statutory. . . . A knowing and voluntary waiver of a statutory right is enforceable," but a claim of ineffective assistance or involuntariness of waiver might be allowed). Cf. *Davila v. U.S.,* 258 F.3d 448, 451 (6th Cir. 2001) (holding that defendant had waived his right to bring claim of ineffective assistance of counsel under §2255: "When a defendant knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bringing a claim of ineffective assistance of counsel based on 28 U.S.C. §2255.").

B. Burden of Proof

Generally, the burden of proof for all factual matters at sentencing is preponderance of the evidence, the burden is on the government to establish the initial offense level, and the burden is then on the party seeking any adjustment to the offense level. See, e.g., *U.S. v. Salmon,* 948 F.2d 776, 778–79 (D.C. Cir. 1991); *U.S. v. Fonner,* 920 F.2d 1330, 1333 (7th Cir. 1990); *U.S. v. Alfaro,* 919 F.2d 962, 965 (5th Cir. 1990); *U.S. v. Ocasio,* 914 F.2d 330, 332–33 (1st Cir. 1990); *U.S. v. Williams,* 905 F.2d 217, 218 (8th Cir. 1990); *U.S. v. Frederick,* 897 F.2d 490, 491–93 (10th Cir. 1990) [3#3]; *U.S. v. Rodriguez,* 896 F.2d 1031, 1032–33 (6th Cir. 1990) [3#3]; *U.S. v. Alston,* 895 F.2d 1362, 1373 (11th Cir. 1990) [3#5]; *U.S. v. Kirk,* 894 F.2d 1162, 1163–64 (10th Cir. 1990) [3#1]; *U.S. v. Howard,* 894 F.2d 1085, 1088–90 (9th Cir. 1990) [3#1]; *U.S. v. McDowell,* 888 F.2d 285, 290–91 (3d Cir. 1989) [2#17]; *U.S. v. Guerra,* 888 F.2d 247, 250 (2d Cir. 1989); *U.S. v. Urrego-Linares,* 879 F.2d 1234, 1238–39 (4th Cir. 1989) [2#10]. But cf. *U.S. v. Restrepo,* 884 F.2d 1294, 1296 (9th Cir. 1989) (burden on defendant to prove it is "clearly improbable" weapon connected to offense so as to avoid enhancement under §2D1.1(b)(1)) [2#13]; *U.S. v. McGhee,* 882 F.2d 1095, 1097–99 (6th Cir. 1989) (same) [2#12]. The Commentary to §6A1.3 was amended Nov. 1991 to indicate the Sentencing Commission's approval of the preponderance standard for "resolving disputes regarding application of the guidelines to the facts of a case."

Several circuits have held that a district court's discretionary decision of whether to grant or deny a reduction for acceptance of responsibility under §3E1.1 is entitled to even more deference. See, e.g., *U.S. v. Anderson,* 174 F.3d 515, 525 (5th Cir.

1999) ("We will affirm a sentencing court's decision not to award a reduction under U.S.S.G. §3E1.1 unless it is 'without foundation,' a standard of review more deferential than the clearly erroneous standard."); *U.S. v. Bennett,* 161 F.3d 171, 196 (3d Cir. 1998) ("the District Court's decision whether to grant the adjustment is entitled to 'great deference' on review because '[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility.' U.S.S.G. §3E1.1 cmt. (n.5)"); *U.S. v. Ngo,* 132 F.3d 1231, 1233 (8th Cir. 1997) (§3E1.1 factual determination "is entitled to great deference . . . [and] should only be reversed if it is so clearly erroneous as to be without foundation").

The Supreme Court held that a sentencing court may not draw adverse inferences from a defendant's use of the Fifth Amendment to remain silent during sentencing. The district court erred by reaching its determination of drug quantity partly by drawing an adverse inference from defendant's failure to testify at sentencing. *Mitchell v. U.S.,* 119 S. Ct. 1307, 1311–16 (1999), *rev'g* 122 F.3d 185 (3d Cir. 1997) [10#4].

The Ninth Circuit held that a preponderance standard is required for factors that would enhance a defendant's sentence but emphasized that such a standard is a "meaningful" one: it is a "misinterpretation [of the preponderance test] that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *U.S. v. Restrepo,* 946 F.2d 654, 661 (9th Cir. 1991) (en banc) [4#9], replacing partially withdrawn opinion at 903 F.2d 648 (9th Cir. 1990) [3#7].

The Eleventh Circuit agrees that "the preponderance standard is not toothless. It is the district court's duty to ensure that the Government carries this burden by presenting reliable and specific evidence." *U.S. v. Lawrence,* 47 F.3d 1559, 1566 (11th Cir. 1995). See also *U.S. v. Wise,* 976 F.2d 393, 402–03 (8th Cir. 1992) (en banc) (preponderance standard "is not without rigor. It certainly does not relieve the sentencing court of the duty of exercising the critical fact-finding function that has always been inherent in the sentencing process. . . . [I]f the probation officer and the prosecutor believe that the circumstances of the offense . . . merit a lengthier sentence, they must be prepared to establish that pertinent information by evidence adequate to satisfy the judicial skepticism aroused by the lengthier sentence that the proffered information would require the district court to impose.").

One court has suggested and one has held that extreme departures require a higher standard of admissibility for facts underlying the departure. See *U.S. v. St. Julian,* 922 F.2d 563, 569 n.1 (10th Cir. 1990) (court should consider whether higher standard warranted); *U.S. v. Kikumura,* 918 F.2d 1084, 1100–02 (3d Cir. 1990) (clear and convincing standard required) [3#15]. See also *U.S. v. Bertoli,* 40 F.3d 1384, 1409–10 (3d Cir. 1994) (remanded: departure in fine "by a factor in excess of 50" must meet clear and convincing standard); *U.S. v. Seale,* 20 F.3d 1279, 1288 (3d Cir. 1994) (remanded: following *Kikumura,* seven-fold, $1.5 million departure in fine must meet clear and convincing standard) [6#12].

The court in *Restrepo* suggested that a clear and convincing standard might be

appropriate when the relevant conduct would dramatically increase the sentence. 946 F.2d at 661. See also *U.S. v. Townley,* 929 F.2d 365, 370 (8th Cir. 1991). The Ninth Circuit later followed that suggestion and remanded a case where relevant conduct from an acquitted offense was used to raise defendant's sentencing range from 24–30 months to 63–78 months. The court held that, because of the shortness of the base guideline range, "a potential increase of 48 months satisfies the *Restrepo* extremely disproportionate impact test. Consequently, the district court erred in failing to apply the clear and convincing standard." *U.S. v. Hopper,* 177 F.3d 824, 833 (9th Cir. 1999). See also *U.S. v. Mezas de Jesus,* 217 F.3d 638, 642–43 (9th Cir. 2000) (remanded: following *Restrepo* and *Hopper* in holding that alleged, uncharged kidnapping, which would have raised sentence from 21–27 months to 57–71 months, had a disproportionate impact on the sentence and therefore had to be proved by clear and convincing evidence). In a case that was later vacated, *U.S. v. Valensia,* 222 F.3d 1173, 1178–82 (9th Cir. 2000), *vacated and remanded,* 121 S. Ct. 1222 (2001), the court discussed prior cases and identified six factors in considering whether enhancements have a disproportionate impact on sentence that may require clear and convincing standard. The court later relied on the *Valensia* factors and prior cases in deciding that if two of the factors—an increase in offense level greater than four and a more than doubling of the sentence—are present, enhancements must be proved by clear and convincing evidence. Furthermore, if the increase is caused by multiple enhancements, all must meet the heightened standard. *U.S. v. Jordan,* 256 F.3d 922, 928–29 (9th Cir. 2001).

Without specifying a particular standard, the Second Circuit has required "a more rigorous standard [when] determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence." *U.S. v. Shonubi,* 103 F.3d 1085, 1087–92 (2d Cir. 1997) (remanding finding of drug quantity because government did not provide "specific evidence" to connect defendant to particular quantity of drugs) [9#4]. The court later declared *Shonubi*'s mention of "a more rigorous standard" was "merely dictum" and reaffirmed the preponderance standard. However, the court stated that under some circumstances, such as "(i) an enormous upward adjustment (ii) for uncharged conduct (iii) not proved at trial and (iv) found by only a preponderance of the evidence, (v) where the court has substantial doubts as to the accuracy of the finding, the Court would be authorized to depart downward from the scheduled adjustment by reason of this extraordinary combination of circumstances." The court also noted that, when relevant conduct is the basis for an upward departure, any doubts the sentencing court had about the strength of the evidence could be resolved by its discretion as to whether and how much to depart. *U.S. v. Cordoba-Murgas,* 233 F.3d 704, 708–10 (2d Cir. 2000). Cf. *U.S. v. Alvarez,* 168 F.3d 1084, 1088 (8th Cir. 1999) (finding that four-fold increase in sentence, from 27–33 months to 121 months, was not so great as to require heightened burden of proof for relevant conduct); *U.S. v. Washington,* 11 F.3d 1510, 1516 (10th Cir. 1993) (although there are "strong arguments that relevant conduct causing a dramatic increase in sentence ought to be subject to a higher standard of proof,"

for calculating the guideline range "the issue of a higher than a preponderance standard is foreclosed in this circuit").

The burden is on defendant to prove that a prior sentence was unconstitutionally imposed and should not be considered for sentencing purposes. *U.S. v. Unger,* 915 F.2d 759, 761 (1st Cir. 1990) [3#14]; *U.S. v. Newman,* 912 F.2d 1119, 1122 (9th Cir. 1990) [3#14]; *U.S. v. Davenport,* 884 F.2d 121, 123–24 (4th Cir. 1989) [2#13].

When the plea agreement establishes facts relevant to sentencing, no further proof of those facts is required. *U.S. v. Parker,* 874 F.2d 174, 177–78 (3d Cir. 1989) [2#7]. And "facts that are uncontested at the sentencing hearing may be relied upon by the court and do not require production of evidence at the hearing." *U.S. v. O'Dell,* 965 F.2d 937, 938 (10th Cir. 1992).

See also section IX.D. Evidentiary Issues

C. Presentence Interview

Note: As amended effective Dec. 1, 1994, Fed. R. Crim. P. 32(b)(2) states: "Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation."

Previously, all circuits to rule specifically on the issue have held that defendants do not have a constitutional right to have an attorney present at the presentence interview. See *U.S. v. Hicks,* 948 F.2d 877, 885 (4th Cir. 1991) (no Sixth Amendment rights at presentence interview) [4#13]; *U.S. v. Woods,* 907 F.2d 1540, 1543 (5th Cir. 1990) (defendant's Fifth and Sixth Amendment rights not violated by not allowing counsel at presentence interview); *U.S. v. Jackson,* 886 F.2d 838, 845 (7th Cir. 1989) (no right to counsel at presentence interview). The Ninth Circuit used its supervisory power to hold that probation officers must honor requests by defendants to have an attorney present. *U.S. v. Herrera-Figueroa,* 918 F.2d 1430, 1433 (9th Cir. 1990) [3#16]. The Sixth Circuit agreed with the majority view that there is no Sixth Amendment right to counsel at a presentence interview but, citing the Ninth Circuit's approach, recommended that probation officers honor such a request from defendant or counsel. *U.S. v. Tisdale,* 952 F.2d 934, 940 (6th Cir. 1991) [4#14]. See also *U.S. v. Saenz,* 915 F.2d 1046, 1048 (6th Cir. 1990) (suggesting in dicta that defendant's attorney should not be excluded from presentence interview).

In the context of an ineffective assistance of counsel case, the Tenth Circuit agreed that defendants have no right to counsel at a presentence interview. See *U.S. v. Gordon,* 4 F.3d 1567, 1571–72 (10th Cir. 1993) ("Because the probation officer does not act on behalf of the government, we join those circuits that have concluded that the presentence interview is not a critical stage of the proceeding within the meaning of the Sixth Amendment. . . . Given that Defendant had no Sixth Amendment right to the presence or advice of counsel during the presentence interview, he cannot obtain relief for original counsel's failure to inform him of his Fifth Amendment right to refuse to answer the probation officer's presentence interview questions.").

The Second Circuit, using its supervisory authority, has required that defendants be given the opportunity to have counsel present at any debriefing by the government related to a possible substantial assistance reduction. "The special nature of a §5K1.1 motion demonstrates that the government debriefing interview is crucial to a cooperating witness. To send a defendant into this perilous setting without his attorney is, we think, inconsistent with the fair administration of justice. . . . Defendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of counsel's failure to attend could be explained to defendant. . . . Alternatively, waiver can be set forth expressly in the cooperation agreement." *U.S. v. Ming He,* 94 F.3d 782, 785–94 (2d Cir. 1996) [9#2].

Miranda warnings are not required at a routine presentence interview. *Hicks,* 948 F.2d at 885; *U.S. v. Cortes,* 922 F.2d 123, 126–27 (2d Cir. 1990) [3#20]; *U.S. v. Rogers,* 921 F.2d 975, 979–80 (10th Cir. 1990); *U.S. v. Davis,* 919 F.2d 1181, 1186–87 (6th Cir. 1990); *U.S. v. Jackson,* 886 F.2d 838, 841–42 n.4 (7th Cir. 1989).

Several courts have held that under the guidelines, the probation officer is still a neutral information-gatherer for the court, not an agent of the government. See, e.g., *Johnson,* 935 F.2d at 50; *U.S. v. Miller,* 910 F.2d 1321, 1326 (6th Cir. 1990); *Woods,* 907 F.2d at 1543–44; *U.S. v. Belgard,* 894 F.2d 1092, 1096–99 (9th Cir. 1990) [3#2]; *Jackson,* 886 F.2d at 844.

D. Evidentiary Issues

1. Hearsay

Generally, hearsay evidence may be used in sentencing, provided the evidence is reliable and the defendant is afforded the opportunity to challenge it. See, e.g., *U.S. v. Drew,* 200 F.3d 871, 879 (D.C. Cir. 2000) ("rules of evidence do not restrict the evidence a sentencing court may consider"); *U.S. v. Petty*, 982 F.2d 1365, 1367–69 (9th Cir. 1993) (Confrontation Clause does not apply, and court may consider reliable hearsay); *U.S. v. Silverman,* 976 F.2d 1502, 1513 (6th Cir. 1992) (en banc) (same; following Fed. R. Crim. P. 32 is sufficient) [5#4]; *U.S. v. Helton,* 975 F.2d 430, 434 (7th Cir. 1992) (Confrontation Clause not violated when defendant is given opportunity to rebut evidence); *U.S. v. Wise,* 976 F.2d 393, 396–403 (8th Cir. 1992) (en banc) (Confrontation Clause does not apply at sentencing; consider hearsay if parties have opportunity to present reliable information on disputed facts) [5#3]; *U.S. v. Figaro,* 935 F.2d 4, 8 (1st Cir. 1991) ("reliability" is the essential evidentiary requirement at sentencing); *U.S. v. Query,* 928 F.2d 383, 384–85 (11th Cir. 1991) (may "consider reliable hearsay evidence at sentencing" provided defendant given opportunity to challenge reliability) [4#2]; *U.S. v. Frondle,* 918 F.2d 62, 64–65 (8th Cir. 1990) (court is "entitled to consider uncorroborated evidence, even hearsay, provided that the defendant is given an opportunity to explain or rebut the evi-

dence"); *U.S. v. Byrd,* 898 F.2d 450, 452–53 (5th Cir. 1990) (defendant's confrontation and cross-examination rights not violated by reliance on hearsay in PSR if given opportunity to present evidence and witnesses); *U.S. v. Sciarrino,* 884 F.2d 95, 96–97 (3d Cir. 1989) (use of reliable hearsay does not offend due process) [2#13]; *U.S. v. Beaulieu,* 893 F.2d 1177, 1180–81 (10th Cir. 1990) (same) [2#20]. See also *U.S. v. Ushery,* 968 F.2d 575, 583 (6th Cir. 1992) (use of hearsay does not violate due process); USSG §6A1.3(a) ("the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy").

The Third Circuit agrees, but has held that hearsay statements relied on to make extreme departures must meet a higher, "intermediate standard" of admissibility. *U.S. v. Kikumura,* 918 F.2d 1084 (3d Cir. 1990) [3#15]. In a case that did not involve departure but where relevant conduct increased the guideline sentence from perhaps 30 years to 100 years, based solely upon a summary of interviews with a witness that was contained in the presentence report, the Seventh Circuit concluded that "a new and more critical look at [defendant's] relevant conduct is required." Whereas defendant's offenses of conviction involved 32.9 grams of crack, the presentence report used the information from the witness to calculate another 5103 grams of crack in relevant conduct. "While it's not required that a judge hear personally from witnesses under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here, 97 percent of a defendant's relevant conduct. Ms. Loonsfoot, the vehicle that skyrocketed Robinson into level 38, did not testify at the sentencing proceeding or, for that matter, at the trial. Her information came to the judge, untested by cross-examination, through the presentence report." *U.S. v. Robinson,* 164 F.3d 1068, 1070–71 (7th Cir. 1999).

The Third Circuit has also stated that the "sufficient indicia of reliability" standard in §6A1.3(a) "should be applied rigorously." *U.S. v. Miele,* 989 F.2d 659, 664 (3d Cir. 1993) [5#11]. The court remanded the case because the district court based the drug quantity on the testimony of an addict-informant without determining whether it met the reliability standard. *Id.* at 666–67 ("Because of the questionable reliability of an addict-informant, we think it is crucial that a district court receive with caution and scrutinize with care drug quantity or other precise information provided by such a witness"). See also *U.S. v. Simmons,* 964 F.2d 763, 776 (8th Cir. 1992) (remanded quantity determination—testimony by addict-informant "marred by memory impairment" was not sufficiently reliable); *U.S. v. Robison,* 904 F.2d 365, 371–72 (6th Cir. 1990) (same for addict-witness with admittedly "hazy" memory).

The Seventh Circuit agreed with the Third that "section 6A1.3(a)'s reliability standard must be rigorously applied," and also that addict-witness testimony should be closely scrutinized. *U.S. v. Beler,* 20 F.3d 1428, 1433–36 (7th Cir. 1994) (remanded: district court included as relevant conduct amounts from one witness's higher estimates, but did not "directly address the contradiction and explain why it credit[ed]

one statement rather than" lower estimates from that witness—"Before the court relies on the higher estimate, it must provide some explanation for its failure to credit the inconsistent statement"; also, "district court should have subjected any information provided by [addict-witness] to special scrutiny in light of his dual status as a cocaine addict and government informant") [6#12]. Cf. *U.S. v. Lee,* 68 F.3d 1267, 1276 (11th Cir. 1995) (affirmed: "mere fact that these witnesses were drug users does not automatically prove that they are unreliable. Lee has pointed to no evidence which indicates that these witnesses were addicts with impaired memories, which would call their testimony into question.").

2. Evidence from Another Trial

Several circuits have held that reliable evidence from the trial of a third party—usually a codefendant—may be used for sentencing purposes as long as defendant has notice and the opportunity to challenge it. See *Smith v. U.S.,* 206 F.3d 812, 813 (8th Cir. 2000) (two-level weapon enhancement based partly on evidence from codefendant's trial); *U.S. v. Linnear,* 40 F.3d 215, 219 (7th Cir. 1994); *U.S. v. Ramirez,* 963 F.2d 693, 708 (5th Cir. 1992); *U.S. v. McCarthy,* 961 F.2d 972, 978–79 (1st Cir. 1992); *U.S. v. Coonce,* 961 F.2d 1268, 1281 (7th Cir. 1992) (statements at others' guilty plea hearings); *U.S. v. Pimental,* 932 F.2d 1029, 1032 (2d Cir. 1991) (drug quantity); *U.S. v. Notrangelo,* 909 F.2d 363, 364–66 (9th Cir. 1990) (obstruction of justice and more than minimal planning) [3#10]; *U.S. v. Castellanos,* 904 F.2d 1490, 1496 (11th Cir. 1990) (dispute over quantity of drugs; vacating and clarifying earlier opinion at 882 F.2d 474) [3#9]; *U.S. v. Beaulieu,* 893 F.2d 1177, 1179–81 (10th Cir. 1990) (role in offense finding) [2#20]. See also *U.S. v. Blackwell,* 49 F.3d 1232, 1237–40 (7th Cir. 1995) (same for testimony from codefendants' sentencing hearings, but remanded because defendant did not receive "sufficient notice to allow him meaningfully to rebut the prior testimony") [7#8]; *U.S. v. Berzon,* 941 F.2d 8, 19–21 (1st Cir. 1991) (same; remanded because defendant was denied opportunity to challenge codefendant's testimony); *U.S. v. Reyes,* 930 F.2d 310, 316 (3d Cir. 1991) (same, but remanded because evidence presented was insufficient to support drug quantity finding). Cf. *U.S. v. Harris,* 56 F.3d 841, 843–44 (7th Cir. 1995) (affirmed: in pre-guidelines case, evidence from post-trial hearings of codefendants properly used at sentencing where defendant was on notice it might be used and "had an opportunity to respond to that evidence either in writing or at his sentencing hearing, and he could have called any witnesses or presented any evidence that might have cast doubt on the evidence").

The Eleventh Circuit held that the sentencing court should follow the procedural safeguards in §6A1.3. *Castellanos,* 904 F.2d at 1496. See also *U.S. v. Falesbork,* 5 F.3d 715, 722 (4th Cir. 1993) (affirmed use of "hearsay accounts of testimony presented at other trials as evidence of the conduct relevant to sentencing"—district court may consider reliable hearsay).

The Third Circuit held that "before a sentencing court may rely on testimonial or other evidence from another proceeding, the court must notify the defendant and

the Government of its intent to do so and must identify with particularity the evidence upon which it expects to rely and for what purpose." The court must also "ensure that the counsel for both sides can obtain the relevant transcripts" and "give the required notice sufficiently far in advance so as to ensure that counsel have a meaningful opportunity to review the transcripts (or continue the sentencing so that they can do so), and, when appropriate, to formulate a response." *U.S. v. Reynoso,* 254 F.3d 467, 474 (3d Cir. 2001) (despite inadequate notice affirming because defendant failed to show prejudice under plain error review).

3. Factual Disputes

Under Fed. R. Crim. P. 32(c)(1) (formerly 32(c)(3)(D)), disputes over facts relevant to the sentence must be specifically resolved before imposition of sentence. See also USSG §6A1.3. The following cases were remanded because the district court failed to resolve factual disputes: *U.S. v. Moore*, 977 F.2d 1227, 1228 (8th Cir. 1992); *U.S. v. Rosado-Ubiera,* 947 F.2d 644, 646 (2d Cir. 1991) [4#13]; *U.S. v. Edgecomb,* 910 F.2d 1309, 1313 (6th Cir. 1990); *U.S. v. Alvarado,* 909 F.2d 1443, 1444–45 (10th Cir. 1990); *U.S. v. Fernandez-Angulo,* 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc); *U.S. v. Rosa,* 891 F.2d 1071, 1072–73 (3d Cir. 1989) [2#18]; *U.S. v. Burch,* 873 F.2d 765, 767–68 (5th Cir. 1989) [2#7]. The decision to hold an evidentiary hearing on a disputed guideline issue is within the discretion of the district court. *U.S. v. Cantero,* 995 F.2d 1407, 1412–13 (7th Cir. 1993); *U.S. v. Harrison-Philpot,* 978 F.2d 1520, 1525 (9th Cir. 1992); *U.S. v. Gerante,* 891 F.2d 364, 367 (1st Cir. 1989).

The Seventh Circuit noted that former rule 32(c)(3)(D) "mandates specific findings only with respect to *factual* objections." However, amended Rule 32(c)(1)'s "use of 'matter controverted' refers to all of the defendant's objections to the presentence report under Rule 32(b)(6)(B) . . . [and] the district court must either make a finding with respect to each challenge or a determination that no finding is necessary, and it must append a written record of these findings and determinations to the presentencing report." The court held that a transcript of the sentencing hearing may be an adequate "written record." *U.S. v. Cureton,* 89 F.3d 469, 472–73 (7th Cir. 1996).

Note that, in addition to Rule 32(c)(1), new Rule 32(b)(6)(D) (effective Dec. 1, 1994) implies that courts should not resolve disputed issues of fact by adopting the presentence report: "Except for any unresolved objection [to the presentence report], the court may, at the hearing, accept the presentence report as its findings of fact." See also *U.S. v. Monus,* 128 F.3d 376, 396–97 (6th Cir. 1997) (remanded: stressing need for "literal compliance" with Rule 32 and stating that "[t]he law in this circuit clearly prohibits a court faced with a dispute over sentencing factors from adopting the factual findings of the presentence report without making factual determinations of its own"); *U.S. v. Romero,* 122 F.3d 1334, 1344 (10th Cir. 1997) (remanded: citing Rule 32(c)(1) in holding that district court must make findings on disputed matters and "may not satisfy its obligation by simply adopting the presentence report as its finding"). But cf. *U.S. v. Moser,* 168 F.3d 1130, 1132

(8th Cir. 1999) (under Rule 32(c)(1), defendant's objection that "a lot of facts" in government's brief supporting PSR were "highly speculative" was "insufficient to entitle him to a hearing because it lacks specificity," and because he "objected not to the facts [in the PSR] themselves but to the PSR's recommendation based on those facts, . . . the district court did not err in relying on the PSR's allegations of fact"); *U.S. v. Hall,* 109 F.3d 1227, 1234 (7th Cir. 1997) (affirmed: "Where the defendant objects but does not offer any evidence of the PSR's inaccuracy, the rule that the court must make findings as to disputed issues can be satisfied by reference to the PSR."); *U.S. v. Valencia,* 44 F.3d 269, 274 (5th Cir. 1995) (same).

Previously, the Fifth Circuit held that remand to resolve a dispute is not necessary if the district court expressly adopted the facts set forth in defendant's PSR. *U.S. v. Sherbak,* 950 F.2d 1095, 1099 (5th Cir. 1992) (in adopting PSR, court implicitly "weighed the positions of the probation department and the defense and credited the probation department's facts"). Cf. *U.S. v. Morgan,* 942 F.2d 243, 245–46 (4th Cir. 1991) (remanded: "if the district court decides to adopt the proposed findings in the presentence report as its resolution of disputed facts, the record must be clear regarding which disputed issues were resolved by the adoption"; statement that court adopted PSR "in toto" not sufficient); *U.S. v. Villarino,* 930 F.2d 1527, 1529 (11th Cir. 1991) (remand not necessary where district court adopted PSR and "meaningful appellate review" of court's disposition of disputes was possible).

The Ninth Circuit has held that "where the district court has received the PSR and the defendant's objections to it, allowed argument to be made and then adopted the PSR, no more is required under Rule 32(c)(3)(D)" (now Rule 32(c)(1)). However, "while a district court may adopt the factual findings of the PSR, it may not 'adopt conclusory statements unsupported by facts or the Guidelines.'" *U.S. v. Williams,* 41 F.3d 496, 499 (9th Cir. 1994). See also *U.S. v. Catano,* 65 F.3d 219, 230 (1st Cir. 1995) (remanded: "where the PSR findings themselves adequately set forth a meaningful rationale for the sentence, a district judge does not err in adopting such findings"; however, if those findings are inadequate, "it is necessary that the district judge make sufficient findings to articulate the rationale for the sentencing decision").

Other courts have held that the district court must make an independent finding when defendant disputes facts. See, e.g., *U.S. v. Pedraza,* 27 F.3d 1515, 1530–31 (10th Cir. 1994) (remanded: "When faced with specific allegations of factual inaccuracy by the defendant, the court cannot satisfy Rule 32(c)(3)(D) by simply stating that it adopts the factual findings and guideline application in the presentence report"); *U.S. v. Fortier,* 911 F.2d 100, 103 (8th Cir. 1990) ("court may rely solely upon a presentence report for findings relevant to sentencing only if the facts in the presentence report are not disputed by the defendant"); *U.S. v. Mandell*, 905 F.2d 970, 974 (6th Cir. 1990) (same).

The Supreme Court held that a sentencing court may not draw adverse inferences from a defendant's use of the Fifth Amendment to remain silent during sentencing. The district court erred by resolving a dispute over drug quantity partly by

drawing an adverse inference from defendant's failure to testify at sentencing. *Mitchell v. U.S.,* 119 S. Ct. 1307, 1311–16 (1999), *rev'g* 122 F.3d 185 (3d Cir. 1997) [10#4].

The Fifth Circuit has also held that the district court need not furnish tentative factual findings before a sentencing hearing to comply with §6A1.3, p.s., when it simply adopts the PSR. *U.S. v. Mueller,* 902 F.2d 336, 347 (5th Cir. 1990). Note, however, that the evidence in the PSR must be reliable. See *U.S. v. Patterson,* 962 F.2d 409, 414–15 (5th Cir. 1992) (remand required where court applied §3B1.1(c) enhancement based on recommendation in PSR addendum that relied on government attorney's unsworn statement).

As part of the defendant's right to challenge the reliability of facts in the PSR, the Tenth Circuit held that defendant "was entitled, upon request, to be informed by the probation office preparing his presentence report, of the factual basis or source of any information contained in the report which may have had an adverse effect on him during the sentencing process." *U.S. v. Wise,* 990 F.2d 1545, 1549–50 (10th Cir. 1992) (remanded: defendant should have been allowed to question probation officer about factual basis for conclusions in PSR) [5#11].

If resolution of a factual dispute would not change the criminal history category, and there would thus be no change in the sentence, the court need not resolve the dispute. *U.S. v. Fields,* 39 F.3d 439, 447 (3d Cir. 1994); *U.S. v. Woods,* 976 F.2d 1096, 1102 (7th Cir. 1992) [5#5]; *U.S. v. Williams,* 919 F.2d 1451, 1458 (10th Cir. 1990); *U.S. v. Lopez-Cavasos,* 915 F.2d 474, 476 (9th Cir. 1990). Disputes involving overlapping guideline ranges may also be left unresolved if the sentence would be the same regardless of the range chosen. See cases cited in Section IX.D. Overlapping Guideline Ranges Dispute.

The First and Ninth Circuits have remanded cases for sentencing courts to make appropriate findings when the courts did not attach a written record of findings to the PSR. See *U.S. v. Cruz*, 981 F.2d 613, 619 (1st Cir. 1992); *U.S. v. Roberson,* 917 F.2d 1158, 1161 (9th Cir. 1990) (modifying 896 F.2d 388) (failure to append findings is "ministerial error not requiring resentencing"—"the appropriate remedy is a limited remand . . . with instructions [to] append"). Other circuits have held, however, that remand for resentencing is not required if the district court resolves factual disputes but does not append its findings to the PSR. *U.S. v. Pless*, 982 F.2d 1118, 1128–29 (7th Cir. 1992) (limited remand to attach written findings); *U.S. v. Musa,* 946 F.2d 1297, 1307–06 (7th Cir. 1991) (government is directed to attach findings to PSR before it is sent to the Bureau of Prisons); *U.S. v. Wach,* 907 F.2d 1038, 1041 (10th Cir. 1990) (remanded this case but, in future, Rule 36 motion before district court is proper remedy).

The First Circuit held that evidence presented at trial does not control for sentencing purposes, and that courts are required "independently to consider proffered information that is relevant to . . . the sentencing determination." *U.S. v. Tavano,* 12 F.3d 301, 305–07 (1st Cir. 1993) (error to refuse to consider evidence proffered by defendant because it differed from evidence at trial) [6#9].

The Tenth Circuit held that defendants seeking to show that their circumstances are outside the "heartland" of a guideline have no right to discovery of the Sentenc-

ing Commission's data used to formulate the guideline; 18 U.S.C. §3553(b) states "the court shall consider only the sentencing guidelines, policy statements, and official commentary." *U.S. v. LeRoy*, 984 F.2d 1095, 1098 (10th Cir. 1993) (also noting "numerous and apparent" practical problems) [5#8].

4. Unlawfully Seized Evidence

The guidelines state that sentencing courts "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). Most of the circuits have held that unlawfully seized evidence that would be excluded at trial may be considered in sentencing under the guidelines. See *U.S. v. Brimah,* 214 F.3d 854, 858–59 (7th Cir. 2000); *U.S. v. Tauil-Hernandez,* 88 F.3d 576, 581 (8th Cir. 1996); *U.S. v. Kim,* 25 F.3d 1426, 1433–36 (9th Cir. 1994) [6#16]; *U.S. v. Montoya-Ortiz,* 7 F.3d 1171, 1181–82 (5th Cir. 1993); *U.S. v. Jenkins,* 4 F.3d 1338, 1344–45 (6th Cir. 1993) (distinguishing as dicta conclusion in *U.S. v. Nichols,* 979 F.2d 402, 410–11 (6th Cir. 1992) [5#5], that unlawfully seized evidence should not be used in setting base offense level) [6#3]; *U.S. v. Lynch,* 934 F.2d 1226, 1234–37 (11th Cir. 1991); *U.S. v. McCrory,* 930 F.2d 63, 68 (D.C. Cir. 1991) [4#1]; *U.S. v. Torres,* 926 F.2d 321, 325 (3d Cir. 1991) [4#1]. The D.C. Circuit noted that evidence that is unlawfully seized for the purpose of increasing the base offense level may require suppression at sentencing. *McCrory,* 930 F.2d at 69. See also *U.S. v. McIver,* 186 F.3d 1119, 1131–32 (9th Cir. 1999) (affirming use of suppressed evidence but indicating that it could not be used if it had been obtained for purpose of enhancing sentence).

The Second Circuit held that illegally seized evidence *must* be considered at sentencing, absent a showing that it was seized to enhance the sentence. *U.S. v. Tejada,* 956 F.2d 1256, 1263 (2d Cir. 1992) [4#18]. However, before a hearing on whether evidence was unlawfully seized in order to enhance the sentence can be held, the defendant must first establish a Fourth Amendment violation. *U.S. v. Arango,* 966 F.2d 64, 66–67 (2d Cir. 1992) (by pleading guilty, defendant waived right to object to illegal search of van and thus was not entitled to evidentiary hearing at sentencing).

The Tenth Circuit held that evidence seized in violation of state law that showed defendant continued similar criminal activity after his arrest may be used to deny a reduction for acceptance of responsibility. *U.S. v. Jessup,* 966 F.2d 1354, 1356–57 (10th Cir. 1992) (affirmed) [4#24].

On another evidentiary issue, the Second Circuit concluded that although "statements made in the course of a later-withdrawn guilty plea are not admissible at trial, *see* Fed. R. Evid. 410; Fed. R. Crim. P. 11(e)(6), that rule of evidence does not apply at sentencing, see Fed. R. Evid 1101(d)(3)." Thus, defendant's admission to possessing a firearm during a guilty plea hearing on a charge that was later dismissed could be used to support a §2D1.1(b)(1) enhancement at resentencing. *U.S.*

v. Simmons, 164 F.3d 76, 79 (2d Cir. 1998). See also *U.S. v. Medina-Estrada,* 81 F.3d 981, 986 (10th Cir. 1996) (same, as support for §3C1.1 enhancement for perjury).

E. Procedural Requirements

Statement of reasons: The requirement for a statement of reasons for the imposition of the particular sentence, 18 U.S.C. §3553(c), is met when the reasons appear on the record of the sentencing proceedings in open court. *U.S. v. Wivell,* 893 F.2d 156, 158 (8th Cir. 1990) [3#1]. However, in order to avoid unnecessary appeals, the Eighth Circuit advised sentencing courts to "refer to the facts of each case and explain why they choose a particular point in the sentencing range" to meet the requirement of 18 U.S.C. §3553(c)(1) for ranges exceeding twenty-four months. *U.S. v. Dumorney,* 949 F.2d 997 (8th Cir. 1991) [4#13]. See also *U.S. v. Wilson,* 7 F.3d 828, 839–40 (9th Cir. 1993); *U.S. v. Georgiadis,* 933 F.2d 1219, 1223 (3d Cir. 1991); *U.S. v. Chartier,* 933 F.2d 111, 117 (2d Cir. 1991); *U.S. v. Veteto,* 920 F.2d 823, 826 & n.4 (11th Cir. 1991). Cf. *U.S. v. Reyes,* 116 F.3d 67, 70 (2d Cir. 1997) ("sentencing court complies with §3553(c)(1) only when it includes in its statement of reasons some particularized discussion of those factors distinctive to the defendant that influenced the court's decision. Such factors may include, for example, the defendant's criminal history, the nature and severity of the offense, or the likelihood of recidivism"). But cf. *U.S. v. Knapp,* 955 F.2d 566, 568–69 (8th Cir. 1992) (court not required "to give an individualized statement of reasons when the same reasons may apply to two or more codefendants").

Note that some courts have concluded that the general requirement for a statement of reasons in §3553(c) is independent of the more specific requirements in subsections (1) & (2). *See, e.g., U.S. v. Underwood,* 938 F.2d 1086, 1091–92 (10th Cir. 1991) ("We agree with the courts that have held that §3553 subsection (c), without regard to subsections (c)(1) and (c)(2), requires a district court to make a general statement of its reasoning for the sentence imposed."); *U.S. v. Lockard,* 910 F.2d 542, 546 (9th Cir. 1990) ("We hold that 18 U.S.C. §3553(c) requires the district court to state, in open court, its general reasons for its imposition of the particular sentence, notwithstanding the absence of the conditions described in subsections (1) and (2).").

The Eleventh Circuit has directed district courts to "elicit fully articulated objections" to the court's findings of fact and conclusions of law in order to facilitate appellate review. *U.S. v. Jones,* 899 F.2d 1097, 1102–03 (11th Cir. 1990) [3#8]. See also *U.S. v. White,* 888 F.2d 490, 495–96 (7th Cir. 1989) (because of the "dominant role of the sentencing judge's findings and reasons," it will aid the appellate court "if district judges marshal their findings and reasons in sentencing cases in the same way they do when making oral findings and conclusions under Fed. R. Civ. P. 52(a)"). Cf. *U.S. v. Range*, 982 F.2d 196, 198 (6th Cir. 1992) (remanded: findings below were not sufficiently specific to each defendant to review enhancement); *U.S. v. Harris,* 959 F.2d 246, 264–65 (D.C. Cir. 1992) (remanded for verification of correct drug

amount where sentencing memorandum purported to rely on PSR but PSR contradicted memorandum).

Noting that the statute states that a court, "at the time of sentencing, shall state in open court" the reasons for the sentence, the Second Circuit held that "use of the words 'open court' unequivocally demonstrates Congress' purpose to have the sentencing court orally deliver its rationale to the defendant." Thus, written reasons placed in the record three days after sentencing, "regardless of [the] contents, . . . cannot satisfy the mandate of §3553." *Reyes,* 116 F.3d at 71 (vacated and remanded for resentencing).

Notice issues: Must a district court notify the defendant in advance that it intends to reject the PSR's recommendation for an acceptance of responsibility adjustment? In a case where the district court denied the reduction at the sentencing hearing, the Ninth Circuit held that the sentencing court "should have articulated its reasons and justifications for denying the §3E1.1 reduction, should have notified the defendant before the sentencing hearing of these tentative findings, and should have held a hearing on the . . . issue." *U.S. v. Brady,* 928 F.2d 844, 848 (9th Cir. 1991) [4#1]. In a later case, without citing *Brady,* the Ninth Circuit held that the district court's finding of no acceptance of responsibility was not clearly erroneous, even though the defendant claimed he had no notice of the court's intention to deny the adjustment, because the denial was "based on evidence clearly available to the defense counsel" and the defendant "had 'ample opportunity . . . to take up the matters, put on evidence, and present an argument.'" *U.S. v. Palmer,* 946 F.2d 97, 100 (9th Cir. 1991).

Other circuits have held that a district court need not give defendant advance notice that it intends to deny the reduction even though the PSR recommends the reduction and the government does not contest it. See *U.S. v. Giwah,* 84 F.3d 109, 113 (2d Cir. 1996) ("Guidelines make clear that a guilty plea does not entitle the defendant to an acceptance reduction and that the defendant must prove to the court that he or she has accepted responsibility"); *U.S. v. Patrick,* 988 F.2d 641, 645–46 (6th Cir. 1993) (affirmed, specifically rejected *Brady*) [5#13]; *U.S. v. Saunders,* 973 F.2d 1354, 1364 (7th Cir. 1992) (affirmed: "inclusion of [probation officer's] *recommendation* in the [presentence] report, by definition, gave Saunders notice that it was an open question at the sentencing hearing"); *U.S. v. McLean,* 951 F.2d 1300, 1302–03 (D.C. Cir. 1991) (PSR indicated acceptance of responsibility would be considered—defendant has burden of showing he accepted responsibility); *U.S. v. White,* 875 F.2d 427, 431–32 (4th Cir. 1989) (defendant was on notice that evidence surrounding obstruction might be introduced). Cf. *U.S. v. Rivera,* 96 F.3d 41, 43 (2d Cir. 1996) ("We do not agree . . . that the sentencing court must disclose an intention not to follow a recommendation contained in the PSR. . . . [S]uch notice is not required since the PSR is only a recommendation, and the defendant has no justifiable expectation that the recommendation will be followed"; however, probation officer's oral statement to court advising against following officer's written recommendation should be disclosed to defendant).

The Fifth Circuit upheld a denial of the §3E1.1 reduction and the imposition of a

§3C1.1 obstruction enhancement, without notice before the sentencing hearing and contrary to the PSR, because both were based on a letter defendant had sent (without his counsel's knowledge) to the sentencing judge. "We hold that, at least if the defendant has actual knowledge of the facts on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of the grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and U.S.S.G. §6A1.3." The court also stated that "[t]he Guidelines themselves put defense counsel on notice that all possible grounds for enhancement or reduction are on the table at a sentencing hearing. That notice satisfies Rule 32(a) and U.S.S.G. §6A1.3." *U.S. v. Knight,* 76 F.3d 86, 88–89 (5th Cir. 1996). See also *U.S. v. Guthrie,* 144 F.3d 1006, 1012 (6th Cir. 1998) (affirming §2F1.1(b)(3)(B) enhancement and alternative calculation of loss that were not in PSR: "We decline to extend the *Burns* notice requirement to include either a district court's application of a sentencing enhancement contained in the guideline for which a defendant is sentenced, or to a district court's alternative determination of the amount of loss.").

Two courts have upheld role in offense adjustments where defendant did not receive advance notice, concluding that the requirement for notice of departures mandated by *Burns v. U.S.,* 501 U.S. 129 (1991), does not apply to adjustments. See *U.S. v. Adipietro,* 983 F.2d 1468, 1473–74 (8th Cir. 1993) (PSR recommended enhancement under §3B1.1(c), court sua sponte enhanced under §3B1.1(b)—"fact that the presentence report provides a section pertaining to 'adjustment for role in the offense' constitutes sufficient due process notice"); *U.S. v. Canada,* 960 F.2d 263, 266–67 (1st Cir. 1992) (PSR made no recommendation as to role, court imposed §3B1.1(b) enhancement—"the guidelines themselves provide notice . . . of the issues about which [defendant] may be called upon to comment"). See also *U.S. v. Rodamaker,* 56 F.3d 898, 903–04 (8th Cir. 1995) (affirmed: defendant not entitled to advance notice that court would deny PSR recommendation for §3B1.2(b) adjustment where defendant "was fairly on notice" that it could be denied).

However, the Second Circuit held that a defendant was entitled to notice before the sentencing hearing that the district court planned to sentence her under a harsher guideline than that used in the presentence report. Remanding, the court concluded that because the factors that determined which guideline section to use were "reasonably in dispute," §6A1.3(a), defendant "was entitled to advance notice of the district court's ruling and the guideline upon which it was based." *U.S. v. Zapatka,* 44 F.3d 112, 115–16 (2d Cir. 1994) [7#5]. See also *U.S. v. Bartsma,* 198 F.3d 1191, 1199–1200 (10th Cir. 1999) (remanded: "the *Burns* rationale applies when a district court is considering imposing a sex offender registration requirement as a special condition of supervised release, and the condition is not on its face related to the offense charged"); *U.S. v. Jackson,* 32 F.3d 1101, 1106–09 (7th Cir. 1994) (remanding sua sponte abuse of trust adjustment at sentencing hearing because defendant had no notice it was contemplated—"When the trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing . . . fails to satisfy the dictates of Rule

32") (note: although concurring in the result, two judges on the panel did not join this part of the opinion).

Other: The Seventh Circuit advised that where a defendant has been convicted on one count of an indictment before conviction on the other counts, the district court should not sentence the defendant until all counts have been resolved, because the guidelines require that the combined offense level for multiple counts be determined under §3D1.1. *U.S. v. Kaufmann,* 951 F.2d 793, 795–96 (7th Cir. 1992) [4#14].

With enhancements, a defendant's offense level may exceed 43, the maximum in the sentencing table. In such a case, the final offense level will be 43. See USSG Ch.5, Pt.A, comment. (n.2). Two circuits have rejected claims that a court should stop the calculation at level 43 before applying the §3E1.1 reduction for acceptance of responsibility to avoid rendering the reduction valueless. See *U.S. v. Houser,* 70 F.3d 87, 91–92 (11th Cir. 1995) (affirmed: proper to increase offense level to 46 after four-level enhancement under §3B1.1(a) before reducing by three for acceptance of responsibility—that follows steps set forth in §1B1.1, and Note 2 of Ch.5, Pt.A indicates that guidelines contemplate possible offense levels above 43); *U.S. v. Caceda,* 990 F.2d 707, 709–10 (2d Cir. 1993) (affirmed: proper to increase offense level to 45 after two-point increase for role in offense before reducing for acceptance of responsibility).

See section I.C for some issues regarding resentencing after remand

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

In 1987, Fed. R. Crim. P. 35(a) was amended to delete the provision allowing district courts to "correct an illegal sentence at any time." The current version refers to correcting illegal sentences "on remand." However, several courts held that district courts retained inherent authority to correct illegal sentences in some situations despite the amendment. The Seventh Circuit held it was proper for a district court to act on its own motion and vacate a sentence two weeks after it was imposed where the district court realized its grounds for departure in the original sentence were not proper. *U.S. v. Himsel,* 951 F.2d 144, 144–47 (7th Cir. 1991).

The Fourth Circuit has allowed a "very narrow" exception to Fed. R. Crim. P. 35 to correct "an acknowledged and obvious mistake" made by a district court in imposing a guideline sentence, but "only during that period of time in which either party may file a notice of appeal." The court had to remand for resentencing in the defendant's presence, however, because the correction increased the penalty. *U.S. v. Cook,* 890 F.2d 672, 674–75 (4th Cir. 1989) [2#17]. Accord *U.S. v. Strozier*, 940 F.2d 985, 987 (6th Cir. 1991) (interpreting *Cook* as allowing corrections to conform sentence to *mandatory* guidelines provisions only); *U.S. v. Smith*, 929 F.2d 1453, 1457 (10th Cir. 1991) (district court has authority to rectify incorrect application of guidelines before defendant begins serving sentence and while government can file appeal); *U.S. v. Rico,* 902 F.2d 1065, 1068 (2d Cir. 1990) (same, even though here defendant had already been released for time served—court meant to impose sentence agreed to in written plea agreement, but received incorrect information at

sentencing hearing and mistakenly imposed shorter term). But cf. *U.S. v. Arjoon,* 964 F.2d 167, 170 (2d Cir. 1992) (no inherent authority to alter sentence merely because judge has change of heart).

However, the addition of Rule 35(c), effective Dec. 1, 1991, has restricted, if not eliminated, any inherent authority to correct sentences imposed after that date. Rule 35(c) allows a court, "within 7 days after the imposition of sentence, [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The Fourth Circuit recognized that this effectively codified its holding in *Cook,* but restricted any corrections to seven days following imposition of sentence. *U.S. v. Fraley*, 988 F.2d 4, 6–7 (4th Cir. 1993). See also *U.S. v. Weber,* 51 F.3d 342, 348–49 (2d Cir. 1995) (remanded: "Rule 35(c) effectively codified the rule laid down in *Rico* and *Cook*, but shortened the time for correcting sentences to seven days"; district court "had no jurisdiction to enter the corrected judgments under Rule 35(c) . . . beyond the seven-day period"); *U.S. v. Lopez,* 26 F.3d 512, 519–20 & n.8 (5th Cir. 1994) (seven-day limit constitutes jurisdictional restraint on district court's power and language strictly limits corrections); *U.S. v. Fahm,* 13 F.3d 447, 453–54 (1st Cir. 1994) (district court had no authority to correct mistake in offense level calculation three months after sentencing—"we conclude that the court had no inherent power to increase its original sentence. The 1991 amendment to Rule 35(c) was intended to codify the result reached in *Rico* and *Cook* but requires as well that the sentencing court act *within* the time frame prescribed in the rule"); *U.S. v. Daddino,* 5 F.3d 262, 265 (7th Cir. 1994) (no authority in Rule 35(c) or elsewhere to correct sentencing error two months after imposition).

The Ninth Circuit held that Rule 35(c) "authorizes the district court to correct obvious sentencing errors, but not to reconsider, to change its mind, or to reopen issues previously resolved under the Guidelines, where there is no error." *U.S. v. Portin,* 20 F.3d 1028, 1029–30 (9th Cir. 1994) (remanded: district court exceeded its authority by increasing defendants' fines when it granted their Rule 35(c) motion to reduce their prison sentences to conform to Rule 11(e)(1)(C) plea agreement—the original fines were properly imposed and neither defendants nor the government challenged them on appeal) [6#12]. See also *U.S. v. Soto-Holguin,* 163 F.3d 1217, 1221–22 (10th Cir. 1999) (remanded: Rule 35(c) precludes resentencing defendant because district court later decided that original sentence was too harsh and downward departure was warranted).

Similarly, Rule 35(c) precluded resentencing a defendant to a longer term for refusing to testify for the government after he had received a §5K1.1 departure based largely on his promise that he would testify against codefendants. *Lopez,* 26 F.3d at 515–22 (remanded: after 1987 and 1991 amendments to Rule 35, district court had no authority to change sentence that was properly imposed three months earlier). Cf. *U.S. v. Blackwell,* 81 F.3d 945, 948–49 (10th Cir. 1996) (remanded: neither Rules 35 or 36 nor inherent power authorized court to resentence defendant over two months later to avoid disparity with more culpable coconspirator who received lower sentence); *U.S. v. Abreu-Cabrera,* 64 F.3d 67, 72 (2d Cir. 1995) (remanded: because resentencing six months later to lower sentence "represented nothing more than a district court's change of heart as to the appropriateness of the sentence, it was

accordingly not a correction authorized by Rule 35(c)") [8#2]; *U.S. v. Werber,* 51 F.3d 342, 347–48 (2d Cir. 1995) (remanded: court has no power under Rule 36 or Rule 35(c) to lower sentence several months after imposition in order to give credit for time served after Bureau of Prisons refused to—even if court intended to give lower sentence originally, this was not a "clerical mistake" correctable under Rule 36).

The Second Circuit held that a complete failure by the district court to consider an applicable supervised release revocation policy statement was the kind of "clear error" allowing correction of sentence under Rule 35(c). "Because courts are required to consider the policy statements in Chapter 7 of the Guidelines, we find that the district court's failure to do so here constituted an 'incorrect application of the sentencing guidelines' within the meaning of Rule 35(a). Accordingly, it properly exercised its authority to correct its error within seven days after the imposition of the original sentence, pursuant to Rule 35(c)." The court noted that this was not a mere "change of heart" that would preclude application of Rule 35(c) under its holding in *Abreu-Cabrera* noted above. *U.S. v. Waters,* 84 F.3d 86, 89–90 (2d Cir. 1996) [8#8]. See also *U.S. v. Yost,* 185 F.3d 1178, 1181 (11th Cir. 1999) (affirmed: resentencing for "other clear error" under Rule 35(c) was proper where district court had "used the wrong guideline, an obvious error").

Rule 35(a) also serves to limit consideration of new matters on resentencing when the case has been remanded only for reconsideration of specific issues. See, e.g., *U.S. v. Gomez-Padilla,* 972 F.2d 284, 285–86 (9th Cir. 1992) (affirmed: where remand was limited to issue concerning defendant's role in offense, district court properly concluded that Rule 35(a) prohibited consideration of defendant's post-sentencing conduct at resentencing after remand); *U.S. v. Apple,* 962 F.2d 335, 336–37 (4th Cir. 1992) (as per revised Rule 35, proper to reconsider on remand only issues appellate court specified might be incorrect and not to consider mitigating rehabilitative conduct since the original sentencing). The Tenth Circuit held that Rule 35(a) precludes consideration of new conduct that occurred after the first sentencing even when the remand that was not limited to specific issues. *U.S. v. Warner,* 43 F.3d 1335, 1339–40 (10th Cir. 1994) (remanded: whether or not a defendant's post-sentencing rehabilitative conduct may ever provide ground for downward departure, it was improper to consider it when resentencing defendant after remand) [7#5]. See also cases in section I.C.

Note that Rule 35(c) "may operate as readily in favor of the defendant as against him" and result in a higher sentence after correction of a mistake. See, e.g., *Yost,* 185 at 1180–81 (in correcting a sentence under Rule 35(c), district court could reconsider decision not to include bank fraud as relevant conduct and use it in resentencing, which resulted in increase of sentence from fourteen to eighteen months); *U.S. v. Goldman,* 41 F.3d 785, 789 (1st Cir. 1994) (affirmed: where government discovered error in calculating career offender sentencing range, proper to increase sentence from 262 months to 360 months three days after sentencing).

Some circuits have held that "imposition of sentence" for purposes of Rule 35(c)'s seven-day limit refers to the oral pronouncement of sentence, not the date the written judgment is entered. See *U.S. v. Aguirre,* 214 F.3d 1122, 1125–26 (9th Cir. 2000)

("sentence is imposed at the time it is orally pronounced"); *U.S. v. Morrison,* 204 F.3d 1091, 1093 (11th Cir. 2000) (also noting that "when seven days are up the court loses jurisdiction to correct a sentence under [Rule 35(c)]," so where court set aside sentence within seven days after oral pronouncement but did not impose new sentence until thirteen days later, that sentence was invalid and original sentence must be reimposed); *U.S. v. Gonzalez,* 163 F.3d 255, 264 (5th Cir. 1998) ("'imposition' of sentence means the date of oral pronouncement"); *U.S. v. Layman,* 116 F.3d 105, 108 (4th Cir. 1997) ("sentence is imposed for purposes of Rule 35(c) when it is orally pronounced by the district court"); *Abreu-Cabrera,* 64 F.3d at 73–74 ("a sentence is imposed for purposes of Rule 35(c) on the date of oral pronouncement") [8#2]; *U.S. v. Townsend,* 33 F.3d 1230, 1231 (10th Cir. 1994) ("sentence is imposed upon a criminal defendant, for purposes of Rule 35(c), when the court orally pronounces sentence from the bench"). See also *Fahm,* 13 F.3d at 453 ("judgment and docket entry plainly reflect that the twenty-month prison sentence was 'imposed'" for purposes of Rule 35(c)). But see *U.S. v. Clay,* 37 F.3d 338, 340 (7th Cir. 1994) (stating that "date of 'imposition of the sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced"; when district court, after reconsidering original sentence and deciding not to change it, entered final judgment twelve days after oral pronouncement of sentence, "it acted within the time constraints of" Rule 35(c)).

The Ninth Circuit agrees that "when an unambiguous oral pronouncement of a sentence conflicts with a written one, the oral pronouncement controls." However, "when the oral sentence is illegal, the correction procedure of Rule 35(c) applies, and the correction supersedes the erroneous oral sentence." Thus, a district court had authority to impose a six-month sentence (for time served) two days after it had orally pronounced a sentence of straight probation, which was illegal because the offense was a Class B felony that required a term of imprisonment. *U.S. v. Colace,* 126 F.3d 1229, 1231 (9th Cir. 1997).

The Seventh Circuit held that former Rule 35 could not be used to resentence defendant under the guidelines when he originally could have been, but instead had been sentenced under pre-guidelines law. Defendant's conspiracy extended past Nov. 1, 1987, but no such finding was made at trial or sentencing. The court held "that the district court lacked jurisdiction under old Rule 35(a) to resentence Corbitt under the Sentencing Guidelines based on a new finding as to the termination date of his conspiracy." Rule 35(a) does not confer jurisdiction "to make new findings at the government's request in order to declare a defendant's theretofore unimpeachable sentence illegal." *U.S. v. Corbitt,* 13 F.3d 207, 212–14 (7th Cir. 1993).

Note that corrections or modifications of supervised release terms are covered under 18 U.S.C. §3583(e)(2) and Fed. R. Crim. P. 32.1(b) and are not limited by Rule 35(c). See *U.S. v. Navarro-Espinosa,* 30 F.3d 1169, 1171 (9th Cir. 1994) (where conditions of Rule 32.1(b) were met, Rule 35(c) did not preclude addition of conditions of supervised release that were inadvertently omitted at original sentencing hearing four weeks earlier).

For Rule 35(b), see section VI.F.4

X. Appellate Review

A. Procedure for Review of Departures

1. In General

Abuse of discretion: In *Koon v. U.S.,* 116 S. Ct. 2035 (1996) [8#7], the Supreme Court set the standard of review for departure decisions: "'The appellate court should not review the departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion. . . . A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. . . . Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. . . . [A] district court's departure decision involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization,"' . . . and as a consequence, de novo review is 'unlikely to establish clear guidelines for lower courts.'" *Id.* at 2043, 2046–47. Cf. *U.S. v. Morken,* 133 F.3d 628, 629 (8th Cir. 1998) (remanded: however, "a district court may not confine its range of comparison within the compass of its own sentencing experience . . . . On the contrary, existing reported cases represent benchmarks a district court must consider when contemplating a departure.").

The Court also adopted then-Chief Judge Breyer's opinion in *U.S. v. Rivera,* 994 F.2d 942, 949 (1st Cir. 1993), that "a sentencing court considering a departure should ask the following questions: '1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?' . . . If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" *Koon,* 116 S. Ct. at 2045.

In addition, the Court indicated that only the Sentencing Commission, not ap-

pellate courts, can categorically prohibit a particular factor from being considered as a basis for departure. "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. Rather, 18 U.S.C. §3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider 'only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.' The Guidelines, however, 'place essentially no limit on the number of potential factors that may warrant departure.' . . . The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it 'does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.' . . . Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission. . . . We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline." *Id.* at 2050–51. See also *U.S. v. Threadgill,* 172 F.3d 357, 375 (5th Cir. 1999) ("district court must not be precluded, categorically, from considering a factor unless the use of that factor is plainly foreclosed by the Guidelines"); *U.S. v. Mendoza,* 121 F.3d 510, 513–15 (9th Cir. 1997) (remanded: defendant's lack of knowledge of high purity of methamphetamine should not have been categorically excluded as possible basis for downward departure—"That ground does not involve one of the few factors categorically proscribed by the Sentencing Commission. . . . We are not at liberty, after *Koon*, to create additional categories of factors that we deem inappropriate as grounds for departure in every circumstance.") [10#2]; *U.S. v. Olbres,* 99 F.3d 28, 32–36 (1st Cir. 1996) (remanded: under §5H1.2, "job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration. . . . To add a judicial gloss equating job loss by innocent third parties with 'vocational skills' is to run headlong into the problem of judicial trespass on legislative prerogative against which the Supreme Court warned in *Koon*") [9#3].

The First Circuit concluded that *Koon* changed the three-step procedure for review of departures that it and other circuits have used: "*Koon* effectively merges the first and second stages of our departure analysis into one, and instructs that our review of the legal conclusions and factual determinations underlying the district court's departure decision be conducted under a unitary abuse-of-discretion standard. . . . [T]he analysis we must conduct in evaluating departure decisions entails reviewing, under an abuse of discretion standard, the district court's determination that the case presents features that make it sufficiently unusual to take it out of the applicable guideline's heartland. . . . Additionally, our analysis, like our pre-*Koon*

review process, requires us to assess the reasonableness of the departure taken." The court added that "encouraged" departures are essentially presumed to be reasonable: "Where the Commission has explicitly identified certain activities or conduct as a factor not adequately taken into account in its formulation of a particular guideline and that guideline does not incorporate that factor at all, we can be confident that the departure undertaken was not unreasonable. . . . Resort to the 'heartland' analysis generally reserved for discouraged departures is, therefore, unnecessary." *U.S. v. Cali,* 87 F.3d 571, 579–80 (1st Cir. 1996) (affirming departure under §3B1.1(b), comment. (n.2), for defendant who managed assets rather than people).

See also *Threadgill,* 172 F.3d at 374–76 (discussing circuit's post-*Koon* three-step procedure); *U.S. v. Collins,* 122 F.3d 1297, 1303 (10th Cir. 1997) (following *Koon* decision, establishing four-step review of departures); *U.S. v. Rybicki,* 96 F.3d 754, 757–59 (4th Cir. 1996) (after *Koon*, setting forth five-step analysis for district courts to follow and clarifying standards of review) [9#2]; *U.S. v. Barajas-Nunez,* 91 F.3d 826, 831 (6th Cir. 1996) ("the *Koon* Court's abuse of discretion standard replaces the three-part standard of review adopted by this court"); *U.S. v. Beasley,* 90 F.3d 400, 403 (9th Cir. 1996) ("*Lira-Barraza* has been effectively overruled. The only relevant inquiry in reviewing Sentencing Guideline departure cases is whether the trial court abused its discretion in imposing the sentence."). Cf. *U.S. v. Charry Cubillos,* 91 F.3d 1342, 1345 (9th Cir. 1996) (remanding for district court to reconsider departure: "After *Koon*, the district court is now required to consider the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole [to] decide whether [the factor] is sufficient to take the case out of the Guideline's heartland.'"); *U.S. v. Weise,* 89 F.3d 502, 506 (8th Cir. 1996) (stating that, even under the abuse of discretion standard from *Koon*, "[d]epartures must be limited . . . to those cases in which the defendant's 'circumstances differ significantly from the normal case'").

The Fourth Circuit, while noting *Koon's* abuse of discretion standard, emphasized that "the Court in *Koon* was quick to acknowledge, lest there be confusion on the point, that this standard would not shield erroneous legal conclusions from reversal. . . . Furthermore, the district court would abuse its discretion if it based its departure decision on a clearly erroneous factual finding. . . . Thus, the Court made clear that it intended to adopt a traditional abuse of discretion standard." *U.S. v. Barber,* 119 F.3d 276, 283 (4th Cir. 1997) (en banc) (also noting that in some situations, such as whether a guideline already accounts for a factor used for departure, appellate review "would amount to a de novo review"). See also *U.S. v. Winters,* 105 F.3d 200, 205–09 (5th Cir. 1997) (following *Koon* analysis in rejecting several downward departures).

In addition to the four factors set forth in *Rivera* and adopted in *Koon*—encouraged, discouraged, forbidden, and unmentioned—the Tenth Circuit recognized a fifth category of "analogous" factors. If a factor is mentioned in a particular guideline as a possible ground for enhancement or departure, and that factor is present for a defendant being sentenced under another guideline that does not list that fac-

tor, under appropriate circumstances a departure may be made by analogy. The court looked to the third paragraph of §5K2.0, which gives the example that "use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason." *U.S. v. Neal,* 249 F.3d 1251, 1256–59 (10th Cir. 2001) (affirmed: although guideline for possessing child pornography, §2G2.4, did not contain increase for child molestation, guideline for trafficking in child pornography, §2G2.2, did and departure by analogy was proper under facts of this case).

For review of the *extent* of a departure, see cases in section VI.D.

Pre-*Koon* review: Before *Koon,* as indicated above, the circuits had developed multistep procedures for reviewing departures. The First Circuit, for example, developed a three-step procedure in *U.S. v. Diaz-Villafane,* 874 F.2d 43, 49 (1st Cir. 1989) [2#6]. The court will (1) "assay the circumstances relied on by the district court in determining that the case is sufficiently 'unusual' to warrant departure," (2) "determine whether the circumstances . . . actually exist in the particular case," and (3) review "the direction and degree of departure . . . by a standard of reasonableness." This procedure has been adopted by some of the other circuits. See *U.S. v. Lira-Barraza,* 941 F.2d 745, 746–47 (9th Cir. 1991) (en banc) (dropping five-part test set forth in earlier opinion, at 897 F.2d 981) [4#6]; *U.S. v. Lang,* 898 F.2d 1378, 1379–80 (8th Cir. 1990) [3#6]; *U.S. v. White,* 893 F.2d 276, 277 (10th Cir. 1990); *U.S. v. Rodriguez,* 882 F.2d 1059, 1067 (6th Cir. 1989) [2#12]. See also *U.S. v. Valle,* 929 F.2d 629, 631 (11th Cir. 1991) (similar three-step analysis); *U.S. v. Gaddy,* 909 F.2d 196, 199 (7th Cir. 1990) (same). The Fourth Circuit uses a similar, four-part "test of 'reasonableness.'" See *U.S. v. Palinkas,* 938 F.2d 456, 461 (4th Cir. 1991) (citing *U.S. v. Hummer,* 916 F.2d 186, 192 (4th Cir. 1990), *vacated on other grounds*, 112 S. Ct. 1464 (1992)).

In its *Rivera* decision that was followed in *Koon*, the First Circuit revised the first part of the *Diaz-Villafane* procedure in order to provide more "leeway" for district courts in determining whether to depart. Originally it held that appellate review of the first part was "essentially plenary." The court limited plenary review to determine whether circumstances "are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all," or to determine "the nature of [a] guideline's 'heartland' (to see if the allegedly special circumstance falls within it)." Otherwise, if the district court's decision involves "a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent," the appellate court "should review the district court's determination . . . with 'full awareness of, and respect for, the trier's superior "feel" for the case,' . . . not with the understanding that review is 'plenary.'" The court also stated that "by definition" a case "that falls outside the linguistically applicable guideline's 'heartland' is . . . an 'unusual case'" and thus a "candidate for departure." *U.S. v. Rivera,* 994 F.2d 942, 947–52 (1st Cir. 1993) [5#14]. See also *U.S. v. Broderson,* 67 F.3d 452, 458–59 (2d Cir. 1995) (following *Rivera* departure analysis); *U.S. v. Canoy,* 38 F.3d 893, 908 (7th Cir. 1994) (citing *Rivera*

approvingly, concluding that because "district courts may have a better feel for what is or is not unusual or extraordinary . . . when a district court clearly explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal"); *U.S. v. Simpson,* 7 F.3d 813, 820–21 (8th Cir. 1993) (citing *Rivera* approvingly). Cf. *U.S. v. Monk,* 15 F.3d 25, 29 (2d Cir. 1994) ("when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered") [6#11].

2. Proper and Improper Grounds

The Supreme Court resolved a split in the circuits when it set forth a two-step inquiry to determine when a sentence based on both valid and invalid departure factors must be remanded. The Court held that an appellate court must answer the question: Would the district court have imposed the same sentence had it not relied on the invalid factors? If yes, then a remand is not required if the degree of departure was reasonable. If the answer is no or indeterminable, then remand is required without proceeding to the reasonableness inquiry. *Williams v. U.S.,* 112 S. Ct. 112, 1118–19 (1992) [4#17]. See also *U.S. v. White Buffalo,* 10 F.3d 575, 577–78 (8th Cir. 1993) (affirmed because valid ground "provided a legally sufficient justification for departure" and extent was reasonable) [6#9]; *U.S. v. Sellers*, 975 F.2d 149, 152 (5th Cir. 1992) (following *Williams,* remanded sentence partly based on invalid departure rather than "speculating" whether same sentence would have been imposed without invalid factor); *U.S. v. Estrada,* 965 F.2d 651, 654 (8th Cir. 1992) (following *Williams,* affirmed "minimal" upward departure of three months even though two of three grounds were invalid).

Before *Williams,* two circuits held that remand was automatic. See *U.S. v. Zamarripa,* 905 F.2d 337, 342 (10th Cir. 1990) [3#10]; *U.S. v. Hernandez-Vasquez,* 884 F.2d 1314, 1315–16 (9th Cir. 1989) [2#13]. Others have held that such departures may be upheld on a case-by-case basis if the remaining grounds warrant departure and it appears the same sentence would have been imposed absent improper factors. See *U.S. v. Jones,* 948 F.2d 732, 741 (D.C. Cir. 1991) [4#12]; *U.S. v. Glick,* 946 F.2d 335, 339–40 (4th Cir. 1991) [4#11]; *U.S. v. Alba,* 933 F.2d 1117, 1122 (2d Cir. 1991) [4#5]; *U.S. v. Diaz-Bastardo,* 929 F.2d 798, 800 (1st Cir. 1991) [4#3]; *U.S. v. Jagmohan,* 909 F.2d 61, 65 (2d Cir. 1990) [3#10]; *U.S. v. Franklin,* 902 F.2d 501, 508 (7th Cir. 1990) [3#8]; *Rodriguez,* 882 F.2d at 1068. Cf. *U.S. v. Michael,* 894 F.2d 1457, 1460 (5th Cir. 1990) (remanded because appellate court could not determine whether improper factor was "necessary part of the basis for departure") [3#2].

B. Discretionary Refusal to Depart Downward

1. Not Appealable

Every circuit has held that, unless the decision involves an incorrect application of the guidelines or is otherwise in violation of the law, a district court's *discretionary*

refusal to depart downward is not appealable. See *U.S. v. Ortez,* 902 F.2d 61, 63–64 (D.C. Cir. 1990); *U.S. v. Davis,* 900 F.2d 1524, 1529–30 (10th Cir. 1990); *U.S. v. Bayerle,* 898 F.2d 28, 30–31 (4th Cir. 1990) [3#4]; *U.S. v. Morales,* 898 F.2d 99, 101 (9th Cir. 1990) [3#4]; *U.S. v. Evidente,* 894 F.2d 1000, 1004 (8th Cir. 1990) [3#2]; *U.S. v. Denardi,* 892 F.2d 269, 272 (3d Cir. 1989) [2#19]; *U.S. v. Tucker,* 892 F.2d 8, 10–11 (1st Cir. 1989) [2#19]; *U.S. v. Draper,* 888 F.2d 1100, 1105 (6th Cir. 1989) [2#16]; *U.S. v. Franz,* 886 F.2d 973, 976–78 (7th Cir. 1989) [2#15]; *U.S. v. Colon,* 884 F.2d 1550, 1552–56 (2d Cir. 1989) [2#13]; *U.S. v. Fossett,* 881 F.2d 976, 978–79 (11th Cir. 1989) [2#13]; *U.S. v. Buenrostro,* 868 F.2d 135, 139 (5th Cir. 1989) [2#2]. See also *U.S. v. Dewire,* 271 F.3d 333, 337–40 (1st Cir. 2001) (affirmed: district court refusal to depart may not be appealed when refusal was based on allegedly erroneous mistake of fact).

Similarly, a discretionary refusal to make downward departure for substantial assistance under §5K1.1 is not appealable. See *U.S. v. Morris,* 139 F.3d 582, 584 (8th Cir. 1998); *U.S. v. DiMarco,* 46 F.3d 476, 477–78 (5th Cir. 1995); *U.S. v. Munoz,* 946 F.2d 729, 730–31 (10th Cir. 1991); *U.S. v. Richardson,* 939 F.2d 135, 139–40 (4th Cir. 1991); *U.S. v. Castellanos,* 904 F.2d 1490, 1497 (11th Cir. 1990).

Some courts have specifically stated that *Koon v. U.S.,* 518 U.S. 81 (1996), did not change this rule. See e.g., *U.S. v. Henderson,* 209 F.3d 614, 617 (6th Cir. 2000) ("*Koon* does not alter this court's precedent that generally precludes appeals from decisions not to depart from the guideline range"); *U.S. v. Brown,* 98 F.3d 690, 692 (2d Cir. 1996) ("Because *Koon* did not involve a judge's decision not to depart, it does not affect the law of this Circuit barring appeal where a district court decides not to depart.").

In a revocation of probation case, the Second Circuit extended this rule to discretionary refusals to depart from the Revocation Table, §7B1.4, p.s. *U.S. v. Grasso,* 6 F.3d 87, 88 (2d Cir. 1993).

If it cannot be determined whether the sentencing court exercised its discretion or mistakenly believed it could not depart, several circuits have held that the case will be remanded. See, e.g., *U.S. v. Scott,* 74 F.3d 107, 112 (6th Cir. 1996); *U.S. v. Mummert,* 34 F.3d 201, 205 (3d Cir. 1994); *U.S. v. Brown,* 985 F.2d 478, 481 (9th Cir. 1993); *U.S. v. Ritchey,* 949 F.2d 61, 63 (2d Cir. 1991); *U.S. v. Diegert,* 916 F.2d 916, 919 (4th Cir. 1990). Cf. *U.S. v. Russell,* 870 F.2d 18, 21 (1st Cir. 1989) (retaining appellate jurisdiction while asking district court for clarification of ambiguity).

However, the Tenth Circuit held that it would "no longer [be] willing to assume that a judge's ambiguous language means that the judge erroneously concluded that he or she lacked authority to downward depart. . . . Accordingly, unless the judge's language unambiguously states that the judge does not believe he has authority to downward depart, we will not review his decision. Absent such a misunderstanding on the sentencing judge's part, illegality, or an incorrect application of the Guidelines, we will not review the denial of a downward departure." *U.S. v. Rodriguez,* 30 F.3d 1318, 1319 (10th Cir. 1994) [7#1]. See also *U.S. v. Chase,* 174 F.3d 1193, 1195 (11th Cir. 1999) ("when nothing in the record indicates otherwise, we assume the sentencing court understood it had authority to depart downward");

U.S. v. Lainez-Leiva, 129 F.3d 89, 93 (2d Cir. 1997) ("in the absence of any remarks by the district judge indicating doubt on a point of law, or as to the options available, a reviewing court should not deem silence an indication that the district court misunderstood its authority" to depart); *U.S. v. Cureton,* 89 F.3d 469, 474–75 (7th Cir. 1996) ("for us to review a district court's decision not to depart as a determination that it lacks the legal authority to do so, there must be some indication in the record that the district court believed it did not possess the authority to depart from the guidelines range"); *U.S. v. Byrd,* 53 F.3d 144, 145 (6th Cir. 1995) (district court need "not affirmatively state that the judge knew he could depart downward but failed to do so"—appellate court will assume that sentencing judge exercised discretion and found departure unwarranted).

2. Extent of Departure Not Appealable

Most circuits have also held that the extent of a downward departure may not be appealed by the defendant. See *U.S. v. Hill,* 70 F.3d 321, 324 (4th Cir. 1995); *U.S. v. Alvarez,* 51 F.3d 36, 39 (5th Cir. 1995); *U.S. v. Bromberg,* 933 F.2d 895, 896 (10th Cir. 1991); *U.S. v. Hazel,* 928 F.2d 420, 424 (D.C. Cir. 1991); *U.S. v. Pomerleau,* 923 F.2d 5, 6–7 (1st Cir. 1991); *U.S. v. Vizcarra-Angulo,* 904 F.2d 22, 23 (9th Cir. 1990) [3#10]; *U.S. v. Gant,* 902 F.2d 570, 572 (7th Cir. 1990); *U.S. v. Parker,* 902 F.2d 221, 222 (3d Cir. 1990); *U.S. v. Left Hand Bull,* 901 F.2d 647, 650 (8th Cir. 1990); *U.S. v. Pighetti,* 898 F.2d 3, 4–5 (1st Cir. 1990) [3#4]; *U.S. v. Wright,* 895 F.2d 718, 721–22 (11th Cir. 1990) [3#4]. The Second Circuit added that "a simple failure to explain the extent of a downward departure is, without more, unreviewable on an appeal by a defendant." *U.S. v. Hargrett,* 156 F.3d 447, 450 (2d Cir. 1998).

This rule also applies to departures for substantial assistance under §5K1.1 and 18 U.S.C. §3553(e). *U.S. v. Doe,* 996 F.2d 606, 607 (2d Cir. 1993); *U.S. v. Gregory,* 932 F.2d 1167, 1168–69 (6th Cir. 1991); *U.S. v. Sharp,* 931 F.2d 1310, 1311 (8th Cir. 1991); *U.S. v. Dean,* 908 F.2d 215, 217–18 (7th Cir. 1990) [3#11]; *U.S. v. Erves,* 880 F.2d 376, 382 (11th Cir. 1989). See also *U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (may not review extent of departure even though defendant challenged role in offense enhancement that had resulted in higher offense level and from which district court departed "fifty percent of that called for under the guidelines").

However, several circuits have held that the starting point for departure is the guideline range and the range must be correctly calculated. Some circuits have upheld that right to appeal the extent of a departure when defendant claimed the guideline range was incorrectly set. See cases at end of section VI.D.

Note that the First Circuit has held that defendants may appeal the extent of a reduction made pursuant to Fed. R. Crim. P. 35(b). *U.S. v. McAndrews,* 12 F.3d 273, 276–79 (1st Cir. 1993) (Rule 35 appeals are governed by 28 U.S.C. §1291, not 18 U.S.C. §3742).

C. Factual Issues

A sentencing court's factual decisions used in determining adjustments, such as role in the offense, acceptance of responsibility, and obstruction of justice, are reviewed under the clearly erroneous standard. See, e.g., *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 557 (9th Cir. 1989) (minimal or minor participant) [2#9]; *U.S. v. Ortiz,* 878 F.2d 125, 126–27 (3d Cir. 1989) (aggravating role) [2#9]; *U.S. v. White,* 875 F.2d 427, 431 (4th Cir. 1989) (acceptance of responsibility) [2#7]; *U.S. v. Daughtrey,* 874 F.2d 213, 217–18 (4th Cir. 1989) (minimal or minor participant) [2#7]; *U.S. v. Franco-Torres,* 869 F.2d 797, 799–801 (5th Cir. 1989) (acceptance of responsibility, obstruction of justice) [2#4]; *U.S. v. Spraggins,* 868 F.2d 1541, 1543 (11th Cir. 1989) (acceptance of responsibility) [2#4]; *U.S. v. Buenrostro,* 868 F.2d 135, 138 (5th Cir. 1989) (minimal participant) [2#2]; *U.S. v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir. 1989) (role in offense) [2#2]. Cf. *U.S. v. Mimms*, 43 F.3d 217, 220 (5th Cir. 1995) ("findings of fact made during [an 18 U.S.C.] §3582(c)(2) proceeding [to reduce a sentence following a lowering of a guideline range] are reviewed under the clearly erroneous standard").

The Supreme Court held that appellate courts should review deferentially a district court's decision on whether prior offenses were consolidated for sentencing for purposes of §4A1.2, comment. (n.3). *Buford v. U.S.,* 121 S. Ct. 1276, 1278–81 (2001). See section IV.A.1.c.

See also section I.C. at "Resentencing after remand"

D. Overlapping Guideline Ranges Dispute

Most circuits have held that a dispute involving overlapping guideline ranges may be left unresolved and the sentence affirmed, but only if it appears that the same sentence would have been imposed regardless of the outcome of the dispute. See *U.S. v. Simpkins*, 953 F.2d 443, 446 (8th Cir. 1992); *U.S. v. De La Torre*, 949 F.2d 1121, 1122 (11th Cir. 1991); *U.S. v. Urbanek*, 930 F.2d 1512, 1516 (10th Cir. 1991); *U.S. v. Lopez*, 923 F.2d 47, 51 (5th Cir. 1991); *U.S. v. Dillon*, 905 F.2d 1034, 1037–38 (7th Cir. 1990) [3#9]; *U.S. v. Williams*, 891 F.2d 921, 923 (D.C. Cir. 1989) [2#19]; *U.S. v. Munster-Ramirez*, 888 F.2d 1267, 1273 (9th Cir. 1989); *U.S. v. Turner*, 881 F.2d 684, 688 (9th Cir. 1989) [2#11]; *U.S. v. White*, 875 F.2d 427, 432–33 (4th Cir. 1989); *U.S. v. Bermingham*, 855 F.2d 925, 926 (2d Cir. 1988) [1#14].

If it appears that the district court intentionally sentenced the defendant at the bottom of the higher of the disputed ranges, however, the case must be remanded for resolution of the dispute. See *U.S. v. Ortiz*, 966 F.2d 707, 717–18 (1st Cir. 1992); *U.S. v. Luster*, 896 F.2d 1122, 1130 (8th Cir. 1990) [3#3]; *U.S. v. Tetzlaff*, 896 F.2d 1071, 1073 (7th Cir. 1990); *Williams*, 891 F.2d at 923; *Bermingham*, 855 F.2d at 926. Cf. *U.S. v. Fuente-Kolbenschlag*, 878 F.2d 1377, 1379 (11th Cir. 1989) (overlapping ranges dispute appealable if either party alleges the guidelines were incorrectly applied, 18 U.S.C. §3742(a)(2)) [2#11]. Also, a court may not deliberately avoid resolving a factual dispute by sentencing within an overlap unless it makes "an ex-

press determination that the sentence would be the same under either of the potentially applicable ranges in the absence of any dispute as to which range applies." *U.S. v. Willard*, 909 F.2d 780, 781 (4th Cir. 1990) [3#11].

The Fifth Circuit relied on *Williams v. U.S.*, 112 S. Ct. 1112, 1120–21 (1992) [4#17], to hold that any error in calculating the defendant's criminal history points did not require remand for resentencing because it appeared "from the record as a whole, that 'the district court would have imposed the same sentence' and that the erroneous calculation of points 'did not affect the district court's selection of the sentence imposed.'" *U.S. v. Johnson*, 961 F.2d 1188, 1189 (5th Cir. 1992) (*Williams* superseded prior circuit precedent that required remand for all incorrect applications of the guidelines). The Fourth Circuit noted that the W*illiams* analysis did not apply to review of an obstruction of justice enhancement that was based on both valid and invalid grounds because once obstruction is found the enhancement is mandatory. *U.S. v. Ashers*, 968 F.2d 411, 414 (4th Cir. 1992) (remand not required) [5#2]. The Seventh Circuit reached an identical result, but did use the *Williams* harmless error analysis. *U.S. v. Jones*, 983 F.2d 1425, 1429–32 (7th Cir. 1993) (no remand required—although sentencing court may have relied on factual errors in PSR for §3C1.1 enhancement, but it also cited other, proper grounds).

The Ninth Circuit has noted that *Williams* "imposes a greater and more exacting burden" on the party attempting to show harmless error. "No longer is it sufficient to point to remarks by the district court indicating that it considered the appropriateness of the sentence under either range urged by the parties . . . . Under *Williams*, . . . the party defending the sentence[ ] must now show that the error did not affect the district court's selection of a specific sentence; that is, that even without the error the district court would have imposed the same sentence and not a lower sentence within the appropriate range." *U.S. v. Rodriguez-Razo*, 962 F.2d 1418, 1423–25 (9th Cir. 1992) (remanded: government failed to show district court would not have imposed lower sentence absent erroneous obstruction of justice enhancement).

In another case involving an incorrect guideline range resulting from a miscalculation of criminal history, the Third Circuit concluded that, even if the sentence imposed is within the correct guidelines range, it resulted from "an incorrect application of the guidelines" and 18 U.S.C. §3742(f)(1) requires remand. Here, however, defendant failed to object and remand was only required if the sentence was plain error and affected defendant's substantial rights. The court concluded that "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights. . . . Because the record does not permit us to find that the same sentence would have been imposed, we hold that Knight was prejudiced by the incorrect application of the Guidelines, and we therefore remand to allow the District Court to impose a sentence based upon a correct application of the Guidelines." *U.S. v. Knight,* 266 F.3d 203, 206–10 (3d Cir. 2001).

Note: The cases in this section apply to misapplications of the guidelines; a sentence imposed in violation of law must be remanded. See 18 U.S.C. §3742(f)(1).

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The Federal Judicial Center

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