Guideline Sentencing Update

volumes 1 through 6

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update

volumes 1 through 6

prepared by Jefri Wood, Publications & Media Division

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VOLUME 1 • NUMBER 1 • FEBRUARY 26, 1988

Constitutionality

Sentencing Guidelines held invalid on separation of powers grounds. A district court has held the Sentencing Guidelines invalid because the Sentencing Reform Act of 1984 violates the separation of powers doctrine by locating the Sentencing Commission in the Judicial Branch and mandating the service of at least three article III judges. The court found the Commission's duties and powers are executive, not judicial, in nature. Moreover, even if the Commission were removed from the Judicial Branch, the mandatory participation of judges on the Commission "impairs their ability to perform their article III duties" and threatens the "actual and apparent impartiality and independence" of the Judicial Branch by excessively mixing the judicial and executive functions. Because "it is impossible to exclude from prior actions of the Commission the influence of the three judge-Commissioners," the court held, the Guidelines are invalid. Defendants had also argued that the Act constituted an excessive delegation of legislative power. The court rejected this contention, finding that "[t]he Act provides ample statements of policy and specific rules to guide the Commission's exercise of the delegated authority."

The decision was on a pretrial motion after the two defendants had pled not guilty. Even though "[t]he Guidelines may never be invoked in this case," the court held the matter ripe for decision because the need for a determination was substantial and the issues were purely legal and thus fit for judicial action.

U.S. v. Arnold, No. 87-1279-B, slip op. (S.D. Cal. Feb. 18, 1988).

The motion in *Arnold* was argued before several other judges in the district, sitting in their individual capacities, who had similar issues pending in cases before them. An order has been issued in one of those cases, adopting the reasoning of *Arnold*.

U.S. v. Manley, No. 87-1290-R, slip op. (S.D. Cal. Feb. 18, 1988).

Defenders lack standing to challenge Guidelines' constitutionality. A district court has dismissed for lack of standing a declaratory judgment action brought by two public defender organizations challenging the constitutionality of the Sentencing Guidelines on non-delegation doctrine and separation of powers grounds. The court held the asserted grounds for standing, increased workload and potential ethical problems, were insufficient. Any workload effects were no greater than those caused to other groups of lawyers by other legislative changes, and the potential ethical problems were neither certain nor insoluble. The court noted "that a prompt resolution" of the issues raised by plaintiffs "is crucial," but determined "it is neither appropriate nor . . . expedient . . . to stretch traditional standing principles to accommodate this particular case."

Federal Defenders of San Diego v. U.S. Sentencing Commission, No. 87-3181, slip op. (D.D.C. Feb. 22, 1988).

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VOLUME 1 • NUMBER 2 • MARCH 2, 1988

Constitutionality

Constitutionality of Sentencing Guidelines upheld. A district court decision in the Southern District of California has upheld the Sentencing Guidelines against a constitutional challenge on nondelegation doctrine and separation of powers grounds. This decision is contrary to earlier rulings in the same district holding the Guidelines invalid because the Sentencing Reform Act of 1984 violates separation of powers. *See U.S. v. Arnold*, No. 87-1279-B (S.D. Cal. Feb. 18, 1988) (order granting motion to invalidate Guidelines); *U.S. v. Manley*, No. 87-1290-R (S.D. Cal. Feb. 18, 1988) (order adopting reasoning in *Arnold*).

Defendants argued that the Guidelines violate the nondelegation doctrine because Article I prohibits Congress from delegating the task of fixing penalties for federal crimes, a "core function" of the legislature, and, alternatively, that if Congress could delegate this power the delegation was overbroad. Rejecting both arguments, the court "decline[d] to find that some 'core functions' are by nature nondelegable," and even if they were "it is impossible for the court to conclude that sentencing is strictly a legislative 'core function'" because federal sentencing duties "traditionally have been distributed throughout all three branches of government." Moreover, Congress met the standard for a proper delegation by "set[ting] out intelligible standards and statements of purpose" to guide the Commission.

For purposes of its separation of powers inquiry, the court concluded that "the Commission is properly regarded as an independent commission within the judiciary," finding that "Congress expressly created an 'independent commission'—a body that . . . would assist in the primarily judicial task of sentencing without itself exercising the judicial power." This does not exceed the scope of the judicial power, the court found, because "it is well settled that Congress may authorize judges to perform tasks that aid in the performance of their judicial functions."

The court found that "the Act does not impair the functioning of the judiciary," because the "[p]lacement of judges on the Commission . . . does not compromise judicial independence or impartiality." Additionally, "the displacement of the three judges from their adjudicative capacities" to serve on the Commission "is not a sufficient intrusion upon the judiciary as a whole to warrant finding a functional impairment." Judge-Commissioners who return to the bench may avoid "[a]ny apparent residual prejudice or impartiality . . . through recusal and reassignment of cases."

The court rejected the argument that powers granted to the President by the Act give "the executive branch an unconstitutional measure of control over the Commission." The Act "spread[s] the selection power among all three branches of government," the court found, thereby guarding against "executive dominance." Moreover, "the power of the President to remove members of the Commission does not infringe upon an exclusively judicial function" because the Commission "performs a sentencing function which has never been regarded as exclusively judicial," and though the Commission is in the Judicial Branch, it "is not an exclusively judicial entity."

Finally, the court held that the presence of non-Article III members on the Commission does not violate separation of powers because "members of the Commission . . . do *not* decide cases or controversies and therefore do not partake of the Article III power." [Emphasis in original.]

U.S. v. Ruiz-Villanueva, No. 87-1296-E (S.D. Cal. Feb. 29, 1988) (memorandum decision and order).

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VOLUME 1 • NUMBER 3 • MARCH 16, 1988

Constitutionality

Guidelines upheld against constitutional, statutory challenge. A district court in E.D. La. has upheld the validity of the Sentencing Guidelines, holding that the statute creating the U.S. Sentencing Commission is constitutional, and that the Guidelines were adopted in accordance with the statutory mandate.

CONSTITUTIONALITY: Defendants attacked the constitutionality of the Sentencing Reform Act of 1984 on three grounds: Congress unlawfully delegated its authority to fix criminal penalties; the presence of judges on the Commission violates the separation of powers doctrine; and the President's power to remove Commissioners constitutes an impermissible control by the executive over the judiciary. In rejecting the delegation doctrine argument the court found that "the Act provides ample detail to confine the authority delegated to the Commission," and this was not a case that compelled revival of the delegation doctrine, "which has remained dormant since 1935." The presence of judges on the Commission does not violate separation of powers because constitutional history and prior case law demonstrate that "individual judges may exercise extra-judicial power while courts may not." In addition, the service of judges on the Commission does not impermissibly impair the functioning of the judiciary: the Commission is not involved in criminal investigation or enforcement and thus "there is no risk of partiality" on the part of judge-Commissioners; any lack of impartiality could be resolved through recusal; such recusal would not interfere with the work of the courts; and the service of judges on the Commission will not adversely affect the impartiality of the federal judiciary in construing or applying the Guidelines.

The President's power to remove Commission members does not constitute "prosecutorial control over the adjudicator" in violation of due process, the court held. The Commission's work "is *executive* in nature, rather than judicial," and sentencing is not strictly a judicial function. (Emphasis in original.) Nor does the removal power violate separation of powers: In assessing its constitutionality, "we look to the functions performed by the Commission. While the Commission is situated in the judicial branch, the duties imposed on the Commission are . . . executive in nature. Hence the removal power is properly vested in the Chief Executive."

STATUTORY CHALLENGES: The court found the Guidelines are not contrary to the enabling statute, and submissions to Congress by the Commission and the GAO were sufficient under the statute to trigger the November 1, 1987 effective date.

STANDING: The government contended that defendants lacked standing unless the court determined initially that defendants would have received a heavier sentence under the new sentencing law than before. The court rejected this argument, finding that even if the Guideline sentences would not be longer, defendants had a "personal stake" because the actual time served under the Guidelines would likely be greater because of the abolition of parole. Moreover, under the new sentencing law each defendant "faces a period of supervised release to which he would not otherwise be subject."

U.S. v. Chambless, No. 87-609 (E.D. La. March 9, 1988) (reasons for judgment).

Application to Pre-Guidelines Offenses

Trial courts lack authority to apply Sentencing Guidelines to offenses committed before November 1, 1987. A district court has denied a defendant's request to be sentenced under the Sentencing Guidelines for a crime committed before the Guidelines' effective date. Defendant asked to be sentenced under the Guidelines if the judge intended to impose a term of incarceration that exceeded the Guideline calculation that had been prepared in his case for information

and training purposes by the probation department. The court denied his request, stating that courts have "no inherent power to impose a sentence, absent legislative authority," and by statute the Guidelines do not apply to offenses committed before November 1, 1987. Therefore, "this court is without power to sentence [defendant] under the Guidelines, even if it were so to desire." The court also observed that the sentencing legislation and the Guidelines together comprise "a new *system* of sentencing," and therefore "it would be impossible to impose the guideline range sentence . . . without applying the rest of the provisions of the new sentencing system." (Emphasis in original.)

U.S. v. Kelly, No. 87-571 (S.D.N.Y. Feb. 25, 1988) (order). *Cf. U.S. v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1988) (provisions of Sentencing Reform Act of 1984 do not apply to defendant sentenced prior to effective date of Act); *U.S. v. Deckard*, 675 F. Supp. 1127, 1128-29 (N.D. Ill. 1987) (Sentencing Reform Act of 1984 may not be used to seek modification of sentence imposed prior to effective date of the Act).

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VOLUME 1 • NUMBER 4 • MARCH 29, 1988

Constitutionality

Placement of Sentencing Commission in judicial branch held severable from Sentencing Reform Act as Guidelines upheld against constitutional and statutory challenge. A district court in N.D. Ga. has upheld the constitutionality of the Sentencing Guidelines, holding that although the Sentencing Reform Act (SRA) establishes the Sentencing Commission as a judicial agency in violation of the separation of powers doctrine, the designation provision is severable from the Act. The court found that the President's power to remove Commissioners under the Act "establishes the Commission as an executive agency." Nonetheless, the court concluded that the remainder of the Act would be valid if it would continue to function in a manner consistent with congressional intent after the invalid designation provision was stricken. Finding that "[t]he legislative history of the SRA makes it plain that Congress was more concerned with sentence reform than with 'judicial' placement of the Commission," the court held that although "the Commission is impermissibly designated a judicial agency . . . this designation is severable from the Act."

The court also rejected defendants' contention that judicial membership on the Commission violated separation of powers: "[I]t is well-settled that Article III judges may, and do in certain instances, engage in non- (quasi-) judicial service." The court distinguished *In re Application of the President's Comm'n on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985), noting that the judicial members of the organized crime commission "were *de facto* required to adopt a pro-Government stance." In this case, however, "there is no equivalent danger that the judicial members of the Commission will adopt a partisan outlook on sentencing."

As to defendants' claims that Congress can never delegate the task of fixing criminal sanctions and that even if it could the delegation in this case was without sufficient guidance, the court held that "the delegation of power to the Commission is constitutionally valid." The court also rejected various statutory challenges to the Guidelines.

U.S. v. Erves, No. CR87-478A (N.D. Ga. Mar. 22, 1988) (order denying motion to preclude application of Sentencing Guidelines).

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VOLUME 1 • NUMBER 5 • APRIL 7, 1988

Constitutionality

Constitutionality of Commission upheld; another judge in the district disagrees, finds Guidelines legislatively invalid. A district judge in W.D. Mo. has held that "the Guidelines are not subject to valid challenge based on claims that (1) the Sentencing Commission lacks constitutional status or (2) there has been an unconstitutional delegation of legislative power." The opinion noted that three other judges of the district agreed with this conclusion. One other judge issued a written opinion dissenting from the conclusion, finding the manner in which Congress delegated power to the Commission to formulate the Guidelines violated the constitutional requirements of majority passage and presentment. Arguments were heard by seven judges of the district who are responsible for the processing of criminal cases.

The court declined to hold that Congress could not lawfully delegate the power to create the Guidelines, and noted that no other court has accepted a non-delegation challenge. In assessing the constitutional status of the Commission, the court concluded that while "the work of the Commission in carrying out the Congressional mandate can more conventionally be described as executive rather than judicial," voluntary service by judges in the executive branch is not unconstitutional and that characterizing the Commission as an executive agency "avoids any problem that would otherwise exist relating to the Presidential power of removal."

The judge also commented that there "are strong policy arguments and possibly constitutional arguments against" using preponderance of the evidence as the standard of proof for resolving contested facts in sentencing, and stated that he expects to continue using the clear and convincing evidence standard.

The dissenting judge found the Guidelines "should properly be categorized as 'legislation' rather than validly promulgated administrative rules." As such, the Guidelines are "constitutionally infirm" because they were not, as required by Article I, §§ 1 and 7 of the Constitution, passed by a majority of both houses of Congress and presented to the President. Moreover, Congress cannot delegate to an independent agency or commission the power to "'regulate' federal judges by enacting binding sentencing guidelines which restrict the sentencing discretion of Article III judges and which have the force and effect of law." Such a restriction could only be enacted through legislation.

U.S. v. Johnson, No. 87-00276-01 (W.D. Mo. Apr. 1, 1988) (memorandum and order); *U.S. v. Johnson*, No. 87-00276-01 (W.D. Mo. Apr. 5, 1988) (Wright, C.J., dissenting from result).

Guidelines held unconstitutional on due process, separation of powers grounds. A district court in W.D. Pa. has held that the Sentencing Guidelines violate the due process clause of the fifth amendment by mandating a procedure that unduly limits a defendant's right to present relevant evidence for a sentencing court's consideration. The court also held that the Sentencing Reform Act of 1984 violates the separation of powers doctrine.

Defendant contended that the guideline sentencing procedure would prevent the district court from according proper weight at sentencing to the individual circumstances of his case. The court agreed, finding that the "mechanical sentencing procedure" in the Guidelines "severely restrict[s] a district court's ability to individualize a defendant's sentence." Once the facts are found, the court noted, "the guidelines establish the sentencing range, not the judge." The court then found that the defendant has a due process right to "affect a court's assessment of a proper sentence," and that this right involves not just the "determination of the existence of facts," but also the

opportunity to influence "the weighing of facts as a whole to determine the appropriate sentence."

In determining what process was due the defendant, and whether the guideline procedures satisfied this right, the court applied the four-factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The court found that all four factors favored defendant, and held that the "guideline procedures applicable here do not adequately protect the due process right of defendant to present evidence and to challenge the basis of his sentence before a court which has the authority to weigh the evidence and determine an appropriate sentence."

On the separation of powers claim, the court adopted the reasoning of *U.S. v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988) (*see GSU* no. 1, Feb. 26, 1988), finding that the location of the Commission in the judicial branch is unconstitutional because the Commission's powers and duties are primarily executive. Moreover, even if the language placing the Commission in the judicial branch could be severed from the remainder of the Act, the mandatory service of three judges on the Commission "renders unconstitutional the Sentencing Reform Act of 1984 and the work product of the Commission, namely, the Sentencing Guidelines."

U.S. v. Frank, No. 87-226 (W.D. Pa. Mar. 30, 1988) (opinion and order).

Structure of Commission violates separation of powers. A district court in D. Colo. has held the Sentencing Guidelines invalid because the structure of the Sentencing Commission "mandates the constant involvement of Article III judges in an ongoing and continuous executive process" in violation of separation of powers. The court examined at length the separation of powers principle, the distribution of the sentencing power among the three branches of government, and the Commission's composition and functions. The court reasoned that by requiring judicial membership on a commission that "is clearly executive in nature," the Sentencing Reform Act of 1984 "radically undermines the concept of an impartial judiciary, free from executive or legislative interference." The "collaboration between the judiciary and the other branches of government the Act creates not only serves to tarnish the reputation of the judiciary as independent of and completely divorced from those other arms of government, but also in fact compromises its very independence." The court also considered and rejected a challenge to the Guidelines on delegation of powers grounds and added some "observations" on "a number of further problems with this Act which must be highlighted, but which have not been raised by defendant."

U.S. v. Smith, No. 87-CR-374 (D. Colo. Mar. 25, 1988) (memorandum opinion and order).

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VOLUME 1 • NUMBER 6 • APRIL 13, 1988

Constitutionality

Guideline sentencing provisions unconstitutional but severable. A district court in D. Minn. has held the Sentencing Guidelines unconstitutional on separation of powers grounds, but has determined that the Guidelines provisions are severable from the remainder of the Sentencing Reform Act and that other sections of the Act governing sentencing should be followed.

The court found the guideline sentencing provisions of the Act unconstitutional "both because they impermissibly grant substantive legislative power to the judicial branch . . . and because they require federal judges to perform duties which would substantially impair the ability of the judiciary to function in an impartial manner." Through the Sentencing Commission, "the judicial branch is directly given the authority to legislate. A review of the Sentencing Reform Act reveals Congress intended the Commission, in formulating the guidelines, to proceed in a non-judicial manner in performing what has historically been considered a uniquely legislative function—prescribing the punishment for crime." Furthermore, while the judicial branch may be granted non-judicial powers within the "carefully limited exception allowing the judiciary to exercise certain delegated authority to fashion rules of practice and procedure in the federal courts," the Guidelines are not limited to procedural rulemaking but constitute "an invalid exercise of substantive legislative power."

Characterizing the Commission as part of another branch would not save it, the court found, because judges may not perform non-judicial functions in either their judicial or individual capacities. Moreover, even if they could, the service of Article III judges on the Commission "seriously threatens the impartiality of the judicial branch because it could impermissibly bias, not only a judge who served on the Commission, but also other federal judges," thereby substantially impairing the function of the judiciary.

The court held, however, that the Guidelines are "severable from other sections of the Sentencing Reform Act and important sections remain valid." The court reasoned that "[t]he question of severing an unconstitutional provision turns largely on legislative intent, with a presumption favoring severability," and that by preserving the remainder of the Act "important purposes and goals relating to sentencing reform which Congress intended to advance will remain in effect." Accordingly, the court concluded it must follow the detailed sentencing standards and principles set forth in the Act, "must impose a 'real time sentence' and must state its reasons for imposing that sentence. Moreover, provisions of the Act providing for appellate review remain applicable."

This is the first decision reported in *Guideline Sentencing Update* in which the court severed the Guidelines and applied other sections of the Act in sentencing. Other judges who found the Guidelines invalid and have dealt with the issue of which sentencing law to apply have stated they would sentence defendants as if their conduct occurred prior to the effective date of the Guidelines. *See, e.g., U.S. v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988); *U.S. v. Tolbert*, No. 87-10091-01 (D. Kan. Apr. 8, 1988) (summarized below).

U.S. v. Estrada, No. CR 5-87-22 (D. Minn. Mar. 31, 1988) (memorandum opinion and order) (Heaney, J., sitting by designation).

Guidelines invalid on separation of powers grounds. A district court in D. Kan. has held the Guidelines invalid because they "were promulgated by a constitutionally flawed commission." Placement of the Commission in the judicial branch violates separation of powers "because it gives the judiciary substantive rulemaking ability beyond its limited authority to determine 'cases' and 'controversies'" and to formulate procedural rules. Furthermore, the Sentencing Reform Act "improperly gives the President removal

power over the commissioners in violation of the principles enunciated in" *Bowsher v. Synar*, 478 U.S. 714 (1986).

The court also "decline[d] to rewrite the Sentencing Reform Act in order to place the commission within the executive branch." Congress clearly intended the Commission to be in the judicial branch, the court found, and placing it in another branch would still present separation of powers problems because of the composition of the Commission. The mandatory participation of three judges "threatens the impartiality of judges on the commission as well as other federal judges," and thus "potentially impairs the proper functioning of the judiciary." Moreover, "service by *any* Article III judge on *any* commission, whose duty it is to legislate, offends Article III of the Constitution." (Emphasis in original.)

The court stated that defendant will be sentenced as if his criminal conduct occurred prior to the effective date of the Guidelines.

U.S. v. Tolbert, No. 87-10091-01 (D. Kan. Apr. 8, 1988) (memorandum and decision) (Kelly, J.).

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VOLUME 1 • NUMBER 7 • APRIL 28, 1988

Constitutionality

Sentencing Reform Act unconstitutional, but Guidelines will be used pending final decision on Act's validity. The district court of Maryland has held the Sentencing Reform Act of 1984 unconstitutional on separation of powers and due process grounds, but stayed the effect of its holding and will sentence defendants under the Guidelines pending a final determination of the Act's constitutionality. This appears to be the first instance of a court's finding the Act unconstitutional but deciding to apply the Guidelines. Oral argument in the case was heard by six judges of the court, and the opinion was signed by all judges sitting in the district. This also appears to be the first decision regarding the Act joined by all the judges of a district court.

The court began its separation of powers analysis by reasoning that when Congress sets "a range of potential sentences, it has created a sphere of discretionary power which is inherently judicial in nature. The Sentencing Reform Act and the mandatory guidelines promulgated thereunder so narrowly restrict the exercise of the courts' discretion that they effectively negate it." Thus, the court held, "the effect of the Act and the guidelines is to violate the separation of powers doctrine by transferring judicial power from the federal courts, whose independence of judgment is constitutionally secured, to the Sentencing Commission, whose fealty to Congress and the President is statutorily prescribed."

The court found that "[f]ormal placement of the Commission within the judicial branch . . . cannot alone save its constitutionality. . . . [T]he fact that at least one non-Article III Commissioner must concur in the promulgation of the guidelines and the other actions of the Commission" violates separation of powers. This conclusion contrasts with that in *U.S. v. Ruiz-Villanueva*, 680 F. Supp. 1411 (S.D. Cal. 1988) (*see GSU* no. 2, Mar. 2, 1988), where the court held the presence of non-Article III members does not violate separation of powers because Commissioners do not exercise Article III powers.

The court also noted that placing the Commission in the executive branch, as urged by the Department of Justice, would not resolve the separation of powers problem. There is "no theory under which the executive branch has any proper role in the establishment of statutory penalties or the *imposition* of individual sentences. The former is a legislative function, the latter a judicial one and neither may be performed by an executive agency." (Emphasis in original.)

The court found that a "related and equal concern" to separation of powers was "a broader problem of due process—a concern for the fair treatment of each defendant." Without finding a constitutional right to "individualized sentencing," the court stated that "a defendant being deprived of his liberty pursuant to a statute which sets a sentencing range is constitutionally entitled to an articulated exercise of discretion by the judge before whom he appears rather than to the mechanical application of formulae adopted by non-constitutional commissioners invisible to him and to the general public." The due process rights of "accountability, reason and a fair opportunity to be heard . . . cannot be replaced by any administrative code, however extensively considered or precisely drawn." Another court previously found a similar due process problem. *See U.S. v. Frank*, No. 87-226 (W.D. Pa. Mar. 30, 1988) ("mechanical sentencing procedure" which "severely restrict[s] a district court's ability to individualize a defendant's sentence" violates due process) *(see GSU* no. 5, Apr. 7, 1988).

Despite holding the Sentencing Reform Act unconstitutional, the court concluded it would, "out of respect for a Congressional enactment of such magnitude, stay the effect of this holding until the constitutionality of the Act has been finally decided. In the

interim we will sentence defendants committing offenses on or after November 1, 1987, under the Act."

U.S. v. Bolding, No. JFM-87-0540 (D. Md. Apr. 14, 1988) (opinion signed by all sitting judges of the court).

The first six issues of *Guideline Sentencing Update* were prepared and distributed on an expedited basis in order to disseminate information quickly on initial district court decisions reaching constitutional issues concerning the Guidelines. We recognize that there will continue to be significant decisions requiring immediate dissemination, and in those instances will continue to publish *Update* on an expedited basis. Beginning with this issue, however, *Update* will be distributed on a regular publication schedule every two weeks, subject to occasional expedited issues.

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VOLUME 1 • NUMBER 8 • MAY 12, 1988

Constitutionality

C.D. Cal. holds Guidelines unconstitutional. Sitting en banc, the Central District of California ruled 14-10 "that the Sentencing Reform Act of 1984 and Guidelines promulgated thereunder are unconstitutional because they violate both the doctrine of separation of powers and defendants' Fifth Amendment right of due process." The court authorized the en banc proceeding to determine the issue of facial constitutionality of the Act and the Guidelines in twenty-two cases pending before individual judges. The majority opinion stated, and the dissenting judges agreed, that the decision is binding upon all members of the court until there is a contrary ruling from the Ninth Circuit or the Supreme Court.

In its separation of powers analysis, the court largely followed the reasoning of *U.S. v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988), and *U.S. v. Estrada*, 680 F. Supp. 1312 (D. Minn. 1988). The court concluded that "the Act violates the expansion of powers branch of the separation of powers doctrine by placing the [Sentencing] Commission in the judicial branch and by requiring service of three Article III judges on the Commission," and that the "quantitative and qualitative impairment of the judiciary by judges' service on the Commission" "violate[s] the impairment branch of the doctrine of separation of powers." On the due process issue, the court followed the reasoning of *U.S. v. Frank*, No. 87-226 (W.D. Pa. Mar. 30, 1988) and found "the Guidelines as formulated are substantively invalid. Quite simply, the mechanical formulas and resulting narrow ranges of sentences prescribed by the Guidelines violate defendants' right to due process . . . by divesting the Court of its traditional and fundamental function of exercising its discretion in imposing individualized sentences according to the particular facts of each case."

The dissenting judges reasoned that "[w]hether the Commission is tagged with the 'judicial branch,' 'executive branch,' or 'independent agency' label is an irrelevancy in determining whether its functions impair or expand judicial powers," and concluded that "[s]ince regulation or guideline writing does not involve the decision of cases or controversies, nor does it impinge on the power of the judiciary to decide the same, the mere creation of a Commission that creates sentencing guidelines does not violate the separation of powers doctrine." In addition, the presence of judges on the Commission is acceptable, the dissenters concluded, because any "impairment" of the judiciary is minor, and the required presence of three judges does not impermissibly "expand[ ] the powers of the judiciary into the area of law making" because the judge-commissioners do not perform judicial work on the Commission. The dissenters also determined that the Guidelines do not violate substantive due process: "Congress can eliminate all discretion in sentencing, or place all discretion in an executive department body; *a fortiori*, it can specify the weight to be given the various factors normally considered."

U.S. v. Lopez, No. CR 88-050-R (C.D. Cal. May 5, 1988) (en banc) (memorandum opinion and order, Hauk, Sr. Dist. Judge) (dissenting memorandum, Hupp, J.).

Other recent decisions finding the Guidelines unconstitutional:

A district court in D. Colo. has held the Guidelines unconstitutional on separation of powers and due process grounds, and ordered that the defendant's sentence "be determined in accordance with pre-existing law."

The court held that the membership of the Sentencing Commission and its placement in the judicial branch violate separation of powers. Placement of the Commission in the executive branch would not resolve the problem: "The . . . Guidelines are designed to control the discretion given to Article III judges by 18 U. S. C. § 3553(a) in sentencing particular defendants. If this statute explicitly placed the Sentencing Commission in the Department of Justice, its unconstitutionality would be manifest: the executive department responsible for prosecution of crimes cannot control the exercise of discretion in determining punishment granted to Article III judges by Section 3553(a). Placement of the Commission anywhere in the executive branch is likewise unconstitutional because the President is the chief prosecutor."

On the due process issue the court noted that, under the Guidelines, while a defendant may contest facts relevant to sentencing, once the court resolves such a dispute the sentence is automatically fixed within a very narrow range. The court reasoned that "Congress cannot combine a grant of discretion to the courts with such restrictions that the results of the adjudicative process are dictated. . . . This is not an interference with judicial

discretion, it is a denial of due process in that the defendant has no opportunity to convince the sentencing judge that there are circumstances which override these point allocations. The question is whether Congress may substitute for constitutional courts, holding the judicial power, an administrative agency of any kind, independent or otherwise, to make determinations of the factual components of the sentencing criteria established in Section 3553(a)."

U.S. v. Elliott, No. 87-CR-393 (D. Colo. Apr. 13, 1988) (memorandum opinion and order, Matsch, J.).

A district court in N.D. Ga. has held that the placement and membership of the Sentencing Commission violate the separation of powers doctrine. The court declined to follow *U.S. v. Estrada*, 680 F. Supp. 1312 (D. Minn. 1988), which had severed the Guidelines and sentenced pursuant to the surviving provisions of the Sentencing Reform Act. "In this Court's view, severance of the guidelines and the portion of the Act that creates the Commission effects such a radical change in the legislation that it becomes an entirely new bill. This Court would prefer to leave the task of rewriting the Act to Congress."

U.S. v. Russell, No. 88-cr-7-MHS (N.D. Ga. Apr. 29, 1988) (order, Shoob, J.).

A district court in S.D.N.Y. has held the Guidelines unconstitutional on separation of powers grounds, concluding: "Either because the Sentencing Reform Act gives the President power to remove Article III judges serving on a commission in the judicial branch, or because the Sentencing Reform Act requires judges to perform non-judicial functions not authorized by Article III of the Constitution, the United States Sentencing Commission, and the Sentencing Guidelines it has promulgated, are unconstitutional." The court also concluded that "because the Guidelines are a central element of the sentencing reform which became effective on November 1, 1987," defendant would, if necessary, be sentenced in accordance with prior law.

U.S. v. Olivencia, No. 88-Cr-64 (S.D.N.Y. April 20, 1988) (opinion and order, Leisure, J.).

A district court in W.D. Wis. has held that the placement and membership of the Sentencing Commission violate separation of powers and the Guidelines are therefore invalid.

U.S. v. Molander, No. 88-CR-2-S (W.D. Wis. Apr. 15, 1988) (order, Shabaz, J.).

Guidelines upheld as constitutional. A district court in D. Mass. has upheld the Guidelines against separation of powers, delegation doctrine, and due process challenges. The court stated that it was "in substantial agreement with the conclusions" in *U.S. v. Ruiz-Villanueva*, 680 F. Supp. 1411 (S.D. Cal. 1988) and *U.S. v. Chambless*, 680 F. Supp. 793 (E.D. La. 1988), but was writing "to press an analysis of the separation of powers issue in terms of the challenge presented, namely, the power of Congress to address comprehensively the growing and intractable problem of unfair disparity in sentencing with legislation compatible with constitutional principles."

The court held that placing the Commission in the judicial branch did not unconstitutionally expand the powers of the judiciary. "Since early on," the court wrote, "Article III courts have been authorized to promulgate rules affecting their administration, procedures and operations." The Sentencing Commission "fits within these standards. . . . Assigning judges to promulgate rules, pursuant to Congress' direction, to guide federal judges in their sentencing discretion does not expand the judicial function. It recognizes the relationship between the branches, the roles each play in the sentencing process and the need for the participation of the judiciary to provide against the domination of one branch over another."

Addressing the claim that the presence of Article III judges on the Commission impairs the judiciary by "intermingl[ing] the judicial and executive function," the court first noted that the judges "serve as commissioners, not judges. . . . [W]here individual judges voluntarily accept an extrajudicial appointment that serves a non-judicial purpose, there is no conflict with the constitution." Furthermore, the President's removal power "is irrelevant to the function of the judiciary in performing its constitutionally mandated tasks of deciding cases. The power of the President over the judge-commissioners extends over them only in their role as commissioners; the President has no power to affect them in their role as judges."

In rejecting the due process challenge, the court cited the "established principle" that a defendant has a legitimate interest in the nature of the sentencing procedure and the right to be sentenced on the basis of accurate and reliable information. The court then found, however, that "it does not follow that *only* with completely unfettered judicial discretion in sentencing can the due process rights of a criminal defendant be protected. This argument not only cuts too broadly, it also ignores the fact that discretion is not destroyed by the guidelines, it is merely channelled." (Emphasis in original.) Moreover, under the Guidelines "a defendant maintains the right to participate in all phases of the pre-judgment process," and thus "is left with a meaningful opportunity to be heard."

The court also rejected the defendants' "core function" and improper delegation arguments.

U.S. v. Alves, No. 88-11-MA (D. Mass. May 3, 1988) (memorandum and order, Mazzone, J.).

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VOLUME 1 • NUMBER 9 • JUNE 1, 1988

Constitutionality

U.S. seeks certiorari for expedited review of Guidelines' constitutionality. The Solicitor General has filed a "petition for a writ of certiorari before judgment" in an appeal of a Guidelines case pending in the Eighth Circuit. The petition requests that arguments be held in the first session of the October 1988 Term, and that if the Court strikes down the Guidelines, "it should also reach the question of the severability" of other provisions of the Sentencing Reform Act.

U.S. v. Mistretta, 682 F. Supp. 1033 (W.D. Mo. 1988), *petition for cert. filed* (U.S. May 19, 1988) (No. 87-1904) (underlying case summarized in GSU # 5, *U.S. v. Johnson*).

Decisions holding Guidelines unconstitutional but staying orders pending appellate review:

A district court in D.D.C. has held that the Sentencing Reform Act unconstitutionally delegates legislative authority, finding that "Congress has given to the Sentencing Commission a mandate of such vagueness that it constitutes no real direction at all." This appears to be the first Guidelines decision to find such an improper delegation. The court also held that the Act violates separation of powers and due process.

In rejecting the argument that the Commission should be assigned to the executive branch, the court noted that such a move would, among other things, subject the Commission to various laws applicable to executive agencies. The court also noted that "a number of the procedures prescribed by the Constitution or by the Federal Rules of Criminal Procedure in implementation of due process standards are infringed or largely rendered useless by the new Act," such as the rights of allocution and to be present at sentencing.

Nonetheless, the court "stay[ed] the effect of its ruling until the constitutionality of the Sentencing Act has been finally decided," and will sentence defendants in accordance with the Act. *U.S. v. Brodie*, No. 87-0492 (D.D.C. May 19, 1988) (opinion, Greene, J.).

U.S. v. Martinez-Ortega, No. 87-40023 (D. Idaho May 6, 1988) (memorandum decision, Callister, J.) (Guidelines "constitutionally flawed and must be struck down" on separation of powers and due process grounds. Court stayed order and will sentence defendants under both Guidelines and pre-existing law.).

Guidelines unconstitutional but severable; repeal of Parole Commission and amendment to rule 35 must also be severed. A district court in D. Conn. has held "that the portion of the Sentencing [Reform] Act which authorizes the Commission to promulgate the Guidelines... contravenes the separation of powers doctrine. It follows... that the Guidelines... are themselves null and void. Those portions of the Sentencing Act that require courts to impose the Guidelines must also fall as null and void," but are severable. Without implementation of the Guidelines, the court found that to be "consistent with the legislature's intent" the Parole Commission should remain operative and thus its repeal must be severed, and that the amendment to rule 35 of the Fed. R. Crim. P. should be nullified. *U.S. v. Molina*, No. N 88-17 (D. Conn. May 16, 1988) (memorandum of decision, Daly, C.J.).

Other recent cases holding Guidelines unconstitutional but severable:

U.S. v. Diaz, No. 87-00159 (S.D. Ala. May 11, 1988) (order, Howard, J.) (Sentencing Reform Act violates separation of powers. Guidelines invalid but other sections of Act making substantive changes in federal criminal sentencing law "are severable and shall remain valid.").

U.S. v. Fonseca, No. 87-00159 (S.D. Ala. May 11, 1988) (order, Hand, C.J.) (same).

U.S. v. DiBiase, No. N-88-4 (D. Conn. May 6, 1988) (opinion and order, Cabranes, J.) (Act violates separation of powers and thus Guidelines are "null and void." Provisions authorizing Commission and requiring application of Guidelines are severable, but "remainder of the Act is 'fully operative as law'" and defendant will be sentenced accordingly.).

U.S. v. Harris, No. 88-CR-6-B (N.D. Okla. Apr. 29, 1988) (opinion, as amended, Brett, J.) (Sections of Act authorizing Commission and Guidelines violate separation of powers but are severable. Defendant, if found guilty, would be sentenced accordingly.).

U.S. v. Nordall, No. CR87-067TB (W.D. Wash. April 21, 1988) (order incorporating oral opinion, Bryan, J.) (Sections of Act that mandate use of the Guidelines, 18 U.S.C. § 3553(b) and the second sentence of § 3553(e), are unconstitutional.

However, "the constitutionally repugnant part of the guideline scheme is severable and can be cured by the simple device of removing the offending mandatory application language from the statute," allowing remainder of Act to stand. Court will "consider" Guidelines in imposing sentence, but not treat them as binding.).

Decisions holding Guidelines invalid and not severable:

Sitting en banc, the judges of N.D. Ala. concluded "that the provisions of the [Sentencing Reform] Act creating and empowering the [Sentencing] Commission impermissibly violate the principle of separation of powers" and that "*de facto* validity" should not be given to past acts of the Commission, such as the promulgation of the Guidelines. The court held that the unconstitutional parts of the Act should not be severed from the remaining provisions—except for the section effecting repeal of the Youth Corrections Act—and that "defendants hereafter . . . will be sentenced in this court without regard to the mandates of the Act."

U.S. v. Allen, No. CR 88-H-4-S (N.D. Ala. May 18, 1988) (opinion, per curiam) (en banc).

U.S. v. Horton, No. 4-87-128 (D. Minn. May 20, 1988) (memorandum opinion and order, Murphy, J.) (Act violates separation of powers because of function, placement, and composition of Commission, and Guidelines are therefore invalid. Unconstitutional provisions cannot be severed, and defendant should be sentenced under preexisting law.).

U.S. v. Wilson, No. CR-88-67-W (W.D. Okla. Apr. 19, 1988) (order, West, J.) (Act violates separation of powers and the "plain intent of Congress" precludes severance of unconstitutional provisions.).

Recent decisions upholding the Guidelines:

Sitting en banc, the judges of D. Ariz. held, 5-1, that the Guidelines do not violate separation of powers. The majority held that placement of the Sentencing Commission in the judicial branch was proper and the function of the judiciary was not impaired. The court found that judges serve as individuals and the President's powers of appointment and removal do not "control" the judiciary. Moreover, the removal power is adequately circumscribed by the "good cause" standard and would not affect a Commissioner's Article III status. The court also rejected challenges to the Guidelines based on due process concerns.

U.S. v. Macias-Pedroza, No. 88-13 (D. Ariz. April 18, 1988) (Bilby, C.J.) (en banc).

U.S. v. Smith, No. 87-20219-4 (W.D. Tenn. May 20, 1988) (memorandum decision, McRae, Sen. Dist. J.) (Act does not violate separation of powers: Commission "is in fact in the executive branch; . . . work of the Commission is a proper method of pursuing sentencing reform;" presence of Article III judges on Commission "is sensible and not unlawful;" Act's placement of Commission in judicial branch is "harmless error" and "erroneous provision should be elided from the Act, thereby salvaging the long sought after sentencing reforms.").

U.S. v. Childress, No. 87-263-N (M.D. Ala. May 16, 1988) (order, Varner, J.) (Guidelines are "constitutionally permissible invasion of the statutory power of trial courts to sentence convicted criminals within the limits provided by statute either because: (1) the guidelines are provided by a past act of the Commission and are, therefore, a valid de facto action or (2) the statute creating the Commission and the various results thereof are not constitutionally unsound.").

Guidelines Application

Court may consider relevant conduct not included in offense of conviction. A C.D. Cal. court has rejected a defendant's claim that, in considering relevant conduct for purposes of determining a Guideline range, the court cannot consider facts outside those inherent in the count of conviction or stipulated to in a plea agreement.

The defendant and two codefendants were charged in an eight-count indictment, and defendant pled guilty to one count; the other counts were dropped. The court found that defendant's offense of conviction fell under Guideline § 3D1.2(d), which requires grouping of multiple counts. Offenses of this nature are governed by Guideline § 1B1.3(a)(2), which states that determination of the Guideline range shall be based on "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 Commentary to this section states that "multiple convictions are not required."

Thus, in calculating the Guideline sentence, the court considered all of defendant's conduct listed in the indictment. Defendant argued that his plea bargain on one count should preclude consideration of conduct relating to the other alleged offenses. The court found that the Commentary "does not support this position," and held that "while the [other] conduct . . . is not contained in the count of conviction, that absence is not a bar to its consideration." The court also rejected defendant's contention that using additional information in this manner would destroy a defendant's incentive to plea bargain, finding that in most cases the Guidelines leave courts "a considerable range of discretion" to be lenient toward a cooperative defendant.

This case was decided prior to *U.S. v. Lopez*, No. CR 88-050-R (C.D. Cal. May 5, 1988) (en banc) (holding the Guidelines are unconstitutional and will not be used in C.D. Cal.), which has not been given retroactive effect.

U.S. v. Ruelas-Armenta, No. CR 87-1027-PAR (C.D. Cal. May 2, 1988) (memorandum of decision, Rymer, J.).

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VOLUME 1 • NUMBER 10 • JUNE 15, 1988

Constitutionality

Certiorari granted in Guidelines' constitutionality case. The Supreme Court has granted the government's and defendant's petitions for writs of certiorari before judgment in a case pending in the Eighth Circuit (*see* GSU #9, 6/1/88). Oral argument will be held during the October 1988 term.

U.S. v. Mistretta, 682 F. Supp. 1033 (W.D. Mo. 1988), *cert. granted* (U.S. June 13, 1988) (Nos. 87-1904 and 87-7028).

Two courts hold President's power to remove Commissioners unconstitutional but severable:

A court in N.D. Cal. held that the presidential removal power provision of the Sentencing Reform Act, 28 U.S.C. § 991(a), is unconstitutional, but severed the provision from the remainder of the statute and upheld the Act and the Sentencing Guidelines against constitutional and statutory challenges. The court found that the removal power provided even more opportunity for undue executive influence and control than the removal power held unconstitutional in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). "*Bowsher* controls this case, and compels the conclusion that presidential removal power over members of a judicial commission is unconstitutional," the court held. The removal provision may be severed, however, because the remainder of the statute will "'function in a *manner* consistent with the intent of Congress.'" (Emphasis in original.)

U.S. v. Myers, No. CR 87-0902 (N.D. Cal. Apr. 11, 1988) (order, Henderson, J.).

A district court in E.D. Mich., also following *Bowsher*, held that the removal power is "an unconstitutional assumption of power by the executive" but may be severed from the rest of the Sentencing Reform Act. The court rejected other constitutional and statutory challenges in upholding the Guidelines.

U.S. v. Sparks, No. 88-CR-20019-BC (E.D. Mich. June 7, 1988) (memorandum opinion and order, Churchill, J.).

Guidelines upheld as constitutional:

NINTH CIRCUIT

U.S. v. Amesquita-Padilla, No. CR87-264R (W.D. Wash. Apr. 20, 1988) (Rothstein, C.J.) (opinion upholding Guidelines against constitutional and statutory challenges).

Guidelines held unconstitutional:

SECOND CIRCUIT

U.S. v. Smith, No. 88 Cr. 49 (S.D.N.Y. May 31, 1988) (Stanton, J.) (order indicating Guidelines will be used, if at all, only as non-binding reference materials).

NINTH CIRCUIT

U.S. v. Harrington, No. CR-88-34-1 (E.D. Wash. Apr. 13, 1988) (McNichols, J.) (memorandum decision holding Guidelines violate separation of powers).

TENTH CIRCUIT

U.S. v. Rivas-Hernandez, No. CR-88-56-T (W.D. Okla. May 16, 1988) (Thompson, C.J.) (order holding that placement of Commission in judicial branch violates article III and separation of powers and that neither designating language nor Guidelines are severable).

U.S. v. Bigger, No. 88-10-CR and *U.S. v. Scott*, No. 88-11-CR (E.D. Okla. May 26, 1988) (Seay, J.) (orders adopting "the findings and opinion" of *Rivas-Hernandez*).

Challenges to Guidelines' Provisions

Guidelines' Criminal Livelihood provision upheld. A district court in W.D. Pa. held that the Criminal Livelihood provision of the Sentencing Guidelines, § 4B1.3, does not violate equal protection or due process by discriminating against indigents, nor does it unconstitutionally deprive the sentencing judge of discretion. The defendants argued that an offender with no or few non-criminal sources of income is more harshly treated under this section of the Guidelines than one who engaged in the same criminal

conduct but has other sources of income. Thus, defendants claim, poverty functions as the sole justification for a longer prison term. One defendant also argued that this provision violates the statutory mandate of 28 U.S.C. § 994(d), which commands the Sentencing Commission to "assure that the guidelines and policy statements are entirely neutral as to the . . . socioeconomic status of offenders."

The court found that the Criminal Livelihood provision does not violate the mandate of 28 U.S.C. § 994(d) because it is derived directly from another subsection of the same statute, § 994(i)(2), which directs the Commission to "assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income."

On the constitutional issues, the court noted that poverty "is not a suspect classification," and laws that discriminate on this basis "are not subject to strict scrutiny." Nevertheless, the Supreme Court "has been more demanding of laws that disadvantage the indigent within the criminal justice system," and thus judges "are commissioned to strike down treatment of the indigent that is fundamentally unfair." The court reasoned, however, that "viewed in the context of a pattern of criminality, the lack of employment and of legitimately obtained financial resources does indicate that the defendant is likely to commit further crimes, and the deprivation of liberty may be based upon it." Moreover, "indigency is not the sole justification for the harsh treatment of offenders . . . under the guidelines. Rather, their pattern of criminality, a pattern upon which they depend for their livelihood, demonstrates a need for their incapacitation." Thus, "the Criminal Livelihood provision furthers a legitimate governmental purpose"—incapacitating professional criminals—and alternatives to achieving this purpose are "inadequate."

The court also rejected the argument that the Criminal Livelihood provision's restriction of judicial discretion violates due process. Case law shows that "individualized sentencing is not a constitutional imperative outside capital cases," and "federal courts have upheld mandatory sentences that eliminate judicial discretion." Therefore, the court held, "from Congress' power to eliminate entirely judicial discretion in sentencing follows the power to limit discretion and assign specific values to sentencing factors." The court also found that the guidelines as a whole provide a sentencing judge with sufficient discretion.

U.S. v. Kerr, No. 87-255 (W.D. Pa. June 3, 1988) (opinion, Diamond, J.).

The first nine issues of *Guideline Sentencing Update* reported extensively on district court decisions concerning constitutional challenges to the Sentencing Reform Act of 1984 and the Sentencing Guidelines. Because of the growing volume of district court cases on these constitutional issues, future issues of *Update* will simply provide circuit-by-circuit citations of recent district court decisions on constitutionality. District court decisions from circuits in which appellate decisions on constitutionality have been reached will not be included in this listing. Appellate decisions, and district court decisions that break new ground in the treatment of constitutional issues, will be reported in greater detail.

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VOLUME 1 • NUMBER 11 • JUNE 29, 1988

Constitutionality

E.D. Ark. to use dual sentencing approach pending resolution of Guidelines' constitutionality. A dual sentencing policy for E.D. Ark. was announced in an opinion by one judge holding the Sentencing Commission and Guidelines unconstitutional on improper delegation, Article I presentment, separation of powers, and due process grounds. In addition, the court found that the provisions of the Sentencing Reform Act regarding "the detailed set of principles or sentencing standards which narrow the judge's discretion" and "the requirement that judges state their reasons for imposing particular sentences" are severable and should remain in effect, but that the provisions for appellate review of sentences and for "real time" sentencing should not survive.

The court determined that because of the uncertainty over whether the Guidelines will ultimately be upheld it would, "at the time of sentencing, state and explain what its sentence would be assuming the Guidelines are upheld. And it will also state and explain what its sentence would be if the Guidelines are struck down as unconstitutional." The sentence entered in judgment "will be the latter only, because that will be the only lawful sentence under the opinion of the Court. However, if the Court is reversed and the Guidelines upheld, a new Judgment and Commitment will have to be entered, but this may be done without any further sentencing hearing."

The court stated that all but one of the other judges of the district agreed that the Guidelines are unconstitutional, that the two previously mentioned provisions are severable, and that they will follow the dual sentencing approach. The remaining judge is "not convinced that the Guidelines are unconstitutional," but has agreed to employ the dual sentencing approach.

U.S. v. Brittman, No. LR-CR-87-194 (E.D. Ark. May 27, 1988) (memorandum opinion, Eisele, C.J.).

Decisions upholding the Guidelines:

SECOND CIRCUIT:

U.S. v. Etienne, No. 87 CR 791 (E.D.N.Y. May 5, 1988) (Nickerson, J.) (memorandum and order upholding Guidelines against constitutional challenge).

THIRD CIRCUIT:

U.S. v. Hodge, No. 88-04 (D.V.I. May 31, 1988) (Christian, Sr. D.J.) (order dismissing defendant's motion to declare the Guidelines invalid because "[w]hether or not The Congress may properly legislate as it did, and the constitutionality *vel non* of such legislation respecting Article III courts, it is certainly within the constitutional powers of The Congress to so provide as to the courts of its own creation, as is the District Court of the Virgin Islands").

FOURTH CIRCUIT:

U.S. v. Richardson, No. 88-8-01-CR-3 (E.D.N.C. May 13, 1988) (Boyle, J.) (order upholding the Guidelines against constitutional and statutory challenges).

Decisions invalidating the Guidelines:

SECOND CIRCUIT:

U.S. v. Mendez, No. 88 CR 78 (S.D.N.Y. June 16, 1988) (Mukasey, J.) (opinion rejecting statutory challenges but holding that Act violates separation of powers and Guidelines are invalid).

FIFTH CIRCUIT:

U.S. v. Perez, No. A-87-CR-116(1) (W.D. Tex. May 23, 1988) (Nowlin, J.) (order holding Sentencing Reform Act violates separation of powers and presentment requirement of article I and Guidelines violate due process, but finding that Guidelines are severable and other parts of Sentencing Reform Act remain valid).

SEVENTH CIRCUIT:

U.S. v. Rosario, No. 87 CR 968 (N.D. Ill. June 23, 1988) (Bua, J.) (order holding the Guidelines invalid because structure of the Sentencing Commission violates separation of powers).

EIGHTH CIRCUIT:

U.S. v. Terrill, No. 88-00013-06-CR-W (W.D. Mo. June 13, 1988) (Oliver, Sr. D.J.) (memorandum and orders holding "Guidelines are not constitutionally valid").

TENTH CIRCUIT:

U.S. v. Scott, No. 88-031-JB (D.N.M. June 3, 1988) (Burciaga, J.) (memorandum opinion and order adopting reasoning of *U.S. v. Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988) and holding the Guidelines invalid because composition and placement of the Sentencing Commission violate separation of powers).

ELEVENTH CIRCUIT:

U.S. v. Bogle, No. 87-856-CR (S.D. Fla. June 15, 1988) (Marcus, J.) ("en banc" opinion holding, 12-4, that the Guidelines are invalid and "will not be applied in this district" because placement and membership of the Sentencing Commission violate separation of powers).

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VOLUME 1 • NUMBER 12 • JULY 21, 1988

Guidelines Applications

Ninth Circuit clarifies arson Guideline. The Ninth Circuit held that the 7-level enhancement for arson during the commission of another felony applies only to defendants convicted under 18 U.S.C. § 844(h). The defendant pled guilty to an arson offense under 18 U.S.C. § 844(i). The district court increased the offense level following Guideline § 2K1.4(b)(4), which reads: "If the defendant used fire . . . to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (*i.e.*, the defendant is convicted under 18 U.S.C. § 844 (h)), increase by 7 levels." The circuit court held that the parenthetical clause, by using the term *i.e.*, "strongly indicates that the Sentencing Commission intended the guideline to apply only where the defendant has violated § 844(h)," and it was therefore improper to increase the offense level for a violation of § 844(i).

U.S. v. King, No. CR 88-1161 (9th Cir. July 1, 1988) (per curiam opinion).

District court finds defendant's circumstances warrant downward departure. A court in D. Minn. determined that a defendant's "unique, unstable upbringing and childhood" and "unique and substantial family ties and responsibilities," along with other factors, were "special circumstances" that warranted, under 18 U.S.C. § 3553(b), a downward departure from the Guideline sentence. The Guideline range for defendant's offense was 97-121 months. The court concluded that an 84-month sentence was sufficient, finding that "the 97-month minimum is excessive and that the 84-month sentence is more appropriate in achieving the four basic purposes [of the Sentencing Reform Act], considering all factors and circumstances described herein."

The court also decided not to impose a fine because of the defendant's inability to pay. Further, following Guideline § 5E4.2(f), the court "considered all alternative sanctions in lieu of all or a portion of the fine" and found that the "total 84-month sentence is punitive" and that any alternative to a fine is unnecessary.

U.S. v. Haigler, No. 3-87 CRIM 135(2) (D. Minn. May 19, 1988) (Statement of Reasons for Imposing Sentence, Alsop, C.J.).

Constitutionality

Decisions upholding the Guidelines:

FIRST CIRCUIT:

U.S. v. Seluk, No. 88-107-K (D. Mass. July 5, 1988) (Keeton, J.) (opinion upholding Guidelines against constitutional challenge).

FOURTH CIRCUIT:

U.S. v. Stokley, No. 2:87-00206 (S.D.W. Va. July 8, 1988) (Copenhaver, J.) (memorandum opinion and order of "en banc" court upholding Guidelines; court severed as unconstitutional provision placing Sentencing Commission in judicial branch).

SIXTH CIRCUIT:

U.S. v. Landers, No. 88-20022-TU (W.D. Tenn. June 24, 1988) (Turner, J.) (order upholding Guidelines against constitutional and statutory challenges and finding designation of Sentencing Commission as judicial agency may be severed from the statute).

Decisions invalidating the Guidelines:

FIFTH CIRCUIT:

U.S. v. Coburn, No. C-88-05 (S.D. Tex. July 13, 1988) (Head, J.) (order invalidating provisions of Sentencing Reform Act, 18 U.S.C. § 3553(b) and the last sentence of § 3553(e), that mandate use of the Guidelines; court "will continue to adhere to all other sentencing provisions" of the Act and will use the

Guidelines "as a product of generally persuasive force").

SIXTH CIRCUIT:

U.S. v. Williams, No. 3-88-00014 (M.D. Tenn. June 23) (per curiam) (memorandum opinion of "en banc" court holding Guidelines "unconstitutional and unenforceable on the ground that they were promulgated by a body to which Congress, consistent with the Constitution, could not delegate such a function"; certain provisions of the Sentencing Reform Act—including "real time" sentencing, elimination of parole, and statement of reasons for imposing sentence—remain valid and defendants will be sentenced accordingly).

U.S. v. Thomas, No. 87-20218 G (W.D. Tenn. June 7, 1988) (Gibbons, J.) (order holding Guidelines invalid on separation of powers grounds and that "there are no severable parts of the Act that may be given effect"; court will announce two sentences—one under prior law and one under Guidelines—and defendants will commence serving prior law sentence with Guideline sentence to take effect if Act is ultimately held constitutional).

EIGHTH CIRCUIT:

U.S. v. Serpa, No. CR87-L-44 (D. Neb. July 12, 1988) (per curiam) (memorandum and order of "en banc" court holding Guidelines invalid on separation of powers grounds, but severable; "defendants shall be sentenced in accordance with the remaining provisions of the Sentencing Reform Act and, where necessary, in reference to" prior law).

ELEVENTH CIRCUIT:

U.S. v. Kane, No. CR87-37R (N.D. Ga. June 28, 1988) (Murphy, J.) (order holding Guidelines invalid on nondelegation and separation of powers grounds, and imposing sentence as if crime committed prior to November 1, 1987).

U.S. v. Bogle, No. 87-856-CR (S.D. Fla. June 30, 1988) (per curiam) (order of "en banc" court, after prior ruling that Guidelines are invalid, holding provisions of Sentencing Reform Act eliminating parole are not severable from Guidelines and therefore shall not apply to sentences imposed in this district, but that provision modifying computation of "good time" credits is severable from Guidelines and shall be applied).

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VOLUME 1 • NUMBER 13 • AUGUST 3, 1988

Guidelines Applications

District court holds exceptional military service record warrants departure. A court in D. Md. held "that a person's military record is a relevant sentencing factor that was not considered by the Sentencing Commission and should be considered as an aggravating or a mitigating factor at sentencing" under 18 U.S.C. § 3553(b). The defendant pled guilty to a mail theft offense, with a resulting Guideline sentence of 1-7 months. The court determined that probation was a permissible sentence, and that under Guideline § 5B1.1(a)(2) the defendant would be required to serve some period of intermittent or community confinement. The court found, however, "that the defendant's exceptional military record is a mitigating factor that warrants departure from Guideline Section 5B1.1(a)(2). Therefore, the defendant will be sentenced to a period of probation, *without* a condition or combination of conditions requiring intermittent confinement or community confinement." (Emphasis in original.)

U.S. v. Pipich, No. S 88-097 (D. Md. July 20, 1988) (Smalkin, J.) (memorandum opinion).

Constitutionality

Probation officers' role, specific Guidelines provisions upheld against constitutional attack. A court in D. Or. rejected challenges to the role of probation officers under the Sentencing Reform Act, and to the acceptance of responsibility and career offender sections of the Guidelines. The defendants argued that the "fundamental change in the role of the probation officer" under the Act violates separation of powers and due process. The court considered the role of the probation officer before and after the effective date of the Guidelines and concluded that "while the duties and role are significantly changed, in their essentials they are still the same," and there is no constitutional violation.

The court rejected the claim that Guideline § 3E1.1, which provides a reduction in offense level for acceptance of responsibility, "chills the exercise" of the sixth amendment right to jury trial and the fifth amendment privilege against self-incrimination. This provision "is not constitutionally objectionable on its face" because it "is not designed for the purpose of inducing involuntary incriminating statements or involuntary guilty pleas" and "a guilty plea, as such, is neither a prerequisite to receiving the benefit of the reduction nor sufficient in itself to entitle a defendant to reduction." Nor is it unconstitutional, the court found, to encourage a guilty plea with a promise of leniency, or to impose a stiffer sentence on defendants who do not accept responsibility for their actions. The court also held that § 3E1.1 was not unconstitutional as applied in this case.

One defendant challenged the constitutionality of the career offender provision, Guideline § 4B1.1. The court held that the provision is not an "impermissible delegation of legislative authority," is not "a new crime 'legislated' by the [Sentencing Commission] in violation of the separation of powers doctrine," does not exceed the authority granted the Commission by the Sentencing Reform Act, and is not a "status offense" but rather "a permissible sentence enhancement provision."

The court also rejected a challenge to Guideline §§ 4A1.2 and 4A1.3(a), which allow consideration of "tribal convictions" for departure purposes, and challenges to the Guidelines as a whole based on unlawful delegation, separation of powers, and due process grounds.

U.S. v. Belgard, No. 88-5-PA (D. Or. June 30, 1988, as amended July 25, 1988) (Burns, J.) (opinion and order).

Decisions upholding the Guidelines:

SECOND CIRCUIT:

U.S. v. Hickernell, No. 88 Cr. 87 (S.D.N.Y. July 27, 1988) (Brieant, C.J.) (memorandum and order upholding Guidelines against constitutional and

statutory challenges; defendant will be sentenced under Guidelines, but "[e]xecution will be stayed until ten (10) days following issuance of the mandate of the Court of Appeals in *United States v. Carlos Martinez*, 87 Cr. 1020 (KTD), unless the Court of Appeals shall direct otherwise").

THIRD CIRCUIT:

U.S. v. Schwartz, No. 87-103 (D. Del. July 8, 1988) (Schwartz, C.J.) (opinion holding: "(1) there is no excessive delegation to the [Sentencing] Commission; (2) the creation of the Commission does not breach separation of powers; and (3) the placement of the Commission in the Judicial Branch does not violate Article III").

EIGHTH CIRCUIT:

U.S. v. Whitfield, No. 3-88-7 (D. Minn. July 27, 1988) (Devitt, Sr. D.J.) (order upholding Guidelines against separation of powers challenge).

Decisions invalidating the Guidelines:

SECOND CIRCUIT:

U.S. v. Alafriz, No. S 88 CR. 0002 (S.D.N.Y. July 6, 1988) (Sweet, J.) (opinion holding that the Sentencing Reform Act violates separation of powers, due process, and the non-delegation doctrine, that the Guidelines "prevent courts from performing their Article III function" to consider defendants as individuals for sentencing purposes, and that defendants "will be sentenced under pre-guideline standards").

U.S. v. Sumpter, No. 88 CR. 275 (S.D.N.Y. July 5, 1988) (Conboy, J.) (opinion and order holding that the presidential removal power over the Sentencing Commission's judges violates separation of powers and that the defendant will be sentenced under prior law).

THIRD CIRCUIT:

U.S. v. Brown, No. 88-00010-01 (E.D. Pa. July 21, 1988) (Newcomer, Sr. D.J.) (memorandum and order holding Guidelines invalid on separation of powers grounds, but court will "stay the effect of this memorandum and order and sentence defendant under the 1984 Act and guidelines until the constitutionality of the Act has been decided").

EIGHTH CIRCUIT:

U.S. v. Bester, No. 5-88-08 (D. Minn. July 19, 1988) (Magnuson, J.) (memorandum and order adopting "the reasoning and holding" of *U.S. v. Horton*, No. 4-87-128 (D. Minn. May 20, 1988) (*see* GSU # 9), holding that "the Sentencing Reform Act of 1984 and Guidelines promulgated thereunder are unconstitutional" and defendant will be sentenced under prior law).

TENTH CIRCUIT:

U.S. v. Swapp, No. 88-CR-006J (D. Utah July 18, 1988) (Jenkins, C.J.) (memorandum opinion of "en banc" court holding Guidelines invalid because "the Sentencing Reform Act of 1984 violates the separation of powers doctrine, the nondelegation doctrine and the procedural requirements of article I"; defendants in this district will be sentenced under prior law, but the U.S. Probation Office is directed "to process its presentence investigation reports under both the old and the new systems in case a defendant may have to be resentenced at a later date").

U.S. v. Brown, No. 88-10036-01 (D. Kan. July 14, 1988) (Crow, J.) (memorandum and order holding Guidelines invalid on separation of powers grounds; court will "state and explain the appropriate sentence for defendants" under both Guidelines and prior law, entering only the latter on judgment and commitment with Guideline sentence to be entered in the future if Guidelines are ultimately upheld).

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VOLUME 1 • NUMBER 14 • AUGUST 26, 1988

Constitutionality—Appellate Courts

Ninth Circuit invalidates Guidelines. In the first appellate court opinion on the constitutionality of the Sentencing Reform Act of 1984, a divided panel of the Ninth Circuit held that provisions of the Act establishing the Sentencing Commission and authorizing the promulgation of the Sentencing Guidelines violate separation of powers. The court also held that the Act's modification of "good time" credits may not be severed from the guideline sentencing system and is thus invalid.

The court began its analysis "by considering whether federal judges serving as commissioners may constitutionally perform the rulemaking functions Congress has assigned to them." Reviewing the Commission's work and statutory mandate, the court concluded "that the Commission is assigned the function of promulgating substantive rules and policies governing primary conduct and having the force and effect of law, tasks that only the legislative or executive branches, not the judicial branch, may constitutionally perform." The Commission's functions, in the court's view, are "quintessentially political in nature, requiring substantive, policy decisions that are intended to affect all future federal criminal defendants—a far cry from Article III's limited grant of judicial power to decide cases and controversies."

The court refused to recharacterize the Commission as an executive branch agency, finding that Congress clearly intended it to be in the judiciary. Moreover, "[t]he Commission is constitutionally infirm not merely because it resides in the judicial branch, but, independently, because its principal officers include federal judges, while its function is political and not judicial in nature."

As to whether the Act "works a substantial and unjustified interference with the operation of the judicial branch and its officers," the court found that "service by federal judges on the Sentencing Commission has significant collateral effects on the operation of the judicial branch." There is "a continuous and fairly significant entanglement between the judicial and executive branches," a possibility of undue executive influence from the President's powers of appointment and removal, and a threat to the impartiality of the judiciary and the public's perception of impartiality. Such effects are not justified by any overriding need, the court concluded. Congress could have "secure[d] the contributions of individuals with expertise in sentencing and judicial administration" by using former or retired judges or informal input from the judiciary.

The court also held that the Act's revision of "good time" credits was invalid. The statutory scheme and legislative history indicate this change was closely connected to implementation of the Guidelines as part of "a 'comprehensive' approach to making sentencing more determinate," and the court refused to implement it separately. The dissent contended that Congress could and properly did delegate to the Commission the power to prescribe sentences, and that in practice the placement, structure, and functions of the Commission neither expand nor infringe upon the constitutionally assigned duties of any of the three branches.

Gubiensio-Ortiz v. Kanahele, No. 88-5848 (9th Cir. Aug. 23, 1988) (Kozinski, J.) (Wiggins, J., dissenting).

Guidelines Application

Second Circuit holds dispute over which guideline range applies may be left unresolved if sentence is unaffected. The Second Circuit has answered the question "whether, and under what circumstances, a dispute as to which of two guideline ranges should apply to a defendant may be left unresolved where the sentence imposed falls within both the guideline range deemed applicable by the Government and a lower guideline range deemed applicable by the defendant." The court held that such disputes need not be resolved when the same sentence would be imposed under either guideline range, but must be resolved if the sentencing judge applied the range urged by the government and selected the sentence because it is at or near the low end of that range.

The dispute in this case arose over the application of a Guideline section to defendant's crime, and which offense level and guideline range should apply. Under the government's interpretation the applicable range was 9-15 months, while in defendant's view a range of 4 to 10 months applied. The sentencing court agreed with the government, and gave defendant a 9-month sentence.

The appellate court determined from the structure of the sentencing table and policy statements of the Sentencing Commission that overlapping ranges were designed, in part, to avoid litigation over minor differences in offense levels. From this, the court concluded that "disputes about applicable guidelines need not be resolved where the sentence falls within either of two arguably applicable guideline ranges and the same sentence would have been imposed under either guideline range. . . . It makes little sense to hold, and review the outcomes of, all the hearings necessary to make these precise determinations in those instances where the sentence is unaffected by the outcome. . . . As long as the sentencing

judge is satisfied that the same sentence would have been imposed no matter which of the two guideline ranges applies, the sentence should stand."

A dispute over sentencing ranges may not be left unresolved, however, in the situation "where a sentencing judge determines that the appropriate sentence is whatever number of months are at or near the bottom of the applicable guideline range. . . . If the judge's intention is not clear, the appellate court will face the choice of either adjudicating a guideline application dispute that might in fact be of no consequence or remanding so that the judge's intention may be clarified." In this case, the court remanded "for clarification of the Judge's intent." The court also observed that "[a]rticulation of the judge's intentions at the time of sentencing will contribute significantly to the efficient functioning of the guideline system," and that it would "be helpful if prosecutors and probation officers alert district judges to this matter in all cases where a sentence falls within the overlapping area of disputed guideline ranges."

U.S. v. Bermingham, No. 88-1025 (2d Cir. Aug. 11, 1988) (Newman, J.).

Good time penalty warrants downward departure, W.D. Tenn. holds. Defendant pled guilty to escape from custody after failure to return to a halfway house. As a result of the incident, Bureau of Prison officials took away sixty days of good time. The court concluded that this action warranted a departure from the Guideline sentence imposed for the escape offense: "The Court . . . finds that the sentence should be imposed below the guidelines in the amount of two months because the Bureau of Prisons has penalized the defendant for this conduct by depriving him of sixty days good time. This is done pursuant to 18 U.S.C. § 3553 as the Court's explanation for sentencing below the guidelines."

U.S. v. Hamer, No. 88-20060-4 (W.D. Tenn. Aug. 8, 1988) (McRae, Sr. D.J.) (order on Guideline variance).

Constitutionality—District Courts

S.D. Fla. provides reasons for earlier ruling denying government request to stay order invalidating Guidelines. On June 15, 1988, the judges of S.D. Fla., sitting "en banc," held the Guidelines invalid on separation of powers grounds (see GSU # 11). The court denied the government's motion to stay that order on June 30, and also determined that the Sentencing Reform Act's modification of "good time" credits survived and remained in effect, but the provisions abolishing parole did not (*see* GSU # 12).

In a recent opinion detailing the reasons for the June 30 order, the court stated it denied the request for a stay because: (1) the government "is without a 'fair prospect' of prevailing in the Supreme Court"; (2) developments in the law subsequent to that ruling, including *Morrison v. Olson*, 108 S. Ct. 2597 (1988), do not compel a different result; (3) imposition of a stay would result in irreparable injury to defendants who would receive prison terms under the Guidelines but not under prior law; (4) exceptions for such defendants on a case-by-case basis would require use of a dual sentencing system, which would be overly burdensome; and, (5) if the Supreme Court finds the Guidelines unconstitutional it will not be easier to change from a Guideline to non-Guideline system than vice-versa if the Guidelines are upheld.

U.S. v. Bogle, No. 87-856-CR (S.D. Fla. Aug. 11, 1988) (Marcus, J.).

Decisions upholding the Guidelines:

SECOND CIRCUIT:

U.S. v. Schender, No. CR-87-00806-02 (E.D.N.Y. July 13, 1988) (Sifton, J.) (memorandum and order rejecting constitutional challenges and claims that Guidelines are inconsistent with enabling statute and that effective date of Sentencing Reform Act should be Dec. 18, 1987).

THIRD CIRCUIT:

U.S. v. Huff, No. 88-72 (W.D. Pa. Aug. 17, 1988) (Diamond, J.) (opinion rejecting constitutional challenges, including arguments that use of uncharged conduct, evidence not admissible to prove guilt, and facts not proven beyond reasonable doubt in calculating Guideline sentence violate due process).

SEVENTH CIRCUIT:

U.S. v. Weidner, No. SCr. 88-15 (N.D. Ind. Aug. 11, 1988) (Miller, J.) (memorandum and order upholding Guidelines against separation of powers and due process challenges).

Decisions invalidating the Guidelines:

THIRD CIRCUIT:

U.S. v. Kapantais, No. 87-251 (W.D. Pa. Aug. 16, 1988) (Bloch, J.) (memorandum opinion holding composition and placement of Sentencing Commission violate separation of powers; other provisions of Sentencing Reform Act, such as factors to consider and statement of reasons, appellate review, abolition of parole, supervised release, and repeal of Youth Corrections Act, remain valid and shall be applied in sentencing).

U.S. v. Rossi, No. 87-241 (W.D. Pa. Aug. 11, 1988) (McCune, Sr. D.J.) (memorandum and order finding "the Guidelines to be legislation and void for failure of Congress to adopt them").

ELEVENTH CIRCUIT:

U.S. v. Richardson, No. CR88-222-1A (N.D. Ga. Aug. 9, 1988) (Freeman, J.) (order holding Guidelines violate separation of powers; court will sentence defendants under prior law).

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VOLUME 1 • NUMBER 15 • SEPTEMBER 14, 1988

Constitutionality—Appellate Courts

Fifth Circuit exercises supervisory power to order use of Guidelines in all district courts pending Supreme Court decision. "After considering the merits of the constitutional arguments raised in various appeals before this court, the impending Supreme Court resolution of the constitutional issues, and the impact on the administration of criminal justice in the interim, we exercise our supervisory power to direct that the sentencing guidelines be applied in all district courts of the Fifth Circuit pending the decision of the Supreme Court . . . in [*U.S.*] *v. Mistretta* and the implementation of that decision by this court." The court stated its ruling does not preclude further constitutional challenges to the Guidelines and noted that all but 6 of the circuit's 65 district judges now use the Guidelines.

U.S. v. White, No. 88-1073 (5th Cir. Sept. 8, 1988) (per curiam).

Government request to stay decision holding Guidelines unconstitutional denied. The Eleventh Circuit refused to grant an emergency stay of the order in *U.S. v. Bogle*, No. 87-00856-CR (S.D. Fla. June 15, 1988) (en banc) (*see* GSU # 11 and # 14), pending appeal on the merits. The court found that the government failed to demonstrate it would suffer irreparable injury if the stay were not granted. On the other hand, "some defendants who would have gotten probation under the pre-guideline system will be required to serve a term of imprisonment" under the Guidelines, and would thereby suffer an "unnecessary deprivation of liberty [that] clearly constitutes irreparable harm."

The court "encouraged" district courts to determine on a case-by-case basis whether they should make findings that would be necessary under the Guidelines in order to alleviate future administrative problems if the Guidelines are upheld.

U.S. v. Bogle, No. 88-5700 (11th Cir. Aug. 26, 1988) (per curiam).

Guidelines Application

District court examines evidentiary procedures when determining offense level. A court in S.D. Ohio resolved several evidentiary issues relating to guideline sentencing. The court held it is not limited to considering evidence admissible at trial or already contained in the presentence report—the Guidelines have not repealed the practice of considering any information with "sufficient indicia of reliability to support its probable accuracy" that defendant has "an opportunity to explain or rebut." In addition, the court held "for purposes of this case" that it "will apply a preponderance of the evidence test to the factual matters set forth in the presentence report which are used to determine the offense level," not the "clear and convincing evidence" standard defendant sought.

The court also examined "to what extent a court may consider evidence of prior unindicted criminal activity . . . in determining the appropriate offense level under the sentencing guidelines." There was evidence of defendant's involvement with drugs several months prior to the offense of conviction, possession with intent to distribute cocaine. The court determined Guideline § 1B1.3 authorizes that "conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range" if "the alleged prior act and the offense of conviction were part of the same course of conduct or common scheme or plan for purposes of § 1B1.3(a)(2)." The court concluded that the acts in question were part of "a continuing course of narcotics dealing on the part of defendant," and were thus "relevant conduct for the purpose of determining the offense level." *But see U.S. v. Smith, infra.* The court "would have been free prior to the guidelines to consider evidence of a continuing pattern of drug activity on the part of a defendant," and the Guidelines have not changed that.

The court also denied defendant's motion to withdraw his guilty plea under Fed. R. Crim. P. 32(d): "The fact that a defendant receives a higher sentence under the guidelines than he anticipated does not constitute grounds in this case for allowing defendant to withdraw his guilty plea."

U.S. v. Silverman, No. CR2-88-028 (S.D. Ohio Aug. 23, 1988) (Graham, J.) (memorandum opinion).

Use of counts dismissed as part of plea bargain limited in setting offense level. A W.D. Tenn. court held that conduct included in setting the base offense level "must be established by a finding of the jury, a plea of guilty confirmed by a finding of guilt in open court, or a stipulated offense other than the offense of conviction on a plea of guilty or *nolo contendere*." Other conduct, however, "if established in the record," may be considered for certain adjustments to the offense level.

Defendant agreed to a plea bargain in which he would plead guilty to one drug count and a second drug count would be dropped. Guidelines §§ 1B1.3(a)(2) and 3D1.2(d) required, however, that the amount of drugs from the second count be considered in setting the base offense level. The court concluded that "the Guidelines and Commentaries of the Commission which authorize or require that alleged criminal conduct included in counts to be dismissed pursuant to a plea agreement and therefore not proven against or admitted by the defendant, be added to counts to which a plea of guilty and a finding of guilt are made for the purpose of determining the

Base Offense Level, are beyond the scope of the enabling legislation, 28 U.S.C. § § 991-998, and therefore inapplicable in the calculations of the Base Offense Level in this case." Even if the legislation authorized such use of unproven conduct, the court held, the "procedure of including the alleged conduct of a dismissed count, creates 'a mitigating circumstance (unjust punishment) . . . to a degree not adequately taken into consideration by the Sentencing Commission . . .'" "which would authorize and require sentencing below the guideline range" by the amount the base offense level was increased by the inclusion of the dismissed counts. The court's decision here differs from two other cases—*Silverman, supra*, and *U.S. v. Ruelas-Armenta*, 684 F. Supp. 1048 (C.D. Cal. 1988) (*see* GSU # 9).

Nonetheless, the court concluded "that conduct other than the conduct which was necessary to establish the essential elements of the offense or offenses of conviction, if established in the record, may be considered for adjustment to the Base Offense Level pursuant to Parts A, B, C and E of Chapter 3 of the Manual, the precise sentence within the range of the guidelines, fines and restitution . . . ." (Note: Parts A, B, C and E of Chapter 3 cover victim-related adjustments, role in the offense, obstruction, and acceptance of responsibility.)

U.S. v. Smith, No. 87-20219-4 (W.D. Tenn. Aug. 26, 1988) (McRae, Sr. D.J.) (ruling on sentencing hearing).

Guideline section mandating consecutive sentences held contrary to statute. In D. Md. a defendant being sentenced for escaping from federal custody still had time remaining on an earlier sentence. In such a situation, Guideline § 5G1.3 states that "the sentences for the instant offense(s) shall run consecutively to . . . unexpired sentences, unless one or more of the instant offense(s) arose out of the same transactions or occurrences as the unexpired sentences." The court found § 5G1.3 inconsistent with 18 U.S.C. § 3584(a), which states that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively," and that "terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." The Sentencing Commission apparently interpreted § 3584(a) as creating a presumption in favor of consecutive sentences, the court found, whereas it "creates a presumption in favor of consecutive sentences only where the Court remains silent on the issue."

The court concluded that the Commission "failed to give adequate consideration to § 3584(a) when formulating Guideline § 5G1.3. Accordingly, the Court will depart from Guideline § 5G1.3 . . . when determining whether to impose . . . sentence concurrently or consecutively." The court ordered the terms to run concurrently.

U.S. v. Scott, No. JH-87-0570 (D. Md. May 23, 1988) (Howard, J.) (memorandum and order).

District court finds problems with plea bargaining under Guidelines; lifts stay of order invalidating Guidelines. "Defects" in plea bargains under the Guidelines led a court in D.D.C. to conclude "it would be imprudent to continue to apply the guidelines." Thus, the court lifted the stay of its order invalidating the Guidelines in *U.S. v. Brodie*, 686 F. Supp. 941 (D.D.C. 1988), and will "abide by prior law."

In one case before the court a plea to a "lesser included offense," a misdemeanor, resulted in the same sentence under the Guidelines warranted by the originally charged felony offense. The court concluded that in such an instance the "benefit" of a plea bargain may be "entirely illusory," and that "it should not participate in a scheme which implicitly or explicitly promises the defendant that his plea will bring him more lenient treatment when, under the guidelines, that is not what will occur." The court concluded that, "in order to avoid misleading criminal defendants in this respect, it should advise such defendants of this fundamental fact at the time of the taking of the plea, or in any event prior to the time that sentence is imposed, so as to permit a withdrawal of the guilty plea."

In a second case, the Guideline sentence for a defendant convicted at trial on one count was ten times that which two other defendants (involved in the same activity and charged with four offenses) would receive in plea bargains dropping three counts in exchange for guilty pleas to another count. The court concluded that "these variations in punishment fly in the face of the dominant congressional purpose underlying the enactment of the new law—that of eliminating unwarranted disparity."

The court noted that if a plea bargain includes an agreement to dismiss or not pursue charges, Guideline § 6B1.2 provides that "the court may accept the agreement [only] if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." The court concluded that following § 6B1.2 "in practice raises well-nigh insurmountable obstacles." It would require courts to probe—perhaps unconstitutionally—into prosecutorial decisionmaking, and the Sentencing Commission has "plainly stated" that Fed. R. Crim. P. 11(e), which requires that charges remaining after a plea bargain reflect the seriousness of the actual offense, "does not authorize judges to intrude upon the charging discretion of the prosecutor." The result is "to leave prosecutors free to employ their charging discretion as they see fit, without any judicial interference or inquiry." The objective of uniform sentencing is not met when "the discretion to impose disparate sentences for equally situated offenders is simply shifted from judges to prosecutors, if the latter are free to pick and choose among the charges."

U.S. v. Bethancurt, No. 88-0188 (D.D.C. Aug. 29, 1988) (Greene, J.) (opinion).

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VOLUME 1 • NUMBER 16 • OCTOBER 3, 1988

Guidelines Application

District court defines "substantial portion of his income" requirement of criminal livelihood provision. Guideline § 4B1.3 establishes a minimum offense level (requiring a term of imprisonment) for an offense committed "as part of a pattern of criminal conduct from which he derived a substantial portion of his income." A court in S.D.N.Y. noted that "substantial portion of his income" "admits of at least two possible meanings." It may apply when "the income received from a pattern of criminal activity constitutes a substantial percentage of the defendant's annual income," or it may be construed to apply only to "offenders for whom the portion of their income derived from the pattern of criminal activity is sufficiently large in amount to be considered 'substantial.'"

The court concluded that "the latter interpretation is correct and that § 4B1.3 should be applied only when the defendant derives substantial income, defined in absolute terms, from criminal activity. This interpretation is a reasonable construction of the statutory language and is most consonant with the purpose and legislative history of the guideline." The other interpretation would produce the "anomalous" result of sentence enhancement for persons with small incomes but whose percentage of income from criminal activity was high, "while someone who engaged in a substantial scale of narcotics dealing would not come under the guideline if that person had a comparatively large source of other income."

The court also noted that the Sentencing Reform Act requires the Guidelines to be "'entirely neutral as to the . . . socio-economic status of offenders.' . . . It would be wholly contrary to [the Act] (and might also raise constitutional questions . . .) for the commission to have required a term of imprisonment for every indigent defendant who engages in a pattern of criminal conduct without mandating similar treatment for the wealthy defendant who derives substantial income from criminal activity." *But cf. U.S. v. Kerr*, 686 F. Supp. 1174 (W.D. Pa 1988) (holding criminal livelihood provision does not violate equal protection, due process, or the Act) (*see* GSU # 10). Since the defendant in this case was indigent and did not gain "substantial" income from his criminal activity, the court did not apply § 4B1.3.

U.S. v. Rivera, No. 88 CR. 0059 (S.D.N.Y. Sept. 20, 1988) (Leval, J.).

District court holds role in offense adjustment is not applicable to solitary drug dealer. Guideline § 3B1.1(a) provides that "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the offense level should be increased by four. Defendant grew and sold marijuana alone, but the government argued that if one considered defendant's customers his operation was "otherwise extensive" under § 3B1.1(a). The court held that this section could not be applied to defendant: "Section 3B1.1(a) . . . requires not only that the operation be extensive or have five or more participants, but also that the defendant be an organizer or leader. The record does not support the proposition that [defendant] organized or led anyone. One who commits a series of solitary crimes does not become an organizer or leader because his crime is extensive; one ordinarily does not, simply by virtue of selling drugs, lead or organize those to whom he sells."

U.S. v. Weidner, No. SCr. 88-15 (N.D. Ind. Sept. 19, 1988) (Miller, J.) (sentencing memorandum).

District court denies defendant's request for a pre-trial guideline computation. "A pre-trial sentencing guideline determination is completely inappropriate; under the prior sentencing system, a request that this Court state what its sentence would be if the defendant pleaded guilty would have been equally inappropriate."

U.S. v. Quezada, No. 88 CR 204 (E.D.N.Y. Aug. 31, 1988) (Platt, C.J.).

Upward departure from Guideline sentence warranted for fugitive status and uncounted criminal history. Defendant's Guideline range was 30-37 months. "However, he committed this offense while on conditions of release and in fugitive status in the State of New Hampshire. In addition, there is a history of thefts from others not resulting in convictions and sentences. Therefore, the Court finds that Criminal History Category III significantly under-represents the seriousness of his criminal history and the likelihood that he will commit further crimes. Criminal History V more adequately represents this defendant's past course of conduct." The court sentenced defendant to a term of 55 months.

U.S. v. Swirzewski, No. 87-86-01 (D. Vt. July 26, 1988) (Billings, J.) (statement of reasons for sentence).

Downward departure warranted by youthfulness. A court in D.N.D. held that a deviation from the sentencing guidelines was justified by the "youth and lack of sophistication" of a "naive and immature" 18-year-old who pleaded guilty to a computer theft misdemeanor. The court noted that while Guideline § 5H1.1 states that "[a]ge is not ordinarily relevant in determining whether a sentence should be outside the guidelines," an exception is provided for the elderly and infirm. It would be "age discrimination," the court found, to

ignore youthfulness.

U.S. v. Kopp, No. C-1-88-06-01 (D.N.D. Apr. 29, 1988) (Kautzman, U.S. Magis.) (transcript of sentencing).

Upward departure warranted to discourage drug traffic and account for local sentiment. Defendant entered a guilty plea in D.P.R. to possession of cocaine on board an aircraft. Noting increasing use of Puerto Rico "as a convenient stopover point for the distribution of narcotics... via commercial, scheduled airline flights," the court held: "It is our honest judicial conviction that departure from the guidelines is warranted in order to discourage the utilization of the Puerto Rico International Airport, an airport with lesser law-enforcement capabilities than those in the mainland, as a connecting point for international narcotics trafficking.... Sentence within the guidelines in a case of this nature would also be in violation of the Puerto Rico public sentiment, feelings, and mores regarding this type of crime." The court sentenced defendant to 48 months; the Guideline range was 21-27 months.

U.S. v. Aguilar-Pena, No. 87-617 (D.P.R. Mar. 23, 1988) (Fuste, J.) (sentencing findings).

Rules and Procedure

District court notes standard for modification of sentence under revised rule 35. A defendant in S.D.N.Y. sentenced under the Guidelines requested a reduction in sentence under Fed. R. Crim. P. 35. The court noted that "[u]nder the old rule, a motion for reduction of sentence is committed to the sound discretion of the District Court." Under the new rule, effective Nov. 1, 1987, that discretion is removed, the court found, and a court may only "correct a sentence determined on appeal to be erroneous" or, on motion by the government, may within a year lower the sentence of a defendant who provided substantial assistance in the investigation or prosecution of another. Since neither of those conditions applied here, the court held there was "no basis for reducing the sentence."

U.S. v. Soto, No. 87 Cr. 0976 (S.D.N.Y. Aug. 24, 1988) (Kram, J.).

Constitutionality — District Courts

Court in D. Md. sentences under Guidelines in accordance with stay order, notes possible exception. Following *U.S. v. Bolding*, 683 F. Supp. 1003 (D. Md. 1988), in which all judges of the district found the Guidelines invalid but determined to apply them pending final resolution of their constitutionality, the court denied defendant's request to be sentenced under prior law. The court noted, however, that "[a] valid reaso. for a departure from the general practice of sentencing under the 1984 Act would be presented if, for example, a defendant whom the Court would not be likely to imprison under prior law would be imprisoned under the 1984 Act but would be eligible for release under that Act before a final adjudication of its constitutionality could reasonably be expected."

U.S. v. Davis, No. HAR 87-0553 (D. Md. Sept. 20, 1988) (Smalkin, J.).

Decisions upholding the Guidelines:

SEVENTH CIRCUIT:

U.S. v. Franz, No. 88 CR 0455 (N.D. Ill. Aug. 26, 1988) (Zagel, J.) (holding guidelines valid; neither Guidelines nor Commission violate delegation doctrine, due process, or separation of powers).

EIGHTH CIRCUIT:

U.S. v. Roy, No. Cr. 6-88-59 (D. Minn. Sept. 13, 1988) (Devitt, Sr. D.J.) (upholding constitutionality of Sentencing Guidelines law and finding that Congress may delegate legislative power to Sentencing Commission and establish Commission as independent agency in the judicial branch).

TENTH CIRCUIT:

U.S. v. Costelon, No. 88-CR-69 (D. Colo. Aug. 1, 1988) (Finesilver, C.J.) (concluding: "(1) the Act does not violate separation of powers principles; (2) Congress did not improperly delegate its legislative authority to establish sentences; and (3) defendant's right to due process of law is not denied but, rather, is expanded under the Act").

Decisions invalidating the Guidelines:

SECOND CIRCUIT:

U.S. v. Johnson, No. 88 Cr. 298 (S.D.N.Y. Aug. 30, 1988); *U.S. v. Sefair*, No. 88 Cr. 301 (S.D.N.Y. Aug. 29, 1988); *U.S. v. Fields*, No. 88 Cr. 286 (S.D.N.Y. Aug. 29, 1988) (Haight, J.) (finding Guidelines invalid but severable from Act; "the remainder of the Act should stand," except for provisions abolishing parole).

THIRD CIRCUIT:

U.S. v. Whyte, No. A. 88-0047 (E.D. Pa. Sept. 9, 1988) (Katz, J.) (holding Guidelines invalid because "[t]he judicial branch has no authority to legislate or execute sentences binding on all judges"; since defendant "is subject to a substantial period of incarceration under either the old statutory standards or the new guidelines" and "will remain in jail until he is sentenced," sentencing is continued until after decision of Supreme Court in *Mistretta v. U.S.*).

SEVENTH CIRCUIT:

U.S. v. Eastland, No. 87 CR 948 (N.D. Ill. Sept. 8, 1988) (Aspen, J.) (concluding Guidelines "are invalid under the nondelegation theory or, alternatively, as an excessive delegation," and adopting finding of *Gubiensio-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988) that composition of Commission violates separation of powers).

ELEVENTH CIRCUIT:

U.S. v. Jackson, No. CR88-96A-01 (N.D. Ga. Sept. 1, 1988) (Ward, J.) (finding Sentencing Reform Act violates delegation doctrine and separation of powers; defendant shall be sentenced under prior law).

U.S. v. Salas, No. 87-422-Cr-T-15B (M.D. Fla. July 19, 1988) (Castagna, J.) (adopting *U.S. v. Russell*, 685 F. Supp. 1245 (N.D. Ga. 1988), holding Guidelines invalid).

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Guidelines Application

Ninth Circuit affirms upward departure. Appellant pled guilty to one count of transportation of illegal aliens. The probation officer recommended a 7-month term of imprisonment, the upper limit of the applicable guideline range, but the district court sentenced appellant to 2 years. Appellant contended that the sentence was excessive, an unwarranted departure from the Guidelines, that it violated due process and constituted cruel and unusual punishment.

Acknowledging that it was bound by the decision in *Gubiensio-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988), holding the Guidelines constitutionally infirm, the appellate court nevertheless determined to "proceed as if the Guidelines remain applicable to this defendant in order to avoid the necessity of reconsidering his appeal if the Supreme Court should sustain their constitutionality." The court reasoned that "the issue in the present case is whether the sentence was properly imposed in excess of the Sentencing Guidelines. Because we hold that it was, we do not rely upon the statute held to be unconstitutional. We conclude the sentence here was proper under the Guidelines, or under the law, in the absence of Sentencing Guidelines."

In upholding the departure the court concluded: "At sentencing, the district judge carefully set out his reasons for departure from the Guidelines as required by 18 U.S.C. § 3553(c). . . . He examined [appellant's] 'role in these events, the nature of the operation, the length of time it existed, (and) the number of aliens moved through it' in determining to depart from the Guidelines, and in fixing the sentence imposed. . . . On the basis of the record before the district court, it is clear that departure from the Guidelines was not unreasonable. The district court set out a number of reasons . . . that demonstrate that the conduct involved varied significantly from the norm. The case thus represents an unusual or atypical case where departure from the Guidelines is entirely appropriate. Nor was the extent of departure unreasonable. [Appellant's] varied activities in the scheme and his position as the 'right hand man' to a leader reflect [his] significant participation and provide the basis for a substantial departure from the Guidelines."

The court also held appellant's other arguments were without merit: "There was no violation of appellant's due process rights. The sentence was well within the statutory maximum and he was afforded a full hearing before sentencing. Further, the two-year sentence does not represent cruel and unusual punishment. As indicated above, the sentencing judge did consider the gravity of the offense and [appellant's] participation in the scheme in arriving at the sentence. He also was mindful of the sentences imposed upon the other participants and assessed the individual participants' culpability and participation before pronouncing sentence."

U.S. v. Nuno-Huizar, No. 88-5192 (9th Cir. Sept. 29, 1988) (*per curiam*).

Constitutionality—Appellate Courts

Ninth Circuit holds supervised release provision of Sentencing Reform Act invalid. In *Gubiensio-Ortiz, supra*, the Ninth Circuit held the Sentencing Reform Act unconstitutional. The question in this case "is whether the SRA's supervised release provision (18 U.S.C. § 3583) is severable from the rest of the Act." The court held that it was not: "In *Gubiensio*, we considered the severability of the provision relating to good time credits and concluded: 'Congress having chosen a "comprehensive" approach to making sentencing more determinate, we will not sever companion sections of the guidelines system that would introduce piecemeal reforms.' . . . We reach the same conclusion as to the supervised release provision. Severing the provision would leave in place two competing systems of post-custodial supervision—parole and probation under pre-SRA law and supervised release under the SRA. The simultaneous availability of both systems would be senseless."

U.S. v. Jackson, No. 88-5204 (9th Cir. Sept. 29, 1988) (*per curiam*).

Eleventh Circuit upholds constitutionality of SRA's substantial assistance provisions. Appellants were convicted on drug conspiracy charges and sentenced under the Anti-Drug Abuse Act of 1986. They argued that the Sentencing Reform Act's "substantial assistance" provisions (18 U.S.C. § 3553(e) and Fed. R. Crim. P. 35(b)), which grant courts authority to impose or reduce sentences below a statute's mandatory minimum, violate the equal protection clause "because minor participants and those of relatively low culpability are without sufficient knowledge to avail themselves of the provision."

In rejecting the equal protection claim, the court held that "Congress' desire to ferret out drug kingpins is obviously served by encouraging those with information as to the identity of kingpins to disclose such information. Hence, there is a rational relationship between the statute and Congress' purpose. Moreover, all 'minor' figures are treated similarly by the statute, which belies any claim of unequal treatment. . . . Appellants' equal protection challenge to the 'substantial assistance' provision is without merit."

The court also rejected appellants' claim that the provision was unconstitutional because it delegated to prosecutors "unbridled discretion to decide who is entitled to a sentence reduction. . . . [T]he only authority 'delegated' by the rule is the authority to move the district court for a reduction of sentence in cases in which the defendant has rendered substantial assistance. The authority to actually reduce a sentence remains vested in the district court . . . ." The court added that "although the term 'substantial assistance' is not defined in the statute, the discretion of prosecutors is limited by considering the 'substantial assistance' provision within the overall context of the Anti-Drug Abuse Act itself."

U.S. v. Musser, No. 87-3616 (11th Cir. Oct. 4, 1988) (*per curiam*) (to be reported at 856 F.2d 1484).

Constitutionality—District Courts

SECOND CIRCUIT:

U.S. v. Perez, No. 88 CR 128 (S.D.N.Y. Oct. 11, 1988) (Sprizzo, J.) (holding Guidelines invalid: "[I]f Congress wishes to eliminate sentencing disparity, there are constitutional ways to do it. Congress can eliminate judicial discretion entirely. . . . However, Congress does not have the power to set up a Commission to direct Judges as to how they should exercise a judicial power once conferred in particular cases. In short, Congress cannot exercise judicial power and may not delegate to a Commission the authority to do what it may not do . . . .").

THIRD CIRCUIT:

U.S. v. Liell, No. 88-00119-01 (M.D. Pa. Oct. 3, 1988) (Muir, Sr. D.J.) (holding Guidelines constitutional, sentencing defendant under Guidelines and also providing "alternate sentence" in case Supreme Court declares Sentencing Reform Act unconstitutional in whole or in part).

ELEVENTH CIRCUIT:

U.S. v. Fernandez, No. 88-114-Cr-T-13(08) (M.D. Fla. Sept. 23, 1988) (Krentzman, Sr. D.J.) (holding placement and membership of Commission violate separation of powers; sentence will be imposed under prior law, but court will conduct hearings and state and explain sentences under both Guidelines and prior law to avoid further sentencing proceedings if Supreme Court upholds Guidelines).

Most of the early issues of *Guideline Sentencing Update* concerned decisions on the constitutionality of the Sentencing Reform Act and the Sentencing Guidelines. Since the issue of constitutionality is now before the Supreme Court, we have shifted our emphasis to cases applying or interpreting the Guidelines or related statutory provisions. We are grateful to all of the courts that have provided us with copies of decisions. We request that courts continue to send us copies of opinions, sentencing memoranda, statements of reasons for imposing sentence, and transcripts of sentencing proceedings that discuss these or other aspects of guideline sentencing.

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Constitutionality

Third Circuit upholds Sentencing Guidelines. Finding no violations of due process or separation of powers, the Third Circuit reversed a district court ruling and held the Sentencing Reform Act constitutional. This is the second opinion by a court of appeals on the constitutionality of the Guidelines. The Ninth Circuit found the Guidelines invalid in *Gubiensio-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988) (*see* GSU #14).

The court determined that, other than in death penalty cases, there is no "federal substantive liberty interest" in individualized sentencing, and thus the narrowing of judicial discretion in the Guidelines does not violate substantive due process. On the separation of powers issue, the court concluded that (1) "Congress may lawfully curtail judicial discretion in sentencing," (2) it lawfully delegated that authority to the Sentencing Commission by providing "an abundance of substantive guidance to the Commission," and (3) neither the composition nor placement of the Commission unconstitutionally increased the power or impaired the function of the executive or judicial branches.

U.S. v. Frank, No. 88-3268 (3d Cir. Nov. 7, 1988) (Gibbons, C.J.) (*reversing in part* 682 F. Supp. 815 (W.D. Pa.) (GSU #6)).

Guidelines Application

Second Circuit affirms upward departure based upon quantity of drugs where offense of conviction does not list quantity as sentencing factor. Appellant was indicted on two drug-related offenses, but those charges were dropped in return for a plea of guilty to "use of a communication facility in the commission of a drug offense." Quantity of drugs is not a sentencing factor for that offense under the Guidelines, but the sentencing judge considered the large amount of drugs involved to be an aggravating circumstance and departed from the guideline range of 6–12 months to impose the statutory maximum of 48 months.

The appellate court determined that the sentencing court could properly consider the quantity of drugs. "[T]here is no place in the Guidelines where the Commission states that it has rejected quantity as a factor in sentencing telephone-count offenders," and courts have the discretion to consider factors not foreclosed by the Commission. The Commission specifically stated in policy statement § 5K2.0 that "a factor may be listed as a specific offense characteristic under one guideline, but not under all guidelines. *Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing.*" (Emphasis in court's opinion.) *See also U.S. v. Restrepo, infra.*

Rejecting appellant's claim that the sentencing court improperly used a "real-offense" methodology, the court found that although "the Guidelines basically adopt a charge-offense method, they contain sufficient elements of the real-offense method to allow the district court in this case to look to the actual facts in determining sentence." Moreover, the commentary to guideline § 1B1.4 states that "information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines."

To appellant's claim that departure from the Guidelines in this case would undermine the congressional goal of uniformity in sentencing, the court noted that "the statutory goal is 'avoiding *unwarranted* sentencing disparities . . . .'" (Emphasis by court.) The court observed that, if anything, the proposed plea bargain would have resulted in greater disparity, allowing a sentence of 6–12 months when the original charges carried sentences of 12.5–15.5 years: "From that perspective, a sentence of 6–12 months creates more discrepancy and is, therefore, much less 'uniform' than a sentence of four years. Allowing judges to ameliorate to some extent the skewing occasioned by plea bargaining may well carry out the intent of the statute. A rigid refusal to allow judges to depart from the Guidelines in this situation simply always transfers discretion from the district judge to the prosecutor, a result that we believe Congress did not intend."

U.S. v. Correa-Vargas, No. 88-1167 (2d Cir. Oct. 18, 1988) (Feinberg, C.J.).

District court explores authority under Guidelines to accept plea to reduced charge. In E.D. Pa. defendants were charged with three drug offenses, the two most serious of which each carried mandatory minimum terms of 10 years. Under a plea agreement defendants would plead guilty to the third, lesser charge, and receive 5-year terms, and the other two counts would be dismissed. The issue for the court was "whether, within the framework of the guidelines," it could properly

accept a plea agreement where the sentence under the remaining count would be half the mandatory minimum for each dismissed count, and less than half of the applicable guideline ranges for those counts. In addition, because the agreed sentence of 60 months was approximately double the top of the guideline range for the remaining offense, the court had to determine whether such a departure was justified.

Following policy statement § 6B1.2, "Standard for Acceptance of Plea Agreements," the court first determined that "the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." § 6B1.2(a). The court based this conclusion upon the facts of the case, the difficulty of presenting the case and obtaining convictions on the more serious charges, and concern over revealing the identity of a government informant.

The court then determined that under § 6B1.2(c)(2) the proposed sentences "depart[ed] from the applicable guideline range for justifiable reasons." The large quantity of drugs involved constituted an "aggravating circumstance" under 18 U.S.C. § 3553(b) that warranted an upward departure. While the statutory offense of conviction does not address the quantity of drugs, the court found it was a proper factor to consider for purposes of departure. *See Correa-Vargas, supra.*

The court also relied upon policy statement § 5K2.14, which authorizes departures above the guideline range "[i]f national security, public health, or safety was significantly endangered." The court concluded that "taking public health as meaning national public health, and safety as meaning national safety, . . . activities involving the storage of drugs, which in this event turned out to amount to 30 kilos of cocaine, did indeed carry with them a threat to the public health and safety of the nation."

U.S. v. Restrepo, No. 88-00086 (E.D. Pa. Aug. 16, 1988) (Pollak, J.).

Guidelines held inapplicable to Assimilative Crimes Act. In what appears to be a question of first impression, a court in D. Kan. held that the Guidelines should not be used when sentencing under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13. That Act provides that persons found guilty "of any act or omission [on federal territory] which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, . . . shall be guilty of a like offense and subject to a like punishment."

The court found that the ACA "has been consistently interpreted to require that the state statute fixes the punishment or sentence to be imposed." Passage of the Sentencing Reform Act by itself does not change that practice, the court held: "There is no clear and manifest indication that Congress intended to repeal the 'like punishment' provision of the ACA. In fact, application of the sentencing guidelines to crimes under the ACA would gut the very policy behind the ACA, because those convicted of state crimes incorporated under the ACA would no longer be treated as if the crime had occurred in the surrounding state."

The court noted that the Guidelines, at § 2X5.1, "indicate that the guidelines do cover assimilative crimes, at least if such crime is a felony or Class A misdemeanor." The court held, however, that "the commission cannot amend or repeal laws, only Congress can. Congress has not amended the ACA by applying the sentencing guidelines to assimilative crimes."

U.S. v. Richards, No. 88-9005M-01 (D. Kan. Oct. 21, 1988) (Reid, U.S. Magis.).

Severability

District court holds grading and probation provisions of Sentencing Reform Act severable from Guidelines. The SRA precludes a sentence of probation where the offense is a Class B felony, as defined by the Act's grading provisions. *See* 18 U.S.C. §§ 3559(a)(1)(B) and 3561(a)(1). A court in S.D.N.Y. that previously found the Guidelines invalid determined that these provisions are severable from the Guidelines and remain valid, thereby precluding probation for a defendant convicted of a Class B felony.

Noting that "[w]hether a statutory provision is severable is primarily a matter of legislative intent," and that "[a] presumption favors severability," the court found the provisions severable: "There is nothing in the structure of the statute that, upon invalidation of the guidelines, vitiates the effectiveness of the grading and probation provisions or otherwise makes those provisions nonsensical in the context of the rest of the Act. Thus, if there is any reason that the presumption in favor of severability should be overcome, it will be through more subtle evidence of Congressional intent."

The court added: "While I agree in principle with the Ninth Circuit . . . when it says in *Gubiensio[-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988)] that Congress intended a 'comprehensive' approach that would make sentencing more determinate, it does not necessarily follow that Congress intended for the remainder of the Act to be jettisoned should the guidelines be found unconstitutional. . . . The abolition of probation for defendants convicted of crimes punishable by imprisonment for twenty years or more serves to narrow the judge's discretion and thereby helps to standardize sentencing. It was that goal of Congress—the reduction of disparities in sentencing—that the *Gubiensio* court called Congress' 'overriding goal' in passing the Sentencing Reform Act. Although Congress would undoubtedly have preferred that the constitutionality of the guidelines be upheld . . . there is no reason to believe that Congress would not wish other provisions to be enforced that further its purposes."

U.S. v. Hernandez, No. 88 Cr. 374 (S.D.N.Y. Oct. 7, 1988) (Haight, J.).

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Sentencing Procedure

District court allocates burden of proof to government and determines standard of proof when resolving disputed facts in presentence report. Both defendant and the government objected to portions of the presentence report, which recommended an increase in defendant's offense level for his role in the offense and a reduction for acceptance of responsibility. The government conceded that it should bear the burden of proving defendant's sentence should be *increased*, but argued that defendant should bear the burden of showing his sentence should be *reduced*.

The court noted that under pre-guidelines sentencing procedures courts had concluded that "the Government bore the burden of persuasion on all matters disputed in PSI's where those matters were relied upon by the sentencing judge." Rejecting the government's argument, the court found that "it is clear that whatever determination the Court makes with respect to either of the disputed matters in the PSI, that determination will have the effect of either increasing or reducing the Guidelines applicable to defendant . . . . This is not essentially different from the situation which existed prior to promulgation of the Guidelines." The court concluded that it was "not unreasonable" for the Government to bear the burden of proving defendant was not eligible for the acceptance of responsibility reduction because the government "should for the most part have as much access to [information on this issue] as the defendant."

The court held that the standard of proof required at the sentencing hearing is "a preponderance of the evidence," rejecting defendant's claim that a "clear and convincing" standard was required.

U.S. v. Dolan, No. CR-1-88-57 (E.D. Tenn. Nov. 22, 1988) (Edgar, J.).

District court allows withdrawal of guilty plea because of "plain error of law." A defendant in W.D. Mo. sought leave under Fed. R. Crim. P. 32(d) to be released from his guilty plea on the ground that it was based upon an erroneous computation by both defense counsel and the government. The parties miscalculated the penalty for the instant offense, "failure to appear," which was to be based upon the maximum penalty authorized for the underlying offense. Because the error apparently resulted from a misreading of the complex statutory scheme involved, rather than merely a "bad guess" by the attorneys as to the expected sentence, the court allowed the withdrawal: "I am mindful that Guideline confusion is likely to be rather common, and there must be considerable caution used in granting relief from pleas that may have been affected by judgment-calls that turn out to be erroneous. This case is exceptional, however, in that a plain error of law has been made in computing the expected sentence, and the error was apparently shared by Government counsel."

U.S. v. Loman, No. 88-00125-01-CR-W-6 (W.D. Mo. Oct. 25, 1988) (Sachs, J.).

Guidelines Application

Upward departure warranted by specific offense characteristics. Defendant, a government employee, pleaded guilty to theft of government property, false claims against the government, and tax evasion. The applicable guideline range was 30 to 37 months, but the court found "at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately" and which warranted upward departure. The court determined that the Guidelines address the severity of the offenses, but not their *duration*, which in this case was over six years. The court further found that departure was warranted by the facts that defendant "abused a process relied upon by the government" and that he "totally violated his oath of employment by engaging in this protracted, devious conduct."

The court relied in part upon the Sentencing Commission's policy statement § 5K2.7, which provides for upward departure when "defendant's conduct resulted in a significant disruption of a governmental function," and held that "stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate instruments," caused such a disruption. Additionally, § 5K2.9 provides for departure if "defendant committed the offense in order to facilitate or conceal the commission of another offense." By evading taxes, the court found, "defendant concealed the crimes of theft and false claims."

The court determined that the above factors warranted an increase in defendant's offense level from 19 to 24, for a sentencing range of 51 to 63 months. Defendant was sentenced to a 60-month term.

U.S. v. Burns, No. 88-0302 (D.D.C. Oct. 14, 1988) (Johnson, J.).

Constitutionality

District court finds "good time" provisions of Sentencing Reform Act not severable from Guidelines. A court in S.D.N.Y. that had earlier held the Guidelines invalid concluded that the good time provisions of the SRA cannot be severed from the Guidelines. "The legislative history suggests that the Act was meant to be a complete package, with the goals of eliminating disparities and establishing more certainty in sentencing. . . . The fact that there is no severability clause is some indication that Congress intended to have the various components accepted as a package, or not at all. . . . [I]f sentences were imposed under the old system and good time were calculated under the new system, disparities in sentencing and uncertainty over release dates could be increased, subverting the overriding Congressional purpose." Defendant will be sentenced under prior law.

U.S. v. Ortega-Fernandez, No. 88 CR. 261 (S.D.N.Y. Oct. 12, 1988) (Griesa, J.).

Decisions invalidating the Guidelines:

U.S. v. Christman, No. Cr. 88-4-2 (D. Vt. Nov. 19, 1988) (*per curiam*) (holding, in "special session en banc," that "the Sentencing Guidelines promulgated as provided in the Sentencing Reform Act of 1984 are unconstitutional" on separation of powers grounds; defendants will be sentenced under prior law).

U.S. v. Schetz, No. 87 CR 981-4 (N.D. Ill. Nov. 3, 1988) (Duff, J.) (holding Sentencing Reform Act unconstitutional because membership of Sentencing Commission and President's authority to appoint and remove commissioners violate separation of powers).

U.S. v. Cortes, No. 88 CR 159 (S.D.N.Y. Oct. 7, 1988) (Kram, J.) (holding Sentencing Commission and Guidelines violate separation of powers, and Guidelines are not severable from other provisions of Sentencing Reform Act).

Guideline Sentencing Update

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Volume 1 • Number 20 • January 4, 1989

Guidelines Application

Second Circuit upholds departure based on quantity of drugs involved in relevant conduct but not used to determine guideline range. Pursuant to a plea agreement, defendant pled guilty to one count of distributing a small sample of heroin; two counts relating to the sale of a larger quantity of the drug were dropped. The district court accepted defendant's claim that the base offense level should be calculated according to the offense of conviction, rather than the overall conduct of which it was a part. After adjustments, this produced an offense level of 10 and a guideline range of 6 to 12 months. The court departed upward, however, because of the defendant's admitted involvement in the scheme to sell the larger amount of heroin, and sentenced defendant to 63 months.

Defendant argued on appeal that the Sentencing Commission had already taken drug quantity into account in setting the base offense level for his offense, and therefore quantity could not be used as a basis for upward departure. The court determined that "if the sentencing judge had . . . selected a base offense level from the drug quantity table that correlated with the total amount of drugs in the ultimate transaction," which in this case would have resulted in a range of 51 to 63 months, "we would doubt that this same quantity could be used to justify a departure above that range. But where, as in this case, a judge selects a guideline range that is not based on all the relevant conduct of the defendant, it is not 'unreasonable,' which is our standard of review, 18 U.S.C. § 3742(d)(3) (Supp. IV 1986), for the judge to depart above that range because of relevant conduct established at a hearing or admitted by the defendant." The court concluded that the departure "was not unreasonable . . . in light of the large quantity of narcotics in the ultimate transaction that [defendant] admitted he had facilitated."

As a preliminary matter, the court rejected defendant's contention that the guidelines in effect on the date of his offense, Dec. 4, 1987, required the guideline range "to be determined solely by the quantity of narcotics handled on the day of the offense." The court noted that the current versions of guideline §§ 1B1.2 and 1B1.3, which were revised Jan. 15, 1988, "clearly" allow the sentencing court to base the guideline range not only on the offense of conviction, but also on the "relevant conduct" of defendant, as that term is defined in § 1B1.3. Reviewing the earlier versions of these sections in effect at the time of defendant's offense, the commentary to the sections, and statements of the Sentencing Commission regarding the later revision, the court held that the Jan. 15, 1988 revisions merely clarified the language of the earlier versions. The sentencing court should have based the offense level on the larger quantity of drugs involved in the overall scheme, the court found. Nevertheless, the court upheld the sentence: "The appropriate guideline range was therefore fifty-one to sixty-three months, and the sixty-three month sentence was therefore proper under the Guidelines."

U.S. v. Guerrero, No. 88-1198 (2d Cir. Dec. 12, 1988) (Newman, J.).

Mandatory minimum sentence to be used if applicable guideline range is lower. The Eighth Circuit has upheld a sentence based on the mandatory minimum called for by statute, rather than the lower sentence calculated under the Guidelines. Defendant was convicted of being a felon in possession of a firearm and sentenced to 15 years without parole, the mandatory minimum. Although the offense occurred after Nov. 1, 1987, the appellate court rejected defendant's argument that he should have been sentenced under the Guidelines: "In fact, the district court did apply the Guidelines, but unfortunately for the defendant, they provide that where the Guidelines sentence would be less than the statutory minimum, that statutory minimum 'shall be the guideline sentence.' Sentencing Guidelines § 5G1.1(b)."

U.S. v. Savage, No. 88-1906 (Dec. 16, 1988) (Woods, J., sitting by designation).

Guidelines apply to conspiracy begun before but ending after effective date of Sentencing Reform Act. In E.D. Pa. defendants were charged with conspiracy to receive and sell stolen treasury checks. The conspiracy began "on or about September 1, 1987 and continued until December 8, 1987." Seven checks were stolen after Nov. 1, 1987, including four on Dec. 8.

The court found that "the crime in the instant case, conspiracy, was 'committed' after November 1, 1987—the effective statutory date of the Sentencing Reform Act of 1984—and after December 7, 1987—the date of the enactment of the Sentencing Act of 1987." Reviewing prior case law, which held that statutory changes that take effect during the course of an ongoing conspiracy will be applied, the court determined that it found "no *ex post facto* violation in the application of the Sentencing Reform Act of 1984 and the Sentencing Act of 1987 to the conspiracy in the case at bar. The conspiracy here was a crime that continued until after the effective dates of both acts." The court held, however, that the amendments to the SRA made by the Criminal Fines Improvements Act of 1987, effective Dec. 11, 1987, would not apply to these defendants.

U.S. v. Gasparotti, No. 88-00094-01 (E.D. Pa. Dec. 19, 1988) (Van Antwerpen, J.).

Special verdict not required to decide whether Guidelines apply or to determine the amount of drugs involved. Defendant, charged in D. Md. with engaging in a drug conspiracy that existed from 1983 through July 1988, requested "special interrogatories to the jury designed to elicit answers to two factual questions relevant to sentencing, *viz.*, (1) whether defendant was a member of the conspiracy on or after November 1, 1987, and (2) what quantity of drugs was involved in the conspiracy." The first inquiry concerned whether the Guidelines applied to the conspiracy count, the second inquiry concerned the penalty imposable, since quantity of drugs is a sentencing factor.

The court denied defendant's request, finding that "[i]t is the almost universal view that special verdicts are not to be employed in federal criminal cases," and that no case has found that a trial judge *must* seek a special factual finding from the jury to aid in determining sentencing factors. The court held that "[t]he determination of facts relevant to sentencing has consistently been understood . . . to be within the trial judge's province. . . . The trial judge has always been able to base factual determinations relevant to sentencing on, *inter alia*, the evidence adduced at trial. . . . This Court sees no reason why it cannot exercise its fact-finding function relevant to sentencing in this case as it always has, *viz.*, without the aid of a jury's special findings."

The court added: "[T]he entire Guideline sentencing scheme depends on the trial judge's resolution of a myriad of factual issues that bear on the calculation of the relevant offense level and criminal history category. Because of this mechanistic approach to sentencing, if defendant's present request is granted, then it could logically be argued that no sentencing fact can be determined by the judge, but all must be submitted to the jury, because the resolution of each fact affects the sentence that the judge *must*, except in unusual circumstances, now impose. . . . Neither the Sentencing Reform Act nor the Constitution compels such a result."

U.S. v. Sheffer, No. S 88-0293 (D. Md. Dec. 1, 1988) (Smalkin, J.).

Constitutionality—District Courts

Decisions holding guidelines invalid:

U.S. v. Dahlin, No. 88 CR 20001 (N.D. Ill. Nov. 22, 1988) (Roszkowski, J.) (holding "that the Sentencing Guidelines are an unconstitutional delegation of legislative power and therefore invalid"; defendant will be sentenced "according to the old procedures").

U.S. v. Bergmark, No. 88 CR 620 (N.D. Ill. Nov. 21, 1988) (Rovner, J.) (Guidelines invalid; defendant will be sentenced under prior law if found guilty).

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VOLUME 1 • NUMBER 21 • JANUARY 19, 1989

Constitutionality

Supreme Court upholds constitutionality of Sentencing Reform Act against delegation and separation of powers challenges. In *Mistretta v. United States* the Supreme Court held, by an 8-1 vote, that although the United States Sentencing Commission is "an unusual hybrid in structure and authority," its Guidelines were not subject to constitutional challenge on the grounds that Congress delegated excessive legislative power to the Commission or that the placement and structure of the Commission violated separation of powers.

The Court first held that "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." Congress set forth the goals and purposes the Commission was to pursue in carrying out its mandate and "prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing." The Court also found that Congress gave specific instructions as to how to set up the guidelines, including the determination of sentencing ranges, factors to use in formulating offense categories and in setting offense levels, and aggravating and mitigating circumstances that may or may not be considered.

The Court noted that "the Commission enjoys significant discretion in formulating guidelines. . . . But our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy." In this instance the discretion granted to the Commission was proper: "Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, 'Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.' . . . We have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act."

On the separation of powers issue, the Court first held that the location of the Commission was proper. "Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary." In the past the Court has held "that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch," and also that "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." In light of this precedent and practice, the Court "discern[ed] no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch. As we described at the outset, the sentencing function has long been a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch. . . . Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this court in establishing rules of procedure under the various enabling acts. . . . Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission's functions, like this Court's function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch."

While conceding that "the degree of political judgment about crime and criminality exercised by the Commission and the scope of the substantive effects of its work does to some extent set its rulemaking powers apart from prior judicial rulemaking," the Court concluded "that the significant political nature of the Commission's work" did not preclude its placement in the Judicial Branch: "Our

separation-of-powers analysis does not turn on the labelling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial.' . . . Rather, our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.' . . . In this case, the 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts." Furthermore, in light of the Guidelines' "limited reach, the special role of the Judicial Branch in the field of sentencing, and the fact that the Guidelines are promulgated by an independent agency and not a court, it follows as a matter of 'practical consequences' the location of the Sentencing Commission within the Judicial Branch simply leaves with the Judiciary what has long belonged to it."

The Court also rejected various contentions concerning the propriety of judicial membership on the Commission. Although the Court found the requirement of judicial service "somewhat troublesome," it concluded that neither the text of the Constitution, historical practice, nor the Court's precedents would prohibit Article III judges from undertaking extrajudicial duties in their individual capacities. The Court found that "[s]ervice on the Commission by any particular judge is voluntary," and it is doubtful that any judge could be forced to serve against his will. Service by judges on the Sentencing Commission does not undermine the integrity of the Judicial Branch by diminishing the independence of the Judiciary or by improperly lending "judicial prestige and an aura of judicial impartiality to the Commission's political work." Nor will judicial service on the Commission "have a constitutionally significant practical effect on the operation of the Judicial Branch. We see no reason why service on the Commission should result in widespread judicial recusals. That federal judges participate in the promulgation of guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues."

While the Court was "somewhat more troubled" by the argument that judicial service on the Commission might undermine public confidence, it concluded that "the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. . . . [T]he Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate."

The Court summarily rejected "petitioner's argument that the mixed nature of the Commission violates the Constitution by requiring Article III judges to share judicial power with nonjudges. . . . [T]he Commission is not a court and exercises no judicial power. Thus, the Act does not vest Article III power in nonjudges or require Article III judges to share their power with nonjudges."

Finally, the Court held that "[t]he notion that the President's power to appoint federal judges to the Commission somehow gives him influence over the Judicial Branch or prevents, even potentially, the Judicial Branch from performing its constitutionally assigned function is fanciful. . . . We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission." The Court also found that the removal power "poses a similarly negligible threat to judicial independence. The Act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges. . . . Also, the President's removal power under the Act is limited" to removal only for good cause. "Under these circumstances, we see no risk that the President's limited removal power will compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies."

In dissent, Justice Scalia reasoned that Congress can delegate rulemaking power only when that power is ancillary to executive or judicial functions. The Sentencing Commission has no executive or judicial functions, he concluded, but rather has been given "a pure delegation of legislative power," and he found "no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."

Mistretta v. United States, No. 87-7028 (U.S. Jan. 18, 1989) (Blackmun, J.).

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TOPICAL INDEX FOR *GUIDELINE SENTENCING UPDATE*, VOLUME 1

The following is an index of cases reported in *Guideline Sentencing Update* up to and including the Supreme Court decision in *Mistretta v. U.S.*, No. 87-7028 (U.S. Jan. 18, 1989), which upheld the Sentencing Reform Act of 1984 (SRA) against separation of powers and delegation doctrine challenges. The index is divided into two parts. The first part lists cases that applied or interpreted the Guidelines or relevant sections of the SRA, or that decided challenges to particular sections of the Guidelines or SRA on grounds other than those in *Mistretta*. The second part of the index lists decisions on the constitutionality of the Guidelines and SRA. The number in brackets at the end of each citation refers to the *GSU* issue in which the case was summarized.

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EIGHTH CIRCUIT:

U.S. v. Roy, 694 F. Supp. 635 (D. Minn. 1988) [#16].
U.S. v. Whitfield, 689 F. Supp. 954 (D. Minn. 1988) [#13].
U.S. v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988) [#5], *aff'd sub nom. Mistretta v. U.S.*, No. 87-7028 (U.S. Jan. 18, 1989) [#21].

NINTH CIRCUIT:

U.S. v. Macias-Pedroza, 694 F. Supp. 1406 (D. Ariz. 1988) (en banc) [#9].
U.S. v. Belgard, 694 F. Supp. 1488 (D. Or. 1988) [#13].
U.S. v. Amesquita-Padilla, 691 F. Supp. 277 (W.D. Wash. 1988) [#10].
U.S. v. Myers, 687 F. Supp. 1403 (N.D. Cal. 1988) [#10].
U.S. v. Ruiz-Villanueva, 680 F. Supp. 1411 (S.D. Cal. 1988) [#2].

TENTH CIRCUIT:

U.S. v. Costelon, 694 F. Supp. 786 (D. Colo. 1988) [#16].

ELEVENTH CIRCUIT:

U.S. v. Childress, No. 87-263-N (M.D. Ala. May 16, 1988) [#9].
U.S. v. Erves, No. CR87-478A (N.D. Ga. Mar. 22, 1988) [#4].

B. Guidelines Invalid

(Parentheticals follow cases that found the Guidelines invalid on constitutional grounds other than or in addition to separation of powers or the delegation doctrine.)

D.C. CIRCUIT:

U.S. v. Brodie, 686 F. Supp. 941 (D.D.C. 1988) (due process, order stayed) [#9], *stay lifted, U.S. v. Bethancurt*, 692 F. Supp. 1427 (D.D.C. 1988) [#15].

SECOND CIRCUIT:

U.S. v. Cortes, 697 F. Supp. 1305 (S.D.N.Y. 1988) [#19].
U.S. v. Perez, 696 F. Supp. 55 (S.D.N.Y. 1988) [#17].
U.S. v. Mendez, 691 F. Supp. 656 (S.D.N.Y. 1988) [#11].
U.S. v. Sumpter, 690 F. Supp. 1274 (S.D.N.Y. 1988) [#13].
U.S. v. Alafriz, 690 F. Supp. 1303 (S.D.N.Y. 1988) (due process) [#13].
U.S. v. Olivencia, 689 F. Supp. 1319 (S.D.N.Y. 1988) [#8].
U.S. v. Molina, 688 F. Supp. 819 (D. Conn. 1988) [#9].
U.S. v. DiBiase, 687 F. Supp. 38 (D. Conn. 1988) [#9].
U.S. v. Christman, No. Cr. 88-4-2 (D. Vt. Nov. 19, 1988) (en banc) (per curiam) [#19].
U.S. v. Ortega-Fernandez, No. 88 Cr. 261 (S.D.N.Y. Oct. 12, 1988) [#19].
U.S. v. Hernandez, No. 88 Cr. 374 (S.D.N.Y. Oct. 7, 1988) [#18].
U.S. v. Johnson, No. 88 Cr. 298 (S.D.N.Y. Aug. 30, 1988) [#16].
U.S. v. Sefair, No. 88 Cr. 301 (S.D.N.Y. Aug. 30, 1988) [#16].
U.S. v. Fields, No. 88 Cr. 286 (S.D.N.Y. Aug. 29, 1988) [#16].
U.S. v. Smith, No. 88 Cr. 49 (S.D.N.Y. May 31, 1988) [#10].

THIRD CIRCUIT:

U.S. v. Whyte, 694 F. Supp. 1194 (E.D. Pa. 1988) [#16].
U.S. v. Brown, 690 F. Supp. 1423 (E.D. Pa. 1988) (order stayed) [#13].
U.S. v. Frank, 682 F. Supp. 815 (W.D. Pa. 1988) (due process) [#5] *rev'd in part, U.S. v. Frank*, No. 88-3220 (3d Cir. Nov. 7, 1988) [#18].
U.S. v. Kapantais, No. 87-251 (W.D. Pa. Aug. 16, 1988) [#14].
U.S. v. Rossi, No. 87-241 (W.D. Pa. Aug. 11, 1988) (article I presentment requirement) [#14].

FOURTH CIRCUIT:

U.S. v. Davis, 694 F. Supp. 1218 (D. Md. 1988) [#16].
U.S. v. Bolding, 683 F. Supp. 1003 (D. Md. 1988) (due process, order stayed) [#7].

FIFTH CIRCUIT:

U.S. v. Perez, 685 F. Supp. 990 (W.D. Tex.) (due process, article I presentment requirement) [#11].
U.S. v. Coburn, No. C-88-05 (S.D. Tex. July 13, 1988) [#12].

SIXTH CIRCUIT:

U.S. v. Thomas, 699 F. Supp. 147 (W.D. Tenn. 1 88) [#12].
U.S. v. Williams, 691 F. Supp. 36 (M.D. Tenn. 1988) (en banc) [#12].

SEVENTH CIRCUIT:

U.S. v. Dahlin, 701 F. Supp. 148 (N.D. Ill. 1988) [#20].
U.S. v. Schetz, 698 F. Supp. 153 (N.D. Ill. 1988) [#19].

U.S. v. Eastland, 694 F. Supp. 512 (N.D. Ill. 1988) [#16].
U.S. v. Rosario, 687 F. Supp. 426 (N.D. Ill. 1988) [#11].
U.S. v. Molander, 683 F. Supp. 701 (W.D. Wis. 1988) [#8].
U.S. v. Bergmark, No. 88 CR 620 (N.D. Ill. Nov. 21, 1988) [#20].

EIGHTH CIRCUIT:

U.S. v. Terrill, 688 F. Supp. 542 (W.D. Mo. 1988) [#11].
U.S. v. Serpa, 688 F. Supp. 1398 (D. Neb. 1988) (en banc) (per curiam) [#12].
U.S. v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988) (due process, article I presentment requirement) [#11].
U.S. v. Horton, 685 F. Supp. 1479 (D. Minn. 1988) [#9].
U.S. v. Estrada, 680 F. Supp. 1312 (D. Minn. 1988) [#6].
U.S. v. Bester, No. 5-88-08 (D. Minn. July 19, 1988) [#13].

NINTH CIRCUIT:

Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988) [#14].
U.S. v. Jackson, 857 F.2d 1285 (9th Cir. 1988) (per curiam) (holding supervised release provision of SRA not severable from Guidelines, invalid following *Gubiensio-Ortiz, supra*) [#17].
U.S. v. Martinez-Ortega, 684 F. Supp. 634 (D. Idaho 1988) (due process, order stayed) [#9].
U.S. v. Ortega-Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988) (en banc) (due process) [#8].
U.S. v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988) [#1].
U.S. v. Nordall, No. CR87-067TB (W.D. Wash. Apr. 21, 1988) [#9].
U.S. v. Harrington, No. CR-88-34-1 (E.D. Wash. Apr. 13, 1988) [#10].
U.S. v. Manley, No. 87-1290-R (S.D. Cal. Feb. 18, 1988) [#1].

TENTH CIRCUIT:

U.S. v. Swapp, 695 F. Supp. 1140 (D. Utah 1988) (en banc) (article I presentment requirement) [#13].
U.S. v. Scott, 688 F. Supp. 1483 (D.N.M. 1988) [#11].
U.S. v. Wilson, 686 F. Supp. 284 (W.D. Okla. 1988) [#9].
U.S. v. Smith, 686 F. Supp. 847 (D. Colo. 1988) [#5].
U.S. v. Elliott, 684 F. Supp. 1535 (D. Colo. 1988) (due process) [#8].
U.S. v. Tolbert, 682 F. Supp. 1517 (D. Kan. 1988) [#6].
U.S. v. Brown, No. 88-10036 (D. Kan. July 14, 1988) [#13].
U.S. v. Bigger, No. 88-10-CR, *U.S. v. Scott*, No. 88-11-CR (E.D. Okla. May 26, 1988) [#10].
U.S. v. Rivas-Hernandez, No. CR-88-56-T (W.D. Okla. May 16, 1988) [#10].
U.S. v. Harris, No. 88-CR-6-B (N.D. Okla. Apr. 29, 1988) [#9].

ELEVENTH CIRCUIT:

U.S. v. Bogle, 693 F. Supp. 1102 (S.D. Fla. 1988) (en banc) [#12].
U.S. v. Kane, 691 F. Supp. 341 (N.D. Ga. 1988) [#12].
U.S. v. Richardson, 690 F. Supp. 1030 (N.D. Ga. 1988) [#14].
U.S. v. Bogle, 689 F. Supp. 1121 (S.D. Fla. 1988) (en banc) [#11], *request for stay of order denied*, 855 F.2d 707 (11th Cir. 1988) (per curiam) [#15].
U.S. v. Fonseca, 686 F. Supp. 296 (S.D. Ala. 1988) [#9].
U.S. v. Allen, 685 F. Supp. 827 (N.D. Ala. 1988) (en banc) [#9].
U.S. v. Diaz, 685 F. Supp. 1213 (S.D. Ala. 1988) [#9].
U.S. v. Russell, 685 F. Supp. 1245 (N.D. Ga. 1988) [#8].
U.S. v. Fernandez, No. 88-114-Cr-T-13(08) (M.D. Fla. Sept. 23, 1988) [#17].
U.S. v. Jackson, No. CR88-96A-01 (N.D. Ga. Sept. 1, 1988) [#16].
U.S. v. Salas, No. 87-422-Cr-T-15B (M.D. Fla. July 19, 1988) [#16].

C. Standing

Federal Defenders of San Diego v. U.S. Sentencing Comm'n, 680 F. Supp. 26 (D.D.C. 1988) (public defender groups do not have standing to challenge Guidelines) [#1].

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Guidelines Application

DEPARTURES

Third Circuit reverses departure because factors relied on were adequately considered by Sentencing Commission. Defendants pleaded guilty to federal firearms offenses. The district court sentenced both defendants above the guidelines, finding that the number and untraceability of the weapons involved, the potential unlawful use of the weapons, and the threat they posed to the public welfare justified upward departure.

The appellate court reversed, holding that in formulating the applicable guidelines the Commission adequately considered the factors relating to the number of guns, traceability, and unlawful purpose, and therefore, pursuant to 18 U.S.C. § 3553(b), "no upward departure was permissible." Basing the departure on the threat to public welfare (guidelines policy statement § 5K2.14) was similarly unsustainable because "the Guidelines clearly contemplate the very activities charged in these cases."

The court also emphasized that "the Guidelines, commentaries and policy statements clearly indicate that departures should be rare," and that the legislative history indicates that departures "are to be the exception, not the rule." The "overriding congressional purpose of reducing sentencing disparity and achieving general uniformity of treatment," the court added, "will be destroyed if courts depart often from the Guidelines."

U.S. v. Uca, No. 88-1607 (3d Cir. Feb. 9, 1989) (Gibbons, C.J.).

Third Circuit holds that factors not considered in setting base offense level for offense of conviction may be considered for departure. Defendant was charged with possession of a controlled substance with intent to distribute, but was convicted of the lesser included offense of simple possession. Based upon the amount, purity, and packaging of the drugs, which are not sentencing factors under the guideline for the offense of simple possession, the district court departed from the 0-6 month guideline and sentenced defendant to 10 months' imprisonment.

The appellate court upheld the departure, finding that the omission of these factors in setting the guideline range for defendant's crime, although they are included in guidelines for other offenses, did not preclude their use in determining whether departure was warranted. The Sentencing Commission specifically stated, in policy statement § 5K2.0, that "a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing." The court noted that the Second Circuit, in *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), rejected arguments "nearly identical" to defendant's, and agreed with that court that "departure may be warranted on the basis of conduct which is not an element of the offense of conviction."

Defendant also argued that the Guidelines only allow departures in "unusual" cases, and that his situation did not meet that requirement. The court acknowledged that the Guidelines "suggest" in some places that departure is warranted only in unusual cases, but determined that this case could be considered unusual because of the drug involved, namely "crack" (cocaine base). The guideline for simple possession does not account for the "particularly insidious and dangerous" nature of cocaine base, the court found, and thus "the district court's departure from the guideline might well be reasonable in view of the Commission's failure to take into account the unusual danger of crack in drafting the guidelines governing drug possession."

U.S. v. Ryan, No. 88-3344 (3d Cir. Jan. 26, 1989) (Greenberg, J.).

Fifth Circuit holds sentencing court may use reliable facts underlying acquitted offense as basis for departure. Defendant was convicted by a jury of two counts of distributing cocaine, and acquitted of one count of carrying a firearm during a drug trafficking offense. The sentencing court determined that the facts underlying the firearm offense were not in dispute, and departed from the recommended guideline range of 12-18 months to impose concurrent sentences of 76 months for the two distribution offenses. A codefendant was convicted of all three counts and given the same term of incarceration. Defendant argued on appeal that basing the departure on the firearm offense in effect overrode the jury's determination that he did not possess a firearm, and that it was also improper to give him the same sentence as a codefendant who was found guilty of one more offense.

The appellate court affirmed the departure, holding that "the district court did not abuse its discretion in considering evidence of [defendant's] possession of a

handgun despite [defendant's] acquittal of the substantive firearm offense." The court reasoned: "Although the jury may have determined that the government had not proved all of the elements of the weapons offense beyond a reasonable doubt, such a determination does not necessarily preclude consideration of underlying facts of the offense at sentencing so long as those facts meet the reliability standard. The sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offense, but to justify the heavier penalties for the offenses for which he was convicted."

The court also held that defendant's other argument, "that receiving the same overall sentence as his codefendant after being convicted of fewer offenses was per se an abuse of discretion, is also without merit. It is within the sentencing court's discretion to treat codefendants differently.... A defendant convicted of fewer substantive counts may receive a heavier sentence if justified."

U.S. v. Juarez-Ortega, No. 88-2547 (5th Cir. Jan. 31, 1989) (per curiam).

Defendant's substantial cooperation warrants departure reducing sentence from 78-97 months to 14 months. Defendant pleaded guilty to conspiracy to possess with intent to distribute 500 grams or more of a controlled substance. After adjustment, the applicable guideline range was 78-97 months. Pursuant to guideline policy statement § 5K1.1, however, which authorizes departures for "Substantial Assistance to Authorities," the court sentenced defendant to 14 months' incarceration. This sizeable departure was based upon defendant's prompt and valuable cooperation, which led to convictions of his codefendants, and upon his "sincere and heartfelt" contrition and the fact that this was "an isolated incident of aberrant behavior."

U.S. v. Campbell, No. CR. 88-00203-A (E.D. Va. Jan. 26, 1989) (Ellis, J.).

Determining Offense Level

District court limits use of conduct not included in offense of conviction when setting base offense level. Defendants were charged with conspiracy to distribute more than five kilograms of cocaine, and convicted by a jury of the included offense of conspiring to distribute 500 or more grams of cocaine. Although the court was "convinced by a preponderance of the evidence that they, in fact, conspired to distribute 5 or more kilograms of cocaine," it used the lesser amount to calculate defendants' base offense levels.

Under guideline § 1B1.3(a)(1), the base offense level where the offense guideline specifies more than one base offense level is to be determined on the basis of "all acts ... committed ... by the defendant ... that occurred during the commission of the offense of conviction ... or that otherwise were in furtherance of the offense." The court concluded: "The key words of limitation in the guideline are the words 'offense of conviction.' The offense of conviction was conspiracy to distribute 500 or more grams of cocaine. By statutory definition, this includes a range of cocaine between 500 grams and 5 kilograms. The lesser does not include the greater. Activity in connection with 5 or more kilograms could not logically occur during the lesser offense nor be in furtherance of it." Accordingly, the court calculated the base offense level using the lesser amount of drugs in the offense of conviction.

U.S. v. Moreno, No. 88-CR-20033-BC-03 (E.D. Mich. Jan. 25, 1989) (Churchill, J.).

Particular Offenses

District court holds offense level for LSD violation should be based on weight of drug plus delivery medium. Defendants were found guilty of drug violations involving LSD. The base offense level depended upon the amount of the controlled substance involved in the relevant conduct. Here, blotter paper was impregnated with LSD; the paper could be ingested along with the drug. The issue was whether to calculate the offense level using the total weight of the paper and drug or the weight of the drug alone.

The applicable statute, 21 U.S.C. § 841(b)(1)(A)(v) and (B)(v), refers to violations involving "a mixture or substance containing a detectable amount of [LSD]." The court determined that "the blotter paper ... is a 'substance' which contains a detectable amount of LSD," and therefore under the "plain language of the statute" the relevant weight for sentencing is the total weight of the paper and drug. Defendants argued that the court should use the "dosage equivalency table" on page 2.45 of the Guidelines Manual, which would result in a lower weight. The court found, however, that the preface to the table indicates that it is to be used "where the number of doses, but not the weight of the controlled substances, are known," and that since the weight is known in this case there is no need to use the table. In addition, the court noted that a recent Sentencing Commission publication specifically stated that the Commission "has not addressed the issue" of whether to use the weight of blotter paper plus LSD or LSD alone, and that sentencing courts may have to make that determination.

U.S. v. Bishop, No. 88-3005 (N.D. Iowa Feb. 7, 1989) (Hansen, J.).

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Appellate Review

Fifth Circuit holds findings under Guidelines are factual, not legal, and reviewable under clearly erroneous standard; sets requirements for reasons justifying sentences. Defendant appealed his sentence, contending it was too long because the district court erroneously found that he was an "organizer, leader, manager, or supervisor" under guideline § 3B1.1(c). The appellate court affirmed the sentence.

The court noted that "[t]o decide [defendant's] appeal of this finding, we must first determine whether the finding was factual or legal. We hold that it was factual." The court then determined that other "sophisticated factual determinations" courts must make under the Guidelines are also factual findings that "enjoy the protection of the 'clearly erroneous' standard. A more exacting approach to appellate review of sentences would frustrate the purpose of the guidelines.... If factual findings were narrowly construed, and legal issues commensurately expanded, actual applications of the guidelines would be subject to review for legal error. District courts would have an incentive to insure against appellate reversal by footing their sentencing decisions on reasonable departures. Such a result would clearly undermine the purpose of the sentencing guidelines.

"The standard of review which we establish today avoids this odd result. We will affirm sentences imposed by district judges who make factual findings that are not clearly erroneous, and who apply the guidelines to those findings. In such cases, the sentencing judge need not offer further reasons justifying the sentence. When, however, the judge departs from the guideline range, an additional reasonableness requirement applies: the judge must offer reasons explaining why the departure is justified in terms of the policies underlying the sentencing guidelines.

"Implicit in what we have said is the conclusion that the district court's simple statement that the defendant is a 'manager' or 'leader' is a finding of fact.... [W]e 'decline to require the judge to write out' more specific findings about the defendant.... Nonetheless, we urge district courts to clarify their ultimate factual findings by more specific findings when possible. Specific findings will both guide reviewing courts to the evidentiary basis for sentencing judgments, and also help the trial judge to identify matters relevant to application of the guidelines."

U.S. v. Mejia-Orosco, No. 88-5584 (5th Cir. Feb. 17, 1989) (Clark, C.J.).

Fifth Circuit holds "minimal participant" status is a question of fact, sets standard of review for refusals to depart from Guidelines. Defendant appealed his sentence on the basis that the district court erred in not finding that he was a "minimal participant" entitled to a reduction in offense level under guideline § 3B1.2(a). Applying the standards of review set forth in *Mejia-Orosco, supra*, the court held that minimal participant status is a question of fact and that the district court's finding was not clearly erroneous.

Defendant also claimed the district court should have departed downward because defendant thought the substance involved was marijuana, not heroin. The appellate court determined that "we will uphold a district court's refusal to depart from the guidelines unless the refusal was in violation of law," and held there was no such violation here.

U.S. v. Buenrostro, No. 88-2490 (5th Cir. Mar. 8, 1989) (Higginbotham, J.).

Constitutionality

Second Circuit upholds Sentencing Reform Act and Guidelines against due process challenge. The district court rejected defendant's due process challenges to the Act and Guidelines. In affirming, the appeals court held that there is no due process right to individualized sentencing in non-capital cases, that the Guidelines "provide... satisfactory procedural safeguards to satisfy the demands of the due process clause," and that the Act does not vest excessive sentencing authority in the executive branch in violation of due process. *See also U.S. v. Frank*, 864 F.2d 992 (3d Cir. 1988) (upholding Act against substantive due process challenge).

U.S. v. Vizcaino, No. 88-1302 (2d Cir. Mar. 6, 1989) (Oakes, C.J.).

Guidelines Application

Departures

Second Circuit affirms upward departure for offenses not included in criminal history calculation. Defendant pleaded guilty to bank robbery. As part of the plea agreement he stipulated to the facts of a second bank robbery, for which he had been charged but not convicted, in order to allow that crime to be included in calculating his offense level. On these facts, defendant was in criminal history Category III and his sentencing range was 37–46 months.

The district court determined, however, that defendant's criminal history calculation underrepresented the seriousness

of his criminal record because (1) it did not include two unrelated state felony convictions because defendant had not yet been sentenced on those charges, and (2) defendant had committed the bank robberies while awaiting sentencing on the state convictions. The court departed from criminal history Category III to Category V and imposed a 60-month sentence.

The appellate court found departure was authorized by policy statement § 4A1.3 of the Guidelines, which allows departure if "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." Factors to consider in making this determination include "whether the defendant was pending . . . sentencing . . . on another charge at the time of the instant offense" (§ 4A1.3(d)), and whether defendant "committed the instant offense while on bail or pretrial release for another serious offense" (§ 4A1.3(4)). The court concluded that the district court's decision to depart was not unreasonable, and that the 60-month sentence "was not unreasonable under the particular circumstances of this case."

The court also restated its emphasis in earlier cases that district courts have "'wide discretion' . . . in determining what circumstances to take into account in deciding whether to depart from the guidelines," and "may 'exercise their sound judgment in departing from the Guidelines' when necessary to account for factors not reflected in the applicable guideline range." *See U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988); *U.S. v. Guerrero*, 863 F.2d 245 (2d Cir. 1988). The Second Circuit has "decided that it is best to allow district judges 'sensible flexibility' in sentencing under the new act."

U.S. v. Sturgis, No. 88-1131 (2d Cir. Feb. 15, 1989) (Altimari, J.).

Fifth Circuit affirms upward departure where criminal history calculation did not account for large quantity of drugs in prior offense or for similarity to present offense. Defendant pleaded guilty to conspiring to possess 200 pounds of marijuana. In 1975 he had been convicted of intent to distribute 1,653 pounds of marijuana. Citing policy statement § 4A1.3 of the Guidelines, the district court found that defendant's criminal history calculation did not adequately reflect the amount of drugs involved in each offense or the fact that the prior conviction was for the same type of offense, and departed from the guideline range of 46–57 months to sentence defendant to 72 months' imprisonment.

Affirming the departure, the appellate court reasoned: "The recidivist's relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated yet again. While the prior similar adult criminal conduct that has resulted in conviction may have already been counted under section 4A1.2(e)(1) or (2) when computing the criminal history category, the similarity between the two offenses provides the district court with additional reason to enhance the sentence under section 4A1.3."

The court also instructed sentencing courts that use § 4A1.3 to make specific findings: "When a district court relies on section 4A1.3 to depart from the established guidelines, it should articulate its reasons for doing so explicitly. We do not, of course, require sentencing judges to incant the specific language used in the guidelines, and, indeed, such a ritualistic recital would make the sentence less comprehensible to the defendant and our review more difficult. What is desirable, however, is that the court identify clearly the aggravating factors and its reasons for connecting them to the permissible grounds for departure under section 4A1.3."

U.S. v. Luna-Trujillo, No. 88-2689 (5th Cir. Mar. 6, 1989) (Rubin, J.).

District court finds Guidelines did not adequately consider terrorism, departs upward. Defendant, a member of the Japanese Red Army (JRA) terrorist organization, was convicted on explosives, weapons, and immigration charges. The guideline range for all counts of conviction totaled 27–33 months. Citing "the aggravating factors concerning these offenses, and finding the Sentencing Commission did not adequately consider (and in fact did not consider) the kind or degree of the conduct at issue or the type or kind of individual who committed these offenses," the court departed from the Guidelines and imposed prison terms totaling 30 years.

The court specifically found that defendant was "an international terrorist, who has trained members of and has been given training by the JRA, who quietly acquired the elements for and constructed three anti-personnel bombs with the intent of murdering scores and severely wounding scores more of the survivors of the blast in order to wage war on the enemy of the JRA—the United States." The court noted that "the Sentencing Guidelines specifically list 'death,' 'physical injury,' 'the dangerousness of the instrumentality (weapon),' 'disruption of governmental function' and 'extreme conduct' as factors warranting departure. Sections 5K2.1, 5K2.2, 5K2.6, 5K2.7 and 5K2.8."

In this case, however, "none of the applicable guidelines takes these critical factors into account. In point of fact, the Guidelines do not consider terrorism or conduct remotely similar to that of [defendant]. Here, because [defendant] intended to cause death and horrible injury, a departure from the guidelines is warranted. Moreover, because the defendant's bombs were intended to cause multiple deaths and injuries, . . . greater departure is warranted."

The court also found that departure was warranted, under policy statement § 4A1.3, because defendant's applicable criminal history category significantly underrepresented the seriousness of his criminal history and the likelihood that he would commit further crimes. This finding was based upon an earlier arrest for terrorist activity and defendant's terrorist training. In addition, the court determined that defendant's actions constituted a threat to national security, public health, or safety, thereby justifying a departure under policy statement § 5K2.14.

U.S. v. Kikumura, No. CR. 88-166 (D.N.J. Feb. 10, 1989) (Lechner, J.).

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Appellate Review

Fifth Circuit holds that whether prior conviction falls within scope of immigration offense guideline adjustment is question of law subject to de novo review. Defendant pleaded guilty to aiding and abetting the transportation of illegal aliens. His offense level was increased by two under guideline § 2L1.1(b)(2), which provides for an increase if a defendant "previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense." On appeal defendant argued that a previous conviction for aiding and abetting the illegal entry of another did not constitute a "related offense."

In affirming the sentence, the appellate court noted: "To the extent that this appeal deals with express or implied findings of fact, such as whether the defendant had a prior conviction of the kind comprehended by section 2L1.1(b)(2), we apply the clearly erroneous standard of review. However, on the question of law as to whether a given prior conviction falls within the scope of section 2L1.1(b)(2), our review is de novo."

After first concluding that the finding of a prior conviction for aiding and abetting the illegal entry of another was not clearly erroneous, the court determined that the prior offense was a "related offense" under § 2L1.1(b)(2): "Under the plain meaning of the term 'related offense,' aiding and abetting the illegal entry of another is clearly related to the offense of smuggling, transporting, or harboring an illegal alien. It is difficult to imagine a situation in which aiding the entry of an illegal alien does not involve some aspect of smuggling, transporting, or harboring that person."

U.S. v. Reyes-Ruiz, No. 88-1632 (5th Cir. Mar. 13, 1989) (Johnson, J.).

Sentencing Procedure

Defendant must be given notice before sentencing of factors that may be used for upward departure, Fifth Circuit holds. At sentencing, the district court departed from the Guidelines because of the purity of the cocaine involved in the offense. However, the defendant was not given notice either by the court or the presentence report that this was being considered.

The appellate court vacated and remanded for resentencing: "Federal Rule of Criminal Procedure 32(a)(1) provides, 'At the sentencing hearing, the court shall afford the counsel for the defendant . . . an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.' This rule contemplates that the court may base its sentencing decisions on matters not raised in the presentence report. If, however, the court intends to rely on any such additional factor to make an upward adjustment of the sentence, defense counsel must be given an opportunity to address the court on the issue." In this case, defendant had no notice "that the cocaine might be considered of unusually high purity or that, if it were found to be, the court might adjust the sentence imposed."

U.S. v. Otero, No. 88-5583 (5th Cir. Mar. 23, 1989) (Rubin, J.).

Guidelines Application

Determining Offense Level

Fifth Circuit holds that weight of LSD in guideline computation includes weight of distribution medium. Defendant challenged his sentence for conspiracy to distribute LSD, claiming the Guidelines were ambiguous as to whether the weight of the drug alone or the weight of the drug plus the medium should be used to calculate his sentence. Affirming the sentence, the appellate court stated: "We believe the guidelines answer this argument, as § 2D1.1 states: 'The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity.' There is no ambiguity in this statement." *Accord U.S. v. Bishop*, No. 88-3005 (N.D. Iowa Feb. 7, 1989) (offense level for LSD violation based on weight of drug plus medium) (*see* 2 GSU #1).

U.S. v. Taylor, No. 88-3677 (5th Cir. Mar. 6, 1989) (Jones, J.).

Low drug purity does not warrant offense level reduction, Fifth Circuit holds. Defendant claimed that she was entitled to a reduction in her offense level because of the low purity of the drug that was produced. The appellate court rejected her argument: "The guidelines provide for no such reduction. The guidelines do provide for an increase in the offense level when the government seizes drugs of unusually high purity, but this guideline provision does not create a corresponding reduction in a 'weak' drug case. *See* Guideline 2D1.1 and commentary."

U.S. v. Davis, No. 88-2587 (5th Cir. Mar. 17, 1989) (Clark, C.J.).

Departures

Fifth Circuit upholds upward departure for "egregious" criminal history of repeat offenses. Defendant pleaded guilty to transporting a stolen truck in interstate commerce. The district court imposed the statutory maximum of five years, rather than the 30–37 month guideline sentence, finding that defendant's criminal history calculation did not adequately reflect the nature of his criminal record. Defendant had a long history of similar offenses and had been in custody or a fugitive almost continuously since December 1975.

The appellate court found departure was appropriate "for a defendant with a record so egregious as [defendant's]. Considering his record, the sentence imposed by the district court was reasonable. Indeed, the district court was justified in concluding that the only reliable way to keep [defendant] from driving stolen trucks is to keep him in prison."

U.S. v. Fisher, No. 88-1790 (5th Cir. Mar. 7, 1989) (Rubin, J.)

Criminal History Category

District court upholds criminal history enhancement based on factors that are also elements of escape offense. In the context of a due process challenge to the Guidelines, which the court rejected, the defendant also argued that his criminal history calculation led to an "inequitable result."

Defendant was charged with escaping from a federal prison camp. Section 2P1.1(a) sets the offense level for the crime of escape at 13 "if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony." Points are to be added to the criminal history calculation "if defendant committed the instant offense while under any criminal justice sentence" or "less than two years after release from imprisonment." *See* guideline § 4A1.1(d) and (e). Thus, defendant's criminal history category would be increased by adding points for facts that comprise elements of the crime charged.

The court held that this is not inequitable or unconstitutional: "While there is no indication in the comments to the sentencing guidelines that the Commission considered this occurrence, there are valid reasons for enhancing defendant's sentence," including helping correctional officers "to keep control of and to encourage good behavior from prisoners."

U.S. v. Jimenez, No. TH 88-14-CR (S.D. Ind. Mar. 8, 1989) (Tinder, J.).

Constitutionality

Fifth Circuit upholds Sentencing Guidelines against due process and other constitutional and statutory challenges. The Fifth Circuit has become the third appellate court to reject a due process challenge to the Guidelines. *See U.S. v. Frank*, 864 F.2d 992 (3d Cir. 1988); *U.S. v. Vizcaino*, No. 88-1302 (2d Cir. Mar. 6, 1989) (2 GSU #2). Defendants had raised several constitutional challenges to the Guidelines: (1) the Guidelines too narrowly limit sentencing courts' discretion, thereby violating defendants' due process rights to present mitigating factors; (2) the acceptance of responsibility guideline deprives defendants of their right to a jury trial by encouraging guilty pleas in contravention of the sixth amendment; and (3) applying the Guidelines to a conspiracy that began prior to their effective date violates the ex post facto clause.

Rejecting defendants' constitutional claims, the court held:

(1) Defendants have no due process right to present mitigating factors prior to sentencing: "The Constitution does not require individualized sentences. . . . Congress has the power to completely divest the courts of their sentencing discretion and to establish an exact, mandatory sentence for all offenses. . . . If Congress can remove the sentencing discretion of the district courts, it certainly may guide that discretion through the guidelines."

(2) The acceptance of responsibility reduction, guideline § 3E1.1, does not violate the sixth amendment even though "[a] defendant who puts the government to its proof by challenging factual guilt cannot receive" it. "Even assuming that the sole purpose of this guideline is to encourage guilty pleas, it is not unconstitutional for the government to bargain for a guilty plea in exchange for a reduced sentence."

(3) The ex post facto clause "is not violated by applying an increased penalty to [a] conspiracy that *continued* after the effective date of the increased penalty. . . . [Defendant's] conspiracy offense continued well after November 1, 1987, and thus was an offense committed after the effective date" of the Guidelines.

Defendants also argued that the Sentencing Commission violated its statutory mandate with respect to the availability of probation, the criminal history calculation, the reduction in sentence for cooperating with the government, and the Guidelines' effect on the prison population. The court rejected these claims, holding that "the Commission acted well within its broad grant of authority and pursuant to congressional goals and principles."

To defendants' final argument, that the Guidelines never became effective because the required General Accounting Office report was inadequate and untimely, the court stated: "This court will not scrutinize the merits or timeliness of reports intended solely for the benefit of Congress. . . . Such a determination is for Congress and is essentially a political question outside the province of the judiciary."

U.S. v. White, No. 88-1073 (Mar. 24, 1989) (per curiam).

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VOLUME 2 • NUMBER 4 • APRIL 18, 1989

Guidelines Application

DETERMINING OFFENSE LEVEL

Court may consider drug quantities not in indictment or offense of conviction when setting offense level, Fifth Circuit holds. Defendant pleaded guilty to attempting to possess, with the intent to distribute, more than 500 grams of cocaine. The district court found as a fact that the offense actually involved more than 5 kilograms of cocaine, and based defendant's offense level on that amount. Defendant appealed his sentence, arguing that the district judge impermissibly looked beyond the indictment in determining the amount of cocaine involved in the offense.

The appellate court affirmed the sentence, finding that "[t]he guidelines make plain that the district court is not bound by the quantity of drugs mentioned by the indictment." (Citing application note 11 to § 2D1.1, application notes 1 and 2 to § 2D1.4.) The court held that "the district court clearly acted properly in considering" that defendant's transaction was part of a larger scheme involving 5 kilograms of cocaine, "rather than restricting its inquiry to the amounts actually mentioned in the indictment." *Accord U.S. v. Perez*, No. 88-3409 (6th Cir. Mar. 29, 1989), *infra*.

U.S. v. Sarasti, No. 88-2734 (5th Cir. Mar. 24, 1989) (Higginbotham, J.).

District court declines to consider conduct for which there is insufficient evidence against defendant in calculating base offense level, and holds that invalid conviction may not be used in criminal history score. Defendant and others were charged in a five-count indictment for cocaine offenses. Defendant was only mentioned in counts I and V, and pleaded guilty to count V, distribution of two ounces of cocaine. In calculating defendant's base offense level "[t]he probation office aggregated all of the cocaine charged in counts II, III, IV and V and 28.3 grams not charged against any of the defendants."

The court found that in determining offense level it may consider quantities of drugs not included in the count of conviction (§ 2D1.1, application note 6), acts that were "part of the same course of conduct or common scheme or plan as the offense of conviction" (§ 1B1.3(a)(2)), and "relevant information" that has "sufficient indicia of reliability to support its probable accuracy" (§ 6A.1(3)(a)). "However, the court will not use the information as a basis for calculating the guideline offense level or criminal history score unless the government can establish the reliability of the information by a preponderance of the evidence. In Landry's case the government has provided no evidence to tie the defendant to counts II and III of the indictment, and insufficient evidence to warrant consideration of the drugs in count IV in calculating Landry's base offense level." The court held that the quantities of drugs from counts II, III, and IV could therefore not be used to set defendant's offense level.

Defendant also successfully challenged his criminal history score. He had been sentenced to make $140 restitution on a bad check charge in 1986, but was jailed for eight days when he failed to make payment. Had defendant paid the $140 he would not have been incarcerated and the offense would not have been counted in his criminal history. The court agreed with defendant that the sentence was constitutionally invalid because "[a] court may not order the offender incarcerated unless it makes a finding that the offender willfully refused to pay or failed to make sufficient bona fide efforts to acquire the resources to pay." Since there was no evidence to support such a finding, the sentence was invalid and the eight-day jail term should not have been included in defendant's criminal history. The court also found that the Guidelines "specifically provide for this type of challenge at sentencing." Section 6A1.3(a) allows the parties "an adequate opportunity to present information to the court" regarding "any factor important to the sentencing determination," and application note 6 to § 4A1.2 states: "Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score."

U.S. v. Landry, No. CR 3-88-090(02) (D. Minn. Mar. 31, 1989) (Magnuson, J.).

DEPARTURES

District court finds dangerous nature of cocaine base warrants departure. Defendant was found guilty of possession of 22.1 grams of cocaine base (crack). The guideline sentencing range was 0–4 months. However, the court concluded that departure was appropriate: "The Drug Quantity Table [in the] Guidelines Manual recognizes that cocaine base is a much more dangerous controlled substance than cocaine and heroin. The table reflects that 20–34.9 grams of cocaine base is the equivalent of 2–3.4 kilograms of cocaine or 400–699 grams of heroin. Section 2D2.1 which sets forth the Base Offense Levels for

unlawful possession of controlled substance does not have a specific reference to cocaine base in setting forth the respective levels. The highest level is 8 for heroin. Therefore the Court concluded that there should be an upward departure from the Guidelines for cocaine base. Based upon the amount of cocaine base in this case, namely 22.1 grams, . . . a sentence of 10 months incarceration is appropriate." *See also U.S. v. Ryan*, No. 88-3344 (3d Cir. Jan. 26, 1989) ("departure from the guideline might well be reasonable in view of the Commission's failure to take into account the unusual danger of crack in drafting the guidelines governing drug possession") (2 GSU #1).

U.S. v. Coleman, No. 88-20037-4 (W.D. Tenn. Feb. 27, 1989) (McRae, Sr. J.).

Other Recent Cases:

U.S. v. Perez, No. 88-3409 (6th Cir. Mar. 29, 1989) (Martin, J.) ("Under the sentencing guidelines, the amount of the drug being negotiated, even in an uncompleted distribution, shall be used to calculate the total amount in order to determine the base level.").

U.S. v. Peoples, No. 88-20234-4 (W.D. Tenn. Mar. 27, 1989) (McRae, Sr. J.) (rejecting arguments attacking Anti-Drug Abuse Act of 1986 and Guidelines on basis of different treatment of cocaine and cocaine base; making upward adjustment for obstruction of justice because defendant threw controlled substance to the ground when running from authorities).

U.S. v. Norquay, No. CR. 6-88-98 (D. Minn. Mar. 28, 1989) (Devitt, Sr. J.) (Guidelines will not be applied to violations of the Major Indian Crimes Act, 18 U.S.C. § 1153).

Appellate Review

Fifth Circuit holds acceptance of responsibility and obstruction of justice determinations are factual questions subject to "clearly erroneous" standard of review. The appellate court upheld findings that the defendant had not accepted responsibility for his crime and had obstructed justice: "Whether or not a defendant has accepted responsibility is a factual question, depending largely upon credibility assessments. With respect to such assessments, we defer to the conclusions of the sentencing judge. We will therefore affirm the sentencing judge's findings unless they are 'without foundation.' . . . In this case . . . [w]e see no reason to conclude that these findings were 'without foundation.'"

Similarly, "[w]hether or not a defendant has obstructed the administration of justice is a factual question, and the district court's resolution of the question enjoys the protection of the clearly erroneous standard. . . . We therefore ask only whether there was sufficient evidence in the record to permit the sentencing judge to conclude that [defendant] obstructed the administration of justice." The court concluded that the "evidence suffices to support the judge's finding."

U.S. v. Franco-Torres, No. 88-1382 (5th Cir. Mar. 24, 1989) (Higginbotham, J.).

Eleventh Circuit holds acceptance of responsibility is factual issue subject to "clearly erroneous" standard, affirms enhancement of criminal history. The district court denied credit for acceptance of responsibility and enhanced defendant's criminal history category from I to IV. The appellate court found that the Guidelines and Sentencing Reform Act indicate that acceptance of responsibility is a factual finding entitled to great deference and subject to review under the "clearly erroneous" standard. *See* Guidelines § 3E1.1 commentary at 3.22; 18 U.S.C. § 3742(d). Reviewing the record, the court held that the district court's findings were not clearly erroneous.

Defendant conceded that departure from criminal history category I to category III would be appropriate, but argued that enhancement to category IV was unreasonable. The court disagreed, holding that the district court properly found conduct that justified departure under guideline § 4A1.3, and that "[b]ased on this information, which the defendant does not argue is unreliable, the district court reasonably could conclude that criminal history category IV more adequately reflects the seriousness of [defendant's] criminal history and the likelihood of recidivism than does category III."

U.S. v. Spraggins, No. 88-3824 (11th Cir. Apr. 5, 1989) (per curiam).

District court refuses to grant in forma pauperis status for frivolous appeal of sentence. The court denied petitioner's application to proceed on appeal in forma pauperis because it determined that "the issues for which petitioner seeks review are frivolous from an objective standard." "The direct appeal of a sentence imposed pursuant to the Sentencing Guidelines Act by an individual proceeding pro se and requesting in forma pauperis status upon appeal after having had the previous benefit of retained counsel presents a situation unlike others considered by this court. Upon considering the applicable rules, the court determines that the standards contained therein, i.e., that a litigant may not proceed in forma pauperis upon appeal if that appeal is not taken in good faith, apply to this situation."

U.S. v. Wilson, No. CR88-12-VAL (M.D. Ga. Mar. 17, 1989) (Owens, C.J.).

Other Recent Case:

U.S. v. Mejia-Orosco, No. 88-5584 (5th Cir. Mar. 31, 1989) (per curiam) (denying petition for rehearing and reaffirming earlier decision, 867 F.2d 216; amendment to 18 U.S.C. § 3742, including addition of "due deference" language, does not affect applicability of "clearly erroneous" standard to sentencing courts' factual determinations).

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VOLUME 2 • NUMBER 5 • MAY 2, 1989

Guidelines Application

CRIMINAL HISTORY CATEGORY

Fifth Circuit holds that degree of departure for inadequate criminal history score should be tied to a specific criminal history category. Defendant pleaded guilty to immigration offenses. Two prior convictions for immigration offenses were not counted in her criminal history score because they fell just outside the ten-year limit of § 4A1.2(e)(2), giving defendant a score of zero and sentencing range of 4–10 months. The sentencing court found that the criminal history score underrepresented defendant's past criminal behavior and likely recidivism, and departed from the Guidelines to impose a two-year sentence.

The appellate court remanded the case for resentencing because the district court simply departed from the Guidelines instead of adjusting defendant's criminal history category: "There is no question that a sentencing court may sometimes justify its departure from the Guidelines based upon the inadequacy of a defendant's criminal history score.... However, the Guidelines provisions treating adjustments for criminal history indicate that in considering a departure from the Guidelines '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.'... [T]he district court was justified in considering that a level of zero was not representative of defendant's true criminal history. Nevertheless, we conclude that the court should not have completely disregarded the Guidelines without further explanation.

"Under section 4A1.3, the judge should have considered the sentencing ranges that would be indicated by raising defendant's criminal history category to II or higher."

In remanding for resentencing, the court "emphasize[d] that in some cases involving defendants with low criminal history scores, it may be justified to impose a sentence reflecting a much higher criminal history category or to go beyond the range corresponding to the highest category VI. However, in such cases the sentencing judge should state definitively that he or she has considered lesser adjustments of the criminal history category and must provide the reasons why such adjustments are inadequate."

U.S. v. Lopez, No. 88-2962 (5th Cir. Apr. 14, 1989) (Smith, J.).

DETERMINING OFFENSE LEVEL

Fifth Circuit upholds decision not to group firearm offenses. Defendant pleaded guilty to possession of a pistol by a convicted felon and unlawful possession of an unregistered firearm, a silencer for the pistol. Defendant claimed the district court should have grouped the two counts as closely related offenses under guideline § 3D1.2(d) instead of sentencing him pursuant to § 3D1.4 according to the combined offense level for the two separate offenses.

Section 3D1.2(d) lists offense guidelines that are specifically included in or excluded from the grouping section. Because the guideline covering defendant's offenses, § 2K2.2, is not on either list, the district court had to determine if grouping was appropriate. In this instance, the appellate court noted, the Guidelines indicate that "'a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.' This determination is in some parts legal rather than factual, and so is not shielded by the clearly erroneous standard. The determination does, however, depend on factual and case-specific conclusions. A reviewing court must therefore give 'due deference' to the district court, and respect the informed judgment made by that court." (Citing 18 U.S.C. § 3742.)

Looking at "the language of the guidelines and the explanatory comments," the court found that "[t]he possession of an unregistered silencer and the unlawful possession of a pistol by a convicted felon do not clearly fall under the language of [guideline § 3D1.2(d)]. Indeed, the 'total amount of harm or loss' and 'the quantity of the substance involved' are not relevant factors in determining the offense level for the crimes [defendant] has committed. . . . Given the plain language of the relevant provision and the different nature of [defendant's] offenses, we find no error in the court's conclusion that his offenses should not have been grouped together under § 3D1.2(d) of the guidelines."

Defendant also argued that his offense level on the silencer count should have been reduced six points, pursuant to § 2K2.2(b)(3), because the silencer was possessed as part of a gun collection. The court held that "the advisory notes to this section make clear that only a lawful collection of guns can be considered as a mitigating factor under § 2K2.2(b)(3).... [I]t would be contrary to the clear intent of this provision to find that an illegal gun collection, such as one possessed by a convicted felon, should be used to reduce the sentence of a person guilty of violating a firearms statute. Common sense and the commentary to the guidelines preclude this result."

U.S. v. Pope, No. 88-1464 (5th Cir. Apr. 14, 1989) (Williams, J.).

Other Recent Cases:

U.S. v. Nunley, No. 88-2169 (8th Cir. Apr. 19, 1989) (Arnold, J.) (stipulation in plea agreement between defendant and government that defendant accepted responsibility in accordance with Guideline § 3E1.1 is not binding on sentencing court; denial of "minimal participant" reduction upheld as not clearly erroneous).

U.S. v. Brett, No. 88-1899 (8th Cir. Apr. 24, 1989) (Lay, C.J.) (affirming upward adjustment for obstruction of justice for giving false name when arrested).

U.S. v. Roberts, No. 88-5087 (4th Cir. Apr. 24, 1989) (Chapman, J.) (amount of drugs sought in conspiracy, not amount actually obtained, are used to set offense level).

U.S. v. Sailes, No. 88-5810 (6th Cir. Apr. 13, 1989) (Nelson, J.) (drugs involved in relevant conduct, not just in offense of conviction, are used to set base offense level).

Departures

Second Circuit finds that decision not to depart was within sound discretion of sentencing court; also, offense level should be based on total amount of drugs in transaction even if defendant is minimal participant. Defendant, who pleaded guilty to a drug violation, received a four-level reduction for minimal role in the offense, and a two-level reduction for acceptance of responsibility. Defendant argued that his minimal role entitled him to a downward departure in addition to the four-level reduction already granted, that his insubstantial prior criminal record provided a further basis for downward departure, and that the sentencing judge exceeded his discretion by not so departing.

The appellate court found that "[t]his argument is without merit. The decision to depart is a matter within the sound discretion of the sentencing judge. . . . Moreover, Congress expected that that broad discretion would be exercised only when the basis for departure was a circumstance not already factored into the Guidelines . . . . Here, [defendant] suggests as bases for departure two factors, minimal role and insubstantial criminal record, both of which were explicitly considered by the Commission in formulating the Guidelines and were taken into account by the District Court in its guideline calculation. Under such circumstances, a decision not to depart from the applicable guideline range cannot possibly be in excess of the discretion confided in sentencing judges, even if we make the doubtful assumption that the discretion not to depart could ever be exceeded."

Defendant had also argued that the district court erred in calculating his base offense level on the basis of the total amount of the drugs in the overall scheme in which he participated. This challenge was rejected "in light of our holding in *United States v. Guerrero*, 863 F.2d 245 (2d Cir. 1988), despite the fact that [defendant] possessed minimal knowledge of the scope of the transaction and had minimal control over its execution. In *Guerrero*, we held that, under section 1B1.3 (relevant conduct), the offense level calculation includes all acts aided and abetted by the defendant that are a part of the same course of conduct or common scheme as the offense of conviction."

U.S. v. Paulino, No. 88-1433 (2d Cir. Apr. 13, 1989) (per curiam).

Other Recent Case:

U.S. v. Salazar-Villarreal, No. 88-2625 (5th Cir. Apr. 21, 1989) (per curiam) (affirming upward departure, from 4–10 months to 3 years, for reckless conduct by driver of van carrying 24 illegal aliens—one passenger killed and others injured in crash when driver attempted to elude authorities).

Sentencing Procedure

Defendant not entitled to pretrial resolution of dispute regarding application of Guidelines to facts of the case. The district court referred this case to a magistrate to resolve pretrial matters. A dispute arose over whether the conduct alleged in the indictment constituted an "organized criminal activity" within the meaning of § 2B1.2(4) of the Guidelines, which would result in a higher base offense level if defendant were convicted. The parties proposed submitting the dispute to the magistrate, who concluded that resolving this dispute before trial would be improper: "[S]uch a procedure not only seeks to have the court enter an advisory opinion, but also creates an undue risk that error could affect the defendant's decision to go to trial or plead guilty." The court adopted the magistrate's report as its opinion.

U.S. v. Ware, No. CR 89-AR-010-S (N.D. Ala. Apr. 10, 1989) (Acker, J.).

Constitutionality

Eighth Circuit rejects due process challenge to Guidelines, approves "two-track" sentencing procedure. The Eighth Circuit held that the Guidelines are not vulnerable to a due process challenge based on the elimination of judges' sentencing discretion. The court found that "some discretion, some power to fit sentences to the individual offender, is left," and that "in any event the Constitution does not guarantee individualized sentencing, except in capital cases."

The court appears to be the first appellate panel to consider the "two-track" sentencing approach used by several district courts while awaiting the Supreme Court decision on the Guidelines. *See, e.g., U.S. v. Brittman*, 687 F. Supp. 1329 (E.D. Ark. 1988) (1 GSU #11). The district court found the Guidelines unconstitutional and imposed sentence under prior law, but also filed a Statement of Reasons for Imposing Sentence, as required by the Sentencing Reform Act, that explained what sentence the court would have imposed under the Guidelines. The appellate court held that "the District Court acted prudently in using this two-track procedure. As the Court observed, 'if the Guidelines and the Commission are held constitutional, only a new commitment order will have to be executed.' . . . It will not be necessary to have a second sentencing hearing." The court affirmed and remanded for resentencing.

U.S. v. Brittman, No. 88-1973 (8th Cir. Apr. 19, 1989) (Arnold, J.).

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Guidelines Application

DETERMINING OFFENSE LEVEL

First Circuit holds that defendant must accept responsibility only for count of conviction. Defendant pleaded guilty to one of five counts. In setting the offense level, a dispute arose over whether defendant had to accept responsibility for the dismissed counts in order to receive the two-level reduction for acceptance of responsibility. Defendant claimed that could cause him to incriminate himself on the other offenses, and that in any event he had accepted responsibility for all counts at the sentencing hearing. The sentencing court "ruled that the Sentencing Guidelines required a defendant to admit responsibility for all his criminal activity, not just the counts to which he was pleading guilty, even if that meant incriminating himself on the other counts."

The appellate court reversed and remanded. "We conclude that the only plausible reading of the Guidelines for cases in which a plea agreement has been made, is that 'acceptance of personal responsibility for his criminal conduct' means the criminal conduct to which the defendant pleads guilty." The court found that forcing a defendant to accept responsibility for all counts would violate the fifth amendment, because it was possible that statements concerning dismissed counts made during plea negotiations might be admissible in other litigation. "A plea bargain can unravel at any time, . . . [and] the judge need not accept the plea agreement. . . . Nor need the judge automatically accept a dismissal of an indictment filed by the government." Also, statements made to a probation officer for a presentence report are not protected by Fed. R. Evid. 410 from possible future admission. The court concluded that, "[g]iven both the language of the Guidelines and the constitutional restrictions, the acceptance of responsibility section can only be interpreted to mean that a defendant who has made a plea agreement must accept responsibility solely for the counts to which he is pleading guilty."

To defendant's argument that he had accepted responsibility for all counts during the sentencing hearing, the court held that the district judge has "substantial discretion" as to whether that acceptance was timely.

U.S. v. Perez-Franco, No. 88-1768 (1st Cir. Apr. 28, 1989) (Bownes, J.).

First and Third Circuits hold that defendants sentenced pursuant to career offender guideline may not receive acceptance of responsibility reduction. Defendants in both cases qualified as career offenders under guideline § 4B1.1 and were sentenced under the offense level table in that section. Each defendant claimed he should have received the two-level reduction for acceptance of responsibility.

The appellate courts held that this reduction should not be applied to the offense levels in the career offender table. Both courts reasoned that this conclusion was consistent with the legislative mandate of 28 U.S.C. § 994(h), which was to "assure that the guidelines specify a sentence [for a career offender] to a term of imprisonment at or near the maximum term authorized"; accepting defendants' position would undercut that policy.

Denying the reduction is also consistent with the Guidelines. The First Circuit found that if the Guidelines "application instructions" are followed, "a career criminal is never allowed the two-point reduction from his career-offender level determination." The Third Circuit concluded that "[i]nasmuch as the career offender table has no provision for adjustments, we would be no more entitled to give [defendant] a two-level reduction under § 3E1.1 than we would be permitted to increase his level by reason of any of the factors [used in] the ordinary total offense level calculation."

The courts also noted that § 4B1.3, the criminal livelihood provision, provides a reduction for acceptance of responsibility. The lack of a similar provision in § 4B1.1 indicates the Commission did not intend the reduction to apply.

The First Circuit added that the reduction may still be reflected in the actual sentence. The career offender offense level gives a sentencing range, and "[i]n determining the exact amount of time to be served from that range, a court may factor into its sentence a defendant's acceptance of responsibility." In addition, the sentencing court "might determine that acceptance of responsibility by a career offender in certain instances constituted 'unusual circumstances' such as to warrant a departure from the guidelines."

U.S. v. Alves, No. 88-1752 (1st Cir. May 8, 1989) (Bownes, J.); *U.S. v. Huff*, No. 88-3733 (3d Cir. May 10, 1989) (Greenberg, J.).

Other Recent Cases:

U.S. v. Wright, No. 88-1687 (1st Cir. Apr. 27, 1989) (Breyer, J.) (affirming sentence and holding: sentencing court may consider relevant related conduct in dismissed counts and "past behavior relevant to determining an appropriate penalty for the crime" when setting offense level; whether defendant was a minor or minimal participant is a "mixed question" of fact and law reviewed under "clearly erroneous" standard).

U.S. v. Graham, No. CR-88-0667 (N.D. Cal. Apr. 7, 1989) (Orrick, Sr. D.J.) (when live marijuana plants are

seized, weight is immaterial and number of plants is used to calculate the offense level).

Departures

Fifth Circuit addresses several departure issues. Defendant, a recent parolee, lived with an elderly man who, according to defendant, died in a household accident. Fearing he would be accused of murder, defendant initially fled the house but later returned, put the body in the trunk of the man's car and drove around Texas for several days while using the man's credit card. Eventually, defendant disposed of the body by placing it in a dumpster and burning it. When arrested by state police for public intoxication, defendant tried to hide the credit card. The police found the card, defendant told the story, and he was indicted on state charges and a federal charge of credit card fraud. Defendant pleaded guilty to the credit card offense, and the sentencing judge departed from the guideline range of 30–37 months to impose a 120-month sentence.

Defendant challenged two of the sentencing court's reasons for the departure: that his conduct, in the treatment and disposal of the body, was "extreme conduct" under § 5K2.8; and that criminal history category VI did not adequately reflect his criminal record or potential for future criminal activity. The appellate court rejected both challenges.

The court concluded that § 5K2.8 is not, as defendant argued, limited to harm done to the victim: "Section 5K2.8 directs the sentencing court's attention to the defendant's conduct, not the victim's harm, and thus does not implicate the limiting language in section 5K2.0." The court also determined that a "victim" under § 5K2.8 need not be the direct victim of the offense of conviction.

Defendant claimed that the district court, in determining that criminal history category VI was inadequate, should not have considered as separate three 1979 convictions that were consolidated for sentencing. The appellate court found that the Guidelines allow consideration of concurrent sentences in that situation. The court also held that, once a sentencing court gives specific reasons for departing from the guideline range, it need not explain why a specific term is chosen: "Nothing in [18 U.S.C. §] 3553 requires the sentencing judge to justify his choice of sentence further by explaining, for example, why 120 months is more appropriate than 100 months."

In addition, defendant claimed that, once the sentencing court determined that category VI was inadequate, it should have gone to the next offense level to guide the departure. This argument is premised on the fact that the Guidelines instruct courts to move between criminal history categories when the applicable category is inadequate. The court determined that the Guidelines do not require courts to do this and, in fact, to do so would be inappropriate: "Arbitrarily moving to a new offense level when the highest criminal history category proves inadequate would skew the balancing of factors which the Commission created in the Sentencing Table."

Defendant also challenged the district court's calculation of the guideline range for the offense of conviction. The appellate court noted that "even if the court decides to depart, it must impose a reasonable sentence. The recommended range provides a point of reference for the sentencing court .... If the court identifies the wrong recommended range, its frame of reference may be skewed.... Accordingly, whether the court incorrectly determined the recommended range is relevant to our review of a sentence imposed under the departure provisions." Reviewing under the "clearly erroneous" standard, the court rejected defendant's various challenges to the sentencing court's guideline calculation, including its findings that the deceased was a "vulnerable victim" under § 3A1.1 and that a vulnerable victim need not be the victim of the offense of conviction; and that defendant tried to obstruct justice by hiding the credit card.

U.S. v. Roberson, No. 88-1624 (5th Cir. Apr. 28, 1989) (Smith, J.).

Other Recent Case:

U.S. v. Velasquez-Mercado, No. 88-2621 (5th Cir. Apr. 28, 1989) (Jones, J.) (upward departure warranted where defendant organized scheme to transport large number of illegal aliens, molested women passengers, and attempted to evade authorities in high-speed chase).

Appellate Review

First Circuit outlines standard of review for departures. In upholding a departure from a sentencing range of 27–33 months to 10 years, the First Circuit set forth a three-step standard for reviewing departure cases. The first step is to "assay the circumstances relied on by the district court in determining that the case is sufficiently 'unusual' to warrant departure. That review is essentially plenary."

Next, the reviewing court should "determine whether the circumstances, if conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error."

Finally, "the direction and degree of departure must, on appeal, be measured by a standard of reasonableness.... In this context, reasonableness is determined with due regard for 'the factors to be considered in imposing a sentence,' generally, and 'the reasons for the imposition of the particular sentence, as stated by the district court.'" (Citing 18 U.S.C. §§ 3553(a) and 3742(d)(3).) "This third step involves what is quintessentially a judgment call.... [A]ppellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case. We will not lightly disturb decisions to depart, or not, or related decisions implicating degrees of departure."

The court added that "we read the Guidelines as envisioning considerable discretion in departure decisions, at least at this early stage of their existence. . . . Although we are cognizant that departures should be the exception rather than the rule,... we must nonetheless defer, within broad limits, to the trial judge's intimate familiarity with the nuances of a given case."

U.S. v. Diaz-Villafane, No. 88-1998 (1st Cir. May 4, 1989) (Selya, J.).

Guideline Sentencing Update

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VOLUME 2 • NUMBER 7 • JUNE 5, 1989

Sentencing Procedure

Third Circuit holds that when plea agreement establishes facts relevant to sentencing no further proof of those facts is required. Defendant entered a plea of guilty to theft of 122 pieces of mail valued at $22,500. Although defendant never withdrew his plea, he challenged the presentence report, claiming he only stole 40–45 packages with a value of less than $20,000, a value that would result in a lower offense level. On appeal, defendant argued that the dispute over the value of the stolen property was not foreclosed by his guilty plea, and that the government should have been required to prove the value through the dispute resolution procedures of Fed. R. Crim. P. 32(c)(3)(D) and guideline § 6A1.3.

The appellate court rejected this view, finding that "the plea agreement encompassed an understanding both as to the number of parcels taken and their value," that there was "no suggestion in the plea agreement that [defendant] reserved the right to challenge the valuation," and that defendant "did not seek to withdraw the plea when the judge ruled that the indictment valuation would be used for sentencing." Thus, the court held, defendant's "plea of guilty admitted the value for purposes of his sentence and no further proof or stipulation was required."

U.S. v. Parker, No. 88-3752 (3d Cir. May 10, 1989) (Greenberg, J.).

Fifth Circuit holds judge must resolve factual disputes before sentencing. Defendant pleaded guilty to conspiracy to possess marijuana with intent to distribute. He objected to the presentence report, claiming that the amount of marijuana used to set his offense level was too high and that he should not have been classified as an organizer or leader. The district court did not rule on these objections or make explicit factual findings. Instead, the court departed from the recommended sentencing range and imposed the statutory maximum of five years, giving as reasons defendant's privileged social background and prior criminal activity. The appellate court vacated the sentence and remanded.

The court noted that "the presentence report and the defendant's objections to that report are essential considerations in proper sentencing." Furthermore, "[t]he guidelines explicitly require that the sentencing court resolve disputed sentencing factors, without regard to whether the court ultimately determines that a departure from the guidelines is warranted. Sentencing Guideline 6A1.3(b). Without a clear resolution of the facts that form the basis for the district court's sentence, this court cannot gauge either the need for or reasonableness of the departure." The court held that "failure to comply with [Fed. R. Crim. P.] 32(c) and guideline 6A1.3(b) requires that we vacate [defendant's] sentence and remand this action for resentencing. . . . The method by which the district court chooses to address the requirements of Rule 32(c) and guideline 6A1.3(b) in a given case is for that court to select. . . . The only requirement we make is that the record reflect the trial court's resolution of any disputed sentencing factors in accordance with the federal rules and the guidelines."

The court also held that "the district court must . . . redetermine, in light of its fact findings, whether a departure is warranted." In doing so, the district court should not consider defendant's education or socio-economic status, as those factors are excluded under the Guidelines.

U.S. v. Burch, No. 88-2680 (5th Cir. May 10, 1989) (Clark, C.J.).

District court determines that party seeking adjustment to base offense level bears burden of proof. Defendant, who pleaded guilty to engaging in a continuing criminal enterprise, objected to an offense level increase for obstruction of justice and claimed he should have received a two-level decrease for acceptance of responsibility. The court held an evidentiary hearing on the dispute, and first concluded that "the preponderance of evidence standard is the appropriate standard of proof to be applied in evidentiary hearings held under the Guidelines."

As to whether the government or defendant bore the burden of proof, the court concluded "that the burden should shift depending on the disputed factor at issue. It is clear to this court that the government should bear the burden of proof when showing that the defendant's base offense level should be increased." On the other hand, "[h]aving the government carry the burden of proof in the context of decreasing the base offense level seems inappropriate. . . . The defendant's base offense level cannot be reduced under the Guidelines without proof that a factor exists which warrants such a reduction, e.g., acceptance of responsibility . . . . Surely the government need not carry the burden of proving that the defendant's base offense level should not be decreased if there is no proof in the record warranting such a decrease. If evidence is submitted by the defendant warranting a decrease . . . , the government can then go forward with evidence disputing the same. But first there must be evidence warranting such a reduction and who is better to offer this evidence than the defendant." *But cf. U.S.*

v. Dolan, 701 F. Supp. 138 (E.D. Tenn. 1988) (holding that government had burden of proof when it challenged presentence report recommendation of downward adjustment for acceptance of responsibility). In this case, the court found that neither party satisfied its burden, and no adjustments to the offense level were allowed.

U.S. v. Clark, No. CR. SCR 88-60(1) (N.D. Ind. May 11, 1989) (Sharp, C.J.).

Guidelines Application

Fifth Circuit holds that lack of connection between drug offense and weapon precludes offense level increase under guideline § 2D1.1(b)(1). Defendant pleaded guilty to possession of cocaine with intent to distribute. Police found a loaded pistol at his residence, which was several miles from the scene of the drug purchase where defendant was arrested. The district court adjusted his offense level under guideline § 2D1.1(b)(1), which directs courts to increase the offense level by two "[i]f a firearm . . . was possessed during commission of (a drug-related) offense."

The appellate court held that "[i]t is a strained interpretation, given this situation, to conclude that defendant possessed the gun during the commission of the offense, even applying the deferential clearly-erroneous standard of review." There was no showing that the gun and drugs were connected in any way, and they were, in fact, always several miles apart. Although the court found that under the language of the guideline "this is a close case," it held that "the adjustment made was inappropriate and must be vacated."

U.S. v. Vasquez, No. 88-2775 (5th Cir. May 19, 1989) (Smith, J.).

Other Recent Cases:

U.S. v. White, No. 88-5613 (4th Cir. May 22, 1989) (Wilkins, J.) (whether to apply acceptance of responsibility guideline "is clearly a factual issue and thus reviewable under a clearly erroneous standard").

U.S. v. Pinto, No. 88-2896 (7th Cir. May 19, 1989) (Easterbrook, J.) (although Sentencing Commission's Application Notes "are not formally binding," sentencing court may use notes to illuminate meaning of guidelines).

U.S. v. Harry, No. 88-1743 (5th Cir. May 18, 1989) (per curiam) (when term of probation is imposed under guideline § 5B1.2, maximum length of term that may be imposed is determined by defendant's total adjusted offense level, not the base offense level).

U.S. v. Daughtrey, No. 88-5151 (4th Cir. May 11, 1989) (Wilkins, J.) (issue of minimal or minor participant status "is an 'essentially factual' question" and, under the "due deference" standard of review, sentencing court's decision will be affirmed "unless clearly erroneous").

U.S. v. Ayarza, No. 88-3123 (9th Cir. May 9, 1989) (Wiggins, J.) (rejecting separation of powers and due process challenges to requirement of substantial assistance provision, § 5K1.1, that such downward adjustment may be made only "upon motion of the government").

U.S. v. Galvan-Garcia, No. 88-2752 (5th Cir. May 1, 1989) (Johnson, J.) (affirming offense level increase for obstruction of justice where defendant threw bags of marijuana out of vehicle during high-speed chase).

U.S. v. Rafferty, No. CR. 88-01508-01 (D. Hawaii May 5, 1989) (Ezra, J.) (increasing offense level for obstruction of justice where defendant gave false information to arresting officers and false testimony at detention hearing).

Departures

U.S. v. Ramirez-de Rosas, No. 88-5219 (9th Cir. May 5, 1989) (Wright, Sr. D.J.) (upholding departure based on high-speed chase on ground that it constituted either "dangerous treatment of aliens" (see Application Notes to § 2L1.1) or an "aggravating circumstance" not adequately considered by the Sentencing Commission; under these circumstances departure to 30-month sentence from guideline range of 0–4 months was "completely reasonable").

Constitutionality

Due Process Challenges

As of this writing, all seven circuits that have considered due process challenges to the Sentencing Guidelines have rejected them, most recently the First, Sixth, and Seventh Circuits. *See U.S. v. Seluk*, No. 88-1779 (1st Cir. Apr. 27, 1989) (per curiam); *U.S. v. Allen*, No. 88-5739 (6th Cir. May 4, 1989) (Contie, Sr. J.); *U.S. v. Pinto*, No. 88-2896 (7th Cir. May 19, 1989) (Easterbrook, J.). In light of this strong trend, *Guideline Sentencing Update* will not report future cases upholding the Guidelines against due process challenges.

Guideline Sentencing Update

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Guidelines Application

DEPARTURES

Second Circuit outlines procedure for departure based on criminal history, holds defendant must be given notice of possible departure. Defendant pleaded guilty to importation of cocaine; his guideline range was 33–41 months. The court departed and imposed a 60-month sentence, finding that defendant's criminal history score, which placed him in Category I, did not adequately represent his past criminal conduct.

The appellate court vacated the sentence, partly because the district court may have based the departure on factors already considered by the Sentencing Commission, but also because the court failed either to adequately set forth the reasons for departing or to use other criminal history categories as a guide: "We believe that the district court should explicitly articulate its reasons for departing pursuant to § 4A1.3. Failure to do so renders the sentence unlawful under 18 U.S.C. § 3742(d)(1).... It is necessary ... that the court clearly identify any aggravating factors and specify its reasons for utilizing a particular criminal history category." The court found that "[a] precise procedure regulates the exercise of discretion in making this type of departure.... [T]he Guidelines require a judge to 1) determine which category best encompasses the defendant's prior history, and 2) use the corresponding sentencing range for that category 'to guide its departure.'" (Citing policy statement § 4A1.3.) *Accord U.S. v. Lopez*, 871 F.2d 513 (5th Cir. 1989) (departure for inadequate history score should be tied to specific criminal history category).

In this case, "[t]he departure to a 60-month term of imprisonment—from an initial range of 33–41 months—can only be supported by placing [defendant] in Criminal History Category IV. The district court's cryptic statement regarding this departure does not satisfy the congressional requirement that specific reason or reasons be cited. . . . Nor was an explanation offered for selecting a sentence appropriate for a defendant in Category IV rather than Category II or III."

The court also held that a defendant must be given notice of and an opportunity to present arguments on possible departures. The court based this ruling, in part, on the language of Fed. R. Crim. P. 32(a)(1), which gives defense counsel the right to "an opportunity to comment upon . . . other matters relating to the appropriate sentence." *Accord U.S. v. Otero*, 868 F. 2d 1412 (5th Cir. 1989) (defense must have notice and opportunity to be heard if court intends upward departure).

U.S. v. Cervantes, No. 89-1002 (2d Cir. June 20, 1989) (Kaufman, Sr. J.).

Ninth Circuit holds district court must clearly identify factors warranting departure. Defendant pleaded guilty to bank robbery. His criminal history score placed him in Category VI, and the guideline range was 63–78 months. The court departed from the range to impose a sentence of 96 months, explaining that departure "is justified under §§ 4A1.3 and 5K2.0 of the Sentencing Guidelines because the guideline sentence does not adequately reflect defendant's criminal history. Since defendant is in the highest category by reason of several convictions, additional convictions which would otherwise be included in the calculation add nothing further. Defendant is very close to career criminal status. Other similar criminal conduct is not reflected. All of this reflects strong, recidivist tendencies."

The appellate court vacated and remanded, holding that the sentencing court's "conclusory statement of reasons . . . fails to clearly identify the specific aggravating circumstances present in this case. The statement also fails to indicate whether the court found that the Sentencing Commission inadequately considered those circumstances in formulating the guidelines. Absent such a finding, departure is not permitted." (Citing 18 U.S.C. §§ 3553(b) and 3742(d)(3).)

U.S. v. Michel, No. 88-1280 (9th Cir. June 8, 1989) (Wiggins, J.).

Fifth Circuit reverses departures for failure to articulate valid rationale, failure to consider adjustment to criminal history. In one case, defendant pleaded guilty to possession of an unregistered firearm with an altered serial number. The evidence showed that defendant, a convicted felon, was stopped at a border checkpoint where 18 different weapons, all with altered serial numbers, were found in his car. The guideline range was 27–33 months. The court departed to impose an eight-year sentence, stating that the guidelines were "weak and ineffectual with respect to [defendant's] crime" and that defendant was addicted to heroin.

The appellate court vacated the sentence, holding that "[t]he sentencing court's articulated rationale for departing from the guidelines in this case, and the resulting sentence," were "unreasonable." The court stated that "[a] sentencing court's personal disagreement with the guidelines does not provide a reasonable basis for sentencing," and found that the "record does not disclose that [defendant's] drug addiction provided a reasonable basis for [departure]. The guidelines admonish that drug dependence is not ordinarily relevant in determining whether a departure is warranted," and the district court's "single statement" that defendant was a heroin

addict "does not sufficiently explain why [defendant's] addiction is so extraordinary that a departure was justified. Without a more particularized rationale, we cannot gauge the reasonableness of this departure nor can we gauge the extent to which addiction justifies the sentence imposed."

U.S. v. Lopez, No. 88-2765 (5th Cir. June 12, 1989) (Clark, C.J.).

In another case, defendant pleaded guilty to falsely representing himself as a U.S. citizen. The sentencing judge departed from the guideline range to impose the statutory maximum of three years' imprisonment, citing defendant's "prior history" and status as an illegal alien. The appellate court reversed, first finding that the sentencing judge should have considered an upward adjustment to defendant's criminal history category if it did not adequately represent his criminal past. The sentence here exceeded the highest possible guideline sentence, using Category VI, by 50%, and "[n]othing in the record indicates that [the district] court considered the possible sentences which would result from an adjustment to criminal history category V or VI. Nor did the court provide any explanation why such adjustments, if they were considered, are inadequate in this case."

The appellate court also found that "[t]he judge's comments suggest that [defendant's] status as an illegal alien and his cavalier attitude toward United States citizenship requirements influenced the judge in departing from the recommended sentence. Since the offense for which [defendant] was convicted already takes into account his illegal immigration status, this was not a valid reason for departure."

U.S. v. Rios, No. 88-6126 (5th Cir. June 12, 1989) (per curiam).

Eighth Circuit voices concern about § 5K1.1 provision that departure for substantial assistance requires motion by government. Defendant pleaded guilty to a drug offense. He argued that he was entitled to a departure under § 5K1.1 for substantial assistance to the government. The government did not dispute that defendant provided substantial assistance, but refused to make a § 5K1.1 motion, and the district court did not depart from the guideline sentence.

Although the appellate court upheld the refusal to depart, it had "several problems with § 5K1.1's requirement that a motion by the government is necessary before a district judge can depart from the guidelines." Such an arrangement "places discretion that has historically been in the hands of a federal judge into the hands of the prosecutor." Whether the prosecutor abuses this discretion "is a question that appears to be unreviewable," and "the issue of whether a defendant has provided substantial assistance to authorities may be a disputed factual issue" that the prosecutor, not the court, now resolves.

"[W]e are not positive that this provision, in the absence of a motion by the government, would divest a sentencing court of the authority to depart below the guidelines in recognition of a defendant's clearly established and recognized substantial assistance to authorities. We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities." The court decided it did not have to reach this issue, however, finding that defendant's assistance may in fact have been recognized by a lenient plea agreement.

U.S. v. Justice, No. 88-2539 (8th Cir. June 8, 1989) (Gibson, Sr. J.).

District court to determine in camera whether prosecutor refused in good faith to follow agreement to move for "substantial assistance" departure. Defendant provided information to an assistant U.S. attorney pursuant to his plea and a "cooperation agreement" he signed with the government. The AUSA did not believe some of the information, concluded that defendant had breached the cooperation agreement, and informed defendant's attorney that the government no longer intended to move for a downward reduction of sentence under 18 U.S.C. § 3553(e) and policy statement § 5K1.1 of the Guidelines. Defendant moved to compel the government to file such a motion.

The court found that, while the statute and policy statement "place sole responsibility and discretion for determining what constitutes 'substantial assistance' on the prosecutor, and not on the trial court," when there is a cooperation agreement and the government refuses to move for departure, the court may scrutinize whether the prosecutor's decision was made "in good faith." The court wanted "to know in detail what actual assistance [defendant] has rendered to the government, and what use the government has made or intends to make out of any information furnished . . . in order to determine whether there is any basis to conclude that, in the totality of the circumstances, the government acted in bad faith in refusing to make a motion on [defendant's] behalf under the guidelines or the statute."

As to procedure, the court determined there was "no need . . . to conduct the equivalent of a trial on the issue, because the issue is not the ultimate objective reality, but rather the subjective state of the prosecutor's mind." The disclosures could be made ex parte and in camera, and the materials provided would "be placed under seal pending this Court's further order or for the purpose of appellate review."

This appears to be the first reported case in which a district court has ordered a prosecutor to defend a decision to refuse to move for a reduction of sentence. Another district court has held that, under the specific circumstance of the case, letters from the prosecutor satisfied the requirements of 18 U.S.C. § 3553(e) and § 5K1.1 when the prosecutor refused to file a motion. *See U.S. v. Coleman*, 707 F. Supp. 1101 (W.D. Mo. 1989) (because of prosecutor's representations to defendants and mistaken belief that a motion was not required, court treated letters from prosecutor detailing defendants' assistance as "functional equivalent" of § 3553(e) motion).

U.S. v. Galan, No. 89 Cr. 198 (S.D.N.Y. June 8, 1989) (Haight, J.).

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Guidelines Application

SENTENCING PROCEDURE

Second Circuit holds courts are not required to advise defendants of likely guideline sentence before accepting plea bargain, but "where feasible, should" do so. Defendant pleaded guilty to importing more than 500 grams of cocaine. The facts showed, and defendant did not dispute, that the offense actually involved 25 kilograms. The district court calculated the offense level based on the larger amount, which resulted in a substantially longer sentence despite a downward departure under § 5K1.1 of the Guidelines for defendant's cooperation. Defendant argued (1) that the court erred in using the larger amount, and (2) that the court should have informed him it would do so at the time of his guilty plea to prevent unfair surprise and enable him to fully understand the consequences of his guilty plea.

Affirming the sentence, the appellate court noted that it had already rejected the first argument in *U.S. v. Guerrero*, 863 F.2d 245 (2d Cir. 1988). The court also rejected defendant's notice argument, holding that Fed. R. Crim. P. 11(c)(1) requires a sentencing court to apprise a defendant only of the statutory minimum and maximum penalties faced, not what the likely sentence under the Guidelines will be. "The district court was not required to calculate and explain the Guideline sentence to the appellant before accepting the plea, for, once appellant was informed of the possible consequences enumerated in the Rule—the maximum and the minimum sentences—the requisites of Rule 11 were met."

The court added, however, that "the sentence likely to be imposed can in some instances be readily calculated from the universe of facts before the district court at the time of the plea. In those cases where the applicable Guidelines sentence is easily ascertainable at the time the plea is offered, the district court has full discretion to—and, where feasible, should—explain the likely Guidelines sentence to the defendant before accepting the plea." *But cf. U.S. v. Ware*, 709 F. Supp. 1062 (N.D. Ala. 1989) (defendant not entitled to pretrial resolution of dispute involving application of Guidelines to facts of case: "such a procedure . . . creates an undue risk that error could affect the defendant's decision to go to trial or plead guilty").

U.S. v. Fernandez, No. 88-1409 (2d Cir. June 15, 1989) (Pierce, J.).

Second Circuit holds defense attorney's underestimation of probable sentencing range does not warrant withdrawal of guilty plea. After defendant pleaded guilty to two offenses, the district court calculated the guideline sentence range to be 51–63 months. Defendant moved to withdraw his pleas, but the court denied the motion and imposed a 57-month sentence. On appeal, defendant argued he should be allowed to withdraw the pleas because he was denied effective assistance of counsel by his attorney's erroneous estimate of a sentencing range of 21–27 months. Defendant claimed he relied on that estimate, and thus his pleas were not voluntarily made with full knowledge of the consequences.

The appellate court found that when defendant pleaded guilty he was aware of the maximum terms he faced, that the length of the sentence to be imposed was within the sole discretion of the sentencing judge, and that even if the sentence was more severe than expected he was bound by his plea. Moreover, under pre-Guidelines law, "it seems clear that we would not have reversed a district judge for refusing to allow withdrawal of a plea under [Fed. R. Crim. P.] 32(d) on the ground that counsel's estimate was erroneous. We do not see why the presence of the Guidelines should change the law in this respect. If anything, they seem to us to reinforce our earlier decisions on the issue. Under the Guidelines there will be many more detailed hearings regarding imposition of sentence, as in this case. A sentencing judge will now frequently indicate, as a result of such hearing, what the sentence may be. In those circumstances, allowing defendants to use the presentence prong of Rule 32(d) to withdraw their pleas would pervert the rule and threaten the integrity of the sentencing process. Defendants may not plead guilty in order to test whether they will get an acceptably lenient sentence."

U.S. v. Sweeney, No. 89-1072 (2d Cir. June 22, 1989) (per curiam).

DEPARTURES

Ninth Circuit holds defendants must be given notice of factors warranting departure, and that courts must follow Guideline standards for departure. Defendants pleaded guilty to one count of aiding and abetting the transportation of illegal aliens. The facts showed the operation was very large and well organized, and that both defendants were key participants. At the sentencing hearing the court, without informing defendants in advance, departed upward from the guideline ranges.

The appellate court held "that the failure to notify appellants of the basis for departure in advance of the imposition of sentence violated Fed. R. Crim. P. 32(a)(1)." The court determined that Rule 32(a)(1) and 18 U.S.C. § 3553(d) "indicate that the presentence report or the court must inform the

defendant of factors that they consider to constitute grounds for departure.... This requirement is not satisfied by the fact that the relevant information is present within the presentence report.... Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment." *Accord U.S. v. Cervantes*, No. 89-1002 (2d Cir. June 20, 1989); *U.S. v. Otero*, 868 F. 2d 1412 (5th Cir. 1989).

The court found that the sentencing court could properly base a departure on the large size of the operation, but held that it "erred in relying on two factors considered and accounted for by the guidelines in its decision to depart from those guidelines," namely defendants' roles in the offense and profit motive. "Such a ruling indicates dissatisfaction with the guidelines rather than a reasoned judgment that particular characteristics of the offense or the offenses have not been accounted for. Moreover, because the court's statement of reasons contained an improper as well as a proper basis for departure, we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors." The court vacated and remanded for resentencing, and emphasized that the decision to depart is limited by statute and "must be based on the guidelines or policy statements in the guidelines."

U.S. v. Nuno-Para, No. 88-5163 (9th Cir. June 20, 1989) (Nelson, J.).

District court finds departure warranted because Sentencing Commission failed to account for civil remedies. Defendant pleaded guilty to trafficking in counterfeit goods. The total offense level was 11, and the guideline range was 8–14 months. The court departed from the Guidelines to impose a 36-month term of probation and $6,000 fine: "Under the special circumstances of this case, a term of imprisonment would serve none of the stated purposes of sentencing. [Defendant] is the mother of a young child, she has no prior criminal involvement, no record of drug or alcohol abuse, and a close-knit extended family. She has freely acknowledged her guilt and immediately after apprehension she sought to cooperate with the government.... She poses no threat to the public and will be justly punished, sufficiently deterred, and adequately rehabilitated" by this sentence.

The court also noted that in this type of crime—counterfeiting trademarks of high-priced, designer-label items—the companies whose merchandise is copied "have powerful civil remedies available for protecting their interests," and, "[i]n fact, that approach to enforcing trademark rights i far more prevalent, effective, and reasonable than enlisting our already overburdened police, prosecutors, and courts to act on behalf of" such companies. The court concluded that departure in this case was appropriate, "the Sentencing Commission not having considered the availability of extraordinary civil remedies to deal with the crimes charged here."

U.S. v. Hon, No. 89 Cr. 0052 (S.D.N.Y. May 31, 1989) (Sweet, J.).

Other Recent Case:

U.S. v. Missick, No. 88-3095 (7th Cir. May 24, 1989) (Cummings, J.) (departure not appropriate for defendant who supplied drugs, through a courier, to persons possessing firearms—defendant did not possess weapon, had no direct contact with, and was not charged as co-conspirator with, those who had weapons).

Determining Offense Level

Recent Cases:

U.S. v. Wilson, No. 88-6086 (6th Cir. June 29, 1989) (Contie, Sr. J.) (the offense level reduction in guideline § 2K2.1(b)(2), covering possession of a firearm by a convicted felon "solely for sport or recreation," is not applicable to a firearm possessed as collateral; reference to "intended lawful use" in the Commentary cannot be used to broaden the "unambiguous language . . . in the guideline itself").

U.S. v. Sanchez-Lopez, No. 88-3102 (9th Cir. June 22, 1989) (Alarcon, J.) ("[w]hether a defendant is a 'minor' or 'minimal' participant in the criminal activity is a factual determination subject to the clearly erroneous standard"; career offender provision does not result in "impermissible double enhancement" of penalties, nor involve "unconstitutional sub-delegation of congressional authority to the various states" because state convictions may trigger the provision).

U.S. v. Mann, No. 88-2085 (8th Cir. June 13, 1989) (Gibson, J.) (quantity of drugs in prior drug sale, not included in indictment or offense of conviction but part of "same course of conduct or common scheme," may be considered by sentencing court).

U.S. v. Moore, No. 88-2573 (8th Cir. June 8, 1989) (per curiam) (separate instances of bank robbery, though committed at same bank, may not be grouped under guideline § 3D1.2).

U.S. v. Ofchinick, No. 89-3008 (3d Cir. June 7, 1989) (Greenberg, J.) (defendant convicted of escape from custody may receive criminal history enhancement under guideline § 4A1.1(d) and (e) for escaping while under sentence of imprisonment and while still in confinement, even though being in custody is element of offense).

U.S. v. Zayas, No. 89-1031 (1st Cir. June 7, 1989) (Torruella, J.) (district court "clearly justified" in refusing reduction for acceptance of responsibility to defendant who committed perjury during trial).

Appellate Review

Recent Case:

U.S. v. Ortiz, No. 89-1056 (3d Cir. June 29, 1989) (Seitz, J.) (under "due deference" standard of 18 U.S.C. § 3742(e), appellate review standard varies depending on whether issue is factual, legal, or mixed; question of defendant's "aggravating role" in offense is "essentially factual" and reviewed under clearly erroneous standard).

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VOLUME 2 • NUMBER 10 • AUGUST 4, 1989

Sentencing Procedure

Fourth Circuit holds defendant bears burden of proof when seeking offense level reduction. Defendant contended the district court erred in not reducing his offense level for acceptance of responsibility, arguing he was entitled to the reduction because the government did not prove by clear and convincing evidence that he was not.

The appellate court found that other courts examining the standard of proof question "have generally agreed that a preponderance standard is the proper measure." The court also noted that, in a pre-Guidelines case, the Supreme Court concluded that applying the preponderance standard to factual findings made by a sentencing court satisfied due process. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

As to the burden of proof, "the guideline in question involved a potential decrease in the offense level which would have had the effect of lowering [defendant's] ultimate sentencing range. In these circumstances, we hold that the defendant has the burden of establishing by a preponderance of the evidence the applicability of the mitigating factor in question. ... However, if the government seeks to enhance the sentencing range and potentially increase the ultimate sentence, it should bear the burden of proof. Such a scheme is entirely consistent with the directives of the Supreme Court in *McMillan* and with due process requirements.... [N]either concerns of procedural due process nor any other good reason suggest that a defendant should be able to put the burden on the government to prove that the defendant should not receive any particular mitigating adjustment."

This appears to be the first appellate court opinion concerning burdens of proof for adjustments to offense level. Previously *GSU* has reported two district court cases on this matter. *See U.S. v. Clark*, No. CR. SCR 88-60(1) (N.D. Ind. May 11, 1989) (burden is on defendant to prove decrease is warranted, on government for increase) (2 *GSU* #6); *U.S. v. Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988) (government has burden of proof when challenging presentence report recommendation of downward adjustment in offense level) (1 *GSU* #19). *See also U.S. v. Lovell, infra.*

U.S v. Urrego-Linares, No. 88-5646 (4th Cir. July 20, 1989) (Wilkins, J.).

District court holds party seeking offense level adjustment bears burden of proof; burden is on government when preponderance of evidence favors neither party. The government contested reductions that defendant sought in his base offense level. The court held that "where there is a dispute as to facts being taken into account by the court relative to an adjustment to the base offense level under the Guidelines, the party who desires to obtain an adjustment ... must bear the burden of coming forward with sufficient proof to establish a prima facie case that the adjustment is appropriate."

"[W]here the proponent of the adjustment has established a prima facie case warranting that adjustment, the burden shifts to the opposing party to come forward with rebuttal evidence. At that point, the issues are determined by a preponderance of the evidence and the resolution of the issues is clear-cut unless the evidence does not preponderate in favor of either party's position.

"In the [latter] event ... the burden of persuasion must be placed upon the government for ... recent authority dealing with pre-Guidelines sentencing procedures concluded that the government should bear the burden of persuasion on all matters disputed in presentence investigation reports when those matters were relied upon by the sentencing judge."

U.S. v. Lovell, No. CR. 88-20171-TU (W.D. Tenn. July 7, 1989) (Turner, J.).

District court allows withdrawal of guilty pleas because of large miscalculations by government and defense counsel as to anticipated sentencing ranges. During their preliminary estimates of defendants' probable Guideline ranges, government and defense attorneys did not include certain "relevant conduct" in their calculations, resulting in much lower ranges than the court ultimately found. Defendants argued that because of the miscalculation they "did not receive the benefit of their bargain with the government which induced these pleas," and that the error provided "fair and just reasons" to allow withdrawal of their guilty pleas pursuant to Fed. R. Crim. P. 32(d).

The court agreed: "While it is true that all parties involved knew that the plea agreement calculations were only preliminary and subject to change, it does not follow that the plea negotiations created no expectations regarding a sentencing range." The court held that one defendant's expected range was close to his final range, and denied leave to withdraw his plea. For two defendants, however, the actual ranges of 41–51 months, versus expected ranges of 27–33 and 21–27 months, were "too far afield" and "simply beyond the scope of expectancy created by the plea agreement. It would be unfair and unjust to enforce the contract between the defendant and the government where the defendant was induced by a promise which could not be kept."

The court stressed that "'considerable caution' will be

used in granting relief from pleas.... Only under exceptional circumstances ... will a motion to withdraw a guilty plea be granted."

U.S. v. Bennett, No. CR 88-30 (N.D. Ind. July 13, 1989) (Lee, J.).

Guidelines Application

Determining Offense Level

First Circuit outlines procedure for sentencing when there is no specific guideline for the offense. Defendant was convicted of contempt of court for refusing to testify at a criminal trial, despite a grant of immunity. The guideline for contempt offenses, § 2J1.1, does not set a specific offense level, leaving it to the court to impose a sentence based on the principles set forth in 18 U.S.C. § 3553(a)(2). The district court imposed a three-year sentence.

The appellate court vacated and remanded for resentencing, holding that the sentence imposed was "unlawfully long." In part, the court based its decision on the facts of the case: defendant believed in good faith that he had a legal basis for refusing to testify; he showed no disrespect for the court; and he had no prior convictions. The court also found the three-year sentence did not comport with the directive of 18 U.S.C. § 3553(b), which provides: "In the absence of an applicable sentencing guideline ... the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by the guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." The "applicable policy statement" in § 2J1.1 refers to § 2X5.1, which directs a sentencing court to "apply the most analogous offense guideline" when no specific guideline was promulgated, and states that "[i]f there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control."

The appellate court determined that "[t]hese various statements all amount to the same thing: they tell the district court to look for analogies. And, in deciding whether the sentence is 'plainly unreasonable' [under 18 U.S.C. § 3742(e)(4)], that is also what we must do." The court determined that § 2J1.5, "Failure to Appear by Material Witness," was "a closely analogous guideline." Under the circumstances of this case, using § 2J1.5 would result in a maximum sentence of six months. The court held that "any sentence in excess of six months ... is 'plainly unreasonable,' and hence unlawful" under 18 U.S.C. § 3742(e)(4), and instructed the district court to sentence defendant to a term of six months or less.

U.S. v. Underwood, No. 89-1315 (1st Cir. July 24, 1989) (Breyer, J.).

District court concludes Sentencing Commission did not adequately consider effects of certain Guidelines sections on escape convictions. Defendant, incarcerated for a pre-Guidelines offense, escaped from custody after the effective date of the Guidelines. Defendant's offense level resulted in a sentencing range of 18–24 months. In addition, guideline § 5G1.3 requires a consecutive sentence for offenses committed by a defendant already serving an unexpired sentence.

Defendant raised two objections. First, since an individual cannot commit the offense of escape unless he is under a criminal justice sentence, the two-point addition to the criminal history score mandated by § 4A1.1(d) is not appropriate in escape cases. Second, the Parole Commission will impose an additional period of incarceration on his earlier, pre-Guidelines offense regardless of the term imposed for the escape. This "sentence," defendant contended, is a factor not adequately considered by the Sentencing Commission in adopting § 5G1.3.

The court held "that the Sentencing Commission inadequately considered the impact of § 4A1.1(d) in an escape case," and departed from the guideline to reduce defendant's criminal history score by two points. The court found that "being incarcerated is an element of the offense" of escape, and under § 4A1.1(d) this same status enhances the criminal history score. The court determined that "[a] basic policy of the guidelines is to avoid double counting.... The underlying principle is that if one provision ... accounts for an element of the offense or a specific offense characteristic, another provision designed to account for the same factor should not apply. The same principle holds true even if the double counting relates to an element of the current offense and calculation of the criminal history score." The court concluded that nothing in the guidelines, policy statements, or commentary indicates that this principle should be abrogated by applying § 4A1.1(d) in an escape case, or "that the Commission was even aware of the double counting that occurs when § 4A1.1(d) is applied to an escape case."

The court specifically disagreed with two earlier decisions that had upheld the use of § 4A1.1(d) in escape cases, *U.S. v. Ofchinick*, 877 F.2d 251 (3d Cir. 1989), and *U.S. v. Jimenez*, 708 F. Supp. 964 (S.D. Ind. 1989). *See also U.S. v. Goldbaum*, No. 88-2239 (10th Cir. July 21, 1989), *infra*. At least one other court has found that using § 4A1.1(d) in an escape case constitutes improper double counting. *See U.S. v. Clark*, No. 88-0793 (S.D.N.Y. Mar. 27, 1989).

The court also agreed that defendant's sentence for the escape should run concurrently with any additional time imposed by the Parole Commission. "Since [defendant's] offenses place him within the jurisdiction of both the Parole Commission and this court, the court cannot dictate exactly the amount of time [defendant] will serve.... Nevertheless, the court cannot close its eyes and ignore the practical effect of the Parole Commission's probable course of action.... There is no evidence that the Sentencing Commission adequately considered this conflict between pre-guideline sentences and post-guideline sentences when it drafted guideline § 5G1.3."

U.S. v. Bell, No. CR. 5-88-021(01) (D. Minn. June 30, 1989) (Magnuson, J.).

Other Recent Case:

U.S. v. Goldbaum, No. 88-2239 (10th Cir. July 21, 1989) (Anderson, J.) (affirming use of guideline § 4A1.1(d) to add two points to criminal history score of defendant convicted of escape). *See also U.S. v. Bell, supra.*

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Guidelines Application

Ninth and Eleventh Circuits disagree as to whether Sentencing Commission may mandate consecutive sentences. In the Ninth Circuit case, defendant was serving a state sentence at the time he was sentenced in the district court. Under guideline § 5G1.3, "[i]f at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences." Prior to taking defendant's plea, the district court did not inform him that the Guidelines required that the sentence imposed be consecutive to his current term. Defendant claimed on appeal that failure to advise him of that fact violated Fed. R. Crim. P. 11.

The appellate court determined that whether a violation of Rule 11 occurred hinged upon whether the consecutive sentence was a "direct consequence" of the plea, of which defendant had to be informed. That issue, in turn, depended upon whether "in this case, the trial judge had discretion to impose a consecutive or concurrent sentence." Guideline § 5G1.3 indicates that the trial judge does not have such discretion, but the court concluded that the guideline conflicts with 18 U.S.C. § 3584(a), which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."

The court held "that a judge has discretion to impose a concurrent or consecutive sentence, as a matter of law, under section 3584(a). First, section 3584(a) unambiguously confers that discretion upon the trial judge.... If the guidelines are to be consistent with Title 18, the discretion cannot be taken away." The court also found that "although the language of the guidelines would deprive the judge of discretion, the Sentencing Commission's commentary suggests that the guidelines are not meant to change section 3584(a), but rather to reflect it." Thus, "the district judge had discretion to impose either a consecutive or concurrent sentence..., the resulting sentence was not a 'direct consequence' of [defendant's] plea... [and t]he judge... did not violate Rule 11." *See also U.S. v. Scott*, No. JH-87-0570 (D. Md. May 23, 1988) (§ 5G1.3 inconsistent with § 3584(a); court will depart from § 5G1.3 when determining whether to impose concurrent or consecutive sentences).

U.S. v. Wills, No. 88-3291 (9th Cir. Aug. 9, 1989) (Leavy, J.).

In the Eleventh Circuit case, defendant argued unsuccessfully that the district court should have allowed her to serve her sentence concurrently with an earlier, unexpired sentence. Citing the discretion given to sentencing courts in 18 U.S.C. § 3584(a), the appellate court found that the Sentencing Reform Act "places limits on the court's discretion in this regard. In considering whether a term should run consecutively or concurrently, the Act requires the court to consider the factors set forth in 18 U.S.C.A. § 3553(a).... That section, in turn requires the court to consider any pertinent policy promulgated by the... Sentencing Commission."

The court cited § 5G1.3 as such a Commission policy, and concluded that "the district court could have ordered appellant to serve her sentence concurrently only if the court had followed the procedures for departing from the sentencing guidelines." *See also U.S. v. Mendez*, 691 F. Supp. 656 (S.D.N.Y. 1988) (holding § 5G1.3 does not conflict with § 3584(a)).

U.S. v. Fossett, No. 88-3904 (11th Cir. Aug. 7, 1989) (Tjoflat, J.).

DETERMINING OFFENSE LEVEL

Recent Cases:

U.S. v. Haynes, No. 88-2277 (8th Cir. Aug. 11, 1989) (Henley, Sr. J.) (defendant acquitted of a Continuing Criminal Enterprise charge may still be given an offense level increase under guideline § 3B1.1(a) for being an organizer or leader based upon his relevant conduct in the criminal activity).

U.S. v. Fuente-Kolbenschlag, No. 88-5424 (11th Cir. Aug. 3, 1989) (per curiam) (increasing offense level under both counterfeiting guideline § 2B5.1(b)(2) for "manufacturing" counterfeit currency, and guideline § 3B1.3 for use of "special skill," does not result in improper "double-enhancement"; also, disputes on overlapping guideline ranges are appealable under 18 U.S.C. § 3742(a)(2) "if the appealing party alleges that the sentencing guidelines have been incorrectly applied, even in cases where the guideline ranges advocated by each of the parties overlap"). *Cf. U.S. v. Bermingham*, 855 F.2d 925 (2d Cir. 1988) (guideline range dispute may be left unresolved if same sentence would be imposed); *U.S. v. Turner*, No. 88-5143 (9th Cir. Aug. 1, 1989) (following *Bermingham*).

U.S. v. Scroggins, No. 88-8218 (11th Cir. July 31, 1989) (Tjoflat, J.) ("loss" under theft guideline § 2B1.1(b) includes cost of repairing property damage, in this case damage to postal vending machines defendant robbed; also, district court properly denied reduction for acceptance of responsibility to defendant who continued to use drugs after his arrest because such use "cast doubt on the sincerity of [defendant's] avowed acceptance of responsibility").

U.S. v. Natal-Rivera, No. 88-2462 (8th Cir. July 14, 1989) (Henley, Sr. J.) (Guidelines do not violate due process, and

district court did not err, by not taking defendant's "cultural heritage" into account as a mitigating factor).

U.S. v. Hewitt, No. 89 Cr. 0025 (S.D.N.Y. Aug. 4, 1989) (Sweet, J.) (when factors relating to defendant's past criminal conduct were used to increase offense level under the criminal livelihood provision, § 4B1.3, court would not use those same factors as basis for upward departure in criminal history category under § 4A1.3—using both sections "would doubly punish defendant for the common nature of his criminal acts, and do so in furtherance of nearly identical sentencing principles. Such sentencing practices involving 'double counting' are inappropriate and, in all likelihood, are unlawful.").

Departures

District court denies request to order government to move for sentence below statutory minimum, notes differences in motions under guideline policy statement § 5K1.1 and 18 U.S.C. § 3553(e). Defendant was subject to a five-year mandatory minimum sentence, and his guideline range was 51–61 months. As part of a written plea agreement the government stated it would "have the option" to move under § 5K1.1 for a departure from the Guidelines if defendant cooperated with the government. The defendant cooperated to some extent, but the government chose not to make the § 5K1.1 motion. Defendant contended he made a good faith effort to cooperate, and was entitled to a departure from the statutory minimum sentence to allow a sentence at the low end of the guideline range, even without a motion by the government.

The court noted that defendant's request for sentencing below the statutory minimum indicated it was actually a request to order the government to make a motion under 18 U.S.C. § 3553(e), which grants a court "the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance" to the government. Section 5K1.1, on the other hand, allows a departure "from the guidelines" if a defendant "has made a good faith effort to provide substantial assistance." The court concluded that, "[b]ecause of the apparent confusion surrounding the distinction between § 3553(e) and § 5K1.1, the Court will construe the plea agreement against the government, the drafter, and will assume the parties used '5K1.1' as the shorthand for a departure from both the Sentencing Guidelines and the statutory minimum."

Although both sections require a motion by the government, and neither section limits the government's discretion, the court found it is "a well established principle" that if a plea was induced by a promise or agreement of the prosecutor, that promise must be fulfilled or the defendant may be entitled to specific performance of the agreement. Thus, in this case, "if the government has breached its obligation under the plea agreement to recommend a departure based upon defendant's assistance, this Court may order specific performance of that promise." In determining whether the government breached its promise, the court noted that "[a]lthough the government clearly reserved the right to determine whether to recommend a downward departure, it has an obligation to make that determination in good faith."

To determine whether the government acted in good faith, the court had to determine "the standard by which defendant's cooperation is to be measured." Defendant argued that under § 5K1.1 he only had to make "a good faith effort to provide substantial assistance." The court held, however, that since defendant sought a departure from the statutory minimum, "§ 3553(e) provides the relevant standard." Under that standard, defendant must actually provide "substantial assistance," not just make a good faith effort to do so. The facts before the court demonstrated that defendant did not provide substantial assistance, and the government therefore acted in good faith. Defendant's motion was denied.

U.S. v. Nelson, No. 4-89-14 (D. Minn. Aug. 1, 1989) (Doty, J.).

District court finds upward departure justified because defendants hid large sum of stolen money. Defendants pleaded guilty to bank larceny and conspiracy. They had stolen a Wells Fargo truck, and at the time of their arrest almost $1.6 million was not recovered, apparently because defendants hid the money for later use. The guideline range for one defendant was 37–46 months, for the other 30–37 months.

The government urged the court to depart from the guideline ranges and impose the statutory maximum of 15 years against each defendant. The court agreed, finding that the "unique" facts of this case were not adequately considered by the Sentencing Commission: "The Defendants have stashed the proceeds of the crime, and they refuse to disclose the location. They plan to be millionaires upon their release from prison. The Defendants have obviously made a calculated decision—if they have to spend some time in prison, they are going to make it worth their while."

"The Sentencing Commission did not foresee cases in which the Defendants plan to exploit the letter of the law to their financial advantage. . . . A sentence imposed under the guidelines would be unjust. Under these circumstances, it is our duty to depart upward from the guidelines. Only a maximum statutory sentence will thwart the Defendants' attempt to defeat the system. . . . If the Defendants have a change of heart and decide to turn over the money to the Government, we will entertain a motion for reduction of sentence."

U.S. v. Valle, No. 89-080-CR (S.D. Fla. July 19, 1989) (Scott, J.).

Other Recent Case:

U.S. v. Gonzalez, No. 88 Cr. 559 (S.D.N.Y. July 27, 1989) (Haight, J.) (Defendant, mother of three small children, was granted downward departure from guideline sentence requiring short term of confinement and given probation. Although policy statement § 5H1.6 states that "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the Guidelines," court holds that "the qualifying adverb 'ordinarily' implies that family ties in some circumstances may be considered in a downward adjustment; and where the father is in prison and the imprisonment of the mother would place minor children at hazard, I am prepared to depart from the ordinary," at least "when the mother's involvement is as peripheral as in the case at bar.").

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Sentencing Procedure

Eleventh Circuit holds evidence from a co-conspirator's trial may not be used to resolve dispute over quantity of drugs. Defendant and four others were indicted on drug charges. Defendant pleaded guilty to one count and stipulated that nine ounces of cocaine were involved in the offense. The presentence report, however, stated that over five kilograms were involved. The district court resolved the dispute by relying on testimony presented at the trial of one of defendant's co-conspirators, which supported the five-kilogram figure.

The appellate court held that the "reliance on testimony adduced at the trial of another was fundamental error," and remanded for resentencing. "We have held that a sentencing judge may rely on the evidence presented at the defendant's own trial in resolving disputed facts for sentencing purposes. ... This procedure is entirely proper: such a defendant has had the opportunity to cross-examine the Government's witnesses, make objections to the evidence, and put on his own case .... When the sentencing judge relies on evidence adduced at the trial of another, however, no such procedural guarantees are present." The court noted that, if appellant's testimony at the co-conspirator's trial constituted an admission as to quantity, that testimony could be used for sentencing. The court determined there had been no such admission, however.

U.S. v. Castellanos, No. 88-3535 (11th Cir. Aug. 17, 1989) (Tjoflat, J.).

Sixth Circuit holds burden of proof to avoid weapons enhancement may be placed on defendant to show it was "clearly improbable" that weapon was connected with offense. Defendant was convicted on drug charges. His offense level was increased by two levels under guideline § 2D1.1(b) because he possessed weapons during the commission of the offense. The commentary to that section states the adjustment should be applied "unless it is clearly improbable that the weapon was connected with the offense." Defendant argued on appeal that shifting the burden of proof on the probability of a connection between the weapons and the offense violated due process.

The appellate court rejected defendant's claim, finding that the "possession of a firearm during the commission of a drug offense may fairly be considered by the court as a fact, or bearing on the extent of punishment," rather than "one of the elements of the substantive crime, to be established to the satisfaction of the jury beyond a reasonable doubt. Not all factors that bear on punishment need to be proven before a jury." The court found that Supreme Court cases supported this conclusion, and also rejected defendant's claim that application of § 2D1.1(b) violated his Sixth Amendment right to a jury trial.

U.S. v. McGhee, No. 88-5878 (6th Cir. Aug. 18, 1989) (Nelson, J.).

Other Recent Cases:

U.S. v. Duque, No. 88-3999 (6th Cir. Aug. 24, 1989) (Gilmore, J.) (under 18 U.S.C. § 3553(c)(1), sentencing court need not state reasons for particular sentence within guideline range if that range does not exceed 24 months).

U.S. v. Turner, No. 88-5143 (9th Cir. Aug. 1, 1989) (Alarcon, J.) (sentencing court need not inform defendant of applicable offense level and criminal history category before accepting guilty plea). *See also U.S. v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989) (sentencing court not required to inform defendant of likely guideline sentence before accepting plea, but "where feasible, should").

U.S. v. Ligon, No. CR 88-00013-01-P (W.D. Ky. Aug. 14, 1989) (Siler, C.J.) (following *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989), holding that defendant must "carry the burden of proof in showing acceptance of responsibility").

Guidelines Application

DEPARTURES

Third Circuit finds Sentencing Commission "adequately considered" differences between escapes from secure and non-secure facilities, bars use of proposed guideline changes as basis for departures. Defendant pleaded guilty to escape from a non-secure prison facility. He argued he should receive a downward departure because the Commission failed to distinguish in the escape guideline between escape from a secure prison versus "walking away" from a non-secure prison camp, as evidenced by a Commission request for comment on whether it should reduce the base offense level for escapes from non-secure facilities.

In rejecting defendant's claims, the appellate court noted that, in § 2P1.1(b)(2), the Commission provided for an offense level reduction for escapees from non-secure facilities who returned voluntarily within 96 hours, showing the Commission did, in fact, make a distinction. Also, the May 17, 1989, final amendments to the Guidelines do not include the proposed amendment on which defendant relied, showing that "the Commission obviously rejected the proposal on further consideration. [Defendant's] argument that the Commission has not considered the issue therefore fails without question."

The court also held that "the existence of a proposal for amendment to the Guidelines is not a legitimate ground for departure from them." "[T]he fact that the Commission has invited public comment on a proposed change in no way indicates that it will in fact adopt this change. Any presumption to the contrary would precipitate departures from the Guidelines before the Commission had made a decision," and could deter the Commission from proposing amendments.

U.S. v. Medeiros, No. 89-5296 (3d Cir. Aug. 18, 1989) (Sloviter, J.).

Sixth Circuit outlines standard of review for departures. In upholding a departure to a six-year term from the guideline range of 30–37 months, the court determined it would follow the three-step process for review of departures outlined by the First Circuit in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989). The court also agreed with the Fifth Circuit, in *U.S. v. Roberson*, 872 F.2d 597 (5th Cir. 1989), that "'[t]he court's discretion to depart from the Guidelines is broad.'"

The court held that two factors used by the district court to justify departure were invalid: "defendant's national origin is not a factor which the court should consider in sentencing under the Guidelines," and "defendant's inability to speak English, while not specifically addressed in the Guidelines, is similarly a factor irrelevant to sentencing." Other factors used by the district court were valid, however, including defendant's illegal entry into the U.S. while serving a foreign sentence, dependence on criminal activity, and propensity to commit future crimes. "While one of the factors found in the present case standing alone might not support the court's sentence, seen as a whole, the sentence is permissible."

U.S. v. Rodrequez, No. 88-3604 (6th Cir. Aug. 15, 1989) (Milburn, J.).

Other Recent Case:

U.S. v. Akhtar, No. 89 CR. 0264 (S.D.N.Y. Aug. 1, 1989) (Sweet, J.) (on government's motion pursuant to guideline policy statement § 5K1.1 and 18 U.S.C. § 3553(e), court departed from guideline range of 97–121 months to impose sentence of one year and one day).

Determining Offense Level

Ninth Circuit holds conduct that does not result in a conviction should not be grouped with counts of conviction in setting guideline range for narcotics offense. Defendant was convicted of two counts of distributing cocaine. At the trial and at the sentencing hearing, a codefendant testified that defendant was involved in two other instances of cocaine possession. The sentencing court found that all four instances were part of a common scheme or plan in which defendant participated, and used the total amount of cocaine to set the offense level. Defendant claimed that the language of the multiple counts, or "grouping," guideline allows a court to use only the quantity of drugs in the offenses of conviction.

In a divided opinion, the appellate court agreed: "In our view, the Multiple Counts section, by its explicit terms, applies only to counts of which the defendant has been convicted.... [T]he opening sentence of the Multiple Counts section refers to 'all the counts of which the defendant is convicted,' Guidelines at 3.9..., and Section 3D1.1 provides instructions for when 'a defendant has been convicted of more than one count....' Guidelines at 3.10." The court concluded that "language that the government cites in the Relevant Conduct section—which provides that conduct related to counts of conviction can be grouped together with conduct not related to any count of conviction—conflicts with the above quoted language of the Multiple Counts section."

"At best," the court determined, "the Guidelines are ambiguous because they support both the interpretation offered by [defendant] and the interpretation offered by the Government. Given this ambiguity, our interpretation of the Guidelines should be informed by the 'rule of lenity.'" Applying that rule, the court held that "the district court erred in interpreting the Multiple Counts section of the Guidelines to require aggregation under subsections 3D1.2(d) and 1B1.3(a)(2) of quantities of drugs involved in counts of which [defendant] was convicted with quantities of drugs involved in counts of which [defendant] was neither charged nor convicted."

The dissenting judge found that the "Guidelines, read in conjunction with the commentary sections, are not ambiguous," and the quantities could be aggregated.

U.S. v. Restrepo, No. 88-3207 (9th Cir. Aug. 24, 1989) (Pregerson, J.) (Boochever, Sr. J., dissenting).

Other Recent Cases:

U.S. v. Rodriguez-Reyes, No. 89-2115 (5th Cir. Aug. 14, 1989) (Reavley, J.) (agreeing with First and Third Circuits that career offenders under guideline § 4B1.1 may not receive acceptance of responsibility reduction; agreeing with First Circuit that district court may account for it by sentencing at lower end of guideline range). *See U.S. v. Alves*, 873 F.2d 495 (1st Cir. 1989); *U.S. v. Huff*, 873 F.2d 709 (3d Cir. 1989).

U.S. v. Cain, No. 88-3977 (11th Cir. Aug. 11, 1989) (per curiam) (count of retaining and concealing stolen U.S. Treasury checks, guideline § 2B5.2, should be grouped pursuant to § 3D1.2 with counts of willfully possessing same stolen checks, § 2B1.1).

U.S. v. Williams, No. 88-2698 (8th Cir. July 20, 1989) (Gibson, Sr. J.) (increase pursuant to guideline § 2K2.2(b)(1) for stolen firearm does not require that defendant knew firearm was stolen; also, conduct in dismissed counts may be considered for adjustments to offense level).

U.S. v. Donatiu, No. 88 CR 441 (N.D. Ill. Aug. 3, 1989) (Rovner, J.) ("court must follow [guideline policy statement] § 5K1.1 in departing from a guideline sentence based on a defendant's substantial assistance," and the court "may not depart unless the government first brings a motion").

U.S. v. Lester, No. 89-13-A (W.D. Va. Aug. 2, 1989) (Williams, Sr. J.). (Defendant who claimed acceptance of responsibility at sentencing hearing would not be given that reduction—he previously told probation officer he had been entrapped, and had told two or three different stories about the offense. Court reasoned that truthfulness and actions of defendant are factors to consider for acceptance of responsibility.).

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Guidelines Application

DETERMINING OFFENSE LEVEL

When facts stipulated in plea agreement establish more serious offense than offense of conviction, court should apply guideline most applicable to stipulated offense. Defendant pleaded guilty to two counts of using a telephone to facilitate a narcotics offense, but as part of the plea agreement stipulated to facts that established the more serious offense of conspiracy to possess marijuana with intent to distribute. In light of the stipulation and other factors, the district court departed from the guideline range to impose consecutive 48-month terms, the statutory maximum for the two counts of conviction.

The Fifth Circuit affirmed, because the district court imposed an appropriate sentence even though it did not follow the proper procedure. Instead of departing, the district court should have used guideline § 1B1.2(a), which provides that "in the case of conviction by a plea of guilty . . . containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense." The appellate court determined that after the sentence for the stipulated offense is calculated, a district court "must formally implement that sentence in terms of the actual convicted offense. . . . If the guideline sentence for the stipulated offense exceeds the maximum statutory sentence for the actual convicted offense, . . . 'the statutory maximum shall be the guideline sentence.'" (Quoting guideline § 5G1.1(a).) "For multiple-count convictions, the guidelines direct the court to order consecutive sentences so that the aggregate sentence equals the guideline sentence for the more serious stipulated offense." Guideline § 5G1.2(d).

In this case, the statutory maximum for each count of conviction was 48 months. The appellate court found that, depending on whether a two-level reduction for acceptance of responsibility was granted, defendant's guideline sentence for the stipulated offense would be 78–97 months or a minimum of 97 months. Thus, the 96-month term imposed by the district court fell within the appropriate sentencing range, and the appellate court affirmed: "[T]he district court's failure to articulate its sentence in this manner did not affect any substantial right of the defendant because the sentence imposed . . . was permissible under a correct application of the guidelines."

U.S. v. Garza, No. 89-1078 (5th Cir. Sept. 7, 1989) (Clark, C.J.).

Other Recent Cases:

U.S. v. Allen, No. 88-5340 (8th Cir. Sept. 12, 1989) (Arnold, J.) (quantities of cocaine distributed before Nov. 1, 1989, but not included in count of conviction, may be considered in determining base offense level pursuant to guideline § 1B1.3(a)(2)).

U.S. v. Tharp, No. 88-1829 (8th Cir. Sept. 12, 1989) (Arnold, J.) (holding that "Guidelines are properly applied to a conspiracy begun before their effective date and ending after it"). *Accord U.S. v. White*, 869 F.2d 822, 826 (5th Cir.) (per curiam), *cert. denied*, 109 S. Ct. 3172 (1989). *But see U.S. v. Davis, infra.*

U.S. v. Sciarrino, No. 89-5243 (3d Cir. Sept. 1, 1989) (Gibbons, C.J.) (use of reliable hearsay evidence "in making findings for purposes of guideline sentencing" does not violate due process; before the Guidelines "the use of hearsay in the sentencing stage of a criminal proceeding was permissible," and "the enactment of the Sentencing Reform Act of 1984 requires no different rules with respect to what evidence may be used in determining a sentence than were already in place").

U.S. v. Baker, No. 88-1833 (5th Cir. Aug. 25, 1989) (per curiam) (Guidelines' method of using drug quantity, rather than purity, to set base offense level not improper; also, court may consider drug purity when deciding where to sentence within guideline range).

U.S. v. Daly, No. 88-5672 (4th Cir. Aug. 24, 1989) (Phillips, J.) (gross weight of "carrier mediums" plus LSD, not just weight of the drug, should be used to calculate base offense level). *Accord U.S. v. Taylor*, 868 F.2d 125 (5th Cir. 1989).

U.S. v. Stern, No. 89-3070 (6th Cir. Aug. 24, 1989) (per curiam) (sentencing court not bound by government's "concession" in plea agreement that defendant was "minor participant," or by government's recommendation that defendant be sentenced at lower end of guideline range).

U.S. v. Davis, No. 87 CR 853 (S.D.N.Y. Aug. 25, 1989) (Griesa, J.) (under the specific circumstances of this case, where "the great bulk of the criminal activity" in multi-year drug conspiracy count occurred before effective date of Guidelines, "it is inappropriate to apply the Sentencing Guidelines" to that count).

Departures

Ninth Circuit vacates upward departure because district court relied in part on improper factors. Defendant pleaded guilty to transporting illegal aliens and was sentenced to a 24-month term, eight months above the guideline maximum. The district court departed from the guideline range on the basis of a high-speed chase preceding arrest, defendant's criminal record, and obstruction of justice by using an alias.

The appellate court found that the high-speed chase was an improper ground for departure because defendant "was not the driver and there is no evidence on the record before us that he was responsible for this chase." The court also held that criminal history is a proper ground "only in limited circumstances where the defendant's record is 'significantly more serious' than that of other defendants in the same category." (Quoting guideline policy statement § 4A1.3.) There was no evidence that was the case here.

The court held that obstruction of justice by use of an alias was a proper ground for departure, but that when "a court relies on both proper and improper factors, the sentence must be vacated and the case remanded." The court added that it saw "no justification for enhancing [defendant's] guideline sentence by a period of more than 3 months on account of using an alias in the district court proceedings," and instructed the district court to "impose such an amended sentence upon remand."

U.S. v. Hernandez-Vasquez, No. 88-5236 (9th Cir. Sept. 13, 1989) (per curiam).

Sixth Circuit affirms departure above category VI based on inadequacy of criminal history calculation. Defendant pleaded guilty to two drug counts and to being a felon in possession of a firearm. His guideline range was 57–71 months, based on an offense level of 18 and criminal history category VI. The district court departed to impose a 120-month sentence, finding that even category VI inadequately represented defendant's criminal history.

The sentencing court found that "defendant's violent, dangerous criminal history and the lenient treatment from the incarceration standpoint that defendant received" for his prior convictions justified a departure above criminal history category VI, *see* guideline policy statement § 4A1.3. In addition, defendant's "record of violating probationary requirements and continuing in his violent behavior against victims, women in particular, indicates the failure of prior punitive and rehabilitative measures," demonstrates that he is a threat to the public welfare and safety, and justifies departure under guideline policy statement § 5K2.14.

The appellate court affirmed, holding that "[c]learly, this defendant's criminal history was sufficiently unusual to justify, factually and legally, the district court's upward departure." The court also held that the sentence of 120 months "was reasonable and appropriate, considering all of the circumstances."

U.S. v. Joan, No. 88-3857 (6th Cir. Aug. 25, 1989) (Gilmore, J.).

Other Recent Cases:

U.S. v. Colon, No. 89-1141 (2d Cir. Sept. 6, 1989) (Winter, J.) (holding that "the discretionary failure to depart downward is not appealable" and dismissing case). *See also U.S. v. Fossett*, No. 88-3904 (11th Cir. Aug. 7, 1989) ("Sentencing Reform Act prohibits a defendant from appealing a sentencing judge's refusal to make a downward departure from the guideline sentencing range").

U.S. v. Lopez-Escobar, No. 88-6157 (5th Cir. Sept. 6, 1989) (Higginbotham, J.) (affirming upward departure from guideline maximum of 24 months to statutory maximum of five years, based on large number of aliens in illegal immigration offense).

U.S. v. Kinnard, No. 88-6437 (6th Cir. Aug. 31, 1989) (per curiam) (affirming upward departure to 90 months from range of 63–78 months based on high purity of cocaine, *see* commentary to guideline § 2D1.1).

U.S. v. Sharp, No. 88-5186 (9th Cir. Aug. 29, 1989) (per curiam) (mitigating circumstances sufficient to warrant departure below minimum guideline sentence may not be used to justify sentence below minimum established by Anti-Drug Abuse Act of 1986).

U.S. v. Edwards, No. 88-4190 (6th Cir. Aug. 21, 1989) (per curiam) (upward departure not warranted by district court's "unproven suspicion" that defendant was part of a larger fraud scheme, and that more money was involved in offense than was reflected in guideline computation; nor is departure warranted by defendant's refusal to assist authorities in identifying other persons involved in alleged scheme, *see* guideline policy statement § 5K1.2).

U.S. v. Concepcion, No. 88 CR. 0607 (S.D.N.Y. Aug. 17, 1989) (Sweet, J.) (Departure was warranted "in view of the unusual circumstances presented by a re-sentencing [under the Guidelines] that follows upon a defendant's satisfactory completion of a prison term" imposed by a court that had held the Guidelines unconstitutional. A fine of $2,000 was imposed, in lieu of additional prison time called for under the Guidelines, in light of defendant's success during probation: "The availability of such post-incarceration information in the context of re-sentencing is a circumstance of a kind unanticipated by the Sentencing Commission.").

Sentencing Procedure

U.S. v. Restrepo, No. 88-3208 (9th Cir. Sept. 12, 1989) (Wright, Sr. J.) (no due process violation to put burden on defendant to prove that firearm was not connected with drug offense so as to avoid weapons enhancement under guideline § 2D1.1(b)(1)). *Accord U.S. v. McGhee*, No. 88-5878 (6th Cir. Aug. 18, 1989) (2 *GSU* #12).

U.S. v. Davenport, No. 88-5661 (4th Cir. Aug. 28, 1989) (Chapman, J.) (defendant, not the government, has the burden of proof when challenging the constitutionality of prior conviction used to enhance present Guideline sentence).

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VOLUME 2 • NUMBER 14 • OCTOBER 6, 1989

Guidelines Application

DETERMINING OFFENSE LEVEL

D.C. Circuit holds district courts have discretion to review circumstances of prior convictions that may place defendant in career offender status. Defendant claimed he was improperly designated a career offender under the Guidelines because one of the two prior convictions required for that status was not a "crime of violence" in Illinois, the state where he was convicted. The offense, robbery, is listed as a crime of violence in the Commentary to guideline § 4B1.2, Application Note 1. The sentencing judge "apparently believed that he did not have discretion to review the facts" of that offense and sentenced defendant as a career offender.

The appellate court remanded for resentencing, holding that a sentencing court "retains discretion to examine the facts of a predicate crime to determine whether it was a crime of violence notwithstanding the Commentary to the guidelines' predetermined list of crimes which it considers to be crimes of violence." In this case, classifying defendant "as a career offender based on statutory characterizations of his previous crimes may be improper if an analysis of the facts demonstrates that they were not in fact crimes of violence.... [I]t may be appropriate, as provided by the guidelines, for a district judge to depart from the guidelines' statutory definition of a particular crime depending on the facts of the case."

U.S. v. Baskin, No. 88-3102 (D.C. Cir. Sept. 22, 1989) (Will, Sr. D.J.).

Other Recent Cases:

U.S. v. Darud, No. 89-5050 (8th Cir. Sept. 28, 1989) (per curiam) (under guideline § 5G1.3, sentence for guideline offense that also served as basis for parole revocation on earlier offense must be served consecutively to the prior unexpired sentence; revocation of parole and resulting reincarceration on earlier offense did not "arise out of the same transactions or occurrences" as the present offense so as to warrant concurrent sentences under § 5G1.3).

U.S. v. Smith, No. 88-6115 (6th Cir. Sept. 28, 1989) (Ryan, J.), *rev'g U.S. v. Smith*, No. 87-20219-4 (W.D. Tenn. Aug. 26, 1988) (1 *GSU* #15) (in determining sentencing range for drug offense committed before Jan. 15, 1988 amendments to Guidelines, district court erred in refusing to consider drug quantities charged in a count dismissed under plea bargain).

U.S. v. Boyd, No. 88-2632 (5th Cir. Sept. 27, 1989) (per curiam) (defendant "cannot base a challenge to his sentence solely on the lesser sentence given . . . to his codefendant").

DEPARTURES

Eleventh Circuit holds departure may be based on quantity of drugs in simple possession offense and on role in offense that fell short of guideline § 3B1.1 definition. Defendant was indicted for conspiracy to distribute cocaine, but pled guilty to simple possession of cocaine. Her guideline sentencing range was 0–4 months. The sentencing court imposed an 11-month sentence, finding that the amount of cocaine in defendant's possession and her role in the offense were not adequately accounted for in the guideline computation and warranted an upward departure.

The appellate court held that "the district court did not err in considering the amount of narcotics possessed by appellant in deciding whether to depart from the guideline sentencing range." The court agreed with the reasoning in *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989), which held that the Guidelines' listing of quantity as a specific offense characteristic for some drug offenses, but not for simple possession, does not preclude courts from using quantity to determine whether departure was warranted in a drug possession case. *See also U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988); guideline policy statement § 5K2.0.

The court also held that the sentencing court was not "precluded from considering a defendant's role in the offense merely because her action did not rise to the level of an aggravating role, as defined by guideline 3B1.1." The court agreed with the Fifth Circuit that "[s]entencing under the guidelines is not . . . an exact science" and that the "guidelines are not intended to cover all contingencies or rigidly bind district judges." (Quoting *U.S. v. Mejia-Orosco*, 867 F.2d 216 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989).)

U.S. v. Crawford, No. 88-3993 (11th Cir. Sept. 15, 1989) (Tjoflat, J.).

Other Recent Cases:

U.S. v. Anderson, No. 89-1203 (8th Cir. Sept. 29, 1989) (per curiam) (vacating departure from criminal history category IV to VI because district court "failed to compare [defendant's] history to that of 'most defendants with a [c]ategory [VI] criminal history'" pursuant to guideline policy statement § 4A1.3, "the procedure required for departure").

U.S. v. Jackson, No. 88-8470 (11th Cir. Sept. 15, 1989) (per curiam) (affirming upward departure in criminal history from category III to IV because criminal history score did not reflect seriousness of defendant's criminal past—two prior armed robberies, committed separately but tried together, were counted as one offense under Guidelines).

Sentencing Procedure

U.S. v. Jackson, No. 88-1686 (7th Cir. Sept. 25, 1989) (Kanne, J.) (holding there is "no sixth amendment right to assistance of counsel at a presentence interview conducted by a probation officer").

Appellate Review

First Circuit establishes policy of summary review for meritless appeals of guideline sentences. Defendant set forth several claims of error on appeal of his guideline sentence, all of which the appellate court found "altogether meritless." Noting that the Sentencing Reform Act and the Guidelines will likely result in an increase in such appeals, partly because defendants have "little to lose by trying," the court set forth a policy of review for appeals of guideline sentences: "To the extent that such appeals raise valid questions, we will respond in kind. On the other hand, if a criminal defendant protests his innocence merely because he has time on his hands, and without any supportable basis in law or fact—as in this case—we will henceforth respond summarily. Sentencing appeals prosecuted without discernible rhyme or reason, in the tenuous hope that lightning may strike, ought not to be dignified with exegetic opinions, intricate factual synthesis, or full-dress explications of accepted legal principles. Assuredly, a criminal defendant deserves his day in court; but we see no purpose in wasting overtaxed judicial resources razing castles in the air."

U.S. v. Ruiz-Garcia, No. 89-1517 (1st Cir. Sept. 28, 1989) (Selya, J.).

Constitutionality

Tenth Circuit finds no double jeopardy violation in prosecuting defendant for crime that was previously used to enhance sentence for a different offense. Defendant was indicted in Utah on drug and firearm charges. He had previously been convicted in South Dakota for a different drug offense, and his sentence for that crime was partly based on evidence of other alleged crimes, including the Utah offense. Defendant claimed that the Utah prosecution would violate double jeopardy and the Sentencing Guidelines because the conduct underlying the Utah offense had already been used to enhance his South Dakota sentence.

The appellate court held that "[t]he Double Jeopardy Clause's ban on multiple prosecutions for the same offense is not implicated here because defendant is not now facing a trial in Utah for the same offense for which he previously has been convicted in South Dakota. The Utah offense and the South Dakota offense are different." Furthermore, the South Dakota sentencing hearing did not constitute a prosecution for the Utah offense: "Although the South Dakota district court inquired into the Utah offense during the sentencing hearing and made findings concerning it, at no time was defendant in jeopardy for the Utah offense. Rather, defendant was only 'in jeopardy' of receiving a harsher sentence for the South Dakota offense than he otherwise would have received."

The court also found nothing in the Guidelines precluded a defendant's subsequent prosecution for a different offense.

U.S. v. Koonce, No. 89-4013 (10th Cir. Sept. 25, 1989) (Ebel, J.).

District court holds "substantial assistance" provisions violate due process. Evidence presented at the sentencing hearing established that defendant had cooperated with the government and provided important testimony at a codefendant's trial. The government did not move for a reduction of sentence under either 18 U.S.C. § 3553(e) or § 5K1.1 of the Guidelines. The court, however, ruled that defendant had provided "substantial assistance" within the meaning of the statute and guideline, reduced defendant's sentence below the statutory minimum and guideline range, and held the statutory and guideline provisions unconstitutional.

The court held that the provisions violate substantive due process because only the government may present evidence on this issue: "[W]here a statute like 18 U.S.C. § 3553(e) or a regulation like § 5K1.1 withholds from the defendant the right to present to the court an issue so intimately related to the appropriate length of sentence, then such a statute or regulation must be struck down as fundamentally unfair. . . . Either side must be able at least to raise the possibility of a downward departure for cooperation." The court also noted it could not raise the issue sua sponte, with the result that in cases like this "the provisions require the Court to ignore facts of which it already has knowledge and which are indisputably relevant."

In addition, the provisions violate procedural due process because the procedure "is tipped too far in favor of the Government" and is therefore "inherently unfair." The court recognized that "defendants have no inherent right to the availability of the 'substantial assistance' provision, but once that provision is made available to one party to the litigation, due process requires that it be made available to all parties." The provisions also violate due process by "den[ying] to the Defendant an opportunity to contest the facts relied upon by the Government in deciding not to move for a departure. It also apparently offers a defendant no opportunity to challenge the decision."

At least two appellate courts have specifically upheld these provisions against due process challenges. *See U.S. v. Huerta*, 878 F.2d 89 (2d Cir. 1989); *U.S. v. Ayarza*, 874 F.2d 647 (9th Cir. 1989). Other courts have questioned or limited the requirement that no reduction in sentence may be granted absent a motion by the government. *See, e.g., U.S. v. Justice*, 877 F.2d 664 (8th Cir. 1989) (expressing concerns about requirement for motion by government); *U.S. v. White*, 869 F.2d 822 (5th Cir. 1989) (§ 5K1.1 "doesn't preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance"); *U.S. v. Galan*, No. 89 Cr. 198 (S.D.N.Y. June 8, 1989) (where plea agreement states government will make § 5K1.1 or § 3553(e) motion if defendant cooperates, refusal to move for reduction must be made in good faith).

U.S. v. Curran, No. 88-10027-02 (C.D. Ill. Sept. 29, 1989) (Mihm, J.).

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Guidelines Application

DETERMINING OFFENSE LEVEL

Eighth Circuit holds that portion of "failure to report" guideline violates statutory mandate. Defendant was sentenced to an 18-month prison term on a drug conviction, but failed to report to prison. She pled guilty to a charge of failure to surrender for service of sentence. The applicable sentencing guideline, § 2J1.6, requires an increase in the base offense level of six based upon the maximum statutory penalty for the underlying offense. In this case the maximum was 15 years or more, resulting in an offense level increase of nine. Defendant argued on appeal that the guideline violates the Sentencing Reform Act by failing to consider the actual sentence imposed for the underlying offense, rather than the maximum potential penalty.

The appellate court agreed: "Section 2J1.6 ignores the significant difference in circumstances between failing to report for trial or sentencing, when a real possibility exists that the maximum sentence will be imposed, and failing to report for service after sentencing where the sentence to be served is but a fraction of the maximum. The language of [18 U.S.C. §] 3553 to consider the nature and circumstances of the offense and to impose a sentence that reflects the seriousness of the offense, and the language in [28 U.S.C. §] 991(b)(1) that the sentencing practices provide certainty and fairness, avoid unwarranted sentencing disparities, and consider mitigating factors, convince us that Congress intended courts to consider this significant difference when sentencing a defendant for failure to appear.... We therefore hold that the application of section 2J1.6 in this case is not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission. We conclude that the appropriate remedy is to invalidate the application of section 2J1.6 insofar as it deals with a defendant's failure to appear after a sentence has been imposed that is but a fraction of the maximum. This will necessitate resentencing as if there were no guideline applicable to this offense."

U.S. v. Lee, No. 88-5292 (8th Cir. Oct. 16, 1989) (Gibson, J.).

Under U.S.S.G. § 1B1.8(a) district court may not, when determining guideline range, use incriminating statements made pursuant to plea agreement unless the agreement so provides, Tenth Circuit holds. Defendant's plea agreement stipulated that in return for her cooperation in the investigation of other drug suspects she would "not be subject to additional federal criminal prosecution for crimes committed in this judicial district," but it also had a disclaimer that while the government would inform the court of her cooperation, "[s]entencing will remain in the sole discretion of the trial court." Self-incriminating information that defendant provided to the government was mentioned in her presentence report, and the court used it to increase her offense level. Defendant argued on appeal that under U.S.S.G. § 1B1.8 the district court should not have used this information in sentencing.

The appellate court agreed. Section 1B1.8(a) reads: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided 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." The court held that the language of the plea agreement here was sufficient to invoke the restriction in § 1B1.8(a). The court also noted that "we believe the language and spirit of *Guidelines* § 1B1.8 require the agreement 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." One of the advantages of § 1B1.8, to "assure potential informants that their statements will in no way be used against them," would "be undercut if we allow ambush by broadly worded disclaimers.... The full disclosure approach we require here will ensure defendants are not unfairly surprised by sentencing determinations and will allow both the defendant and the government to bargain with full information."

U.S. v. Shorteeth, No. 88-2853 (10th Cir. Oct. 10, 1989) (Logan, J.).

Eighth Circuit adopts narrow definition of "substantial portion of his income" in Criminal Livelihood guideline; impending guideline amendment has similar effect. Defendant earned $450 from his criminal activities out of an annual income of approximately $1,525, and the district court determined that this constituted a "substantial portion of his income" under the Criminal Livelihood provision, U.S.S.G. § 4B1.3. The appellate court reversed, holding that because the "substantial portion" language was derived from the Dangerous Special Offender statutes, 18 U.S.C. § 3575(e)(2) and 21 U.S.C. § 849(e)(2), the definition from those statutes should apply to this provision. Those statutes defined "substantial source of income" as an amount that exceeds the yearly minimum wage under the Fair Labor Standards Act and also exceeds half of the defendant's declared adjusted gross income. The current yearly minimum wage is approximately

$6,700, the court found, and thus the Criminal Livelihood provision should not have been applied here.

A concurring opinion noted that § 4A1.3 has been amended, effective Nov. 1, 1989, to reach a similar result. The relevant language now reads: "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood...." The commentary to the guideline states that "engaged in as a livelihood" means that the defendant earned income from the criminal conduct in excess of the yearly minimum wage and "that such criminal conduct was the defendant's primary occupation in that twelve-month period."

U.S. v. Nolder, No. 88-2648 (8th Cir. Oct. 4, 1989) (Wollman, J.).

Other Recent Case:

U.S. v. Leeper, No. 88-3726 (11th Cir. Sept. 29, 1989) (per curiam) (remanding for resentencing because on the facts of this case, offense level enhancement for "substantial interference with the administration of justice" under perjury guideline, U.S.S.G. § 2J1.3(b)(2), should not be applied when conduct in question occurred before and did not relate to offense of conviction; this position was taken by Department of Justice on appeal, and the appellate court agreed).

Departures

First Circuit holds departure may not be based on "community sentiment." The district court departed upward in sentencing a defendant convicted of possessing cocaine on board an aircraft. The court found departure was warranted "to discourage the utilization of the Puerto Rico International Airport, an airport with lesser law-enforcement capabilities than those in the mainland, as a connecting point for international narcotics trafficking," and because of the strong local public sentiment against this type of offense.

The appellate court remanded, holding that "the guidelines do not allow departures for reasons such as these. The basic flaw in the district court's reasoning is that it depends entirely upon the mere commission of the offense of conviction. ... Because the grounds for departure derived their essence from the offense itself, not from idiocratic circumstances attendant to a particular defendant's commission of a particular crime, the grounds, virtually by definition, fell within the heartland" of typical cases encompassed by the Guidelines. The court also determined that departures based on local sentiment are inconsistent with the statutory language, and would undermine the goal of "national uniformity in sentencing."

U.S. v. Aguilar-Pena, No. 88-1477 (1st Cir. Oct. 12, 1989) (Selya, J.), *rev'g* 696 F. Supp. 781 (D.P.R. 1988).

Other Recent Case:

U.S. v. Warters, No. 89-2155 (5th Cir. Sept. 29, 1989) (Garwood, J.) (departure may be warranted for defendant convicted of misprision of conspiracy if facts demonstrate defendant was member of conspiracy and guilty of that offense—"[a] misprision defendant's personal guilt of the underlying offense is ... a circumstance not taken into account in formulating the misprision guidelines under section 2X4.1").

Appellate Review

Departures

Seventh Circuit holds it has no jurisdiction to review refusal to depart. Defendant pled guilty to a charge of bank fraud. He requested a downward departure in his sentence on the grounds that there were mitigating factors present in his case that were not adequately considered by the Guidelines. The district court refused to depart, finding that the factors defendant raised were "considered in the guideline range."

The appellate court held that it did not have jurisdiction to review a district court's refusal to depart from the Guidelines. The court determined that 18 U.S.C. § 3742(a) controlled appellate review of sentences under the Guidelines. While subsection (2) of that statute "seems to support appellate review of a refusal to depart from the guidelines" when read literally, the court concluded that "the structure of section 3742 as a whole" and the legislative history lead to the conclusion "that Congress did not intend a district court's decision refusing to depart from the guidelines to be appealable."

The court noted that a similar decision was reached by the Second Circuit in *U.S. v. Colon*, No. 89-1141 (2d Cir. Sept. 6, 1989) ("the discretionary failure to depart downward is not appealable"), and that a "compatible" decision was reached by the Fifth Circuit in *U.S. v. Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989) ("we will uphold a district court's refusal to depart from the guidelines unless the refusal was in violation of law"). The court "agree[d] with the Fifth Circuit that, when a district court's refusal to depart is in violation of law, appellate review of that decision is available under 18 U.S.C. § 3742(a)(1)." *See also U.S. v. Fossett*, 881 F.2d 976, 979 (11th Cir. 1989) (claim that "district court did not believe it had the statutory authority to depart from the sentencing guideline range ... presents a cognizable claim on appeal").

U.S. v. Franz, No. 88-2739 (7th Cir. Oct. 4, 1989) (Ripple, J.).

Fourth Circuit applies "reasonableness" standard in review of refusal to make departure permitted by Guidelines. Defendant requested, and was denied, a departure based on a claim that he acted under coercion or duress, a departure specifically listed in U.S.S.G. § 5K2.12, p.s. The appellate court determined that "where the defendant challenges a district court's decision to grant or deny a requested downward departure" it would "review to determine whether it was 'reasonable' for the district court to conclude that [defendant] did not act under 'coercion' or 'duress,' and that he therefore was not eligible for a downward departure under Guidelines § 5K2.12. *See* 18 U.S.C. § 3742(e)(3)." The court affirmed the refusal to depart.

U.S. v. McCrary, No. 88-5698 (4th Cir. Oct. 16, 1989) (per curiam).

Note: Beginning with this issue of *GSU* we will use the recommended citation forms found in United States Sentencing Commission, *Guidelines Manual* (Nov. 1989).

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VOLUME 2 • NUMBER 16 • NOVEMBER 22, 1989

Guidelines Application

DETERMINING OFFENSE LEVEL

D.C. Circuit holds offense level increase for firearm possession may not be applied absent showing of scienter. Defendant pled guilty to possession of heroin with intent to distribute. He had travelled by train with the heroin in a tote bag. The police also discovered a gun in the bag. Defendant claimed he was unaware that the gun was in the bag, and argued that the court should not apply the increase under U.S.S.G. § 2D1.1(b) unless he had knowingly possessed it. The sentencing court did, however, and defendant appealed.

The appellate court, noting that "[t]he United States conceded at oral argument that § 2D1.1(b) should not be read to apply in the absence of scienter," reversed and remanded. The court concluded that while § 2D1.1 "is silent as to scienter," language in § 1B1.3(a) regarding specific offense characteristics "suggests that a defendant's mental state must be taken into account."

The court construed § 1B1.3(a)(3) to mean that "the sentencing judge should upgrade the sentence of a drug defendant who possessed a dangerous weapon or firearm whenever it is found that the defendant possessed it 'intentionally, recklessly or by criminal negligence.'" This standard applies "(i) where it is shown that the defendant knew that he was in possession of a weapon; or (ii) where there is insufficient proof to show that the defendant knew he was in possession of a weapon, but it is shown that possession was avoidable but for the defendant's recklessness or criminal negligence."

The court stated that "possession with proof of knowledge" includes both actual and "constructive possession," and that in either case "the Government must show possession of a weapon in reasonable proximity to the scene of the drug transaction." In a case of "possession without proof of knowledge" the government must prove that, "in addition to having *direct physical control of the weapon*, the defendant failed to take reasonable steps that would have disclosed the weapon in question." (Emphasis in original.)

On other issues, the court held that the application of § 2D1.1(b) "is not contingent on a finding that the gun . . . was operable" or "that the defendant used the firearm or would have used the firearm to advance the commission of the underlying drug offense," that facts necessary for sentencing may be proved by a preponderance of the evidence, and that "insofar as § 2D1.1(b) relates to a matter that would enhance the defendant's sentence, the burden of proof is on the prosecution."

U.S. v. Burke, No. 88-3179 (D.C. Cir. Oct. 31, 1989) (Edwards, J.).

Other Recent Case:

U.S. v. White, No. 89-1313 (7th Cir. Oct. 25, 1989) (Easterbrook, J.) (When drug amounts from separate transactions are combined under § 1B1.3(a)(2) to set offense level, the "[s]entence must be based on the sales that were part of one 'common scheme or plan' (such as a single conspiracy) or a single 'course of conduct' (the unilateral equivalent to the conspiracy). Offenses of the same kind, but not encompassed in the same course of conduct or plan, are excluded." Court also advised district courts to "marshall 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).").

DEPARTURES

Third Circuit holds that jury's rejection of coercion and duress defense does not preclude departure under U.S.S.G. § 5K2.12. Defendant was convicted by a jury of bank robbery offenses. The verdict indicated that the jury rejected her defense that she was forced to commit the crimes because of the coercion and duress imposed by two codefendants. At sentencing the district court indicated it thought a departure under § 5K2.12 was warranted, but declined to depart because that would have been inconsistent with the jury verdict.

The appellate court remanded. Section 5K2.12 provides, in part: "If the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range." The court held that "section 5K2.12 makes it clear that the Commission intended to provide for a downward departure in some situations where the evidence of coercion does not amount to a complete defense. Indeed, in situations where the coercion does amount to a complete defense, the defendant would be acquitted." Thus the provision must be read "as providing a broader standard of coercion as a sentencing factor than coercion as required to prove a complete defense at trial," and "the district court has the power to depart if [defendant] proves coercion or duress by a preponderance of the evidence."

U.S. v. Cheape, No. 89-3207 (3d Cir. Nov. 14, 1989) (Becker, J.).

Eleventh Circuit upholds criminal history departure to career offender status where consolidation of prior convictions underrepresented defendant's criminal past. Defendant pled guilty to four counts of bank robbery and one escape count. In 1982 he had pled guilty to four bank robberies

in two different states. The earlier robberies had been combined for sentencing under Fed. R. Crim. P. 20(a), and as a result were treated under U.S.S.G. § 4A1.2(a)(2) as one sentence in the criminal history calculation for the current sentencing. The district court found that the resulting criminal history score inadequately represented defendant's past and likely future criminal conduct, concluded that defendant should be treated as a career offender, and departed upward to impose a 262-month sentence.

The appellate court affirmed, holding that departure was justified despite the language of § 4A1.2(a)(2): "We do not believe that the Commission intended that someone with a history such as [defendant's] should be treated as having only one prior conviction, solely because he is permitted to take advantage of Rule 20(a)'s procedural device." The court noted that Application Note 3 of § 4A1.2 "recognizes that strict application of the related case criteria may not properly reflect a defendant's criminal history," and states that in such a case "the court should consider whether departure is warranted." In addition, § 4A1.3 states that "departure under this provision is warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes."

U.S. v. Dorsey, No. 88-8442 (11th Cir. Sept. 29, 1989) (Roney, C.J.).

District court holds departure warranted where defendant lacked knowledge of or control over size of drug transaction. Defendant pled guilty to conspiring to distribute cocaine; he had allowed his apartment to be used to store cocaine in return for payment of his rent. The court determined that defendant was entitled to an offense level reduction as a "minimal participant," U.S.S.G. § 3B1.2(a), thus lowering the guideline range from 41–51 months to 27–33 months.

The court imposed a sentence of 18 months, however, finding departure was warranted under U.S.S.G. § 5K2.0 because "the Guidelines do not sufficiently consider the fact that defendant had no knowledge of, and played no role in determining, the size of the drug transaction in which he participated. As a result, the Guidelines overstate the severity of defendant's offense conduct." The court reasoned that drug offenses "are graded under the Guidelines strictly on the basis of the quantity/weight of the drug in question," and thus "the applicable base offense level is wholly unaffected by the degree to which the participant had knowledge of the size or scope of the drug transaction."

In a case where a defendant "had no knowledge of or control over the quantity of drugs involved, nor stood to gain anything more from a larger rather than smaller transaction, predicating a sentence so predominantly upon drug quantity may result in punishment unfitting of the crime . . . notwithstanding the availability . . . of a four point adjustment for 'minimal offense role.'" That reduction, "designed to assist in evaluating the severity of offenses of every nature described in the Guidelines—gives insufficient consideration to the significance in drug offenses of a participant's lack of knowledge of or stake in the scope of a transaction, in view of the weight-driven system of grading such offenses."

U.S. v. Batista-Segura, No. S 89 CR. 377 (S.D.N.Y. Oct. 19, 1989) (Sweet, J.).

District court holds successful rehabilitation of drug addict warranted departure. Defendant was found guilty of selling a small amount of crack for $10. The guideline range was 8–14 months, but the applicable statute required that if a sentence of imprisonment was given it had to be for not less than one year. Thus, the court would have to sentence defendant to a minimum one-year term unless it could depart to give a sentence of probation.

The court found that the circumstances of the case warranted departure. The defendant "has accomplished an impressive rehabilitation," overcoming his drug addiction and remaining drug-free for almost two years, reuniting with his family, and obtaining employment. The court concluded it would be "senseless, destructive and contrary to the objectives of the criminal law to now impose a year's jail term on this defendant."

The court also concluded that the Guidelines' general prohibition against consideration of a defendant's "personal characteristics" did not preclude this departure. Although offender characteristics "were essentially left out of the Guideline calculation, they are provided for through Policy Statements and through the departure power," allowing for departures in "atypical" cases such as this. *See* U.S.S.G. Ch. 1, Pt. A, intro. comment at 1.6.

U.S. v. Rodriguez, No. 88 CR 117 (S.D.N.Y. Oct. 27, 1989) (Leval, J.).

Appellate Review

Departures

U.S. v. Draper, No. 88-5933 (6th Cir. Nov. 2, 1989) (Taylor, Dist. J.) ("A sentence which is within the Guidelines, and otherwise valid, . . . is not appealable on the grounds that the sentencing judge failed to depart from the Guidelines on account of certain factors which the defendant feels were not considered by the Guidelines and should reduce his sentence."). *Accord U.S. v. Franz*, No. 88-2739 (7th Cir. Oct. 4, 1989) (2 *GSU* #15).

Constitutionality

U.S. v. Roberts, No. 89-0033 (D.C.D.C. Nov. 16, 1989) (Greene, J.) (Holding "the sentencing statute and the guidelines issued pursuant thereto" unconstitutional on due process grounds for causing "de facto transfer of the sentencing authority from the judge to the prosecutor." Also holding that the substantial assistance provisions, U.S.S.G. § 5K.1.1 and 18 U.S.C. § 3553(e), violate due process by "preclud[ing] a defendant from contesting the refusal of the prosecution to acknowledge his substantial cooperation with law enforcement authorities so as to establish his eligibility for sentencing leniency"; defendants in two cases before the court may present evidence that they provided substantial assistance.).

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VOLUME 2 • NUMBER 17 • DECEMBER 6, 1989

Guidelines Application

DEPARTURES

Fourth Circuit holds lack of prior criminal record and fact that possible loss of employment may make restitution more difficult are not proper grounds for departure; holds finding on minimal planning was "clearly erroneous." Defendant pled guilty to check kiting and making false statements to a bank. He borrowed money from friends to pay back the illegally obtained funds, but still owed over $6,400 to the banks. The district court resolved a dispute over the appropriate offense level by finding the offense did not involve "more than minimal planning," U.S.S.G. § 2F1.1(b)(2), resulting in an offense level of 8 and guideline range of 2–8 months. Under the Guidelines, defendant could be sentenced to probation, with a minimum two months of intermittent or community confinement. *See* U.S.S.G. §§ 5B1.1(a)(2), 5C1.1(c). The court imposed a term of probation for five years with no confinement, holding that departure was warranted because defendant had not "been in any trouble before," and because a term of imprisonment could cost defendant his job and make restitution to the banks and repayment to his friends more difficult.

The appellate court reversed, finding that both the departure and offense level calculation were improper. The court held that two points must be added to the offense level under § 2F1.1(b)(2) because "the record is undisputed that the check kiting scheme required more than minimal planning and . . . any finding of fact that the increment was not justified would be clearly erroneous. As a matter of law the increment must be added."

The departure was improper because "the district court cannot credit [defendant] for lack of a record of prior criminal behavior. Th[at] fact . . . is taken into consideration in the Sentencing Table. . . . Having received credit for his lack of prior offenses in the determination of the sentencing range, [he] is not entitled to further credit in the form of a downward adjustment."

The court also concluded that "we do not think that the economic desirability of attempting to preserve [defendant's] job so as to enable him to make restitution warrants a downward adjustment," reasoning that "[defendant] is no different from any other person convicted of a similar offense. Both would be unable to work; it is not unlikely that both would be discharged; without earned income both would be hindered or prevented from making restitution." In remanding, the court noted that the various conditions of community and intermittent confinement "provide the sentencing court with other options that may allow [defendant] to keep his job."

U.S. v. Bolden, No. 88-5183 (4th Cir. Nov. 22, 1989) (Winter, J.).

Other Recent Cases:

U.S. v. Lucas, No. 88-2239 (6th Cir. Nov. 13, 1989) (Milburn, J.) (district court may depart upward to account for psychological injury to robbery victims; robbery guideline allows departure for physical injury to robbery victims, but does not address psychological injury).

U.S. v. Smith, No. 88-2817 (10th Cir. Nov. 3, 1989) (Moore, J.) (sentencing court's "brief statement" that "the force and violence used by the defendant in committing the offense . . . justifies an upward departure from the guidelines" does not satisfy the requirement for a specific statement of reasons to justify a departure).

U.S. v. Pitman, No. 89-1264 (6th Cir. Nov. 2, 1989) (per curiam) (unpublished disposition) (convictions that occurred more than 10 years prior to current offense, and thus could not be used for calculating criminal history score, could be used as basis for departure under U.S.S.G. § 4A1.3, p.s.; also, large sum of money found at defendant's home at time of arrest and other reliable evidence indicating defendant was a drug trafficker provided additional basis for departure).

U.S. v. Sadler, No. 88-10055 (D. Idaho Oct. 2, 1989) (Ryan, C.J.) (holding that "defendant's educational and vocational skills, mental and emotional condition, previous employment record, and family and community ties, although not ordinarily relevant [pursuant to U.S.S.G. § 5H1.1, *et seq.*, p.s.], exist in the present case in such a quality and to such a degree as to warrant a downward departure"). *Cf. U.S. v. Rodriguez*, No. 88 CR 117 (S.D.N.Y. Oct. 27, 1989) (Guidelines' general prohibition against consideration of defendants' "personal characteristics" does not preclude departure in "atypical" case) (2 *GSU* #16).

DETERMINING OFFENSE LEVEL

Seventh Circuit holds that conviction for offense that occurred during and was related to conspiracy of current conviction may count toward career offender status. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. He was sentenced to 30 years in prison as a career offender under U.S.S.G. § 4B1.1. "Two

prior felony convictions" are required for career offender status, and defendant disputed one of the convictions used by the court. The conspiracy in the instant offense took place in Milwaukee and lasted from Nov. 1, 1987, to Sept. 13, 1988. During the course of the conspiracy, defendant was arrested and convicted in California for possession of cocaine. Because the California cocaine was connected with the Milwaukee conspiracy, "[d]oubt whether this was a 'prior conviction' within the meaning of the guidelines arises from the fact that although the [California] conviction preceded his current conviction, it punished conduct that took place after the offense underlying the current conviction . . . had begun and that indeed was part of that offense."

The appellate court held that the California conviction was properly deemed a "prior felony conviction." "Nothing in the guidelines' definition of a career offender requires . . . that every act constitutive of the offense underlying his current conviction have been committed after the prior conviction, and we can think of no reason for such a requirement." The court concluded that "the 'subsequent' offense need not be entirely subsequent to preserve the relation between the guideline and its animating policy of punishing the recidivist more severely."

The court also reasoned that, in this particular case, "the evidence presented to the jury makes clear that [defendant's] subsequent participation in the conspiracy was sufficient by itself to support the conspiracy conviction. The 'instant offense' was 'subsequent' in the practical sense that the part of the conspiracy that preceded the prior conviction could be lopped off without affecting [his] guilt."

U.S. v. Belton, No. 89-1649 (7th Cir. Nov. 20, 1989) (Posner, J.).

Sentencing Procedure

Fourth Circuit carves "very narrow" exception to Fed. R. Crim. P. 35 to allow district court to amend improper guideline sentence. Defendant was convicted of distributing cocaine. Her sentencing range was 6–12 months, and she was not eligible for probation. The district judge stated that he intended, pursuant to U.S.S.G. § 5C1.1(c), to sentence defendant to three months' imprisonment followed by supervised release with a condition of three months of community or intermittent confinement. At sentencing, however, the judge actually sentenced defendant to three months of community confinement followed by three months of supervised release. Neither the government nor defendant objected, but the judge "subsequently realized that he had incorrectly interpreted section 5C1.1(c). Without notice to the parties the district judge then sua sponte issued an amended judgment and sentencing order that changed [defendant's] sentence" to that which he originally intended.

The appellate court held that the court could amend the sentence. Although Rule 35 substantially restricts the power of district courts to amend sentences, "this is an unusual case and we recognize the inherent power in a court to correct an acknowledged and obvious mistake." The court cautioned, however, that this "inherent power is not without limitation," and held "that the authority to modify a sentence to correct an acknowledged and obvious mistake exists only during that period of time in which either party may file a notice of appeal. After that time, we believe that the sentence has become final, and the district court lacks any authority to modify it."

The court stressed "that our holding is a very narrow one. The power of a district court to amend a sentence does not extend to a situation where the district judge simply changes his mind about the sentence. Nor should this be interpreted as an attempt to reenact former Rule 35 by judicial edict. Our decision is limited to the case where the district court states that a particular kind of sentence is to be imposed and then imposes a different sentence solely because of an acknowledged misinterpretation of the pertinent guidelines section."

The appellate court found, however, that the district court may not increase the sentence in defendant's absence, Fed. R. Crim. P. 43(a), and remanded for resentencing.

U.S. v. Cook, No. 89-5622 (4th Cir. Nov. 22, 1989) (Wilkins, J.).

Other Recent Cases:

U.S. v. Soliman, No. 89-1162 (2d Cir. Nov. 13, 1989) (Kaufman, J.) (upholding sentencing judge's consideration of foreign conviction in deciding to sentence at top of guideline range, but cautioning district judges to be aware of "possible constitutional infirmities surrounding a foreign conviction" and to exercise "informed discretion" in deciding whether to rely on foreign conviction to increase sentence within range or to justify departure under U.S.S.G. § 4A1.3(a), p.s.).

U.S. v. McDowell, No. 89-3265 (3d Cir. Oct. 25, 1989) (Rosenn, Sr. J.) ("a sentencing court considering an adjustment of the offense level . . . need only base its determination on the preponderance of the evidence" standard, and "the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence").

Constitutionality

U.S. v. Francois, No. 88-5110 (4th Cir. Nov. 22, 1989) (Chapman, J.) (rejecting due process challenge to substantial assistance provisions: "the requirement that the government file the motion does not deprive the defendant of any constitutional rights whether the failure to make the motion be under [U.S.S.G.] § 5K1.1 or under [Fed. R. Crim. P.] 35(b), because there is no constitutional right to the availability of a substantial assistance provision to reduce a criminal sentence").

U.S. v. Savage, No. 89-1643 (7th Cir. Nov. 2, 1989) (Easterbrook, J.) (rejecting claim that U.S.S.G. § 2J1.6, Failure to Appear, is unconstitutional on the ground that it does not allow sentencing court to consider mitigating factors such as prompt voluntary surrender).

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Guidelines Application

DEPARTURES

First Circuit holds departures are warranted only where the circumstances "are sufficiently unusual to remove a case from the heartland" of typical guideline cases. Defendant pled guilty to a string of bank robberies and robbery attempts committed in a three-week period. The district court concluded a downward departure was warranted because defendant did not use a weapon, was "ineffective" and "half-hearted" as a bank robber, committed the crimes during a brief period when he suffered from cocaine addiction, had a minimal prior record, and expressed the desire to reform.

The appellate court vacated the sentence, finding that most of the district court's reasons for departure were factors already considered by the Sentencing Commission. The court also found that two factors that might warrant departure—defendant's excellent conduct in prison before sentencing and his "lack of enthusiasm" in committing the robberies—were "clearly insufficient" to support a departure in this case. The court stressed that "departures must be bottomed on meaningful atypicality . . . , the circumstances triggering a departure must be truly 'unusual,'" and "the trial court's right to depart, up or down, must be restricted to those few instances where some substantial atypicality can be demonstrated."

U.S. v. Williams, No. 89-1689 (1st Cir. Dec. 15, 1989) (Selya, J.).

Other Recent Cases:

U.S. v. Coe, No. 89-1205 (2d Cir. Nov. 30, 1989) (Newman, J.) (short span of time in which robberies were committed and defendant's false claim of having weapon were not permissible grounds for upward departure under U.S.S.G. § 5K2.0, p.s.; departure was warranted because defendant's pattern of behavior indicated he was likely to commit future offenses, U.S.S.G. § 4A1.3, p.s., and district court should follow procedure for such departures set forth in *U.S. v. Cervantes*, 878 F.2d 50 (2d Cir. 1989), by determining which criminal history category "best encompasses the defendant's prior history" and then using the corresponding sentencing range for that category "to guide its departure").

U.S. v. Mahler, No. 88-5193 (4th Cir. Dec. 8, 1989) (Widener, J.) (use of replica of handgun in robbery warranted upward departure—replicas are not covered in the Guidelines definitions of firearm or dangerous weapon, and are therefore "an aggravating circumstance" not adequately considered by Sentencing Commission; sentencing court treated replica as an unloaded gun under U.S.S.G. § 2B3.1(b)(2)(C) and increased offense level by three).

U.S. v. Jordan, No. 89-1774 (7th Cir. Dec. 7, 1989) (Cummings, J.) (departure from 70–87 months to 120 months warranted because defendant's attempt to flee from arrest resulted in injury to government agent, there was evidence defendant continued to deal and use drugs while awaiting sentencing, and criminal history score did not represent seriousness of past activity).

U.S. v. Yellow Earrings, No. 89-5142 (8th Cir. Dec. 1, 1989) (Bright, Sr. J.) (affirming downward departure for assault defendant, from range of 41–51 months to 15 months, because victim "substantially provoked" the offense (*see* U.S.S.G. § 5K2.10, p.s.)).

DETERMINING OFFENSE LEVEL

U.S. v. Otero, No. 89-3077 (11th Cir. Dec. 11, 1989) (per curiam) (defendant who claimed he was unaware that co-conspirator had firearm was properly given enhancement for firearm possession under U.S.S.G. § 2D1.1(b)). *Cf. U.S. v. Missick*, 875 F.2d 1294 (7th Cir. 1989) (departure for defendant who supplied drugs to persons possessing weapons was not proper because defendant had no direct contact with and was not charged as co-conspirator with those who possessed weapons).

U.S. v. Mocciola, No. 89-1471 (1st Cir. Dec. 5, 1989) (Aldrich, Sr. J.) (defendant who pled guilty to drug possession charge may be given enhancement for possession of firearm under U.S.S.G. § 2D1.1(b)(1) despite acquittal by jury on charge of using a weapon during a drug trafficking crime under 18 U.S.C. § 924(c)(1)). *See also U.S. v. Isom*, 886 F.2d 736, 738 & n.3 (4th Cir. 1989) (acquittal does not necessarily preclude use of underlying facts of offense at sentencing); *U.S. v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989) (per curiam) (same); *U.S. v. Ryan*, 866 F.2d 604, 609 (3d Cir. 1989) (same).

U.S. v. Green, No. 89-5198 (8th Cir. Nov. 15, 1989) (Wollman, J.) (although gun was not loaded and was found in different room from most of drugs, defendant's "undenied possession of a firearm and ammunition in the same place where she conducted drug transactions and the additional hazard the presence of the firearm created in her drug operation satisfy us that connection of the gun to the offense is not clearly improbable," and an upward adjustment under U.S.S.G. § 2D1.1(b)(1) was proper).

U.S. v. Gerante, No. 89-1235 (1st Cir. Dec. 8, 1989) (Campbell, C.J.) (sentencing court properly converted $68,000 that originated from prior drug transaction into estimated quantity of cocaine to determine relevant quantities for purpose of calculating base offense level under U.S.S.G. § 2D1.1(a)(3); case must be remanded, however, because court did not make explicit finding required by Fed. R. Crim. P. 32(c)(3)(D) on disputed issue of whether the $68,000 did in fact originate from prior drug transaction).

U.S. v. Garcia, No. 89-1499 (5th Cir. Nov. 30, 1989) (Jolly, J.) (court may base offense level on amount of drugs under negotiation in an uncompleted drug transaction, *see* U.S.S.G. §§ 2D1.1, comment. (n.12), 2D1.4, comment. (n.1) (Nov. 1989); here, defendant sold eight ounces of cocaine but had negotiated to sell 16 ounces, and the larger amount was properly used to determine base offense level).

U.S. v. Lanese, No. 89-1133 (2d Cir. Nov. 29, 1989) (Re, J.) (remanding for resentencing: "district court did not make a specific finding of the identities of the 'five or more participants,' or that the criminal activity was 'otherwise extensive,'" and thus appellate court could not determine whether defendant's sentence was correctly increased for being a "manager or supervisor" under U.S.S.G. § 3B1.1(b); also reversed codefendant's sentence because finding that he was a "manager or supervisor" was "clearly erroneous").

U.S. v. Ford, No. 89-3205 (6th Cir. Nov. 27, 1989) (Kennedy, J.) (no double jeopardy when sentencing court used same information, given by defendant to probation officer, to grant defendant reduction for acceptance of responsibility and to impose sentence near high end of guideline range).

Criminal History

U.S. v. Vickers, No. 89-3308 (5th Cir. Dec. 8, 1989) (per curiam) (agreeing with *U.S. v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989), and *U.S. v. Ofchinick*, 877 F.2d 251 (3d Cir. 1989), that it is not improper to add points to criminal history score, pursuant to U.S.S.G. § 4A1.1(d) and (e), of defendant convicted of escape from custody). *See also U.S. v. Wright*, No. 88-1277 (9th Cir. Dec. 4, 1989) (Canby, J.) (when defendant is convicted of escape offense it is not error or violation of double jeopardy to add criminal history points under U.S.S.G. §§ 4A1.1(d) and (e)). *But see U.S. v. Bell*, 716 F. Supp. 1207 (D. Minn. 1989) (adding criminal history points under § 4A1.1(d) amounts to double counting); *U.S. v. Clark*, 711 F. Supp. 736 (S.D.N.Y. 1989) (same).

U.S. v. Williams, No. 89-50017 (9th Cir. Dec. 6, 1989) (Nelson, J.) (not a violation of due process to use juvenile conviction in criminal history calculation even though there was no right to jury trial in the juvenile adjudication; also, "commitment to juvenile hall is a form of confinement" that falls within U.S.S.G. § 4A1.2(d)(2)(A)).

Sentencing Procedure

Fourth Circuit holds that limited power to sentence below statutory minimum for substantial assistance, 18 U.S.C. § 3553(e), also applies to 18 U.S.C. § 3561(a)(1) to allow probation for Class A and B felonies. Defendant pled guilty to conspiracy to possess and distribute cocaine. He argued that the circumstances of his case made a sentence of probation appropriate, and that 18 U.S.C. § 3553(e) allowed it. The district court disagreed, holding that the prohibition against probation for Class A and B felonies in 18 U.S.C. § 3561(a)(1) applied.

The appellate court remanded, holding that probation could be given to a defendant who qualified under § 3553(e): "As we view Section 3553(e), there is no logical distinction between the two situations, i.e., between the mandatory minimum sentence and the prohibition against probation. The statute was intended to free the sentencing judge to exercise, on motion of the Government, a prudent discretion by disregarding, where there has been substantial governmental assistance by the defendant, both the affirmative mandate to impose a minimum prison sentence and the negative mandate of Section 3561(a)(1) not to grant probation to a Class A or a Class B offender."

U.S. v. Daiagi, No. 88-5161 (4th Cir. Dec. 15, 1989) (Russell, J.).

Other Recent Cases:

U.S. v. Rosa, No. 88-3692 (3d Cir. Dec. 8, 1989) (Stapleton, J.) (defendant in conspiracy that began before and ended after Nov. 1, 1987, properly sentenced under Guidelines despite claim he withdrew from the conspiracy before then—defendant failed to "affirmatively renounce" conspiracy before that date; remanded for resentencing, however, for district court to make specific findings required by Fed. R. Crim. P. 32(c)(3)(D) when defendant disputes information in presentence report, here the government's version of offense).

U.S. v. Jordan, No. 89-1774 (7th Cir. Dec. 7, 1989) (Cummings, J.) (holding defendant not entitled to notice before sentencing hearing that district court would depart—defendant was "not unfairly surprised with new evidence or information" at the hearing and was allowed to contest all factors used to determine his sentence). *Cf. U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989) (defendant must be given notice of and opportunity to comment on factors that may constitute grounds for departure prior to sentencing, Fed. R. Crim. P. 32(a)(1)); *U.S. v. Cervantes*, 878 F.2d 50 (2d Cir. 1989) (same); *U.S. v. Otero*, 868 F.2d 1412 (5th Cir. 1989) (same).

Constitutionality

U.S. v. Cyrus, No. 88-3156 (D.C. Cir. Dec. 12, 1989) (Mikva, J.) (higher penalties in Guidelines for possession of cocaine base (crack) than for cocaine do not violate equal protection, due process, or the eighth amendment).

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Guidelines Application

DEPARTURES

District court holds substantial assistance departure should apply to those who help to exonerate persons suspected of criminal activity. Defendants assisted a federal investigation by providing information that helped to demonstrate that another person had not committed a crime, and the government moved for a downward departure pursuant to U.S.S.G. § 5K1.1, p.s. However, that section only allows departure for substantial assistance "in the investigation or prosecution of another person who *has committed* an offense" (emphasis added), and not for exonerating another person.

The court concluded that assisting in the exculpation of another was a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," 18 U.S.C. § 3553(b), and therefore it had the power to depart downward. The court also found that the benefit to the government, namely stopping "the expense of a fruitless inquiry and the diversion of effort from more promising work," was another circumstance not considered by the Commission that warranted departure.

U.S. v. Huss, No. 89 CR 760 (N.D. Ill. Dec. 20, 1989) (Zagel, J.).

Other Recent Cases:

U.S. v. Summers, No. 89-5116 (4th Cir. Jan. 2, 1990) (Wilkins, J.) (when sentencing court departs downward because defendant's criminal history category has been "exaggerated" by minor offenses, it must guide departure by reference to appropriate lower criminal history categories, U.S.S.G. § 4A1.3, p.s.; in this case court should use the criminal history category that would result absent consideration of the minor offenses).

U.S. v. Strange, No. 89-5826 (6th Cir. Dec. 28, 1989) (per curiam) (unpublished disposition) (affirming upward departure, from 27–33 month range to 66 months, because case is "sufficiently unusual"—"a combination of mental illness and a prior criminal history that leads strongly to the conclusion that the defendant is likely to continue to engage in conduct that has the very real potential for death or serious injuries to others," and "psychiatric evaluations indicated that intensive long-term psychotherapy would be necessary").

U.S. v. Maddalena, No. 89-1533 (6th Cir. Dec. 21, 1989) (Kennedy, J.) (remanding for resentencing—district court mistakenly believed it could not consider defendant's efforts to avoid drugs as basis for downward departure).

U.S. v. Geiger, No. 89-1429 (5th Cir. Dec. 20, 1989) (Reavley, J.) (affirming upward departure, from 21–27 month range to 120 months, because defendant's criminal history score did not adequately reflect seriousness of prior criminal conduct—three earlier drug convictions were consolidated for sentencing and thus counted as one offense, *see* U.S.S.G. § 4A1.2(a)(2) & comment. (n.3), and the current offense was committed while defendant was on probation and out on bail).

U.S. v. Speight, No. 88-0245 (D.D.C. Dec. 12, 1989) (Oberdorfer, J.) (pursuant to U.S.S.G. § 5K2.13, p.s., departing downward from 188–235 month range to mandatory minimum of 120 months, to be served concurrently with unexpired state sentence, "because defendant's long history of mental illness establishes that he acted with significantly reduced mental capacity at the time he committed the offenses").

CRIMINAL HISTORY

Trio of district court cases explores definition of "crime of violence" under Guidelines. In N.D. Ill. the court had to determine if possession of a weapon by a convicted felon was a "crime of violence" under the career offender guidelines, U.S.S.G. §§ 4B1.1, 4B1.2. Concluding that defendant's prior burglaries and the present offense were "crimes of violence," the court held: (1) that it could "consider the circumstances of the offense in deciding whether it was a 'crime of violence,'" *see also Maddalena, supra* ("court has the discretion to consider evidence other than the statute in determining whether an offense was a 'crime of violence'"); (2) "that the crime of possession of a handgun by a convicted felon by its nature involves a substantial risk that physical force may be used against another person"; and (3) "that the crime of burglary, which involves breaking and entering into a building without permission of the owner, clearly involves as one of its elements the use of physical force against property and is a crime of violence." (Note: An amendment to § 4B1.2, effective Nov. 1, 1989, deleted reference to 18 U.S.C. § 16 and amended the definition of "crime of violence." *See* U.S.S.G. App. C, amendment 268.)

U.S. v. Colston, No. 88 CR 843 (N.D. Ill. Dec. 12, 1989) (Plunkett, J.).

A court in S.D.N.Y. had to determine whether two prior burglaries of motel rooms constituted "crimes of violence" under the career offender provisions. The government claimed that a motel room was considered a "dwelling" under the law of the state of conviction, and that U.S.S.G. § 4B1.2(1)(ii) (Nov. 1989) provides that "burglary of a dwelling" is a crime of violence. Nevertheless, the court held they were not violent crimes. Noting the part of the definition in § 4B1.2(1)(ii) that states "or otherwise involves conduct that presents a serious potential risk of physical injury to another,"

the court determined that "the clear thrust of this section is to categorize crimes using physical force against persons as violent crimes. . . . Absent any showing that [defendant's] burglary convictions involved the use of or threatened use of violence against persons, it would be a hypertechnical and distorted interpretation of the Guidelines to classify these offenses as prior violent felonies."

U.S. v. Johnson, No. 89 CR 0176 (S.D.N.Y. Dec. 21, 1989) (Sweet, J.).

In D.D.C. the court had to determine whether defendant could receive a downward departure for diminished capacity under U.S.S.G. § 5K2.13, p.s. That section allows departure, in part, if the current offenses were "non-violent." Using the amended definition of "crime of violence" in § 4B1.2(1), the court concluded that neither of defendant's offenses—possession with intent to distribute cocaine and possession of a weapon by a felon—were violent. The court concluded that it should only consider the nature of the offenses charged, not the actual circumstances of their commission. It held that, "[w]hile both drug trafficking and possession of a weapon by a felon on occasion may present some risk of injury to a person, the crimes are not themselves ones that... necessarily pose such a risk by their very nature."

U.S. v. Speight, No. 88-0245 (D.D.C. Dec. 12, 1989) (Oberdorfer, J.).

Determining Offense Level

U.S. v. Pierce, No. 88-2985 (5th Cir. Jan. 4, 1990) (Jones, J.) (affirming upward adjustment for obstruction of justice, U.S.S.G. § 3C1.1, for attempting to flee arrest and to influence testimony of witness).

U.S. v. Salyer, No. 89-1485 (6th Cir. Dec. 21, 1989) (Contie, Sr. J.) (defendant convicted of conspiracy to interfere with civil rights, for burning cross on black couple's lawn, was properly given upward adjustment under U.S.S.G. § 3A1.1 for victim vulnerability—defendant "should have known" the victims were "particularly susceptible to the criminal conduct" because of their race, and the offense guideline did not already incorporate that factor, *see* § 3A1.1, comment. (n.2)).

U.S. v. Evans, No. 89-1758 (8th Cir. Dec. 14, 1989) (Fagg, J.) (pursuant to U.S.S.G. § 2D1.1, comment. (n.12) and § 2D1.4, comment. (n.2), sentencing court properly approximated and used in setting offense level the amount of methamphetamine defendants were capable of producing, 22.5 kilograms, not .0688 kilograms actually seized).

U.S. v. Williams, No. 89-3135 (D.C. Cir. Nov. 29, 1989) (Wald, C.J.) (role in offense adjustment for being "manager" of a criminal activity, U.S.S.G. § 3B1.1(c), applies only to defendant's role in offense of conviction—adjustment may not be applied to defendant convicted of possession of illegal weapon who admitted running a crack operation in house where weapon was found). *Cf. U.S. v. Foster*, 876 F.2d 377, 378 (5th Cir. 1989) (courts should not apply adjustment for "use of special skill," U.S.S.G. § 3B1.3, "unless such a skill is used to facilitate commission or concealment of 'the offense'—the one charged in the indictment—and not any other crime or crimes that may have been revealed during presentence investigation").

Sentencing Procedure

U.S. v. Garcia, No. 88-2557 (10th Cir. Dec. 29, 1989) (Ebel, J.) (held "that the sentencing guidelines apply to assimilative crimes, but that the sentence imposed may not exceed any maximum sentence and may not fall below any mandatory minimum sentence that is required under the law of the state in which the crimes occur"; also held "the commentary to § 2X5.1 of the sentencing guidelines, which 'require[s]' courts to apply guidelines applicable to analogous federal crimes in determining sentences for assimilative crimes, has no legal effect to the extent that it exceeds the less-restrictive mandate of the Sentencing Reform Act of 1984 to give only 'due regard' to analogous federal sentencing guidelines").

Determining the Sentence

U.S. v. Bakhtiari, No. 88 CR 889 (S.D.N.Y. Dec. 18, 1989) (Sweet, J.) (Defendant sentenced for offense that occurred prior to conviction and sentencing for earlier, separate offense should receive a consecutive, not concurrent, term of imprisonment for current offense. Although the Guidelines "are here not particularly helpful," "[t]he sentencing factors set forth at 18 U.S.C. § 3553(a)(2)... favor making the sentence on the instant offenses run consecutively with the term of imprisonment imposed on the [prior] convictions." The term of supervised release imposed in this case would also be consecutive to the term of supervised release in the earlier offense. The court noted that imposing concurrent sentences when, as here, the second term is shorter than the first, "in effect would require [defendant] to serve no time for the [second offense]," and "thus would fail entirely 'to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment' for his behavior. 18 U.S.C. § 3553(a)(2)(A).").

Appellate Review

Departures

U.S. v. Denardi, No. 89-3365 (3d Cir. Dec. 19, 1989) (Seitz, J.) (18 U.S.C. § 3742(a) does not authorize appeal of district court's discretionary refusal to depart from an otherwise valid guideline sentence). *Accord U.S. v. Tucker*, No. 89-1222 (1st Cir. Dec. 19, 1989) (Torruella, J.). *See also U.S. v. Draper*, 888 F.2d 1100 (6th Cir. 1989); *U.S. v. Franz*, 886 F.2d 973 (7th Cir. 1989); *U.S. v. Colon*, 884 F.2d 1550 (2d Cir. 1989); *U.S. v. Fossett*, 881 F.2d 976 (11th Cir. 1989).

Overlapping Guideline Ranges

U.S. v. Williams, No. 89-3135 (D.C. Cir. Nov. 29, 1989) (Wald, C.J.) (noting agreement with *U.S. v. Bermingham*, 855 F.2d 925, 930–31 (2d Cir. 1988), that when a disputed sentence "falls within either of two arguably applicable Guidelines ranges and it is clear that the same sentence would have been imposed under either Guidelines range, the court need not resolve the dispute. . . . Where it appears, however, that the district court chose a sentence because it was at the low end of the applicable Guidelines range, the court should remand for proper resentencing.").

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Adjustments

Second Circuit holds that flight from arrest, without more, does not constitute obstruction of justice. Defendant pled guilty to three counts of bank burglary. When he was detected at one of the banks he went to great lengths to avoid arrest, including running across rooftops, hiding under a boat, pulling loose from an officer twice, and jumping a fence. In light of these efforts, the sentencing court enhanced defendant's offense level for "obstruction of justice," pursuant to U.S.S.G. § 3C1.1.

The appellate court vacated and remanded, holding that "flight from arrest, in itself, does not constitute obstruction of justice under . . . § 3C1.1." The court determined that "Guidelines § 3C1.1 contains a clear mens rea requirement that limits its scope to those who 'willfully' obstruct or attempt to obstruct the administration of justice. . . . [W]e are convinced that the word 'willfully' . . . requires that the defendant consciously act with the purpose of obstructing justice. We therefore hold that mere flight in the immediate aftermath of a crime, without more, is insufficient to justify a section 3C1.1 obstruction of justice enhancement."

The court noted, however, that flight from arrest may still be considered in sentencing: "a defendant who flees in order to avoid apprehension may be sentenced to the maximum term within the applicable guideline range, while one who voluntarily surrenders may be sentenced to the minimum."

U.S. v. Stroud, No. 89-1258 (2d Cir. Jan. 8, 1990) (Meskill, J.).

Other Recent Case:

U.S. v. Carroll, No. 88-2260 (6th Cir. Jan. 9, 1990) (Ryan, J.) (role in offense adjustment, U.S.S.G. § 3B1.1, for organizer or leader requires at least one other "criminally responsible" person in offense—may not be applied where only other participants were undercover agents).

Sentencing Procedure

Tenth Circuit holds that sentencing court may use evidence from co-conspirators' trial to resolve factual dispute. Defendant pled guilty to drug charges. The sentencing court, relying on testimony from the trial of two co-conspirators, increased his offense level under U.S.S.G. § 3B1.1(a) for being an "organizer or leader." Defendant appealed, citing *U.S. v. Castellanos*, 882 F.2d 474 (11th Cir. 1989) (2 *GSU* #12), which held that evidence from a co-conspirator's trial could not be used to resolve a dispute over drug quantity because the defendant had no opportunity to cross-examine the witnesses and present evidence at that trial.

The appellate court affirmed, finding "no constitutional, statutory, or procedural rule . . . that would bar the sentencing judge's consideration of relevant and reliable information of the type used in this case." Noting its difference with *Castellanos*, the court held that "the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings," and concluded that "the better rule . . . is that reliable hearsay—including testimony from a separate trial—may be used at sentencing to determine the appropriate punishment."

U.S. v. Beaulieu, No. 88-2586 (10th Cir. Jan. 10, 1990) (Brown, Dist. J.).

Fifth Circuit outlines procedure when plea stipulation indicates more serious offense. Defendant pled guilty to a drug offense, but facts in the plea agreement indicated he committed a more serious offense. The government contended he should be sentenced pursuant to U.S.S.G. § 1B1.2(a), which in this case would have resulted in a four-year sentence, the statutory maximum for the offense of conviction. The court, however, sentenced defendant to probation for five years. The government appealed.

The appellate court remanded and outlined the procedure for sentencing under § 1B1.2(a). The court held 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." In making that decision "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.'"

The court also determined that a court may "depart from the guidelines and sentence below the statutory maximum for the offense of conviction when the guideline calculations for the stipulated offense yield a sentencing range above the statutory maximum. . . . provided that appropriate and adequate reasons for the departure are assigned. . . . We find nothing in either the relevant statutory or guideline provisions . . . which would make departure inapplicable to the sentencing procedure for guilty plea convictions."

U.S. v. Martin, No. 89-1011 (5th Cir. Jan. 11, 1990) (Politz, J.).

Departures

Sixth Circuit holds that district court need not explain reasons for not following government recommendation for substantial assistance departure, but suggests "it would be helpful." Defendant pled guilty to a drug charge.

His sentencing range was 63–78 months, but the government, pursuant to the plea agreement, recommended a departure to 48 months for defendant's substantial assistance, U.S.S.G. § 5K1.1. Without commenting on the government's recommendation, the court imposed a 63-month sentence. Defendant appealed, claiming it was reversible error for the court to fail to state any reasons for imposing the 63-month sentence.

The appellate court affirmed, basing its decision on *U.S. v. Duque*, 883 F.2d 43 (6th Cir. 1989). There, the court held the sentencing judge was not required "to state with particularity his reasons for setting a sentence that falls within the guidelines where the guideline range was less than 24 months." *Id.* at 43. *See also* 18 U.S.C. § 3553(c)(1).

The court also held that "section 5K1.1, is discretionary . . . . Defendant does not point to any provision in the guidelines or other authority which requires a sentencing judge to explain the refusal to grant a motion for a departure from the guidelines range. Although the notes to section 5K1.1 specify that reasons must be stated for a downward departure based upon a defendant's cooperation, there is no converse requirement that a court explain its decision to refuse a departure and impose a sentence within the guidelines."

The court noted, however, that "when the government has made a recommendation based upon a Rule 11 plea agreement obligation to do so, it would be helpful, even if not required, for a district judge to indicate why he is not following the recommendation."

U.S. v. Jones, No. 89-1374 (6th Cir. Jan. 10, 1990) (per curiam) (unpublished disposition).

Other Recent Cases:

U.S. v. Carey, No. 89-1826 (7th Cir. Jan. 12, 1990) (Flaum, J.) (vacating downward departure for "cumulative effect" of defendant's age and physical condition, fact that voluntary restitution was almost complete, and offense was single act of aberrant behavior—district court's reasons "were, in part, improper and otherwise not sufficiently articulated"; also, reasons for departure must be stated at time of sentencing in open court, not in memorandum filed *nunc pro tunc*).

U.S. v. Rivalta, No. 89-1159 (2d Cir. Dec. 21, 1989) (Feinberg, J.) (remanding to sentencing court for more explicit finding on whether death of victim "resulted" from defendants' criminal activity, U.S.S.G. § 5K2.1, p.s.; facts supporting such a departure must be proved by preponderance of the evidence).

U.S. v. Boshell, No. CR-88-361-S (E.D. Wash. Jan. 11, 1990) (McNichols, J.) (downward departure warranted because "blindly applying the Guidelines" to defendant, who went to trial, would be unfair and counter to "every essential purpose underlying" the Guidelines where co-conspirators who pled guilty in order to be sentenced under pre-Guidelines law received much lighter sentences; also, consistent with 18 U.S.C. § 3661, personal characteristics may be considered despite § 5H1 recommendations to the contrary pursuant to 28 U.S.C. § 994(e)).

Criminal History

U.S. v. Kirby, No. 88-5869 (6th Cir. Jan. 16, 1990) (per curiam) (adjudication of delinquency and subsequent commitment may be considered in criminal history computation).

U.S. v. Carroll, No. 88-2260 (6th Cir. Jan. 9, 1990) (Ryan, J.) (criminal history points may be added to escapee's score pursuant to § 4A1.1(d) and (e)). *Accord U.S. v. Wright*, 891 F.2d 209 (9th Cir. 1989); *U.S. v. Vickers*, 891 F.2d 86 (5th Cir. 1989); *U.S. v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989); *U.S. v. Ofchinick*, 877 F.2d 251 (3d Cir. 1989).

U.S. v. Hearrin, No. 89-1020 (8th Cir. Jan. 3, 1990) (Gibson, J.) (for purposes of criminal livelihood provision, U.S.S.G. § 4B1.3, "pattern of criminal conduct" does not require separate criminal offenses but may mean planned acts over period of time during single course of conduct).

Determining the Sentence

Consecutive or Concurrent Sentences

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Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Index for *Guideline Sentencing Update*, Volume 2

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Cases are arranged by subject matter, with the first five major headings roughly following the format of the Sentencing Guidelines. Within each grouping cases are cited in reverse chronological order, with appellate court cases listed ahead of district court cases, reported cases ahead of unreported. The numbers in brackets at the end of each citation indicate the issue in 2 *GSU* in which the case was summarized.

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U.S. v. Concepcion, 721 F. Supp. 493 (S.D.N.Y. 1989) (completed old law sentence before resentencing) [#13].
U.S. v. Bell, 716 F. Supp. 1207 (D. Minn. 1989) (applying § 4A1.1(d) to escapee is double-counting, earlier sentence likely to be increased) [#10].
U.S. v. Boshell, No. CR-88-361-S (E.D. Wash. Jan. 11, 1990) (personal characteristics, applying guidelines to defendant unfair compared to co-conspirators sentenced under pre-Guidelines law) [#20].
U.S. v. Speight, No. 88-0245 (D.D.C. Dec. 12, 1989) (significantly reduced mental capacity, definition of "nonviolent," § 5K2.13, p.s.) [#19].
U.S. v. Batista-Segura, No. S 89 CR 377 (S.D.N.Y. Oct. 19, 1989) (no knowledge or control of drug amount) [#16].
U.S. v. Sadler, No. 88-10055 (D. Idaho-Oct. 2, 1989) (education and skills, other personal characteristics) [#17].
U.S. v. Gonzales, 88 CR 559 (S.D.N.Y. July 27, 1989) (family ties, "peripheral" involvement) [#11].
U.S. v. Hon, No. 89 CR 0052 (S.D.N.Y. May 31, 1989) (personal characteristics, civil remedies available) [#9].

b. Downward Departure Not Warranted

U.S. v. Carey, —F.2d— (7th Cir. Jan. 12, 1990) (cumulative effect of personal characteristics, restitution) [#20].
U.S. v. Williams, 891 F.2d 962 (1st Cir. Dec. 15, 1989) (lack of weapon, ineffectiveness, addiction, desire to reform) [#18].
U.S. v. Bolden, 889 F.2d 1336 (4th Cir. 1989) (lack of prior criminal record, possible loss of employment making restitution more difficult) [#17].
U.S. v. Medeiros, 884 F.2d 75 (3d Cir. 1989) (escape from non-secure facility, § 2P1.1) [#12].
U.S. v. Natal-Rivera, 879 F.2d 391 (8th Cir. 1989) (cultural heritage) [#11].

c. Downward Departure Not Required

U.S. v. Paulino, 873 F.2d 23 (2d Cir. 1989) (per curiam) (sound discretion of court not to depart) [#5].

See also **H. Appellate Review**

4. Notice Required Before Departure

U.S. v. Jordan, 890 F.2d 968 (7th Cir. 1989) (not before sentencing hearing) [#18].

U.S. v. Cervantes, 878 F.2d 50 (2d Cir. 1989) [#8].
U.S. v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989) [#9].
U.S. v. Otero, 868 F.2d 1412 (5th Cir. 1989) [#3].

5. Statement of Reasons for Departure

U.S. v. Carey, — F.2d — (7th Cir. Jan. 12, 1990) (must be at time of sentencing, in open court) [#20].
U.S. v. Smith, 888 F.2d 720 (10th Cir. 1989) (brief statement insufficient) [#17].
U.S. v. Cervantes, 878 F.2d 50 (2d Cir. 1989) (clearly identify aggravating factors, reasons for using particular criminal history category) [#8].
U.S. v. Michel, 876 F.2d 784 (9th Cir. 1989) (clearly identify factors warranting departure) [#8].

6. Substantial Assistance (§ 5K1.1, 18 U.S.C. § 3553(e))

See also **I. Challenges to Guidelines**

a. Departures

U.S. v. Daiagi, 892 F.2d 31 (4th Cir. 1989) (allows probation for Class A and B felonies) [#18].
U.S. v. Campbell, 704 F. Supp. 661 (E.D. Va. 1989) (from 78–97 month range to 14 months) [#1].
U.S. v. Akhtar, No. 89 CR 0264 (S.D.N.Y. Aug. 1, 1989) (from 97–121 month range to a year and a day) [#12].

b. Procedure

U.S. v. Jones, — F.2d — (6th Cir. Jan. 10, 1990) (per curiam) (table, unpub.) (need not explain refusal to follow government recommendation for departure) [#20].
U.S. v. Justice, 877 F.2d 664 (8th Cir.) (requirement for government motion), *cert. denied*, 110 S. Ct. 375 (1989) [#8].
U.S. v. Donatiu, 720 F. Supp. 619 (N.D. Ill. 1989) (may not depart absent government motion) [#12].
U.S. v. Nelson, 717 F. Supp. 682 (D. Minn. 1989) (declining to order government motion, found no bad faith) [#11].
U.S. v. Huss, No. 89 CR 760 (N.D. Ill. Dec. 20, 1989) (applicable to exoneration of another) [#19].
U.S. v. Galan, No. 89 CR 198 (S.D.N.Y. June 8, 1989) (in camera determination of whether prosecution refused in good faith to follow agreement) [#8].

G. Sentencing Procedure

See also **F. Departures**

1. Plea Bargaining

U.S. v. Martin, — F.2d — (5th Cir. Jan. 11, 1990) (plea stipulation establishes more serious offense) [#20].
U.S. v. Shorteeth, 887 F.2d 253 (10th Cir. 1989) (incriminating statements pursuant to plea agreement) [#15].
U.S. v. Stern, 884 F.2d 581 (6th Cir. 1989) (per curiam) (table, unpub.) (government "concession" that defendant is "minor participant") [#13].
U.S. v. Garza, 884 F.2d 181 (5th Cir. 1989) (facts in plea agreement establish more serious offense) [#13].
U.S. v. Turner, 881 F.2d 684 (9th Cir.) (need not inform defendant of offense level and criminal history category before accepting plea), *cert. denied*, 110 S. Ct. 199 (1989) [#12].
U.S. v. Sweeney, 878 F.2d 68 (2d Cir. 1989) (per curiam) (no withdrawal of plea for underestimation of range) [#9].
U.S. v. Fernandez, 877 F.2d 1138 (2d Cir. 1989) ("where feasible, should" advise defendants of likely sentence before accepting plea) [#9].
U.S. v. Parker, 874 F.2d 174 (3d Cir. 1989) (when plea agreement establishes facts relevant to sentencing no further proof required) [#7].
U.S. v. Bennett, 716 F. Supp. 1137 (N.D. Ind. 1989) (allowing withdrawal because of miscalculations of estimated guideline range) [#10].

2. Burden of Proof

U.S. v. McDowell, 888 F.2d 285 (3d Cir. 1989) (on party attempting to adjust sentence) [#17].
U.S. v. Restrepo, 884 F.2d 1294 (9th Cir. 1989) (on defendant to prove firearm not connected to drug offense, § 2D1.1(b)(1)) [#13].
U.S. v. Davenport, 884 F.2d 121 (4th Cir. 1989) (on defendant when challenging constitutionality of prior sentence) [#13].
U.S. v. McGhee, 882 F.2d 1095 (6th Cir. 1989) (on defendant to prove "clearly improbable" weapon connected to offense, § 2D1.1(b)) [#12].
U.S. v. Urrego-Linares, 879 F.2d 1234 (4th Cir.) (party seeking adjustment), *cert. denied*, 110 S. Ct. 346 (1989) [#10].
U.S. v. Parker, 874 F.2d 174 (3d Cir. 1989) (when plea agreement establishes facts relevant to sentencing, no further proof required) [#7].
U.S. v. Ligon, 716 F. Supp. 1009 (W.D. Ky. 1989) (on defendant for acceptance of responsibility) [#12].
U.S. v. Lovell, 715 F. Supp. 854 (W.D. Tenn. 1989) (on party seeking adjustment, on government when evidence favors neither party) [#10].
U.S. v. Landry, 709 F. Supp. 908 (D. Minn. 1989) (preponderance of evidence to prove relevant conduct) [#4].
U.S. v. Clark, No. CR. SCR 88-60(1) (N.D. Ind. May 11, 1989) (party seeking adjustment) [#7].

3. Factual Disputes

U.S. v. Beaulieu, — F.2d — (10th Cir. Jan. 10, 1990) (may use evidence from co-conspirators' trial) [#20].
U.S. v. Rosa, 891 F.2d 1071 (3d Cir. 1989) (defendant disputes government version of facts in presentence report) [#18].
U.S. v. Castellanos, 882 F.2d 474 (11th Cir. 1989) (drug quantity dispute may not be resolved with evidence from co-conspirator's trial) [#12].
U.S. v. Burch, 873 F.2d 765 (5th Cir. 1989) (must resolve before sentencing or departure) [#7].

4. Other

U.S. v. Cook, 890 F.2d 672 (4th Cir. 1989) (exception to Fed. R. Crim. P. 35 to amend incorrect sentence) [#17].
U.S. v. Soliman, 889 F.2d 441 (2d Cir. 1989) (consideration of foreign conviction) [#17].
U.S. v. Jackson, 886 F.2d 838 (7th Cir. 1989) (per curiam) (no right to counsel at presentence interview) [#14].

U.S. v. Sharp, 883 F.2d 829 (9th Cir. 1989) (per curiam) (no sentence below statutory minimum for mitigating circumstances) [#13].
U.S. v. Duque, 883 F.2d 43 (6th Cir. 1989) (reasons for sentence within range not exceeding 24 months) [#12].
U.S. v. Pinto, 875 F.2d 143 (7th Cir. 1989) (Application Notes used to explain Guidelines) [#7].
U.S. v. Brittman, 872 F.2d 827 (8th Cir.) ("two-track" sentencing procedure approved), *cert. denied*, 110 S. Ct. 188 (1989) [#5].
U.S. v. Ware, 709 F. Supp. 1062 (N.D. Ala. 1989) (no pretrial resolution of Guidelines dispute) [#5].

H. Appellate Review

1. Procedure for Review of Departures

U.S. v. Hernandez-Vasquez, 884 F.2d 1314 (9th Cir. 1989) (per curiam) (remand when court relies on proper and improper grounds) [#13].
U.S. v. Rodriguez, 882 F.2d 1059 (6th Cir. 1989) (three-step procedure, improper reasons may not require remand if proper reasons also given) [#12].
U.S. v. Diaz-Villafane, 874 F.2d 43 (1st Cir.) (three-step procedure), *cert. denied*, 110 S. Ct. 177 (1989) [#6].

2. Discretionary Refusal to Depart Downward

U.S. v. Denardi, 892 F.2d 269 (3d Cir. 1989) (not appealable) [#19].
U.S. v. Tucker, 892 F.2d 8 (1st Cir. 1989) (not appealable) [#19].
U.S. v. Draper, 888 F.2d 1100 (6th Cir. 1989) (not appealable) [#16].
U.S. v. McCrary, 887 F.2d 485 (4th Cir. 1989) (per curiam) (reviewed for reasonableness) [#15].
U.S. v. Franz, 886 F.2d 973 (7th Cir. 1989) (not appealable) [#15].
U.S. v. Colon, 884 F.2d 1550 (2d Cir.) (not appealable), *cert. denied, Papathanasion v. U.S.*, 110 S. Ct. (1989) [#13].
U.S. v. Fossett, 881 F.2d 976 (11th Cir. 1989) (not appealable) [#13].
U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989) (uphold unless refusal in violation of law) [#2].

3. Clearly Erroneous Standard

U.S. v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989) (minor or minimal participant) [#9].
U.S. v. Ortiz, 878 F.2d 125 (3d Cir. 1989) (aggravating role) [#9].
U.S. v. White, 875 F.2d 427 (4th Cir. 1989) (acceptance of responsibility) [#7].
U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) (minimal or minor participant) [#7].
U.S. v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989) (acceptance of responsibility, obstruction of justice) [#4].
U.S. v. Spraggins, 868 F.2d 1541 (11th Cir. 1989) (per curiam) (acceptance of responsibility) [#4].
U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989) (minimal participant status, § 3B1.2(a)) [#2].
U.S. v. Mejia-Orosco, 867 F.2d 216 (5th Cir.) (role in offense, § 3B1.1(c)), *cert. denied*, 109 S. Ct. 3257 (1989) [#2].

4. Overlapping Guideline Ranges Dispute

U.S. v. Williams, 891 F.2d 921 (D.C. Cir. 1989) (may be unresolved if same sentence would be imposed, remand if sentence chosen because at low end of range) [#19].
U.S. v. Turner, 881 F.2d 684 (9th Cir.) (may be unresolved if same sentence would be imposed), *cert. denied*, 110 S. Ct. 199 (1989) [#11].
U.S. v. Fuente-Kolbenschlag, 878 F.2d 1377 (11th Cir. 1989) (per curiam) (appealable if party alleges guidelines incorrectly applied, 18 U.S.C. § 3742(a)(2)) [#11].

5. Other

U.S. v. Ruiz-Garcia, 886 F.2d 474 (1st Cir. 1989) (summary review for meritless appeals) [#14].
U.S. v. Wilson, 707 F. Supp. 1582 (M.D. Ga. 1989) (denied in forma pauperis status for frivolous appeal) [#4].

I. Challenges to Guidelines and Sentencing Reform Act

1. Do not Violate Due Process

U.S. v. Pinto, 875 F.2d 143 (7th Cir. 1989) [#7].
U.S. v. Allen, 873 F.2d 963 (6th Cir. 1989) [#7].
U.S. v. Seluk, 873 F.2d 15 (1st Cir. 1989) [#7].
U.S. v. Brittman, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989) [#5].
U.S. v. Vizcaino, 870 F.2d 52 (2d Cir. 1989) [#2].
U.S. v. White, 869 F.2d 822 (5th Cir.) (per curiam) (also statutory and other constitutional challenges), *cert. denied*, 109 S. Ct. 3172 (1989) [#3].

2. Violate Due Process

U.S. v. Roberts, No. 89-0033 (D.D.C. Nov. 16, 1989), *stayed in U.S. v. Holland*, No. 89-0342-01 (D.D.C. Jan. 11, 1990) [#16].

3. Rejecting Challenges to Specific Provisions

U.S. v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989) (higher penalty for cocaine base than for cocaine) [#18].
U.S. v. Francois, 889 F.2d 1341 (4th Cir. 1989) (due process challenge to substantial assistance provisions) [#17].
U.S. v. Savage, 888 F.2d 528 (7th Cir. 1989) (§ 2J1.6, Failure to Appear, mitigating factors not considered) [#17].
U.S. v. Koonce, 885 F.2d 720 (10th Cir. 1989) (prosecution for crime used to enhance prior sentence) [#14].
U.S. v. Restrepo, 884 F.2d 1294 (9th Cir. 1989) (burden on defendant to prove firearm not connected to drug offense, § 2D1.1(b)(1)) [#13].
U.S. v. Sciarrino, 884 F.2d 95 (3d Cir.) (reliable hearsay in guideline sentencing findings), *cert. denied*, 110 S. Ct. 553 (1989) [#13].
U.S. v. Baker, 883 F.2d 13 (5th Cir.) (per curiam) (drug quantity, not purity, to set offense level), *cert. denied*, 110 S. Ct. 517 (1989) [#13].

U.S. v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989) (career offender provision, § 4B1.1) [#9].

U.S. v. Ayarza, 874 F.2d 647 (9th Cir. 1989) (§ 5K1.1, p.s., requirement for government motion), *cert. denied*, 110 S. Ct. 847 (1990) [#7].

4. Upholding Challenges to Specific Provisions

U.S. v. Lee, 887 F.2d 888 (8th Cir. 1989) (offense level increase in "failure to report" guideline, § 2J1.6) [#15].

U.S. v. Curran, 724 F. Supp. 1239 (C.D. Ill. 1989) (substantial assistance provisions, § 5K1.1 and 18 U.S.C. § 3553(e), violate due process) [#14].

U.S. v. Boshell, No. CR-88-361-S (E.D. Wash. Jan. 11, 1990) (§ 5H1, personal characteristics; unconstitutional as applied to defendant who went to trial when co-conspirators pleading guilty to be sentenced under pre-Guidelines law given much lighter sentences) [#20].

U.S. v. Roberts, No. 89-0033 (D.D.C. Nov. 16, 1989) (substantial assistance provisions, § 5K1.1 and 18 U.S.C. § 3553(e), violate due process) [#16].

J. Decision to Apply Guidelines

U.S. v. Garcia, — F.2d — (10th Cir. Dec. 29, 1989) (assimilative crimes) [#19].

U.S. v. Rosa, 891 F.2d 1071 (3d Cir. 1989) (conspiracy begun before and ending after Nov. 1, 1987) [#18].

U.S. v. Tharp, 884 F.2d 1112 (8th Cir. 1989) (conspiracy begun before and ending after Nov. 1, 1987) (withdrawn from bound volume—opinion to be republished) [#13].

U.S. v. Davis, 718 F. Supp. 8 (S.D.N.Y. 1989) (conspiracy mostly before Nov. 1, 1987) [#13].

U.S. v. Norquay, 708 F. Supp. 1064 (D. Minn. 1989) (not applied to Major Indian Crimes Act) [#4].

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Sentencing Procedure

FACTUAL DISPUTES

D.C. Circuit holds court may not use evidence from the trial of another to determine drug quantity. Two defendants were indicted on three counts of distributing PCP. Defendant Chandler went to trial and was convicted of distributing one kilogram or more of PCP. Defendant Osborne pled guilty to distributing 100 grams or more of PCP, and the sentencing judge used the one kilogram figure from Chandler's case to set Osborne's offense level.

The appellate court held, and the government conceded, that it was error to use the amount from Chandler's trial in Osborne's sentencing, "for Osborne was not a party to that trial and cannot be bound by the verdict." *Accord U.S. v. Castellanos*, 882 F.2d 474 (11th Cir. 1989). *But see U.S. v. Beaulieu*, 893 F.2d 1177 (10th Cir. Jan. 10, 1990) (may use evidence from co-conspirator's trial). The court added that "the government will bear the burden of establishing the amount of PCP Osborne distributed by a preponderance of the evidence."

U.S. v. Chandler, No. 88-3110 (D.C. Cir. Jan. 30, 1990) (per curiam).

PLEA BARGAINING

Seventh Circuit holds court need not inform defendant of probable guideline minimum before accepting plea, but recommends withholding acceptance of plea until after submission of presentence report. Defendant argued that because the offenses to which he pled guilty did not have mandatory minimum sentences, Fed. R. Crim. P. 11(c)(1) required the sentencing court to inform him of the minimum sentence he could receive under the Guidelines before it accepted his plea.

The appellate court held that "the Sentencing Guidelines do not impose a 'mandatory minimum penalty' within the meaning of Rule 11(c)(1), and the district judge did not err in failing to inform [defendant] of the ultimate sentencing range that he would likely face on his convictions." *See also U.S. v. Foreman*, No. 89-3686 (6th Cir. Feb. 2, 1990) (per curiam) (unpublished disposition) (court not required to inform defendant of offense level and criminal history category before accepting plea); *U.S. v. Turner*, 881 F.2d 684 (9th Cir.) (same), *cert. denied*, 110 S. Ct. 199 (1989). The court agreed with *U.S. v. Fernandez*, 877 F.2d 1138, 1142–43 (2d Cir. 1989), that due process does not require courts to advise defendants of their likely sentencing range before accepting guilty pleas.

However, the court noted its "agreement with the . . . proposal in *Fernandez* that district courts withhold their acceptance of guilty pleas until after the presentence report has been submitted to the court and the court has had an opportunity to review the information with the defendant and counsel. . . . Like the Second Circuit, we decline to find that Rule 11 requires the court to predict the applicable sentencing range, but we believe that defendants will be able to make more intelligent choices about whether to accept a plea bargain if they have as good an idea as possible of the likely Guidelines result. Further, we note that such a practice would accord with the . . . policy statement at section 6B1.1(c)."

The court also reiterated its "request that district courts endeavor to present their reasons for imposing sentence in some concise, easily accessible form."

U.S. v. Salva, No. 89-1556 (7th Cir. Jan. 23, 1990) (Cudahy, J.).

Other Recent Cases:

U.S. v. Howard, No. 89-30093 (9th Cir. Jan. 25, 1990) (Fernandez, J.) (agreeing with *U.S. v. McDowell*, 888 F.2d 285 (3d Cir. 1989), and *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989), that "the party seeking to adjust the offense level should be required to persuade the court that such an adjustment is merited," and facts must be proved by a preponderance of the evidence; also holding the government "should bear the burden of proving the facts necessary to establish the base offense level").

U.S. v. Kirk, No. 89-3020 (10th Cir. Jan. 22, 1990) (Kane, Sr. Dist. J.) (following *Urrego-Linares, supra*, that burden of proof is on party seeking sentencing adjustment, by preponderance of evidence).

U.S. v. Burns, No. 88-3161 (D.C. Cir. Jan. 12, 1990) (Mikva, J.) ("suggest[ing] that future plea agreements explicitly address the possibility that the trial judge may depart from the Guidelines, even if such a departure is not recommended by the government or the probation officer").

U.S. v. Wivell, No. 89-5104 (8th Cir. Jan. 3, 1990) (Bowman, J.) (requirement of 18 U.S.C. § 3553(c) that sentencing judge "state in open court the reasons for its imposition of the particular sentence" is met when "the reasons appear on the record of the sentencing proceedings in open court"—there was "no error in the court's failure to articulate specific reasons in the written memorandum").

U.S. v. Ameperosa, No. 89-00589-01 (D. Hawaii Jan. 18, 1990) (Kay, J.) (holding 18 U.S.C. § 3500 (Jencks Act)

"should be extended to providing government witnesses' statements to defendants at [contested] sentencing hearings, where the defendant has pled guilty" and "factual allegations by a Government witness are relevant to both the validity and terms of Defendant's sentence").

Appellate Review

Ninth Circuit sets standard for review of departures, holds courts must give specific reasons for extent of departure. Noting the three-step procedure set forth in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir), *cert. denied*, 110 S. Ct. 177 (1989), the court "agree[d] with the First Circuit that the question of whether departure on a particular ground is permissible under the Guidelines is a question of statutory construction that we review de novo." The court also "in effect, agree[d] with the second step of the First Circuit's analysis, since we will apply the companion standards of clear error and abuse of discretion" to "the determination of whether the particular case is one where there should be a departure."

The court differed, however, on the standard that should be used for the third step—reviewing the reasonableness of the extent of the departure. Finding that the First Circuit used, in effect, an "abuse of discretion" standard, the Ninth Circuit held that it would "review the extent of any departure from the Guidelines de novo." The court reasoned that "the choice of a particular sentence should be accomplished in a carefully guided manner.... That is, it should always be pursued with an eye on the Guidelines categories themselves, and with an adherence to the concept of discrete changes in offense or history levels for discrete reasons."

In the present case, the court upheld the reasons for the departure, but remanded because the sentencing court "failed to indicate how it arrived at the sentence that it imposed."

U.S. v. Gayou, No. 89-30096 (9th Cir. Jan. 30, 1990) (Fernandez, J.).

Departures

U.S. v. Ceja-Hernandez, No. 89-30152 (9th Cir. Jan. 30, 1990) (per curiam) (reversing upward departure based on immigration defendant's anticipated deportation upon release that prevents court from imposing fine or supervised release—"Sentencing Commission would certainly have been aware of the practice of promptly deporting aliens").

U.S. v. Chase, No. 89-1502 (1st Cir. Jan. 29, 1990) (Campbell, C.J.) (defendant's conviction on 15 counts of bank robbery, while multiple count adjustment procedure in U.S.S.G. § 3D1.4 provides same penalty for six or more counts, was aggravating circumstance warranting upward departure from range of 57–71 months to 120-month term).

U.S. v. Williams, No. 89-1134 (8th Cir. Jan. 22, 1990) (Bowman, J.) (upward departure warranted for defendant who pled guilty to using telephone in commission of drug offense because of her "significant involvement" in the underlying offense; agreeing with *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), that court may consider quantity of drugs in underlying offense as factor in departure decision).

U.S. v. Sanchez, No. 89-1356 (5th Cir. Jan. 19, 1990) (Davis, J.) (upward departure warranted for defendant's continued unlawful conduct while on pre-trial release, *cf. U.S. v. Jordan*, 890 F.2d 968 (7th Cir. 1989) (upholding departure partly based on continued criminal conduct while awaiting trial); same conduct also used to deny reduction for acceptance of responsibility).

U.S. v. Burns, No. 88-3161 (D.C. Cir. Jan. 12, 1990) (Mikva, J.) (when facts providing basis for departure are contained in presentence report, and because defendant has opportunity to challenge departure at sentencing hearing and right to appeal sentence, neither the Guidelines nor Fed. R. Crim. P. 32 requires advance notice of decision to depart). *See U.S. v. Jordan*, 890 F.2d 968 (7th Cir. 1989). *Cf. U.S. v. Cervantes*, 878 F.2d 50 (2d Cir. 1989) (notice and opportunity to comment required prior to sentencing); *U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989) (same); *U.S. v. Otero*, 868 F.2d 1412 (5th Cir. 1989) (same).

U.S. v. Kennedy, No. 89-3399 (6th Cir. Jan. 9, 1990) (Milburn, J.) (sentencing court's statement that it departed because of defendant's "long history of violation of the law" undeterred by prior punishment was not sufficiently specific; also, when departing upward because of inadequate criminal history score court should first consider next higher criminal history category).

U.S. v. White, No. 89-3003 (10th Cir. Jan. 8, 1990) (Tacha, J.) (upward departure warranted because consolidation of prior offenses for sentencing underrepresented defendant's criminal history, and current offense was committed while defendant was out on bail; district court properly used higher criminal history category to guide departure).

Adjustments

U.S. v. Sanchez, No. 89-1356 (5th Cir. Jan. 19, 1990) (Davis, J.) (defendant's continued unlawful conduct while on pretrial release justified denial of acceptance of responsibility reduction; same conduct used as basis for upward departure).

Offense Conduct

Weapons Possession

U.S. v. Williams, No. 89-5460 (6th Cir. Jan. 25, 1990) (Contie, Sr. J.) (abuse of discretion to give U.S.S.G § 2D1.1(b)(1) enhancement to co-conspirators not present at commission of crime where weapon was allegedly possessed, when co-conspirator who possessed weapon was not given same enhancement).

Challenges to Guidelines

U.S. v. Holland, No. 89-0342-01 (D.D.C. Jan. 11, 1990) (Greene, J.) (staying decision in *U.S. v. Roberts*, No. 89-0033 (D.D.C. Nov. 16, 1989) (2 *GSU* #16), "insofar as it broadly holds unconstitutional the sentencing law and the guidelines in their entirety"; court will "apply the statute and the guidelines pending disposition of the current appeals").

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Departures

Fourth Circuit holds "past acquittals by reason of insanity may be a basis for departure from the Guidelines range." Defendant pled guilty to drug charges. His criminal history category was I and the guideline range was 27–33 months. Defendant's criminal history score did not include two acquittals by reason of insanity: one for second-degree murder and attempted murder, and one for four counts of attempted murder. The district court concluded that category I did not adequately reflect the serious nature of defendant's criminal history, U.S.S.G. § 4A1.3, departed upward to category IV, and sentenced defendant to 51 months.

Affirming, the appellate court noted: "It is undisputed that the Guidelines Manual nowhere mentions or takes into account acquittals by reason of insanity." The court also noted that "'[a] verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness. . . . The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.'" (Quoting *Jones v. U.S.*, 463 U.S. 354, 363–64 (1982).) The court concluded: "From these observations, it plainly follows, and we so hold, that an acquittal by reason of insanity is reliable information that a district court may consider in assessing whether a defendant's criminal history category . . . adequately reflects [his] past criminal conduct or his potential for future criminal behavior."

U.S. v. McKenley, No. 88-5137 (4th Cir. Feb. 6, 1990) (Ellis, Dist. J.).

NOTICE

U.S. v. Michael, No. 89-1274 (5th Cir. Feb. 15, 1990) (Smith, J.) (sentencing court need not, prior to the sentencing hearing, give notice to defendant that it intends to ignore presentence report recommendation and depart—there is no requirement that the court issue its tentative factfindings and sentence prior to the hearing; case remanded, however, because one of district court's two reasons for departing was not supported by evidence in the record).

U.S. v. Acosta, No. 89-10050 (9th Cir. Feb. 2, 1990) (Pregerson, J.) (requirement for notice of departure met when "[a]ll of the factors identified as bases for departure by the court when it imposed sentence were listed as possible departure grounds in the presentence report and commented upon by [defendant's] counsel before sentencing").

SUBSTANTIAL ASSISTANCE

U.S. v. Coleman, No. 89-1704 (8th Cir. Feb. 7, 1990) (Magill, J.) ("a government motion is required before a court may depart from the mandatory minimum sentence under [18 U.S.C.] § 3553(e)"—letters from the government outlining defendants' cooperation were not the "functional equivalent" of a § 3553(e) motion; if plea agreement binds government to file motion court may enforce that agreement, or plea may be withdrawn, but there was no such agreement here).

STATEMENT OF REASONS

U.S. v. Newsome, No. 89-1379 (6th Cir. Jan. 31, 1990) (Nelson, J.) (remanded because district court failed to make specific finding in open court of aggravating circumstance that would justify upward departure).

Other Recent Cases:

U.S. v. Van Dyke, No. 89-5502 (4th Cir. Feb. 12, 1990) (Wilkins, J.) (holding that "rehabilitative conduct" after arrest and before sentencing—here drug abuse treatment and counseling inmates about drug abuse—was not a factor on which departure could be based because such conduct is accounted for in acceptance of responsibility guideline, § 3E1.1).

U.S. v. Evidente, No. 88-5208 (8th Cir. Jan. 29, 1990) (Bowman, J.) (discretionary refusal by district court to depart downward is not reviewable). For other circuits that have so held, see *2 GSU Index* (Appellate Review: Discretionary Refusal to Depart Downward).

U.S. v. Reeves, No. 89-4111 (5th Cir. Jan. 18, 1990) (Duhe, J.) (affirming upward departure because defendants intended bribe to be much larger than amount actually paid).

U.S. v. Drew, No. 88-2661 (8th Cir. Jan. 17, 1990) (Bowman, J.) (upward departure warranted for attempt to murder government witness—obstruction of justice guideline, U.S.S.G. § 3C1.1, does not adequately account for this conduct).

U.S. v. Mills, No. 88 CR 956 (S.D.N.Y. Jan. 17, 1990) (Haight, J.) (combination of "extraordinary circumstances," resulting in the "total absence of responsible adults" to care for defendant's children if she were incarcerated, warrants downward departure for "family ties and responsibilities" under U.S.S.G. § 5H1.6, p.s.).

U.S. v. Fuentes, No. 89-00156-A (E.D. Va. Dec. 28, 1989) (Ellis, J.) (upward departure warranted under U.S.S.G. § 5K2.0, p.s., because the "Guideline range for [Continuing

Criminal Enterprise offenses] is manifestly inadequate in its failure to account adequately for the dimensions and duration of this CCE," which spanned a decade and involved numerous participants and large amount of cocaine).

Adjustments

Role in the Offense (§ 3B1)

U.S. v. Anderson, No. 89-10059 (9th Cir. Feb. 8, 1990) (Stotler, Dist. J.) (bank robbery defendant properly classified as organizer or leader, pursuant to U.S.S.G. § 3B1.1(c), even though codefendant was unaware of crime until after its commission because of defendant's trickery, and district court assumed that codefendant was not criminally responsible for robbery). *But see U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1990) (adjustment under § 3B1.1(c) requires at least one other "criminally responsible" person in offense).

U.S. v. Gordon, No. 89-5003 (4th Cir. Feb. 2, 1990) (Wilkins, J.) ("mitigating role adjustments apply only when there has been group conduct and a particular defendant is less culpable than other members of the group"—minor participant status, U.S.S.G. § 3B1.2(b), not appropriate for defendant convicted of cocaine possession absent evidence of group conduct).

Obstruction of Justice (§ 3C1)

U.S. v. Werlinger, No. 89-5269 (8th Cir. Feb. 2, 1990) (Lay, C.J.) (not applicable for concealment of crime when concealment is element of offense, here embezzlement).

U.S. v. Baker, No. 89-50170 (9th Cir. Jan. 24, 1990) (Schroeder, J.) (rejecting defendant's argument that his misstatements to probation officer regarding his criminal history were immaterial and thus not grounds for enhancement because probation officer could have secured "rap sheet" showing defendant's true criminal past).

U.S. v. Penson, No. 88-2640 (8th Cir. Jan. 12, 1990) (Heaney, Sr. J.) (affirming enhancement for threatening a witness and providing false information that delayed investigation of defendant).

Acceptance of Responsibility (§ 3E1)

U.S. v. Gordon, No. 89-5003 (4th Cir. Feb. 2, 1990) (Wilkins, J.) ("in order for section 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal conduct," not just for count of conviction). *Accord U.S. v. Moskowitz*, 888 F.2d 223 (2d Cir. 1989); *U.S. v. Tellez*, 882 F.2d 141 (5th Cir. 1989). *But cf. U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989) (defendant need only accept responsibility for count to which he pled guilty as part of plea agreement).

U.S. v. Evidente, No. 88-5208 (8th Cir. Jan. 29, 1990) (Bowman, J.) (escape defendant's "past failure to accept responsibility for his criminal conduct, and his demonstrated propensity for flight, properly could be considered by the sentencing court in evaluating" defendant's present claim of acceptance of responsibility).

Criminal History

Calculation

U.S. v. Mackbee, No. 89-50231 (9th Cir. Jan. 23, 1990) (per curiam) ("Section 4A1.1 sentence enhancements apply to sentences that are pending appeal"—if prior conviction reversed defendant "would have the right to petition for resentencing").

U.S. v. McCrudden, No. 89-50246 (9th Cir. Jan. 23, 1990) (per curiam) (not improper to apply U.S.S.G. § 4A1.1(d) enhancement for committing offense while on unsupervised probation for traffic offense).

Criminal Livelihood Provision (§ 4B1.3)

U.S. v. Cianscewski, No. 89-1160 (3d Cir. Jan. 18, 1990) (Becker, J.) (holding version of U.S.S.G. § 4B1.3 in effect before Nov. 1, 1989, "is inapplicable to defendants whose yearly profit from crime is less than 2000 times the hourly minimum wage"; court noted that defendants sentenced after Nov. 1, 1989, are covered by amended guideline, which incorporates same limitation).

Offense Conduct

Drug Quantity

U.S. v. Bishop, No. 89-1221 (8th Cir. Jan. 22, 1990) (Gibson, J.) (weight of LSD includes weight of carrier medium). *Accord U.S. v. Daly*, 883 F.2d 313 (4th Cir. 1989); *U.S. v. Rose*, 881 F.2d 386 (7th Cir. 1989); *U.S. v. Taylor*, 868 F.2d 125 (5th Cir. 1989). *But see U.S. v. Healy*, No. 89-0177 (D.D.C. Jan. 18, 1990) (Gesell, J.) (disagreeing with *Daly*, holding weight of carrier medium should not be included).

Sentencing Procedure

Plea Bargaining

U.S. v. Moya, No. CR3-88-262-D (N.D. Tex. Feb. 1, 1990) (Fitzwater, J.) (court not bound by amount of drugs stipulated to in plea agreement, *see* U.S.S.G. §§ 1B1.3(a), 6B1.4(d), p.s.; in addition, court may not restrict itself to sentencing defendant on amount in plea agreement if relevant facts show larger quantity involved, *see* U.S.S.G. §§ 6B1.2(a), p.s., 2D1.1(a)(3)).

Challenges to Guidelines

U.S. v. Evidente, No. 88-5208 (8th Cir. Jan. 29, 1990) (Bowman, J.) (escape guideline, U.S.S.G. § 2P1.1, adequately distinguishes types of escapes and complies with statutory directive). *See also U.S. v. Medeiros*, 884 F.2d 75 (3d Cir. 1989).

U.S. v. Belgard, No. 88-3173 (9th Cir. Jan. 25, 1990) (Fernandez, J.) (rejecting constitutional challenges to role of probation officers under Guidelines).

U.S. v. Buckner, No. 89-1438 (8th Cir. Jan. 22, 1990) (Sneed, Sr. J.) (holding that "100 to 1 ratio" of cocaine to cocaine base in U.S.S.G. § 2D1.1(c), Drug Quantity Table, does not violate due process or prohibition against cruel and unusual punishment).

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Criminal History

Ninth Circuit limits "application note" to U.S.S.G. § 4A1.2(a)(2), upholds separate counting of convictions for unrelated offenses that were consolidated for sentencing. Defendant had three prior convictions that had been consolidated for sentencing, although the offenses were factually unrelated. Defendant argued the three convictions should be treated as one sentence under § 4A1.2(a)(2) because they were "related cases" according to Application Note 3 of that section: "Cases are considered related if they . . . were consolidated for trial or sentencing." The sentencing court found the cases were not related and counted them separately.

The appellate court affirmed, rejecting "that part of Application Note 3 that suggests that cases consolidated for sentencing are to be deemed related. These application notes are not binding law, they are only advisory commentary to assist in the application of the statute." The court reasoned: "A defendant convicted of multiple unrelated offenses who fortuitously is sentenced for all offenses by one judge at one time would subsequently face less punishment when his points are totalled than another defendant who committed the same crimes but was separately sentenced on successive days or on the same day by different judges. Aside from offending the legislative intent and public policy involved, such a result would be inequitable."

This appears to be the first court to reach this conclusion. Other courts have allowed departures when following Note 3 resulted in a criminal history score that underrepresented the seriousness of a defendant's criminal history. *See, e.g., U.S. v. White*, 893 F.2d 276 (10th Cir. 1990); *U.S. v. Geiger*, 891 F.2d 512 (5th Cir. 1989); *U.S. v. Dorsey*, 888 F.2d 79 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 756 (1990).

U.S. v. Gross, No. 89-10098 (9th Cir. Feb. 27, 1990) (Hall, J.).

Other Recent Cases:

U.S. v. Daddino, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (Williams, J.) (in determining criminal history score for "prior sentence of imprisonment" under U.S.S.G. § 4A1.1, "the court should count the full time in a prior sentence that was 'imposed,' regardless of time served on that sentence," *see* § 4A1.2(b)(1)).

U.S. v. Schweihs, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (Williams, J.) (although conviction that was reversed is not ordinarily counted in criminal history calculation, court will count it here because it was reversed on technical grounds and there was reliable evidence that defendant intended to commit the crime—court distinguished it from actual conviction by assessing only two instead of three criminal history points).

Departures

Second Circuit recommends using multiple counts procedure, U.S.S.G. § 3D1.1–.5, to guide departures based on acts of misconduct not resulting in conviction. Defendant was indicted on six charges relating to an attempt to aid illegal entry of aliens. He pled guilty to one count, and the district court departed upward based on the established facts underlying the counts that were dismissed.

The appellate court remanded, and set forth the procedure the district court should follow in determining the extent of departure in such a situation: "[G]uidance is found initially in the multi-count analysis of sections 3D1.1–.5. Since the Commission carefully constructed a system for aggregating acts of misconduct that result in conviction (or stipulation in connection with a plea), that system must initially be used by a judge contemplating enhanced punishment for acts of misconduct not resulting in conviction, where the acts of misconduct constitute offenses for which guidelines have been established." The court stressed that the resulting calculation provides only initial guidance: "[T]he judge need not depart upward all the way to the aggregate guideline range resulting from that calculation. On the other hand, the judge is not limited to that range in especially serious cases. . . . [A] departure beyond the aggregate guideline range would still be available despite the use of multi-count analysis."

The court found "further guidance" in the structure of the sentencing table. Noting that it has already ruled that courts must refer to the next higher criminal history when departing upward because of an inadequate criminal history score, the court held that "when an offense level is deemed inadequate and a judge is contemplating a 5K departure by moving [in] the sentencing table to a more serious level, the judge should consider the next higher levels in sequence to determine if they adequately reflect the seriousness of the defendant's conduct." The court found this procedure "consistent with the caution we have indicated is appropriate for upward departures."

U.S. v. Kim, No. 89-1221 (2d Cir. Feb. 15, 1990) (Newman, J.).

Third Circuit holds that combination of factors, which by themselves could not support departure, did not justify departure under 18 U.S.C. § 3553(b). Defendant pled guilty to sending a threatening communication through the mail with the intent to extort money. Defendant claimed he was eligible for downward departure under U.S.S.G. § 5K2.13, p.s., "diminished capacity," because he was a compulsive gambler. He also argued that the combination of his gambling addiction and lack of intent to carry out his threats could justify departure.

The appellate court agreed with the district court that no departure was warranted. A condition for departure under § 5K2.13, the court found, is that the offense was non-violent. Defendant's argument—that his crime was non-violent because he did not actually use violence—must fail because "[c]rimes of violence . . . include situations where force is threatened but not used." The court found that compulsive gambling could only be considered a ground for departure under § 5K2.13; because defendant's crime was not non-violent and § 5K2.13 was thus unavailable, compulsive gambling was not a valid ground for departure under the Guidelines.

The court also held that defendant's gambling and lack of intent to carry out his threats—which could not justify departure individually—did not warrant departure even when combined. These factors are not "atypical" such that departure is permitted under 18 U.S.S.C. § 3553(b), and the court concluded that "a combination of typical factors does not present an unusual case" permitting departure under § 3553(b). *See U.S. v. Carey*, 895 F.2d 318 (7th Cir. Jan. 12, 1990) (vacating departure based on "cumulative effect" of factors). *But cf. U.S. v. Mills*, No. 88 CR 956 (S.D.N.Y. Jan. 17, 1990) (combination of "extraordinary circumstances" warranted departure under U.S.S.G. § 5H1.6, p.s.) (3 *GSU* #2).

U.S. v. Rosen, No. 89-5819 (3d Cir. Feb. 21, 1990) (Seitz, Sr. J.).

Substantial Assistance

U.S. v. Wilson, No. 88-5215 (4th Cir. Feb. 21, 1990) (Widener, J.) (when departing pursuant to 18 U.S.C. § 3553(e) "there is no lower limit placed on the court's authority"—the court is not required to impose a sentence of imprisonment but may impose probation).

U.S. v. Rexach, No. 89-1286 (2d Cir. Feb. 20, 1990) (Pratt, J.) (when plea agreement "provides that the prosecutor will move for a downward departure under the sentencing guidelines in return for the defendant's good faith effort to provide substantial assistance, evaluation of defendant's effort lies in the discretion of the prosecutor and may be reviewed only on a showing of prosecutorial misconduct or bad faith," neither of which occurred here; also upholding requirement for government motion in U.S.S.G. § 5K1.1, p.s., against constitutional challenge).

U.S. v. Lewis, No. 88-3030 (7th Cir. Feb. 20, 1990) (Manion, J.) (requirement of government motion in U.S.S.G. § 5K1.1 does not violate statutory mandate in 21 U.S.C. § 994(n) or due process).

Notice

U.S. v. Hernandez, No. 89-1912 (1st Cir. Feb. 22, 1990) (Breyer, J.) (defendant was not deprived of notice because presentence report did not specifically recommend departure—the report contained the information that warranted departure, defendant received the report well before sentencing, and the court allowed argument on the departure at the sentencing hearing). *See also U.S. v. Burns*, 893 F.2d 1343 (D.C. Cir. Jan. 12, 1990) (advance notice of decision to depart not required when facts supporting departure are in PSI and defendant has opportunity to challenge departure at sentencing hearing).

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Rogers, No. 89-5029 (4th Cir. Feb. 26, 1990) (Phillips, J.) (agreeing with *U.S. v. Fossett*, 881 F.2d 976 (11th Cir. 1989), that U.S.S.G. § 5G1.3, requiring imposition of consecutive sentence when offense is committed while defendant is serving unexpired term of imprisonment, may be reconciled with discretion to impose consecutive or concurrent sentences granted in 18 U.S.C. § 3584(a)—reconciliation is achieved by allowing departure when that would be appropriate under the Guidelines or statute). *Cf. U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989) (§ 5G1.3 conflicts with § 3584(a)—courts retain discretion to impose consecutive or concurrent sentences).

Adjustments

Career Offender Provision (§ 4B1.1)

U.S. v. Wallace, No. 89-1547 (8th Cir. Feb. 5, 1990) (Beam, J.) (rejecting claim that due process requires filing of information pursuant to 21 U.S.C. § 851(a)(1) before prior offenses may be used in sentencing defendant as career offender; also holding that "[t]he penalty range under the guidelines for career offenders is neither irrational nor excessive").

Sentencing Procedure

Burden of Proof

U.S. v. Fredericks, No. 89-6009 (10th Cir. Feb. 28, 1990) (McKay, J.) (approving preponderance of evidence standard for sentencing factors, including proof of uncharged criminal conduct).

U.S. v. Rodriguez, No. 89-1527 (6th Cir. Feb. 23, 1990) (Kennedy, J.) ("when a defendant seeks to establish facts which would lead to a sentence reduction under the Guidelines, he shoulders the burden of proving those facts by a preponderance of the evidence"—here, court held government met its burden of proving amount of drugs in offense, and defendant had burden to prove less was involved; court explicitly rejected *U.S. v. Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988) (placing burden of proof of all facts on government)).

Relevant Conduct

U.S. v. Guerrero, No. 89-1359 (7th Cir. Jan. 30, 1990) (Wood, J.) (relevant conduct includes drug transactions of co-conspirators that defendant "was aware of or that he should have reasonably foreseen").

Appellate Review

Overlapping Guideline Ranges

U.S. v. Luster, No. 89-1767 (8th Cir. Feb. 22, 1990) (Henley, Sr. J.) (remanded for resentencing because offense level was incorrectly calculated—although sentence imposed was within corrected guideline range, district court sentenced at bottom of what it thought was applicable guideline range and "might very well have sentenced the defendant to fewer months imprisonment" had it known correct range). *Accord U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989); *U.S. v. Bermingham*, 855 F.2d 925 (2d Cir. 1988).

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Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit upholds downward departure based on unusual personal circumstances, notwithstanding U.S.S.G. §§ 5H1.5 and 5H1.6, p.s. Defendant, an American Indian living on a reservation, was convicted of two assault counts. The guideline range was 37–46 months, but the district court departed to impose a 24-month term, citing defendant's intoxication at the time of the offense, lack of prior criminal record, excellent employment history, consistent efforts to overcome the adverse living conditions on the reservation, and numerous letters of support from the community. The government appealed.

The appellate court found that two of the reasons given for departure—intoxication and lack of a prior record—were adequately accounted for by the Guidelines and were not proper grounds for departure. The court held, however, that the other reasons given by the district court "are appropriate and are supported by the record." While recognizing that "Guideline policy statements indicate that previous employment record and family ties and responsibilities and community ties are 'not ordinarily relevant in determining whether a sentence should be outside the guidelines,'" see U.S.S.G. §§ 5H1.5, 5H1.6, p.s., the court concluded that defendant's "case presents mitigating circumstances in these areas of a magnitude 'not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.' *See* 18 U.S.C. § 3553(b).... We believe that the district court acted within its discretion in sentencing [defendant] below the Guideline range, and that [defendant's] excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment are sufficiently unusual to constitute grounds for a departure from the Guidelines."

This appears to be the first reported appellate court decision specifically upholding a departure based on factors that § 5H1 states are "not ordinarily relevant" in sentencing. The Sixth Circuit, without discussing § 5H1, has remanded a case after finding the district court mistakenly believed it could not consider a defendant's efforts to avoid drugs as a basis for downward departure. *U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). *But cf. U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (vacating downward departure that was based on the "cumulative effect" of various personal circumstances, including defendant's age and physical condition, §§ 5H1.1, 5H1.4, p.s.).

U.S. v. Big Crow, No. 89-5275 (8th Cir. Mar. 7, 1990) (Heaney, Sr. J.).

CRIMINAL HISTORY

Eleventh Circuit holds departures based on post-plea conduct should be guided by procedure in U.S.S.G. § 4A1.3, using appropriate criminal history category as reference. Defendant pled guilty to bribing a Florida public official. While free on bond pending sentencing he was charged with a similar offense in Virginia, and with possession of a firearm by a convicted felon. The latter charges were transferred to Florida, but were not consolidated with the bribery offense and defendant did not plead guilty to them until after sentencing for the bribery charge. For the bribery offense the district court determined departure was warranted because of the second, similar offense, and imposed a 42-month sentence, double the top of the guideline range. The firearm offense was not considered.

The appellate court remanded, finding that the district court made an "unguided departure" pursuant to U.S.S.G. § 5K2.0, p.s., when it should have used the procedure for criminal history departures set forth in § 4A1.3. Noting that the Guidelines "do not explicitly address the manner in which post-plea offenses should be factored into the guidelines sentencing process," the court held "that Guidelines § 4A1.3 is controlling where, as here, a departure involves post-plea offenses." The court reasoned that "[p]ost-plea offenses, no less than offenses which occur prior to the entry of a plea, implicate the concerns which led to the creation of a criminal history category with guided departure provisions."

The court also concluded that using the § 4A1.3 procedure for post-plea offenses would help avoid disparate treatment of defendants. Here the 42-month sentence was twice the upper limit of the guideline range, whereas if defendant had been convicted of both post-plea offenses before sentencing on the bribery charge, accounting for those offenses in his criminal history instead of departing would have resulted in a maximum sentence of 27 months. The court held that following § 4A1.3, rather than allowing unguided departures under § 5K2.0, "is in keeping with the aims of guideline sentencing" to limit disparity in sentencing.

U.S. v. Fayette, No. 89-5306 (11th Cir. Mar. 8, 1990) (Hatchett, J.).

AGGRAVATING CIRCUMSTANCES

Sixth Circuit holds district court may not use self-incriminating information as basis for departure if U.S.S.G. § 1B1.8 applies to the plea agreement. Defendant pled guilty to a firearms charge, and the district court departed upward because of the dangerousness of the weapon and

defendant's involvement with drugs. The departure decision was based, in part, on incriminating information the defendant provided pursuant to the plea agreement.

The appellate court remanded for consideration of whether U.S.S.G. § 1B1.8 applied to this plea agreement. Section 1B1.8 prohibits a court, in setting the guideline range, from using self-incriminating information given by a defendant to the government. The court held that "if information under § 1B1.8, or its equivalent in the form of a plea agreement, was not to be used 'in determination of the applicable guideline range,' then it certainly should not be used by the district court to depart and to enhance the sentence." The sentencing court must "set out with particularity the extent to which he considered, if at all, information given which might be subject to § 1B1.8(a) limitations in respect to the departure."

On other issues relating to the departure, the court determined that "the nature of the firearm, whether it is automatic and intended to be used in the drug trade," and defendant's involvement in the crack cocaine trade, are factors that may warrant departure, but the fact that defendant came from out of town to engage in the local drug trade is not.

U.S. v. Robinson, No. 88-4020 (6th Cir. Mar. 13, 1990) (Wellford, J.).

Substantial Assistance

Third and Eleventh Circuits hold substantial assistance departure may not be made absent government motion, but that evidence of cooperation may be considered in sentencing within guideline range. The Third Circuit held that "the district court was without power to depart" under U.S.S.G. § 5K1.1, p.s., "in the absence of a government motion based on defendant's cooperation." Citing 18 U.S.C. § 3661, however, the court remanded for resentencing because "the district court was required to consider defendant's cooperation when sentencing within the guideline range, though it retained discretion as to whether to give effect to that cooperation."

The Eleventh Circuit held that the "plain language" of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, p.s., makes it clear that "without a motion by the Government requesting a departure, the district court may not depart from the guidelines on the ground of substantial assistance." Such assistance may, however, be considered under U.S.S.G. § 1B1.4 in determining what sentence to impose within the guideline range.

U.S. v. Bruno, No. 89-3512 (3d Cir. Mar. 6, 1990) (Seitz, Sr. J.).

U.S. v. Alamin, No. 88-3919 (11th Cir. Mar. 8, 1990) (Tjoflat, C.J.).

Adjustments

Role in the Offense

U.S. v. Tetzlaff, No. 89-2175 (7th Cir. Feb. 28, 1990) (Cummings, J.) (U.S.S.G. § 3B1.1(c) applies only to offense of conviction, not to other "relevant conduct"—adjustment for managerial status was improper where defendant was sole participant in offense of conviction). *Accord U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989).

Multiple Counts

U.S. v. Egson, No. 89-2418 (8th Cir. Feb. 28, 1990) (per curiam) (district court properly found offenses of cocaine distribution and illegal acquisition of food stamps were not "closely related" so as to require grouping under U.S.S.G. § 3D1.2, even though they arose from the same transaction—the "offenses involved separate and distinct societal interests and thus were not required to be grouped together as closely-related counts under section 3D1.2").

Appellate Review

Review of Departures

U.S. v. Lira-Barraza, No. 88-5161 (9th Cir. Feb. 28, 1990) (George, Dist. J.) (setting forth five-step procedure for review of departures: "(1) whether the district judge adequately identified the 'aggravating or mitigating circumstance' (hereinafter 'circumstance'); (2) whether the identified circumstance actually existed; (3) whether the circumstance was adequately taken into consideration by the Sentencing Commission; (4) if not, whether the circumstance should result in departure; and, (5) whether the extent or degree of departure was unreasonable").

Holding refusal to depart downward is not appealable: *U.S. v. Bayerle*, No. 89-5166 (4th Cir. Mar. 9, 1990) (Butzner, Sr. J.); *U.S. v. Morales*, No. 89-10168 (9th Cir. Mar. 5, 1990) (Skopil, Sr. J.); *U.S. v. Waldrop*, No. 89-5671 (6th Cir. Feb. 28, 1990) (per curiam) (unpub. disp.).

Holding defendant may not appeal extent of downward departure: *U.S. v. Pighetti*, No. 89-1357 (1st Cir. Mar. 2, 1990) (Selya, J.); *U.S. v. Wright*, No. 88-3948 (11th Cir. Mar. 1, 1990) (per curiam).

Criminal History

U.S. v. Schweihs, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (Williams, J.) (holding that ties to organized crime, absent "specific acts leading to some kind of [criminal] adjudication," do not support departure under U.S.S.G. § 4A1.3(e); however, in this case defendant's proven connection to organized crime warrants a departure under 18 U.S.C. § 3553(b) because he "used that association to carry out the crimes of which he has been convicted"—court analogized use of those ties to use of a weapon, and calculated the length of departure by reference to the specific offense characteristic increase for use of a firearm in the guideline for the offense of conviction).

Offense Conduct

U.S. v. Gaddy, No. 89-8223 (11th Cir. Feb. 20, 1990) (Tuttle, Sr. J.) (offense level increase in U.S.S.G. § 2A4.1(b)(4)(A), for kidnapping victim not released within 30 days, may be applied when victim was murdered within 24 hours; court also noted departure under U.S.S.G. § 5K2.1, p.s., death of victim, would have been appropriate).

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VOLUME 3 • NUMBER 5 • APRIL 5, 1990

Determining the Sentence

CONSECUTIVE OR CONCURRENT SENTENCES

Third Circuit holds sentence for crimes committed on parole may run concurrently or consecutively to unexpired term for parole violation. Defendant pled guilty to several crimes he committed while on parole, and his sentence for those offenses was made consecutive to the unexpired term he had to serve when his parole was revoked. The district court found it was compelled to make the terms consecutive under U.S.S.G. § 5G1.3 (1987), which stated, in part, "[i]f at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences . . . ."

The appellate court remanded for resentencing, holding that § 5G1.3 conflicted with 18 U.S.C. § 3584(a) and district courts retain the discretion to impose consecutive or concurrent sentences granted in § 3584(a). *Accord U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989). The court noted that the recent amendment to § 5G1.3, effective Nov. 1, 1989 (after defendant was sentenced), would not prohibit concurrent sentences in a case like this where the offenses were committed while defendant was on parole. The court also distinguished *U.S. v. Fossett*, 881 F.2d 976 (11th Cir. 1989), finding that the facts of that case—defendant was sentenced for escape from a federal correctional facility while serving a term of imprisonment—"carry different sentencing ramifications." *Cf. U.S. v. Rogers*, 897 F.2d 134 (4th Cir. 1990) (agreeing with *Fossett* that § 5G1.3 may be reconciled with § 3584(a) by allowing departure to concurrent sentence when appropriate).

U.S. v. Nottingham, No. 89-5553 (3d Cir. Mar. 19, 1990) (Scirica, J.).

Departures

CRIMINAL HISTORY

U.S. v. Keys, No. 89-6104 (10th Cir. Mar. 30, 1990) (Tacha, J.) (holding "that a prison disciplinary record may, in appropriate situations, be a proper basis for an upward departure" under U.S.S.G. § 4A1.3, p.s.).

U.S. v. Harvey, No. 89-1476 (5th Cir. Mar. 26, 1990) (Johnson, J.) (affirming upward departure on basis of inadequate criminal history score from 18–24 month range to statutory maximum of 60 months, despite failure of district court to first consider next higher criminal history category or to explain why that was inadequate; court distinguished *U.S. v. Lopez*, 871 F.2d 515 (5th Cir. 1989) (error to bypass guidelines and not consider next higher criminal history category), because "*Lopez* was confined to those cases where a defendant's criminal history category is low"—here, defendant was in category V).

U.S. v. Allen, No. 89-3095 (D.C. Cir. Mar. 20, 1990) (per curiam) (when departing because of inadequate criminal history score, "district court should (1) identify the correct Guidelines category, (2) consider whether upward adjustment within the Guidelines criminal history categories is inadequate and, if such adjustment is inadequate, (3) state why a sentence longer than one allowed by the top criminal history category is in order").

U.S. v. Carey, No. 89-5298 (8th Cir. Mar. 14, 1990) (McMillian, J.) (affirming departure above statutory minimum for defendant convicted of possessing a firearm as a convicted felon—defendant's sentence was enhanced under 18 U.S.C. § 924(e)(1) to a minimum of 15 years, superseding the guideline range of 27-33 months, *see* U.S.S.G. § 5G1.1(b), but court imposed 19-year sentence because of the seriousness of defendant's prior offenses and because two prior convictions for the same type of offense failed to deter him).

MITIGATING CIRCUMSTANCES

U.S. v. Hays, No. 89-5029 (6th Cir. Mar. 29, 1990) (Brown, Sr. J.) (remanding because district court erred in departing downward for career offender based on small amount of drugs and non-violent criminal history—these factors were considered by Commission in formulating U.S.S.G. § 4B1.1 and could not be used as mitigating circumstances warranting departure).

U.S. v. Brewer, No. 89-5371 (6th Cir. Mar. 29, 1990) (Wellford, J.) (remanding because reasons for downward departure to home detention and probation for embezzlement defendants—degree of community support, continued community involvement, family ties, degree of remorse and promptness of restitution, aberrant nature of conduct, no useful purpose for incarceration, and victim's recommendation of clemency—were adequately considered by Sentencing Commission; court directed that possible aggravating factors should be considered on remand and noted Commission's concern that white-collar criminals be treated no differently from others).

AGGRAVATING CIRCUMSTANCES

U.S. v. Chiarelli, No. 89-3563 (3d Cir. Mar. 14, 1990) (Cowen, J.) (proper to depart upward pursuant to U.S.S.G. § 5K2.14, p.s., on basis of threat to public safety caused by

defendants' high-speed escape attempt through crowded urban area—offense guideline, § 2B1.2, does not account for this risk of harm from receiving stolen property; improper to depart under § 5K2.0, p.s., on basis of "the magnitude of the thievery" because that is accounted for in § 2B1.2(b)(1)).

U.S. v. Guarin, No. 89-3278 (6th Cir. Mar. 14, 1990) (Boggs, J.) (affirming upward departure—extent of defendant's cocaine dealing and his dependence on dealing for livelihood were not reflected in base offense level, *see* U.S.S.G. § 5H1.9, p.s.).

U.S. v. Bates, No. 89-2558 (5th Cir. Mar. 7, 1990) (Politz, J.) (affirming upward departure for bank robbers who, during escape attempt, briefly took elderly man hostage, commandeered several vehicles at gunpoint, invaded peoples' homes to get vehicles, and fired upon pursuing law enforcement officials).

Criminal History

Calculation

U.S. v. Lewis, No. 89-6122 (6th Cir. Mar. 21, 1990) (Milburn, J.) (proper to apply U.S.S.G. § 4A1.1(d), adding two criminal history points for committing offense while under criminal justice sentence, to defendant convicted of failure to report, U.S.S.G. § 2J1.6).

U.S. v. Jimenez, No. 89-2142 (7th Cir. Mar. 12, 1990) (Wood, J.) (agreeing with five other circuits that U.S.S.G. § 4A1.1(d) and (e) may be applied to escapee).

U.S. v. Bucaro, No. 89-3483 (3d Cir. Mar. 14, 1990) (Hutchinson, J.) (rejecting due process and ex post facto challenges to use of defendant's prior adjudications of juvenile delinquency under state law in determining criminal history score, U.S.S.G. § 4A1.2(d)(2)). *See also U.S. v. Kirby*, 893 F.2d 867 (6th Cir. 1990) (per curiam) (juvenile convictions may be considered); *U.S. v. Williams*, 891 F.2d 212 (9th Cir. 1989) (not a violation of due process to use juvenile conviction even though there was no right to jury trial in juvenile adjudication).

Adjustments

Role in the Offense

U.S. v. Fuller, No. 89-1880 (1st Cir. Mar. 12, 1990) (Campbell, C.J.) (reversing as clearly erroneous finding that defendant who pled guilty to conspiracy to distribute marijuana qualified for adjustment as "an organizer, leader, manager, or supervisor" under U.S.S.G. § 3B1.1(c): "The evidence indicated that [defendant] did not rely on the assistance of others, but instead engaged in a number of private drug distributions, in which he essentially did all the work himself. ... [I]n the absence of any evidence that [defendant] exercised control over these persons or was otherwise responsible for organizing them in the commission of the offense, the mere fact that [defendant] had dealt with a large quantity of marijuana does not support a finding that he was an organizer, leader, supervisor, or manager").

Acceptance of Responsibility

U.S. v. Cross, No. 89-1865 (6th Cir. Mar. 27, 1990) (per curiam) (affirming denial of acceptance of responsibility reduction because defendant refused to provide financial information necessary to assess his ability to pay a fine).

Victim-Related Adjustments

U.S. v. Moree, No. 89-4204 (5th Cir. Mar. 29, 1990) (Clark, C.J.) (victim of obstruction of justice offense was not "unusually vulnerable," U.S.S.G. § 3A1.1, to defendant's scheme to "fix" victim's criminal case when his "only particular susceptibility to the crime was his prior indictment" and not age or unusual physical or mental problems).

Relevant Conduct

U.S. v. Moreno, No. 89-1150 (6th Cir. Mar. 27, 1990) (Guy, J.) (remanding for resentencing: district court erred in calculating base offense level for drug conspirators by using amount in jury verdict, 500 or more grams of cocaine, "despite the fact that the court found by a preponderance of the evidence that the conspiracy involved over five kilograms"; 21 U.S.C. § 841(b), under which defendants were sentenced, "sets forth penalty provisions only and not separate 'lesser included' offenses. As such, the sentencing judge, not the jury, has the prerogative to make a determination of the quantity of drugs involved in the scheme and to sentence accordingly") (*rev'g in part* 710 F. Supp. 1136 (E.D. Mich. 1989) [2 *GSU* #1]).

U.S. v. Alston, No. 88-8802 (11th Cir. Mar. 8, 1990) (Hill, Sr. J.) (proper to consider quantities of drugs not included in count of conviction: "We hold that the district court was correct in considering the total quantity of cocaine involved in the 'same course of conduct or common scheme or plan as the offense of conviction' under Sentencing Guidelines § 1B1.3(a)(2). In so doing, we join six out of seven circuits that have addressed this question"; proof is by a preponderance of evidence).

Offense Conduct

U.S. v. Roberts, No. 88-2125 (10th Cir. Mar. 15, 1990) (Seymour, J.) (upholding sentence pursuant to U.S.S.G. § 1B1.2(a) because plea established more serious offense than offense of conviction; rejecting claim that § 1B1.2(a) is "unconstitutionally vague" because it does not define "more serious offense").

Challenges to Guidelines

U.S. v. Foote, No. 89-1715 (8th Cir. Mar. 15, 1990) (Bowman, J.) (rejecting claim that Guidelines are invalid because prosecutor has discretion either to charge use of a firearm in the commission of a drug offense as substantive offense under 18 U.S.C. § 924(c), which requires mandatory minimum sentence of five or ten years consecutive to any other term, or to charge the firearm use "merely" as specific offense characteristic that would enhance sentence for drug trafficking offense, *e.g.*, U.S.S.G. § 2D1.1(b)(1)).

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VOLUME 3 • NUMBER 6 • APRIL 27, 1990

Departures

Ninth Circuit holds extent of departure should be guided by analogy to relevant guidelines, not by comparison to pre-Guidelines sentencing practices. Defendant pled guilty to eight counts of bank robbery and attempted bank robbery. Under the multiple counts guideline, U.S.S.G. § 3D1.4, his offense level was increased five levels for having more than five offense units, resulting in a guideline range of 51–63 months. The district court departed and imposed a 120-month sentence because of the number of offenses, *see* § 3D1.4, comment. (backg'd). The court identified the reason for departure by referring to the presentence report's explanation of its recommendation for departure, and stated that the extent of departure was based on a comparison to a sentence it had imposed in a pre-Guidelines robbery case.

The appellate court held that departure was warranted, and that incorporating the presentence report in the statement of reasons adequately identified the aggravating circumstance. The court held, however, that the extent of departure was unreasonable for two reasons. First, the district judge had "indicated that the departure was determined at least in part by his own sentencing history prior to the guidelines. This perpetuates the kind of sentencing disparity between individual judges that the guidelines were designed to avoid.... It was inappropriate for the district judge to refer to his pre-guidelines sentencing habits in setting the amount of departure."

Second, the court determined that the Sentencing Commission intended district courts to guide departures by analogy to relevant guidelines when possible, and found that by analogy to § 3D1.4 the district court could have added one offense level for each of the uncounted robberies, resulting in a range of 63–78 months. The court held the 120-month sentence "so greatly exceeds the amount suggested by analogy that the amount of departure is unreasonable." The court noted that it did "not imply that a departure by analogy always must be on a strict proportional basis to the guidelines sentence. Factors other than the number of offenses may be considered, ... [and t]here may be many other factors justifying results different from those derived by analogy.... We hold only that, based on the legitimate factors mentioned by the district judge in his initial sentencing, 120 months is unreasonable."

U.S. v. Pearson, No. 89-50117 (9th Cir. Apr. 6, 1990) (Boochever, Sr. J.).

Seventh Circuit outlines procedure for extent of departure when Criminal History Category VI is inadequate; also recommends imposition of consecutive sentences, when appropriate, in lieu of departure. Defendant pled guilty to one count of dealing in firearms without a license and one count of being a felon in possession of a firearm. His criminal history put him in category VI, and the guideline range was 21-27 months. Finding that defendant's criminal history category underrepresented the seriousness of his criminal past, the district court departed to give 60-month terms on each count, concurrent with each other and a state sentence defendant was serving.

The appellate court held that the extent of departure was unreasonable, and in remanding gave instructions on how to calculate the degree of departure: "For any given offense level, the Guidelines sentencing range increases roughly ten to fifteen percent from one Criminal History Category to the next higher category. In the case of a Category VI defendant, a sentencing judge can use this ten to fifteen percent increase to guide the departure. For example, if the grounds justifying a conclusion that Category VI is inadequate would normally have warranted a one category increase ..., the sentencing judge should consider sentencing the defendant within a range ten to fifteen percent higher than the range corresponding to Criminal History Category VI." The court found that the one valid aggravating circumstance in this case did not warrant the departure to more than double the top of the guideline range.

In remanding, the court also noted that the district court should consider imposing consecutive sentences, pursuant to its discretion under 18 U.S.C. § 3584(a) and U.S.S.G. § 5G1.3 (Nov. 1989), instead of departing: "While district courts are given broad discretion on whether to impose consecutive or concurrent sentences, we urge them to refrain from departing upward from the Guidelines and then imposing the sentence concurrent with an unexpired sentence if they can accomplish the same length of incarceration by sentencing within the Guideline range and imposing the sentence to run consecutive to an unexpired sentence."

U.S. v. Schmude, No. 89-1478 (7th Cir. Apr. 9, 1990) (Kanne, J.).

Sixth Circuit holds conduct in dismissed count was not proper ground for departure, but rather relevant conduct that should have been used to calculate offense level. Defendant pled guilty to conspiracy to maintain a "crack house." A second count, dropped as part of the plea agreement, charged defendant with unlawful possession with intent to distribute crack and cocaine within 1,000 feet of a school, an offense subject to enhanced penalties. The district court departed, sentencing defendant to 96 months instead of within the guideline range of 41–51 months. The court based the departure on the conduct in the dismissed offense and, citing

U.S.S.G. § 5K2.14, p.s., "the extreme threat to society" posed by crack.

The appellate court remanded, holding the district court erred when "it considered the location of the crack house as a justification for an upward departure when it should have considered this conduct in calculating the defendant's base offense level. The guidelines are clear that conduct other than that for which the defendant has been convicted may be considered by the court in determining the appropriate sentencing range. . . . The operation of this crack house close to two schools clearly is 'conduct that was part of the same course of conduct' as the conspiracy."

"Consideration of the location of the crack house in this case implicates section 2D1.3 of the guidelines, which provides that the base offense level is to be calculated 'corresponding to double the drug amount involved . . . for distributing or manufacturing a controlled substance . . . within 1000 feet of a schoolyard.' That is, the consequence in this case of considering the location of the crack house is to double the quantity of drugs considered in calculating the base offense level."

The court also held that the dangers involved in running crack houses had been adequately considered by the Sentencing Commission in formulating the Guidelines, and therefore departure was not warranted under § 5K2.14, p.s.

U.S. v. McDowell, No. 89-3345 (6th Cir. Apr. 13, 1990) (Guy, J.).

Criminal History

U.S. v. Cantu-Dominguez, No. 89-2346 (5th Cir. Apr. 6, 1990) (Reavley, J.) ("a history of arrests that did not result in convictions . . . is not the type of 'reliable information' that justifies a departure" under U.S.S.G. § 4A1.3).

Notice

U.S. v. Anders, No. 89-5465 (6th Cir. Apr. 4, 1990) (Keith, J.) (notice requirement satisfied when presentence report specifieally identifies factors warranting departure or court advises defendant it is considering departure based on particular factors and allows defense counsel opportunity to comment).

Adjustments

Acceptance of Responsibility

U.S. v. Fleener, No. 89-5474 (6th Cir. Apr. 9, 1990) (Suhrheinrich, Dist. J.) (not error to allow acceptance of responsibility reduction, U.S.S.G. § 3E1.1, for defendant who raised entrapment defense at trial).

Determining the Sentence

Probation

U.S. v. Delloiacono, No. 89-1847 (1st Cir. Apr. 12, 1990) (Cyr, Dist. J.) (remanding sentence of probation conditioned on 1,000 hours of community service—defendant's guideline range required that a sentence of probation be coupled with some form of intermittent confinement, and community service cannot be substituted for confinement, *see* U.S.S.G. §§ 5C1.1(c)(2), 5C1.1(e)).

Sentencing Procedure

U.S. v. Rodriguez-Gonzalez, No. 89-1346 (2d Cir. Mar. 27, 1990) (Feinberg, J.) (conduct that is the subject of a prior acquittal may be used to justify sentencing enhancement under the Guidelines, here an enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of weapon during drug offense after acquittal under 18 U.S.C. § 924(c)). *Accord U.S. v. Mocciola*, 891 F.2d 13 (1st Cir. 1989). *See also U.S. v. Isom*, 886 F.2d 736 (4th Cir. 1989) (acquitted offense used for counterfeiting guideline enhancement); *U.S. v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam) (used for departure); *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989) (departure).

U.S. v. Luna, No. 89-00024-P (D. Me. Mar. 23, 1990) (Carter, C.J.) (agreeing with *U.S. v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990), that reliable evidence from a trial to which defendant was not a party may be used to determine drug quantity for sentencing purposes). *Contra U.S. v. Castellanos*, 882 F.2d 474 (11th Cir. 1989); *U.S. v. Chandler*, 894 F.2d 463 (D.C. Cir. 1990) (table, unpublished disposition).

Appellate Review

U.S. v. Lang, No. 89-1464 (8th Cir. Mar. 28, 1990) (Hunter, Sr. Dist. J.) (joining Sixth and Tenth Circuits in adopting three-step procedure for review of departures in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989)).

Relevant Conduct

U.S. v. Rivera, No. 89-1843 (5th Cir. Apr. 3, 1990) (Jolly, J.) (remanding for determination whether quantity of drugs sold by co-defendants should be attributed to defendant: "In the absence of a finding that [defendant] knew or should have known of the distribution of heroin by his co-defendants, or in the absence of a joint undertaking or plan, the quantities of heroin distributed by persons other than [defendant] should not have been included in the calculation of his base offense level."). *See also North, infra* (reversing use in base offense level calculation of drug quantity that co-conspirator had obtained and sold without knowledge of or benefit to defendant).

Offense Conduct

Weapons Possession

U.S. v. North, No. 89-1870 (8th Cir. Apr. 2, 1990) (Lay, C.J.) (reversing adjustment for possession of firearms during commission of drug offense, U.S.S.G. § 2D1.1(b)(1): one weapon was inoperable replica of nineteenth century revolver, the others belonged to defendant's son and it was "clearly improbable" they were connected with offense).

Note: The Ninth Circuit has withdrawn *U.S. v. Restrepo*, 883 F.2d 781 (9th Cir. 1989) (conduct not resulting in conviction may not be used in setting base offense level) (2 *GSU* #12), and granted rehearing. *See* 47 CrL 1015 (1990).

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Relevant Conduct

Ninth Circuit reissues *Restrepo* opinion. The Ninth Circuit has withdrawn its earlier opinion in *U.S. v. Restrepo*, 883 F.2d 781 (9th Cir. 1989) (2 *GSU* #12), and held that quantities of drugs in counts on which a defendant is not convicted may be used to set the offense level: "The Sentencing Commission's intent is clear: Amounts of drugs calculated on the basis of conduct of which the defendant is neither charged nor convicted but that were 'part of the same course of conduct or common scheme or plan as the offense of conviction' may properly be used to adjust the offense level."

The court also agreed with other circuits that "the standard of proof required for factors enhancing a sentence is a preponderance of evidence," but found that a "more demanding interpretation of the preponderance standard is particularly appropriate for enhancement of a sentence under the Guidelines." Thus, the court held "that when a preponderance of the evidence standard is used in criminal sentencing to increase the period of confinement, it means a sufficient weight of evidence to convince a reasonable person of the probable existence of the enhancing factor."

U.S. v. Restrepo, No. 88-3207 (9th Cir. May 8, 1990) (Boochever, Sr. J.).

Departures

Aggravating Circumstances

Seventh Circuit recommends approaches to calculating extent of departures based on seriousness of crime. Defendant was convicted of drug and firearms offenses. The district court departed from the guideline range of 41–51 months to a 120-month term. The court found departure was warranted because defendant's criminal history category underrepresented the seriousness of his criminal history and likelihood of future criminal activity, and because the offenses of conviction—selling two guns and 5.83 ounces of cocaine—understated the seriousness of defendant's criminal activity, a large-scale fencing operation in which stolen guns were frequently purchased with cocaine.

In remanding because the district court failed to explain why it selected 120 months, the appellate court stressed that "[e]very departure must be 'reasonable' in extent" and courts should attempt to "link the extent of departure to the structure of the guidelines." The court referred to procedures for computing criminal history departures, *see* U.S.S.G. § 4A1.3, p.s. ("use, as a reference, the guideline range for a defendant with a higher or lower criminal history category"); *U.S. v. Schmude*, — F.2d — (7th Cir. Apr. 6, 1990) (suggesting increases in 10-15% increments if category VI is inadequate), and concluded that a similar approach "should be used for departures based on the seriousness of the crime . . . . In departing the judge should compare the seriousness of the aggravating factors at hand with those the Commission considered. Congress prescribed the method of analogy for crimes without guidelines, 18 U.S.C. § 3553(b), and it is equally appropriate for crimes with guidelines but without sufficient detail in the lists of aggravating and mitigating circumstances. So if possessing a gun during a sale elevates the offense by two levels, the judge might conclude that buying a gun with drugs elevates the offense by four levels, an upward 'departure' of two levels." *But cf. U.S. v. Rodriguez-Castro*, No. 89-50093 (9th Cir. May 10, 1990) (Hall, J.) (citing *Montenegro-Rojo, infra*, upholding upward departure and finding that "a district court need not justify the amount of its sentence by explicit analogy," although court "urge[d] district courts to fully explain the reasons for the degrees of their departures").

The court also suggested that "[a]n alternate method of computing upward departures is to treat the aggravating factor as a separate crime and ask how the defendant would be treated if convicted of it. . . . *See United States v. Kim*, 896 F.2d 678, 684–86 (2d Cir. 1990), recommending this analogy to the grouping rules as the standard way to determine the amount of departure." The court found that doing so in this case would result in a guideline range of 70–87 months. The court emphasized that "[s]ince this is what [defendant] would have received had he been convicted of fencing, a 'departure' should not exceed this level. It would throw the structure of the guidelines out of kilter to say that a defendant may receive more time on a 'departure' than he could have received had he been convicted of the crime leading the judge to depart."

U.S. v. Ferra, No. 89-1507 (7th Cir. Apr. 24, 1990) (Easterbrook, J.).

Other Recent Cases:

U.S. v. Hawkins, No. 89-6192 (10th Cir. Apr. 20, 1990) (Moore, J.) (District court departed upward, finding that bank robbery defendant's false claim of possessing a weapon and threat to kill teller were aggravating circumstances. Appellate court remanded, holding that threat or intimidation is an element of the offense of robbery and that "use of a weapon [under U.S.S.G. § 5K2.6, p.s.] does not include claimed possession of a nonexistent weapon," *see also U.S. v. Coe*, 891 F.2d 405 (2d Cir. 1989). District court also departed pursuant to § 5K2.9, based on defendant's admitted crack

habit, but appellate court held "fact that defendant has an addiction, without more, does not suggest a connection between the charged offense and additional criminal conduct to which § 5K2.9 applies." Departure based on fact defendant "narrowly missed" career offender status also vacated: "One is either a career offender or one is not. No allowance is made for 'close cases.' ... It is not a province of district judges to elasticize the constraints within which that definition exists.").

U.S. v. Bennett, No. 89-30130 (9th Cir. Apr. 11, 1990) (Canby, J.) (affirming upward departure for defendant convicted of using telephone to facilitate distribution of cocaine, from 8–14 month range to 24 months, based on "unusually large quantity of cocaine"—fact that offense level for crime is not correlated to quantity of drug does not preclude departure based on large amount of drug in underlying offense). *Accord U.S. v. Williams*, 895 F.2d 435 (8th Cir. 1990); *U.S. v. Crawford*, 883 F.2d 963 (11th Cir. 1989); *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988).

U.S. v. Pridgen, No. 89-6086 (5th Cir. Apr. 6, 1990) (Jones, J.) (upholding departure from 41–51 month range to 97 months for robbery defendant who, as part of plea bargain to dismiss a separate charge of kidnapping during robbery, had stipulated to that conduct—the four-level enhancement for kidnapping during bank robbery, U.S.S.G. § 2B3.1(b)(4), "does not ... take into account the uniquely severe punishment prescribed by Congress" for such an offense, namely a ten-year minimum, and is "inadequate to reflect the seriousness of the conduct" in this case, *see* 18 U.S.C. § 3553(b)).

U.S. v. Gomez, No. 89-50254 (9th Cir. Apr. 2, 1990) (Boochever, Sr. J.) (affirming departure to 24 months from 1–7 month range for defendant convicted of transporting illegal aliens because of "dangerous and inhumane" treatment of the aliens—seven adults and one child were placed in small sealed compartment over exhaust system in van).

Mitigating Circumstances

U.S. v. Alvarez-Cardenas, No. 89-30060 (9th Cir. Apr. 27, 1990) (Fernandez, J.) (rejecting defendant's claim that possible deportation warranted downward departure—"possibility of deportation is not a proper ground for departure"). *Cf. U.S. v. Ceja-Hernandez*, 895 F.2d 544 (9th Cir. 1990) (per curiam) (reversing upward departure based on anticipated deportation after release).

Criminal History

U.S. v. Montenegro-Rojo, No. 89-50134 (9th Cir. Apr. 12, 1990) (Hall, J.) (holding that, under abuse of discretion standard for review of the extent of a departure announced in *U.S. v. Lira-Barraza*, 897 F.2d 981 (9th Cir. 1990), "a district court's departed sentence may reasonably be higher than any sentence authorized by an adjacent criminal history category without the court having to explain why a sentence within the adjacent category would not have sufficed. ... [T]he district court's failure to explain in any detail why it departed as much as it did ... does not by itself constitute a sufficient ground for resentencing"; also, disciplinary problems during prior prison term may provide basis for departure, *accord U.S. v. Keys*, 899 F.2d 1000 (10th Cir. 1990)).

Adjustments

Role in Offense

U.S. v. DeCicco, No. 89-2080 (7th Cir. Apr. 20, 1990) (Flaum, J.) (reversing finding that defendant, who "organized" unknowing participants in fraud scheme, qualified for enhancement under U.S.S.G. § 3B1.1(c) as an "organizer, supervisor or manager in any criminal activity": "[W]e find that the Sentencing Commission intended § 3B1.1 to apply only to situations where the offender organizes or leads criminally responsible individuals"). *Accord U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1990). *But see U.S. v. Anderson*, 895 F.2d 932 (9th Cir. 1990) (§ 3B1.1(c) applicable when codefendant tricked into offense).

Determining the Sentence

Sentencing Factors

U.S. v. Duarte, No. 89-30136 (9th Cir. Apr. 27, 1990) (Alarcon, J.) ("[D]istrict court may, but need not, consider the defendant's character as described in letters to the court or probation office as a basis for finding a sentence within the Guideline range"—concluding that U.S.S.G. § 5H1.6, p.s., Family Ties and Responsibilities, and Community Ties, applies to departures, not to adjustments within the guideline range, and 18 U.S.C. §§ 3553 and 3661 allow use of such information in sentencing).

Restitution

U.S. v. Owens, No. 89-1819 (8th Cir. Apr. 24, 1990) (McMillian, J.) (remanding order of restitution because district court thought restitution was mandatory—although U.S.S.G. § 5E1.1 states that restitution "shall be ordered ... in accordance with 18 U.S.C. § 3663(d)," this language "require[s] only that restitution orders be imposed in accordance with the [Victim and Witness Protection Act] and not that restitution shall be ordered in every case"; also, indigency does not bar a restitution order, but courts should make specific findings as to indigent's ability to pay).

Criminal History

Career Offender Provision

U.S. v. Rivers, No. S 89-0396 (D. Md. Apr. 9, 1990) (Smalkin, J.) (holding, pursuant to U.S.S.G. § 4B1.2(3)(B), that defendant was not career offender because sentences for two prior felony convictions should not be counted separately under § 4A1.2—"accident of geography" caused defendant to be sentenced separately for two robberies within twelve days, one in Baltimore City and one in Baltimore County, second prison term was made concurrent with first term, and cases "no doubt ... would have been consolidated for trial and/or sentencing" had they occurred in same jurisdiction; court also found that "the two prior robbery offenses were committed pursuant to a single plan" and "are not to be separately counted for career offender purposes," *see* § 4A1.2, comment. (n.3)).

Guideline Sentencing Update

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VOLUME 3 • NUMBER 8 • JUNE 15, 1990

Departures

AGGRAVATING CIRCUMSTANCES

Fifth Circuit holds district court should link extent of departure to penalty under analogous guideline. Defendant was convicted of two drug offenses, and his guideline range was 70–87 months. The sentencing court departed to impose concurrent sentences of 300 months because defendant had involved a minor in the offenses.

The appellate court remanded for resentencing because defendant had not been given proper notice of the intent to depart, and also because the extent of departure was unreasonable. The court found that U.S.S.G. § 2D1.2, which enhances the base offense level for "Drug Offenses . . . Involving Underage . . . Individuals," provided guidance as to "what sentence would be appropriate for the involvement of juveniles in drug trafficking." Had defendant been convicted of a drug offense involving a minor under 21 U.S.C. § 845b and sentenced pursuant to § 2D1.2, his maximum sentence would be 108 months. The court concluded that "although . . . the district court is not strictly bound by the adjustment specified in section 2D1.2, [it] should explain its reasons for going beyond it." *See also U.S. v. Ferra*, 900 F.2d 1057 (7th Cir. 1990) (recommending that courts attempt to link extent of departure to analogous guidelines).

U.S. v. Landry, No. 89-3275 (5th Cir. May 30, 1990) (Johnson, J.).

Other Recent Cases:

U.S. v. Shuman, No. 88-8885 (11th Cir. June 4, 1990) (Tjoflat, C.J.) (affirming upward departure for defendant convicted of drug offenses who had brought her son into drug-trafficking business and caused his resulting chemical dependence; extent of departure, from 24–30 month range to 40 months, was reasonable compared to enhancements for similar aggravating factors under other guidelines).

U.S. v. Miller, No. 89-2765 (5th Cir. May 30, 1990) (Smith, J.) (court may not base upward departure on fact that defendant, whose bank robbery convictions from several different jurisdictions were consolidated for sentencing, could have received far greater punishment had he been sentenced separately in each jurisdiction—Sentencing Commission "must have contemplated and intended this difference," *see* U.S.S.G. §§ 3D1.4 and 5G1.3; court also erred in using defendant's alcohol dependency as basis for departure, *see* § 5H1.4, p.s.).

U.S. v. Murillo, No. 89-3261 (5th Cir. May 23, 1990) (Johnson, J.) (holding that it is within district court's discretion to "rely[ ] solely on information contained in a presentence investigation report in departing upward"; also, departure for "disruption of governmental function," U.S.S.G. § 5K2.7, p.s., was proper for defendant who helped illegal aliens fraudulently apply for amnesty, thereby compromising government's amnesty program).

U.S. v. Colon, No. 89-1249 (2d Cir. May 18, 1990) (Winter, J.) (court erred in using quantities of drugs in relevant conduct as basis for discretionary upward departure instead of factoring them into the base offense level—those quantities must be considered in setting the base offense level, *see U.S. v. Schaper, infra*).

U.S. v. Franklin, No. 88-3257 (7th Cir. May 7, 1990) (Kanne, J.) (upward departure warranted for defendants who continued to use or deal drugs while out on bond for current drug charge).

U.S. v. Richison, No. 89-10080 (9th Cir. Apr. 20, 1990) (per curiam) (defendant's alcohol and cocaine abuse may provide basis for upward departure, but district court must articulate why defendant's dependency was unusual—language of U.S.S.G. § 5H1.4, p.s., "suggests that the Commission meant to foreclose consideration of [drug or alcohol] dependency only as a ground for downward departure, leaving open the possibility of taking drug or alcohol abuse into account in determining where within the Guidelines a sentence should fall, or whether an upward departure is warranted, if extraordinary circumstances exist"; also remanded for district court to state specific reasons for criminal history departure from category I to category IV instead of to lower category).

MITIGATING FACTORS

U.S. v. Pozzy, No. 89-1879 (1st Cir. Apr. 30, 1990) (Bownes, Sr. J.) (reversing downward departure, holding that under facts of this case it was improper to base departure on grounds that defendant was pregnant at time of sentencing, she may have participated in offense only to go along with her husband, her husband's imprisonment would affect her, and there was no halfway house near her home; appellate court also rejected the use of a "totality of the circumstances" approach to determining whether departure is justified).

CRIMINAL HISTORY

U.S. v. Robison, No. 89-3724 (6th Cir. June 1, 1990) (Jones, J.) (vacating departure to career offender status based on criminal activity not counted under career offender guideline: "district court cannot arbitrarily change the requirements for career offender status established by the Sentencing Commission simply because it feels that [defendant] 'got a break'" in sentencing on a prior offense). *See also U.S. v. Hawkins*,

901 F.2d 863 (10th Cir. 1990) (improper to depart based on fact defendant "narrowly missed" career offender status).

U.S. v. Brown, No. 89-5346 (8th Cir. May 10, 1990) (Lay, C.J.) (holding that district courts are not prohibited from considering downward departure, pursuant to U.S.S.G. § 4A1.3, for defendants who are to be sentenced under career offender guideline, § 4B1.1).

Adjustments

Role in the Offense

U.S. v. Pettit, No. 89-3127 (10th Cir. May 25, 1990) (Babcock, Dist. J.) (agreeing with *U.S. v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990), that adjustments under U.S.S.G. § 3B1.1 apply only to offense of conviction and not to "defendant's role in other criminal conduct for which he was not convicted"). *Accord U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989).

Obstruction of Justice

U.S. v. White, No. 89-1598 (7th Cir. May 24, 1990) (Coffey, J.) (obstruction of justice enhancement, U.S.S.G. § 3C1.1, is applicable to defendant fleeing arrest "where the facts demonstrate clear physical endangerment of others," in this case from high-speed chase through residential area).

U.S. v. Altman, No. 89-1479 (2d Cir. Apr. 19, 1990) (Miner, J.) (remanded because district court erred in not allowing medical testimony at sentencing hearing bearing on whether defendant had the requisite mental state for obstruction of justice under U.S.S.G. § 3C1.1).

Acceptance of Responsibility

U.S. v. Braxton, No. 89-5651 (4th Cir. May 8, 1990) (Chapman, J.) (remanding denial of reduction—district court incorrectly found that possibility of rehabilitation is a necessary element of acceptance of responsibility, U.S.S.G. § 3E1.1, and thus erred in denying reduction to defendant whose mental condition seemed to preclude rehabilitation).

Victim-Related Adjustments

U.S. v. Jones, No. 88-3377 (11th Cir. Apr. 30, 1990) (Tjoflat, C.J.) (upholding finding that bank teller was "particularly susceptible" to crime of bank larceny and was thus a "vulnerable victim" under U.S.S.G. § 3A1.1).

Criminal History

Career Offender Provision

U.S. v. McNeal, No. 89-2570 (7th Cir. Apr. 20, 1990) (Manion, J.) (agreeing with *U.S. v. Williams*, 892 F.2d 296 (3d Cir. 1989), that unlawful possession of a gun while firing it is a "crime of violence" under U.S.S.G. § 4B1.2(1)).

See also U.S. v. Brown, supra.

Sentencing Procedure

Sentencing Factors

U.S. v. Emanuel, No. 88-119 (S.D. Iowa Apr. 17, 1990) (Vietor, C.J.) (rejecting government's contention that it has power to limit extent of any sentence reduction under Fed. R. Crim. P. 35(b)—"once the government files a motion for reduction of sentence the sole power to reduce the sentence and to determine the extent of any reduction rests with the court"; however, "the court should accord considerable weight to the government's view of how much to reduce the sentence").

Other

U.S. v. Jones, No. 88-3377 (11th Cir. Apr. 30, 1990) (Tjoflat, C.J.) (in order "to limit the objections cognizable on appeal" and facilitate appellate review, court exercises its supervisory power to instruct district courts "to elicit fully articulated objections, following imposition of sentence, to the court's ultimate findings of fact and conclusions of law").

Offense Conduct

Drug Quantity

U.S. v. Schaper, No. 89-1405 (2d Cir. May 16, 1990) (Winter, J.) (district court is required under Guidelines to consider in the base offense level calculation quantities of drugs that were neither seized nor charged in the indictment if they were part of the same scheme or plan as the offense of conviction, *see* U.S.S.G. § 1B1.3(a)(2)).

Firearms Offenses

U.S. v. Peoples, No. 89-10333 (9th Cir. May 29, 1990) (per curiam) (agreeing with *U.S. v. Williams*, 879 F.2d 454 (8th Cir. 1989), that enhancement under U.S.S.G. § 2K2.1(b)(2) for stolen firearm does not require participation in or knowledge of the theft by defendant).

U.S. v. Aguilera-Zapata, No. 89-1279 (5th Cir. May 9, 1990) (Garwood, J.) (in order to apply enhancement for possession of weapon during drug offense, U.S.S.G. § 2D1.1(b), based on co-defendant's possession of weapon, district court must find that possession was known or "reasonably foreseeable" to the defendant; burden of proof is on government, by preponderance of evidence).

Relevant Conduct

U.S. v. Braxton, No. 89-5651 (4th Cir. May 8, 1990) (Chapman, J.) (proper to determine offense guideline based on stipulation that establishes more serious offense where there is no plea agreement but defendant orally agreed to the facts of the more serious offense: "stipulation" in U.S.S.G. § 1B1.2(a) "is not used in a restrictive way so that only an agreement designated as a 'stipulation' would comply with the guideline.... There is no requirement in the guidelines... that this stipulation must be in writing. It is only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts.")

Appellate Review

U.S. v. Franklin, No. 88-3257 (7th Cir. May 7, 1990) (Kanne, J.) (remand not automatically required when district court relies on both proper and improper grounds for upward departure—"the sentence can be upheld if, standing alone, the proper factors justify the magnitude of departure"). *Accord U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *Contra U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989) (remand required).

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Departures

AGGRAVATING CIRCUMSTANCES

Ninth Circuit holds upward departure to equalize sentence with that of codefendant is not permissible; also holds type and number of weapons are invalid grounds for upward departure in U.S.S.G. § 2K2.1 offense. Defendant pled guilty to one count of aiding and abetting in providing false statements in firearms acquisition, and was sentenced under. § 2K2.1. The district court departed from the guideline range of 4–10 months to impose a two-year term.

The departure was partly based on the two-year sentence given to a codefendant. In reversing, the appellate court noted that the codefendant had confessed to another offense, and thus had not pled guilty to the same crime as defendant, and that defendant had negotiated a more favorable plea agreement. The court found it may be appropriate in some cases to look behind the plea agreement to assess the actual culpability of a defendant, but "there are two other important principles that must also be considered. . . . Plea bargaining is a critical tool in the criminal justice system. . . . Were the plea bargaining process to lose its effectiveness as a result of judges ignoring the benefits of the plea bargain to which defendants are entitled, the consequences for both the criminal and civil justice systems might well be disastrous."

The court also found such a departure "would seriously frustrate" the Guidelines scheme and goal of limiting judicial discretion: "Judges would be able to determine a defendant's sentence not just on the basis of what the Guidelines provide with respect to his conduct but also on what they provide with respect to the conduct of any of his co-defendants. There is little indication in the Guidelines that the Commission contemplated so expansive an approach. . . . In short, an upward departure for purposes of equalization is not permissible."

The court also found that upward departure based on the type and number of weapons—46 AK-47 rifles and 2 other rifles—was not permitted under the Guidelines. The court held that the Sentencing Commission had adequately considered and rejected both circumstances in determining a sentence under § 2K2.1. *Cf. U.S. v. Uca*, 867 F.2d 783 (3d Cir. 1989) (upward departure based on number of guns improper for defendant sentenced under U.S.S.G. § 2K2.3 (1987)).

The district court had also based its departure on the ground that defendant committed the offense "for no other reason than to satisfy his greed." The appellate court found that "profit is a primary motivating factor in many if not most types of crimes," and thus greed is not an unusual or extraordinary circumstance that warrants departure.

U.S. v. Enriquez-Munoz, No. 89-10256 (9th Cir. June 28, 1990) (Reinhardt, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Morales, No. 89-1210 (2d Cir. May 30, 1990) (Cardamone, J.) (personal characteristics of defendant that made him "particularly vulnerable to in-prison victimization"—namely his "diminutive size, immature appearance and bisexual orientation"—were proper grounds for departure to the statutory minimum because "it is plain that the Commission did not consider vulnerability to the extent revealed in this record—where the only means for prison officials to protect [defendant] was to place him in solitary confinement"; also, sentencing court did not improperly rely on factors in U.S.S.G. § 5H1.1, p.s., that should not ordinarily be used as grounds for departure).

CRIMINAL HISTORY

U.S. v. Russell, No. 89-6142 (10th Cir. June 20, 1990) (Seth, Sr. J.) (holding that in determining reasonableness of extent of departures above criminal history category VI, "we should afford the trial judge due deference and not 'lightly overturn determinations of the appropriate degree of departure'"; court declined to impose any sort of formula for computing such departures, finding that the Sentencing Commission "would have provided such a formula had one been intended"). *See also U.S. v. Bernhardt*, No. 89-6323 (10th Cir. June 11, 1990) (McKay, J.) ("Because the Sentencing Commission has provided no guidance for determining the reasonableness of upward departures from category VI, we must simply use our own judgment as to whether the sentence imposed is proportional to the crime committed, in light of the past criminal history."). *Cf. U.S. v. Schmude*, 901 F.2d 555 (7th Cir. 1990) (suggesting increases in 10–15% increments if category VI is inadequate).

U.S. v. Gardner, No. 89-6289 (10th Cir. June 18, 1990) (Ebel, J.) (affirming departure to lower end of career offender range because criminal history category VI underrepresented defendant's criminal history—although defendant was not a "career offender" because a second violent felony was too old to be counted, his "criminal history closely resembled that of a career offender and the district court's decision to sentence defendant by reference to the career offender provisions was reasonable, particularly where, as here, the district court chose to sentence him to the lower range for a career offender").

U.S. v. Stacy, No. 89-2780 (7th Cir. May 17, 1990) (per curiam, unpub. disposition) (affirming upward departure based on similarity of crime to prior offense, *accord U.S. v. Carey*, 898 F.2d 642 (8th Cir. 1990); *U.S. v. Luna-Trujillo*, 868 F.2d 122 (5th Cir. 1989), and the additional factor of proximity in time to similar prior offense, *accord U.S. v. Sturgis*,

869 F.2d 54 (2d Cir. 1989)). *See also U.S. v. Chavez-Botello*, No. 89-30175 (9th Cir. June 5, 1990) (per curiam) (similarity between current offense and prior offenses is not considered in Guidelines and may provide basis for departure).

Substantial Assistance

U.S. v. Howard, 902 F.2d 894 (11th Cir. 1990) ("sentencing court is obligated to rule on a [U.S.S.G.] section 5K1.1 motion at the time of sentencing," and may not postpone the ruling on the basis that most of defendant's agreed-upon cooperation had not yet occurred at time of sentencing and government could later file motion under Fed. R. Crim. P. 35(b) for reduction of sentence).

Adjustments

Role in the Offense

U.S. v. Preakos, No. 90-1055 (1st Cir. June 21, 1990) (per curiam) (when finding defendant was organizer or leader of criminal activity involving "five or more participants," U.S.S.G. § 3B1.1(a), may count defendant as one of the five).

Victim-Related Adjustments

U.S. v. White, 903 F.2d 457 (7th Cir. 1990) (enhancement for "vulnerable victim," U.S.S.G. § 3A1.1, properly given to defendant who took sixty-year-old man with respiratory problems hostage during escape attempt).

U.S. v. Schroeder, 902 F.2d 1469 (10th Cir. 1990) (reversing "official victim" enhancement under U.S.S.G. § 3A1.2 for defendant convicted of interstate communication of a threat to injure—holding an official victim under § 3A1.2 must be the object of the threat, whereas here the official merely received a threat directed at others).

Acceptance of Responsibility

U.S. v. Oliveras, No. 89-1380 (2d Cir. June 4, 1990) (per curiam) (agreeing with *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989), that defendant need only accept responsibility for offense of conviction, and not also for counts that have been dismissed). *But see U.S. v. Gordon*, 895 F.2d 932 (4th Cir. 1990) ("defendant must . . . accept responsibility for all of his criminal conduct").

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Garcia, 903 F.2d 1022 (5th Cir. 1990) (agreeing with *U.S. v. Watford*, 894 F.2d 665 (4th Cir. 1990), that sentencing courts have discretion to impose consecutive sentences when defendant is convicted of both Guidelines and pre-Guidelines offenses).

U.S. v. Miller, 903 F.2d 341 (5th Cir. 1990) (agreeing with *U.S. v. Rogers*, 897 F.2d 134 (4th Cir. 1990), and *U.S. v. Fossett*, 881 F.2d 976 (11th Cir. 1989), that district courts did not have discretion under the former version of U.S.S.G. § 5G1.3 to impose consecutive or concurrent sentences, but that courts could depart to impose concurrent sentences when appropriate). *Contra U.S. v. Nottingham*, 898 F.2d 390 (3d Cir. 1990) (§ 5G1.3 conflicts with statute, district courts retain discretion); *U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989) (same).

Criminal History

Career Offender

U.S. v. Selfa, No. 89-10309 (9th Cir. June 14, 1990) (Schroeder, J.) (rejecting defendant's argument for hearing to determine whether his two previous bank robberies were "crimes of violence" under career offender provision, holding "that persons convicted of [bank robbery under] 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1. We conclude that the elements of the crimes of which defendant was previously convicted, and not the particular conduct of the defendant on the day the crimes were committed, should control. Further satellite factual hearings should not be required as a matter of course in order to determine whether the defendant has previously been convicted of crimes of violence"). *Cf. Taylor v. U.S.*, 110 S. Ct. 2143, 2160 (1990) (holding that, when determining whether a prior offense was a "violent felony" under 18 U.S.C. § 924(e), Career Criminals Amendment Act of 1986, trial court is required "to look only to the fact of conviction and the statutory definition of the prior offense," and not to the facts underlying the conviction).

Sentencing Procedure

Evidence From Another Trial

U.S. v. Castellanos, No. 88-3535 (11th Cir. June 13, 1990) (Tjoflat, C.J.) (vacating prior opinion, at 882 F.2d 474 [2 *GSU* #12], and clarifying earlier holding: "evidence presented at the trial of another may not—without more—be used to fashion a defendant's sentence if the defendant objects. In such a case, where the defendant has not had the opportunity to rebut the evidence or generally to cast doubt upon its reliability, he must be afforded that opportunity. It was never the position of this panel that a sentencing court may not consider testimony from the trial of a third party as a matter of law; rather, we were of the view that a sentencing court must follow the procedural safeguards incorporated in section 6A1.3 of the guidelines . . . ."). *Cf. U.S. v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990) (may use reliable evidence from another trial). *But see U.S. v. Chandler*, 894 F.2d 463 (D.C. Cir. 1990) (per curiam) (table, unpub.) (error to use evidence from codefendant's trial to determine drug quantity).

Appellate Review

Overlapping Guideline Ranges

U.S. v. Dillon, No. 88-3505 (7th Cir. June 20, 1990) (Kanne, J.) (upholding sentence even though district court erred in placing defendant in criminal history category II instead of category I, because resulting sentencing ranges overlapped and conduct that caused court to use category II could have been used to sentence defendant at upper end of the lower range—disputes over proper criminal history category need not be resolved if resulting ranges overlap and "it is reasonable to conclude that the same sentence would have been imposed irrespective of the outcome of the dispute"). *Accord U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989); *U.S. v. Turner*, 881 F.2d 684 (9th Cir.), *cert. denied*, 110 S. Ct. 199 (1989); *U.S. v. Bermingham*, 855 F.2d 925 (2d Cir. 1988).

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Adjustments

ACCEPTANCE OF RESPONSIBILITY

Ninth Circuit holds refusal to grant acceptance of responsibility reduction may not be based on constitutionally protected conduct. Defendant pled guilty to unarmed bank robbery. After arrest defendant had requested an attorney, did not provide any statements to the authorities or assist in the investigation, and did not offer to make restitution until after his guilty plea. Following the recommendation in the presentence report, the district court denied the offense level reduction for acceptance of responsibility because defendant had not voluntarily surrendered to authorities or assisted in the recovery of the money, factors listed in the commentary to U.S.S.G. § 3E1.1. Defendant appealed, arguing that basing the denial on this "pre-plea conduct" impermissibly punished him for exercising Fifth and Sixth Amendment rights.

The appellate court held that "in determining a defendant's acceptance of responsibility, a sentencing court cannot consider against a defendant any constitutionally protected conduct, whether it occurs before or after the entry of a plea. . . . Thus, the district court may not balance against evidence of remorse or acceptance of responsibility, the fact that the defendant requested counsel, or relied upon the privilege not to make any statement to the police or to assist them in gathering inculpatory evidence. This construction of section 3E1.1 will avoid an unconstitutional application of the Sentencing Guidelines." Vacating and remanding, the court concluded that "[p]enalizing a defendant for failing to provide evidence against himself or to make incriminating statements violates his constitutionally protected rights."

Defendant also argued that the district court erred in considering only his pre-plea conduct, while ignoring his conduct and statements after he had pleaded guilty. Without specifically ruling on this issue, the appellate court directed the district court on remand to "make an express finding regarding whether it has considered [defendant's] post-plea conduct."

U.S. v. Watt, No. 88-3092 (9th Cir. Aug. 6, 1990) (Alarcon, J.).

U.S. v. Simpson, 904 F.2d 607 (11th Cir. 1990) (due process does not require either sentencing judge or probation officer to inform defendant that his sentence may be favorably adjusted under Guidelines for acceptance of responsibility).

ROLE IN THE OFFENSE

U.S. v. Foreman, 905 F.2d 1335 (9th Cir. 1990) (abuse of position of trust enhancement, U.S.S.G. § 3B1.3, was properly given to police officer who showed her badge and identified herself as active police officer to DEA agents and Los Angeles police who stopped her for questioning in airport; fact that defendant was not successful in concealing her offense does not preclude enhancement—§ 3B1.3 applies to attempts to conceal).

U.S. v. Drabeck, 905 F.2d 1304 (9th Cir. 1990) (affirming § 3B1.3 enhancement for abuse of position of trust for nighttime janitor who committed bank larceny—defendant had keys to bank, worked unsupervised, and had access to areas not open to public).

OBSTRUCTION OF JUSTICE

U.S. v. Matos, 907 F.2d 274 (2d Cir. 1990) (enhancement under U.S.S.G. § 3C1.1 for obstruction of justice properly given for false testimony at suppression hearing).

U.S. v. Dillon, 905 F.2d 1034 (7th Cir. 1990) (§ 3C1.1 enhancement properly given to defendant who gave false name for source of cocaine, even though he recanted and provided true name the next morning—government expended resources pursuing false lead, and defendant received acceptance of responsibility reduction for subsequent cooperation).

U.S. v. Lofton, 905 F.2d 1315 (9th Cir. 1990) (§ 3C1.1 enhancement properly given to defendant who, while in jail awaiting sentencing for wire fraud charges, continued those activities using jail telephone—defendant supplied material falsehoods to probation officer by misleading officer that he had accepted responsibility for his crimes, and also impeded the government's investigation of his activities by causing it to expand the investigation to include the later activity).

Criminal History

CALCULATION

U.S. v. Hanley, 906 F.2d 1116 (6th Cir. 1990) (commitment to juvenile facility is "imprisonment" for purposes of U.S.S.G. § 4A1.1(e) enhancement for committing current offense "less than two years after release from imprisonment").

CRIMINAL LIVELIHOOD

U.S. v. Irvin, 906 F.2d 1424 (10th Cir. 1990) (five to seven months was "substantial period of time" within definition of "pattern of criminal conduct" in criminal livelihood provision, U.S.S.G. § 4B1.3).

Offense Conduct

DRUG QUANTITY

U.S. v. Havens, No. 89-2115 (10th Cir. Aug. 6, 1990) (McKay, J.) (court may estimate drug quantity in attempt to manufacture methamphetamine offense, even though at time of arrest drug could not be manufactured because precursor chemical absent, *see* U.S.S.G. § 2D1.4(a), comment. (n.2)).

Departures

Mitigating Circumstances

Second Circuit holds government must have notice of downward departure, but finds failure to give sufficient notice was "harmless error" in this case; also, departure affirmed despite improper ground because other grounds were sufficient. Defendant pled guilty to bribery, and the guideline range was 15–21 months. The district court imposed a three-year term of probation, explaining the departure was justified by defendant's lack of a criminal record, his employment record since coming to the U.S., and the "unusual nature of the bribery transaction." The PSI did not indicate departure was warranted and the court did not announce the departure until after both parties had spoken at the sentencing hearing.

Noting that it had held in previous cases that defendants must be given notice of upward departures prior to imposition of sentence, the appellate court held "the same rule should apply to the government in the context of downward departures." However, the court then held that "the failure of the district court to give the government notice of its intention to depart was harmless error." The court reasoned that the government had, in fact, already argued against one of the departure grounds, and that its other arguments would have failed.

The court held the departure appropriate even though one of the three grounds—lack of a criminal record—was clearly improper. *Cf. Zamarripa, infra.* Although downward departure on the basis of employment history is ordinarily not warranted, U.S.S.G. § 5H1.5, p.s., the court determined that "once it is coupled with the third factor—the unusual circumstances of the offense—the district court was justified in considering appellee's case to be sufficiently exceptional to justify departure." The defendant's use of a personal check for the bribe, "in the district court's view, reflected an utter lack . . . of the sophistication usually shown by persons bribing an official. Thus, the picture painted of appellee is one of a person with an entirely stable background, indicated by his employment history, and whose unusually unsurreptitious conduct in undertaking the bribery constituted a mitigating factor 'of a kind, or to a degree' not adequately considered by the Guidelines." *But cf. U.S. v. Pozzy*, 902 F.2d 133 (1st Cir. 1990) (reversing downward departure based on aggregation of personal factors); *U.S. v. Brewer*, 899 F.2d 503 (6th Cir. 1990) (same); *U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (same).

U.S. v. Jagmohan, No. 90-1045 (2d Cir. July 13, 1990) (Meskill, J.).

U.S. v. Goff, No. 89-5656 (4th Cir. July 6, 1990) (Wilkins, J.) (vacating downward departure based on defendant's drug addiction, receipt of drugs instead of money for participation in conspiracy, responsibility for young children, longer sentence than co-conspirator with more serious criminal history—Guidelines accounted for first three factors and differences in conduct accounted for different sentence of co-conspirator; court also held that "viewing the[se] factors cumulatively" does not provide justification for departure, *accord U.S. v. Rosen*, 896 F.2d 789, 792 (3d Cir. 1990) ("combination of typical factors does not present an unusual case")).

U.S. v. Brand, 907 F.2d 31 (4th Cir. 1990) (vacating downward departure based on personal circumstances of defendant and the "devastating impact" her imprisonment would have on her two young children—appellate court found that situation was not so out of the ordinary as to warrant exception to general prohibition in U.S.S.G. § 5H1.6, p.s., against departures based on family ties and responsibilities).

Criminal History

U.S. v. Leake, No. 89-50266 (9th Cir. July 20, 1990) (Price, Sr. Dist. J.) (pursuant to U.S.S.G. § 4A1.2(e), comment. (n.8), convictions too old to be counted in criminal history score may provide basis for departure only if they are "evidence of similar misconduct" as current offense—departure based partly on old assault convictions, for defendant convicted of passing forged checks, must be remanded).

Sentencing Procedure

Evidence From Another Trial

U.S. v. Notrangelo, No. 89-10221 (9th Cir. July 18, 1990) (Rymer, J.) (reliable evidence from another trial may be used to adjust offense level when defendant has notice and opportunity to challenge). *Accord U.S. v. Castellanos*, 904 F.2d 1490 (11th Cir. 1990); *U.S. v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990). *But see U.S. v. Chandler*, 894 F.2d 463 (D.C. Cir. 1990) (per curiam) (table) (error to use amount of drugs separately tried codefendant convicted of distributing).

Appellate Review

Extent of Departure

U.S. v. Vizcarra-Angulo, 904 F.2d 22 (9th Cir. 1990) ("defendant may not challenge on appeal the extent of a downward departure"). *Accord U.S. v. Parker*, 902 F.2d 221 (3d Cir. 1990); *U.S. v. Left Hand Bull*, 901 F.2d 647 (8th Cir. 1990); *U.S. v. Pighetti*, 898 F.2d 3 (1st Cir. 1990); *U.S. v. Wright*, 895 F.2d 718 (11th Cir. 1990) (per curiam).

Proper and Improper Grounds

U.S. v. Zamarripa, 905 F.2d 337 (10th Cir. 1990) (departure based on proper and improper grounds must be remanded). *Accord U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989). *Cf. U.S. v. Michael*, 894 F.2d 1457 (5th Cir. 1990) (remanded because appellate court could not determine that improper factor was not necessary part of basis for departure). *But see Jagmohan, supra* ("two of the three grounds relied on by the court are sufficient to sustain the departure"); *U.S. v. Franklin*, 902 F.2d 501 (7th Cir. 1990) ("sentence can be upheld if, standing alone, the proper factors justify the magnitude of departure"); *U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989) (upheld because "seen as a whole, the sentence is permissible"), *cert. denied*, 110 S. Ct. 1144 (1990).

Decision to Apply Guidelines

U.S. v. Norquay, 905 F.2d 1157 (8th Cir. 1990) (Guidelines apply to violations of Indian Major Crimes Act, 18 U.S.C. § 1153, limited by maximum and minimum sentences established by state law). Similar conclusions with respect to the Assimilative Crimes Act, 18 U.S.C. § 13, were reached in *U.S. v. Leake*, No. 89-50266 (9th Cir. July 20, 1990) (Price, Sr. Dist. J.), and *U.S. v. Garcia*, 893 F.2d 250 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1792 (1990).

Guideline Sentencing Update

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Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Ninth Circuit holds additional term of supervised release may not be imposed when original term is revoked. Defendant had completed his prison term and was serving his term of supervised release when he violated a condition of release. The court revoked release, sentenced defendant to a 10-month term of imprisonment, and imposed a new 24-month term of supervised release to follow incarceration. Defendant was also ordered to pay restitution and a fine relating to the violation.

In what appears to be the first reported appellate decision on this issue, the circuit court reversed and remanded, holding that 18 U.S.C. § 3583(e) and U.S.S.G. § 7A1.3(b), p.s., do not permit imposition of an additional term of supervised release after revocation. When revocation is discretionary, the statute and guideline allow a court to extend and/or modify the term of supervised release, or to revoke release. Following the rules of statutory interpretation, the court concluded that "a district court is not permitted to revoke a person's supervised release, order a term of incarceration and then order another term of supervised release."

The court also held that neither the statute nor the guideline authorizes imposition of restitution or a fine when a person violates a condition of supervised release.

U.S. v. Behnezhad, 907 F.2d 896 (9th Cir. 1990).

U.S. v. Lockard, No. 89-50469 (9th Cir. July 26, 1990) (Thompson, J.) (affirming two-year sentence imposed after revocation of two-year term of supervised release—court may "require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision," 18 U.S.C. § 3583(e)(3)).

REVOCATION OF PROBATION

Eleventh Circuit holds that sentence imposed after probation revocation is limited by sentence authorized for original offense. Defendant's probation was revoked after he violated one of its conditions. His guideline range for the underlying offense had been 4–10 months, and his sentence was three years' probation with four months served at a community treatment center. After revocation the probation officer calculated a new guideline sentence, using both the original offense and the conduct underlying the probation violation (simple possession of drugs), for a range of 12–18 months. The district court determined that the Guidelines do not apply to sentences after probation revocation and that the statutory maximum for the original offense controls, and imposed an 18-month prison term and three-year term of supervised release.

Finding this to be a "case of first impression for the courts of appeals," the appellate court reversed and remanded, holding that the guideline sentence from the original offense limited the sentence that could be imposed on revocation. The relevant statute, 18 U.S.C. § 3565(a)(2), allows a court to "revoke the sentence of probation and impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3551–3559] at the time of the initial sentencing." The court concluded that, for defendants sentenced under the Guidelines, the "sentence that was available . . . at the time of the initial sentencing" means the original guideline sentencing range, and "the original determinations of total offense level and criminal history category, based upon relevant facts established at the time of sentencing, delimit the sentences that were then available. The probation officer's use of the guidelines [in this case]—adding the base offense level for the post-sentencing conduct that violated probation to the total offense level for the offense of conviction—was clearly incorrect in light of section 3565."

The court added that the question of whether and to what extent the district court may depart is also controlled by "the relevant sentencing facts originally before the court rather than on the conduct that constituted the probation violation." If departure was available at the original sentencing, however, later conduct may be used in deciding whether to depart when sentencing for the probation revocation. Also, the later conduct may be used in determining where to sentence within the guideline range, and whether to impose a discretionary term of supervised release.

U.S. v. Smith, 907 F.2d 133 (11th Cir. 1990).

Departures

CRIMINAL HISTORY

U.S. v. Smith, No. 89-1512SI (8th Cir. July 27, 1990) (Arnold, J.) (affirming downward departure for career offender, from 292–365 month range to 240 months—"The relatively minor nature of [defendant's] crimes, the briefness of his career, and his [young] age at the time the crimes were committed make this an unusual case. The factors that make the appellant a career offender are only barely present.").

U.S. v. Gaddy, No. 89-3037 (7th Cir. July 26, 1990) (Flaum, J.) (departure may be based on pending charges of similar criminal conduct, *see* U.S.S.G. § 4A1.3(e), p.s. (departure may be considered for "prior similar adult criminal conduct not resulting in a criminal conviction")). *But cf. U.S. v. Cantu-Dominguez*, 898 F.2d 968 (5th Cir. 1990) (history of arrests, without more, cannot provide basis for departure, citing U.S.S.G. § 4A1.3, p.s.).

U.S. v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) (vacating earlier opinion, 900 F.2d 1376 [3 *GSU* #7], and holding that departure must be remanded because district court did not state its reasons for extent of departure; disciplinary problems during prior prison term provide basis for departure).

AGGRAVATING CIRCUMSTANCES

U.S. v. Doering, No. 89-50092 (9th Cir. July 26, 1990) (per curiam) (vacating upward departure imposed partly for purpose of securing psychiatric treatment for defendant—language of Guidelines, §§ 5H1.3 and 5K2.13, and of 28 U.S.C. § 994(k), "makes abundantly clear that the need for psychiatric treatment is not a circumstance which justifies departure").

Adjustments

Obstruction of Justice

Fifth Circuit holds obstruction of justice enhancement is not applicable to conduct that occurred before, not during, investigation or prosecution of offense. Defendant attempted to ship firearms illegally and used an alias when he gave the package to the shipper. The sentencing court held that the use of the alias impeded the investigation of the offense and warranted the enhancement for obstruction of justice.

The appellate court reversed, basing its decision on the plain language of U.S.S.G. § 3C1.1: "There is simply no evidence that [defendant] wilfully impeded or obstructed the administration of justice, or attempted to do either, *during the investigation or prosecution* of his offense. [Defendant] did not misrepresent his identity to law enforcement officers; he misrepresented it to Federal Express. At that time, [he] was unaware that any investigation was taking place and prosecution had not yet begun. His intent clearly was not to impede the investigation or prosecution of his offense. His intent was to disguise himself in such a way so that his crime would go unpunished. . . . Were we to countenance an offense level increase in this instance, then consistency would demand that we permit it in a case in which the defendant wears a mask, where he disguises his voice, he leaves town, uses gloves, and so forth. This is not the type of conduct intended to be covered by Section 3C1.1."

In a later case, the Fifth Circuit reversed an obstruction enhancement given to an assault defendant who had concealed the gun he used immediately after committing the offense but before the investigation had begun.

U.S. v. Wilson, 904 F.2d 234 (5th Cir. 1990).

U.S. v. Luna, 909 F.2d 119 (5th Cir. 1990) (per curiam).

U.S. v. Lueddeke, No. 89-1988 (7th Cir. July 27, 1990) (Cudahy, J.) (defendant convicted of perjury and obstruction of justice offenses properly received § 3C1.1 enhancement for obstruction of justice for *additional* acts of interference with the investigation of those offenses, *see* U.S.S.G. § 3C1.1, comment. (n.4)).

U.S. v. Gaddy, No. 89-3037 (7th Cir. July 26, 1990) (Flaum, J.) (§ 3C1.1 obstruction enhancement properly given to defendant who gave false name after arrest and falsely claimed he had never been arrested and had no fingerprints on file—defendant gave true name two days after arrest but "he had gone sufficiently forward to constitute an attempt" to obstruct justice). *See also U.S. v. Blackman*, 904 F.2d 1250 (8th Cir. 1990) (use of alias after arrest warranted enhancement for obstruction of justice even though police actually knew defendant's true identity—"§ 3C1.1 specifically encompasses an *attempt* to impede or obstruct justice") (changing prior decision, at 897 F.2d 309, on rehearing).

U.S. v. Garcia, No. 89-50589 (9th Cir. July 25, 1990) (Noonan, J.) (§ 3C1.1 obstruction enhancement should not have been given to defendant for brief attempt to evade arrest; also noting that a pending amendment to § 3C1.1, to take effect Nov. 1, 1990, will exclude flight from arrest as an obstruction of justice). *Accord U.S. v. Stroud*, 893 F.2d 504 (2d Cir. 1990).

U.S. v. Perry, 908 F.2d 56 (6th Cir. 1990) (obstruction enhancement properly given to defendant who fled jurisdiction while on bond pending sentencing and thereby delayed sentencing for the eight months he was at large).

Victim-Related Adjustments

U.S. v. Creech, No. 89-6199 (10th Cir. June 26, 1990) (Moore, J.) (reversing vulnerable victim finding, U.S.S.G. § 3A1.1, for defendant who threatened to harm family of recently married individual—court held that victim's recent marriage may have made the crime possible, but did not make him "vulnerable" within meaning of guideline enhancement).

Role in the Offense

U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) (when imposing U.S.S.G. § 3B1.1(a) enhancement for being leader of criminal activity involving five or more participants, sentencing court (1) must make specific finding that five or more participants were involved, *cf. U.S. v. Lanese*, 890 F.2d 1284 (2d Cir. 1989) (§ 3B1.1(b) requires specific finding of the identities of the five or more participants), *cert. denied*, 110 S. Ct. 2207 (1990); (2) may count defendant as one of the participants, *accord U.S. v. Preakos*, 907 F.2d 7 (1st Cir. 1990) (per curiam); and (3) may calculate "inferentially" the number of participants, "provided that the court does not look beyond the offense of conviction," *see also U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990) (§ 3B1.1 adjustments must be based only on offense of conviction, not related conduct); *U.S. v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990) (same); *U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989) (same)).

Criminal History

Career Offenders

U.S. v. Jones, 908 F.2d 365 (8th Cir. 1990) (career offender provision, U.S.S.G. § 4B1.1, is ambiguous as to whether a defendant who pleaded guilty to, but has not yet been sentenced for, two prior violent felonies may be sentenced as career offender; "rule of lenity" thus precludes sentencing as career offender, but sentencing court may depart upward under § 5K2.0 because of the unusual circumstances and use § 4B1.1 to guide extent of departure).

Offense Conduct

Possession of Weapon During Drug Offense

U.S. v. Garcia, No. 89-10332 (9th Cir. July 31, 1990) (Choy, J.) (proper to apply U.S.S.G. § 2D1.1(b)(1) enhancement to defendant who was in backseat of car used in drug offense and driver had weapon under floormat—driver's possession of weapon was "reasonably foreseeable" by defendant, *see* U.S.S.G. § 1B1.3, comment. (n.1), in light of the large amount of drugs involved).

Drug Quantity

U.S. v. Corley, 909 F.2d 359 (9th Cir. 1990) (following instruction at end of Drug Quantity Table, U.S.S.G. § 2D1.1(c), base offense level is determined by number of marijuana plants when live plants are seized, by weight for dried plants). *Accord U.S. v. Bradley*, 905 F.2d 359 (11th Cir. 1990) (per curiam).

Appellate Review

Overlapping Guideline Ranges Dispute

U.S. v. Willard, No. 89-5244 (4th Cir. July 18, 1990) (Murnaghan, J.) (sentencing judge may not sentence within an overlap and deliberately avoid resolving a factual dispute solely because of the existence of that overlap, unless the court makes "an express 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").

Extent of Departure Not Appealable

U.S. v. Dean, No. 89-2786 (7th Cir. July 27, 1990) (Flaum, J.) (the rule that the extent of a discretionary downward departure may not be appealed by defendant also applies to substantial assistance departures under U.S.S.G. § 5K1.1, p.s. and 18 U.S.C. § 3553(e)).

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Offense Conduct

Fifth Circuit holds that applying guideline amendment effective before sentencing but after arrest, which could result in longer sentence, violates ex post facto clause; scienter required for enhancement for possession of weapon during drug offense committed before November 1989. Defendant pled guilty to a drug charge and was given a two-level increase for possession of a firearm during the offense, U.S.S.G. § 2D1.1(b). The district court found that defendant possessed the firearm and that she did so during a drug offense, but did not make the finding of scienter that defendant argued should be required following *U.S. v. Burke*, 888 F.2d 862 (D.C. Cir. 1989). The court in *Burke* based its decision on an earlier version of U.S.S.G. § 1B1.3(a)(3), holding that it "require[d] a showing of scienter under section 2D1.1(b)" that a defendant possessed the weapon "intentionally, recklessly or by criminal negligence."

The Fifth Circuit "agree[d] with the D.C. Circuit that the [former] version of § 1B1.3(a)(3) . . . 'operate[d] to require a showing of scienter under section 2D1.1(b).'" The question in this case, however, was whether that version of § 1B1.3(a)(3) should be applied to this defendant, or the amended version, effective Nov. 1, 1989, that deleted the scienter language relied on in *Burke*. The Sentencing Reform Act of 1984, at 18 U.S.C. § 3553(a)(4) and (5), states that sentencing courts "shall consider" guidelines and policy statements "that are in effect on the date the defendant is sentenced." Defendant was arrested before, but sentenced after, § 1B1.3(a)(3) was amended, and applying the amended guideline might result in a longer sentence than if the earlier version were applied. This, the court held, would violate the ex post facto clause: "Were the district court now to find that [defendant] lacked the scienter required by the pre-November 1989 version of § 1B1.3, its enhancement of a sentence under the current version (which does not require scienter) would obviously violate the ex post facto clause. . . . Because amended § 1B1.3 may increase [defendant's] punishment, the amendment is not simply a change in procedure which does not affect a matter of substance."

Remanding, the court instructed the district court to follow the version of § 1B1.3 in effect when defendant was arrested, and determine whether she possessed the firearm "intentionally, recklessly or by criminal negligence."

U.S. v. Suarez, No. 90-1052 (5th Cir. Aug. 30, 1990) (Wiener, J.).

Firearms Offenses

U.S. v. Smith, No. 89-2346 (6th Cir. Aug. 6, 1990) (per curiam) (the "cross reference" provision in former U.S.S.G. § 2K2.2(c) (Jan. 1988) (now § 2K2.1(c)(2)), which directs courts to use guideline for other offense defendant used firearm to commit if the resulting offense level is higher than that for the § 2K2.2 offense, "applies to state as well as federal offenses"; however, the state offense must also meet the federal definition of the offense—here, e.g., "the district court must apply the guidelines' definition of aggravated assault to determine whether a state assault offense as applied to a defendant's conduct falls within the guidelines' parameters as the base offense of aggravated assault").

Other Specific Offenses

U.S. v. Graves, No. 89-50391 (9th Cir. July 16, 1990) (Price, Dist. J.) (for enhancement for bodily injury from an assault, U.S.S.G. § 2A2.2(b)(3), "'the victim'...refers only to the victim of the aggravated assault of which the defendant is convicted," and enhancement is not applicable to injury inflicted in related assault charge that was dismissed).

Probation and Supervised Release

Revocation of Supervised Release

Seventh Circuit holds term of incarceration imposed after revocation of supervised release is not limited by guideline sentence authorized for original offense; however, total length of incarceration for offense and for revocation is limited by statute. Defendant had been sentenced to a three-month prison term and two-year period of supervised release. After release from prison his supervised release was revoked for violation of several conditions, and the district court sentenced him to a year and a day in prison. Defendant argued that the term imposed upon revocation could not exceed the maximum term under the Guidelines for his original offense, which he claimed was eight months.

The appellate court affirmed the sentence, holding that 18 U.S.C. § 3583(e)(3) and the legislative history establish the intent to allow a district court to "require the person [whose supervised release is revoked] to serve in prison all or part of the term of supervised release." *Accord U.S. v. Lockard*, —F.2d— (9th Cir. July 26, 1990). Thus "the district court did not err in fixing [defendant's] period of post-release incarceration at a term that exceeded the maximum allowable initial sentence." *Cf. U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) (sentence after revocation of *probation* limited by sentence authorized for original offense, 18 U.S.C. § 3565(a)).

The court noted, however, that defendant's possible term of incarceration after revocation was limited by the length of supervised release allowed under § 3583(e)(3) less the time served prior to release. Section 3583(e)(3) states that "a person whose term is revoked under this paragraph may not be required

to serve more than . . . 2 years in prison if the offense [for which the person was convicted] was a Class C or D felony." The court held that this language "places absolute limits on the total length of the sentence an offender can serve pre- and post-release, for each category of crime. Because [defendant] committed a Class D felony, section 3583(e)(3) limits his total prison sentence for that crime to two years. . . . [T]he maximum allowable prison sentence the district court could have imposed upon [defendant] when revoking his supervised release [was limited] to twenty-one months, two years less the three months served prior to his supervised release." *But cf. Lockard, supra* (affirming two-year prison term after revocation for defendant who originally committed Class C felony and served 9-month term).

U.S. v. Dillard, No. 89-3056 (7th Cir. Aug. 17, 1990) (per curiam).

Criminal History

Calculation

U.S. v. Eckford, No. 89-4862 (5th Cir. Aug. 20, 1990) (Johnson, J.) (when calculating criminal history score under U.S.S.G. § 4A1.1, "district court may consider . . . prior uncounseled misdemeanor convictions for which the defendant did not receive a term of imprisonment").

Departures

Aggravating Circumstances

U.S. v. Barnes, No. 89-6179 (6th Cir. Aug. 13, 1990) (Guy, J.) (affirming upward departure for defendant convicted of being felon in possession of firearm—defendant had prior conviction for same offense, committed instant offense only two months after release from prison on earlier offense, and "prescribed guideline range would have resulted in a sentence less than the sentence the defendant received on his prior conviction for the same offense").

Mitigating Circumstances

U.S. v. Parker, No. 90-1046 (6th Cir. Aug. 30, 1990) (Nelson, J.) (district court may not make downward departure for sole purpose of harmonizing sentence with that of codefendant when defendants' conduct and records were dissimilar). *Accord U.S. v. Enriquez-Munoz*, 906 F.2d 1356 (9th Cir. 1990).

U.S. v. Whitehorse, 909 F.2d 316 (8th Cir. 1990) (downward departure for escape defendant appropriate because of "prison officials' ill-advised decision to release [defendant] on unsupervised furlough despite her alcohol addiction," fact that defendant would lose two months of "good time" credits for escape, and defendant's need for treatment outside of prison—defendant failed to return to prison because she immediately went on drinking spree that prison officials should have foreseen, and the circumstances of this case were not considered in Guidelines; also proper under these facts to depart and impose sentence concurrent to term being served, despite provision in U.S.S.G. § 5G1.3 to impose consecutive sentence, which effectively resulted in no additional time served for escape).

Substantial Assistance

U.S. v. Brown, No. 89-6342 (10th Cir. Aug. 29, 1990) (McKay, J.) (government's confidential memorandum to court outlining defendant's assistance is not "functional equivalent" of government motion to depart under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1, p.s.). *Cf. U.S. v. Coleman*, 895 F.2d 501 (8th Cir. 1990) (letters outlining defendant's cooperation are not "functional equivalent" of motion).

Adjustments

Role in the Offense

U.S. v. Zweber, 89-30235 (9th Cir. Aug. 31, 1990) (Fletcher, J.) ("defendants could receive reductions [as minor or minimal participants under U.S.S.G. § 3B1.2] only for their roles in their offenses of conviction, but not their roles in the uncharged and unconvicted conspiracy"). *See also U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990); *U.S. v. Petit*, 903 F.2d 1336 (10th Cir. 1990); *U.S. v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990); *U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1990).

Acceptance of Responsibility

U.S. v. Watkins, No. 90-4205 (5th Cir. Aug. 27, 1990) (Johnson, J.) (affirming denial of reduction for acceptance of responsibility for defendant convicted of possessing stolen treasury checks who used drugs while on release pending sentencing—unlawful conduct providing basis for denial of reduction need not be related to offense of conviction).

U.S. v. Ramirez, No. 90-1329 (2d Cir. Aug. 17, 1990) (per curiam) (affirming denial of reduction even though district court improperly based denial in part on defendant's refusal to accept responsibility for conduct outside offense of conviction, *see U.S. v. Oliveras*, 905 F.2d 623 (2d Cir. 1990)—there were other, valid reasons for the denial, and "we [can] affirm on that other [clearly permissible] basis notwithstanding the court's reliance on one flawed basis," *U.S. v. Santiago*, 906 F.2d 867 (2d Cir. 1990)).

Sentencing Procedure

Factual Disputes

U.S. v. Fortier, No. 89-5179ND (8th Cir. Aug. 22, 1990) (Arnold, J.) (reversing finding that additional amount of cocaine was part of relevant conduct that should be included in offense level—court based finding that cocaine belonged to defendant on multiple hearsay without making independent finding that the hearsay was reliable; hearsay is admissible at sentencing hearings, but "hearsay statements admitted against a defendant . . . violate the Confrontation Clause unless a court finds that the declarant is unavailable and that there are indicia of reliability supporting the truthfulness of the hearsay statements").

Plea Bargaining

U.S. v. Kemper, No. 89-6197 (6th Cir. July 19, 1990) (Contie, Sr. J.) (error to reject plea agreement that stipulated to amount of drugs in offense, and thereby to a specific guideline range, and sentence defendant using larger amount from presentence report—plea agreement contained binding recommendation for specific sentence pursuant to Fed. R. Crim. P. 11(e)(1)(C), and while court may reject such a plea agreement if it concludes guideline range was incorrectly calculated, *see* U.S.S.G. §§ 6B1.2(c), p.s., and 6B1.4(d), p.s., it must then afford defendant opportunity to withdraw guilty plea, U.S.S.G. § 6B1.3, p.s. (citing Fed. R. Crim. P. 11(e)(4)).

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VOLUME 3 • NUMBER 13 • SEPTEMBER 21, 1990

Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Eleventh Circuit affirms imposition of full term of supervised release after revocation. Defendant had been sentenced under the Guidelines to one year in prison and two years of supervised release. After defendant violated the terms of his release, the district court revoked supervised release and imposed a two-year prison term. Defendant argued that he should have been sentenced under the Guidelines to a six-month term, a calculation based on treating the criminal conduct that violated his conditions of release as a Guideline offense and then crediting him for the time served in prison on the original offense.

The appellate court noted that there "is no specific provision for a new guideline calculation upon revocation" of supervised release. Thus, a sentencing court is to be guided by 18 U.S.C. § 3583(e)(3), which states that a court may "revoke a term of supervised release and require the person to serve in prison all or part of the term of supervised release." The appellate court determined that its review of sentences that are "imposed for an offense for which there is no applicable sentencing guideline" is limited under 18 U.S.C. § 3742(e)(4) to whether the sentence "is plainly unreasonable," and held that the two-year term imposed in this case "was not plainly unreasonable."

The Ninth Circuit has also affirmed imposition of the full term of supervised release. *See U.S. v. Lockard*, 910 F.2d 542 (9th Cir. 1990). The Seventh Circuit, however, has held that the length of incarceration for revocation of supervised release is limited by the maximum term allowed under § 3583(e) less time served for the original offense. *See U.S. v. Dillard*, 910 F.2d 461 (7th Cir. 1990) (per curiam).

U.S. v. Scroggins, No. 89-8910 (11th Cir. Sept. 5, 1990) (per curiam).

Adjustments

ROLE IN THE OFFENSE

U.S. v. Reid, No. 89-5158 (10th Cir. Aug. 20, 1990) (Baldock, J.) ("defendant was an organizer or leader of a criminal activity that was extensive under § 3B1.1(a)" where drug conspiracy "involved the defendant and three subordinates (four participants directly or indirectly controlled by the defendant), and relied upon the knowing services of at least two drug suppliers to supply hundreds of customers over a three-week period").

MULTIPLE COUNTS

U.S. v. Porter, 909 F.2d 789 (4th Cir. 1990) (money laundering offense need not be grouped under U.S.S.G. § 3D1.1 with gambling counts, even though laundered money came from gambling proceeds—apart from origin of money, laundering and gambling offenses were not "closely-related" within definition of § 3D1.2).

Criminal History

CAREER OFFENDER PROVISION

Eleventh Circuit holds circumstances of predicate offenses should not be reviewed in "crime of violence" determination. In a case where defendant was sentenced before the November 1989 guideline amendments, the district court looked at the actual circumstances of defendant's prior robbery and burglary offenses and determined they were not "crimes of violence" under U.S.S.G. § 4B1.2 and defendant was therefore not a "career offender." Alternatively, the court held that even if defendant qualified as a career offender a downward departure was warranted because the career offender sentence—with a range of 262–327 months instead of 46–57 months—would be "grossly unfair and grossly excessive."

The appellate court reversed, holding that "the guidelines prohibit the sentencing court from reviewing the underlying facts of a conviction to determine whether it is a crime of violence for career offender purposes." The sentencing court should only examine whether the offense "has as an element the use, attempted use, or threatened use of physical force," or whether "the generic, rather than the particular nature of the predicate offense" involves a substantial risk that force would be used. "Once the court determines that the defendant has been convicted of a crime that usually involves a risk of harm, the inquiry ends; it does not matter whether that risk has matured into actual harm" and "evidence establishing the particular conduct of the defendant on the day the crime was committed does not bear on that inquiry." *Accord U.S. v. Selfa*, — F.2d — (9th Cir. June 14, 1990). *Contra U.S. v. McNeal*, 900 F.2d 119 (7th Cir. 1990); *U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). *Cf. U.S. v. McVicar*, 907 F.2d 1 (1st Cir. 1990) (pursuant to U.S.S.G. § 4B1.2, comment. (n. 1) (1988), holding that defendant's actual conduct in prior "larceny from the person" offense—which is not listed in note 1—was "crime of violence"); *U.S. v. Terry*, 900 F.2d 1039 (7th Cir. 1990) ("We read [§ 4B1.2, application note 1 (1988)] as vesting a sentencing court with the discretion to explore the underlying facts of a prior conviction when that conviction is not one of the crimes specifically enumerated in the application note."); *U.S. v. Carter*, No. 89-3516 (7th Cir. Aug. 23, 1990) ("*Terry* does not require a sentencing judge to explore the underlying facts of a prior conviction that is identified as a crime of violence in the Commentary to § 4B1.2").

The appellate court also held that a finding that defendant's prior offenses involved only the threat, but not actual use, of violence is not an adequate ground for departure from the career offender guideline. *But see U.S. v. Baskin*, 886 F.2d 383 (D.C. Cir. 1989) (in determining whether departure is appropriate "sentencing judge retains discretion to examine the facts of a predicate crime to determine whether it was [in fact] a crime of violence notwithstanding the Commentary to the guidelines'

predetermined list of [violent] crimes"), *cert. denied*, 110 S. Ct. 1831 (1990). The court also held that departure "on the grounds that the sentence was simply too harsh" was improper.

U.S. v. Gonzalez-Lopez, No. 89-8093 (11th Cir. Sept. 7, 1990) (Cox, J.)

U.S. v. O'Neal, 910 F.2d 663 (9th Cir. 1990) (offenses of being a felon in possession of a firearm, assault with a deadly weapon, and vehicular manslaughter "qualify as violent felonies under Guideline 4B1.1").

Calculation

U.S. v. Aichele, No. 89-10547 (9th Cir. Aug. 30, 1990) (Noonan, J.) (reckless driving conviction is not "minor traffic infraction," U.S.S.G. § 4A1.2(c)(2), and therefore may be included in criminal history calculation—defendant's offense did not meet definition of "infraction" in U.S.S.G. § 1B1.9, comment. (n.1), and Guidelines rather than state law should be used to determine this question).

Departures

Aggravating Circumstances

U.S. v. Fousek, No. 89-5358 (8th Cir. Aug. 29, 1990) (per curiam) (because nothing in the Guidelines "indicates that the Commission considered the circumstance of a bankruptcy trustee embezzling estate funds . . . the district court did not err in taking into consideration [defendant's] position as a bankruptcy trustee as a basis for upward departure" to 36 months from range of 12–18 months; proper to base departure on U.S.S.G. § 2F1.1, comment. (n.9) ("the offense caused a loss of confidence in an important institution"), even though defendant was sentenced under § 2B1.1—"the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines," U.S.S.G. § 5K2.0, p.s.).

U.S. v. Carpenter, No. 89-30290 (9th Cir. Aug. 23, 1990) (Wallace, J.) (affirming departure to 108 months from 51–63 month range for defendant who hired two juveniles to attempt to murder his wife—the risks created to others by giving juveniles a rifle and instructing them to either run the wife's car off a road with a logging truck or blow up her house trailer, were not accounted for in the guideline calculation and "creation of a risk" may provide basis for departure, U.S.S.G. § 1B1.3, comment. (n.4); also, district court reasonably calculated extent of departure by analogizing to guidelines—to § 2A2.1(b)(2) for possession of the weapon by juveniles and to § 3A1.1 for the risk to others—and increasing defendant's offense level accordingly).

U.S. v. Castro-Cervantes, 911 F.2d 222 (9th Cir. 1990) (improper to depart upward on basis that bank robbery defendant was part of "organized group"—"the Guidelines implicitly take into account participation by a robber as a member of a ring" in the role in offense guideline, U.S.S.G. § 3B1).

Mitigating Circumstances

U.S. v. Harrington, 741 F. Supp. 968 (D.D.C. 1990) (Court departed downward to 60-month statutory minimum from 97–121 month range for first-time drug offender with long history of addiction because defendant's substantial progress in drug treatment programs since arrest indicated likelihood of successful rehabilitation. Court found—after a report from amicus appointed to research the issue—that the Guidelines did not preclude downward departure under these circumstances: "Examination of the four corners of the Guidelines and official comment on them provides no indication that the Commission addressed the case of a first offender drug addict found by expert opinion to be a likely candidate for successful treatment for drug addiction. . . . Neither does the Sentencing Commission's rejection of addiction as a factor to be considered in sentencing, Sentencing Guideline § 5H1.4 para.2, establish that the Sentencing Commission considered the likelihood of successful treatment for addiction." Court also determined that, although Congress "rejected imprisonment as a means of promoting rehabilitation" in passing the Sentencing Reform Act of 1984, it "did not foreclose consideration of a defendant's prospect of rehabilitation as a factor to be considered in determining the duration of a prison sentence."). *See also U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989) (sentencing court may consider "defendant's efforts to stay away from drugs as a basis for departing").

Criminal History

U.S. v. Dycus, No. 89-6594 (6th Cir. Aug. 29, 1990) (per curiam, unpublished) (affirming upward departure for defendant with history of serious and repeated firearms offenses and 19 criminal history points; extent of departure, from 24–30 month range to 46 months, was reasonably based on "a hypothetical criminal history category VIII into which a criminal history score of 19 would fall").

U.S. v. Williams, No. 89-3084 (7th Cir. Aug. 27, 1990) (Ripple, J.) (convictions more than fifteen years old that are not "evidence of similar misconduct," U.S.S.G. § 4A1.2(e)(1), comment (n.8), properly used for departure "as part of an overall assessment of the defendant's criminal background" under § 4A1.3 when such convictions constituted ""reliable information' indicating more extensive criminal conduct than otherwise reflected by the criminal history category"; although prior arrest record itself cannot provide basis for departure, "the guidelines allow the district court to go beyond the arrest record itself and to consider whether the underlying facts evidence 'prior similar adult conduct not resulting in a criminal conviction'" under § 4A1.3(e)).

Substantial Assistance

U.S. v. Damer, 910 F.2d 1239 (5th Cir. 1990) (per curiam) (affirming district court's refusal to grant downward departure for substantial assistance after government made U.S.S.G. § 5K1.1 motion—"once the government has filed its 5K1.1 motion, application of downward departure is left to the discretion of the sentencing court," and here the court did not abuse its discretion in sentencing defendant within the guideline range).

U.S. v. Peralta, 741 F. Supp. 1197 (D. Md. 1990) (in making downward departure for substantial assistance under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, sentencing court "has no authority to consider factors other than those relevant to substantial assistance"—the court's "scope of discretion to evaluate the value of substantial assistance does not include the right to consider unrelated grounds for a departure such as, in this case, the alleged extraordinary family circumstances or emotional state of the defendant").

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Adjustments

ROLE IN THE OFFENSE

Fifth Circuit holds that relevant conduct that "directly brought about" offense of conviction may be considered for role in offense adjustment. Defendant pled guilty to one count of selling two ounces of amphetamine. Her offense level was increased under U.S.S.G. § 3B1.1(a), "organizer or leader of a criminal activity that involved five or more persons," based on her role in the related manufacturing and distribution scheme.

In affirming, the appellate court held that "the 'offense' for § 3B1.1(a) purposes includes 'criminal activity' greater in scope than the exact, or more limited, activity comprising the elements of the offense charged." Relevant conduct that "directly brought about the more limited sphere of the elements of the specific charged offense" may be considered.

In *U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990), the Fifth Circuit had held that "section 3B1.1(a) focuses upon the number of transactional participants, which can be inferentially counted provided that the court does not look beyond the offense of conviction to enlarge the class of participants," and that 'a section 3B1.1(a) adjustment is anchored to the transaction leading to the conviction." The court in this case stated that "[o]ur holding is an application of the *Barbontin* holding .... The § 3B1.1(a) adjustment in this case was 'anchored to the transaction leading to the conviction,' because the district court incorporated and considered the very activities and persons ('participants') that directly lead to the final distribution [by defendant] of the amphetamine produced as a result of those activities of those persons. . . . The offense of conviction involved the last link of a continuous chain of transaction in manufacturing, distributing, and retailing amphetamine."

Three other circuits have held that, when counting the number of participants, § 3B1.1 applies only to the offense of conviction. *See U.S. v. Petit*, 903 F.2d 1336 (10th Cir. 1990); *U.S. v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990); *U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989). *But see U.S. v. Haynes*, 881 F.2d 586 (8th Cir. 1989) (affirming § 3B1.1(a) increase based on relevant conduct).

U.S. v. Manthei, No. 89-1970 (5th Cir. Sept. 20, 1990) (Barksdale, J.).

U.S. v. Mares-Molina, No. 89-50706 (9th Cir. Sept. 10, 1990) (Leavy, J.) (reversing finding that defendant convicted of conspiracy to import cocaine was "organizer, leader, manager, or supervisor" pursuant to U.S.S.G. § 3B1.1(c)—defendant could be considered manager or organizer of trucking business warehouse where cocaine was stored, but there were "no facts to support the conclusion that [he] exercised control or was otherwise responsible for organizing, supervising, or managing others in the commission of the offense" of conviction).

OBSTRUCTION OF JUSTICE

U.S. v. Hagan, No. 90-1072 (7th Cir. Sept. 25, 1990) (Ripple, J.) (holding that "the instinctive flight of a criminal about to be caught by the law" does not constitute obstruction of justice, U.S.S.G. § 3C1.1). *Accord U.S. v. Garcia*, 909 F.2d 389 (9th Cir. 1990); *U.S. v. Stroud*, 893 F.2d 504 (2d Cir. 1990).

U.S. v. Rodriquez-Macias, No. 89-10442 (9th Cir. Sept. 13, 1990) (per curiam) (affirming U.S.S.G. § 3C1.1 obstruction of justice enhancement for giving false name at time of arrest). *Accord U.S. v. Saintil*, 910 F.2d 1231 (4th Cir. 1990) (using false name at time of arrest and until arraignment before magistrate had "material" effect on government investigation).

U.S. v. Edwards, 911 F.2d 1031 (5th Cir. 1990) (affirming U.S.S.G. § 3C1.1 obstruction enhancement for defendant who failed to inform authorities of whereabouts of co-conspirator after being instructed to do so).

VICTIM-RELATED ADJUSTMENTS

U.S. v. Cree, No. 89-5611 (8th Cir. Sept. 25, 1990) (Larson, Sr. Dist. J.) (reversing U.S.S.G. § 3A1.1 "vulnerable victim" finding—even if victim of involuntary manslaughter offense could be considered vulnerable because of intoxication, there was no evidence that defendant knew extent of victim's intoxication or that he intended to exploit that vulnerability). *But cf. U.S. v. Boise*, No. 89-30071 (9th Cir. Aug. 29, 1990) (Wright, J.) (affirming finding that six-week-old baby was "vulnerable victim" under § 3A1.1 and rejecting argument that § 3A1.1 requires defendant to intentionally select victim because of vulnerability).

U.S. v. Wilson, No. 89-5209 (4th Cir. Sept. 4, 1990) (Wilkinson, J.) (reversing finding that recipients of letters that fraudulently solicited funds for tornado victims were "vulnerable victims" under U.S.S.G. § 3A1.1—defendant sent letters at random, and fact that "persons targeted might be sympathetic to the causes for which funds were fraudulently solicited may have 'made the crime possible, but it did not confer upon the victim the degree of vulnerability for which § 3A1.1 permits an upward adjustment,'" *U.S. v. Creech*, 913 F.2d 780 (10th Cir. 1990)).

ACCEPTANCE OF RESPONSIBILITY

U.S. v. Mourning, No. 89-7005 (5th Cir. Oct. 1, 1990) (Clark, C.J.) (for acceptance of responsibility reduction under U.S.S.G. § 3E1.1, defendant "must first accept responsibility for all of his relevant criminal conduct," as relevant conduct is defined in U.S.S.G. § 1B1.3(a); reduction properly denied money laundering defendant who did not accept responsibility for drug activity underlying offense of conviction). *Accord U.S. v. Gordon*, 895 F.2d 932 (4th Cir. 1990); *U.S. v. Henry*, 883 F.2d 1010 (11th Cir. 1989). *Contra U.S. v. Oliveras*, 905 F.2d 623 (2d Cir. 1990); *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989).

Probation and Supervised Release

Revocation of Probation

U.S. v. Von Washington, No. 90-1423 (8th Cir. Sept. 28, 1990) (per curiam) (agreeing with *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990), that when probation is revoked pursuant to 18 U.S.C. § 3565 defendant must be resentenced within guideline range applicable to original offense of conviction; in resentencing, the conduct that caused the revocation may be considered for three purposes: reconsidering the initial decision of whether to depart (but any departure must be supported by facts that were presented at sentencing for the original offense); deciding whether to continue or revoke probation; determining the appropriate sentence within the applicable guideline range).

Criminal History

Calculation

U.S. v. Crosby, No. 89-3932 (6th Cir. Sept. 11, 1990) (Martin, J.) (sentencing court properly included in criminal history score a prior state drug conviction that was also an element of defendant's continuing criminal enterprise offense—although U.S.S.G. § 4A1.2(a)(1) defines "prior sentence" as a sentence imposed "for conduct not part of the instant offense," the Guidelines make an exception for CCE offenses, which necessarily involve continuous criminal activity, in § 2D1.5, comment. (n.3): "A sentence resulting from a conviction sustained prior to the last overt act of the instant [CCE] offense is to be considered a prior sentence under § 4A1.2(a)(1) and not part of the instant offense").

Career Offender Provision

U.S. v. Goodman, No. 89-6170 (5th Cir. Oct. 1, 1990) (Duhe, J.) ("[w]hen the instant offense is not one of those enumerated" as a "crime of violence" in the commentary to U.S.S.G. § 4B1.2, court may "look beyond the face of the indictment and consider all facts disclosed by the record"; unlawful possession of weapon by convicted felon, who intended to use it to retrieve another weapon with which he had previously threatened a group of people, was "crime of violence"). *Cf. U.S. v. Alvarez*, No. 89-2670 (7th Cir. Sept. 27, 1990) (Bauer, C.J.) (unlawful possession of weapon by convicted felon properly considered "crime of violence" where defendant struggled with arresting officer while holding fully loaded gun); *U.S. v. McNeal*, 900 F.2d 119 (7th Cir. 1990) (unlawful possession of weapon by convicted felon is "crime of violence" where defendant fired weapon); *U.S. v. Williams*, 892 F.2d 296 (3d Cir.) (same), *cert. denied*, 110 S. Ct. 322 (1990).

U.S. v. Jones, 910 F.2d 760 (11th Cir. 1990) (per curiam) ("a prior state court case wherein the defendant enters a nolo plea and adjudication is withheld can be used as a 'conviction' to make the defendant eligible for career offender status under Section 4B1.1 of the Sentencing Guidelines," even though defendant was placed on probation for that offense).

Departures

Aggravating Circumstances

U.S. v. Baker, No. 89-1165 (10th Cir. Sept. 12, 1990) (Tacha, J.) (affirming upward departure of three offense levels, from 51–63 month range to 70-month term, because "use of explosives for intimidation during a bank robbery is an aggravating factor not considered by the Sentencing Commission in Guidelines section 2B3.1 . . . [and] abduction at gunpoint is an aggravating factor not considered by the Commission in Guidelines section 2K1.6" (illegal use or possession of explosives)).

U.S. v. Thomas, No. 89-2071 (8th Cir. Sept. 11, 1990) (Wollman, J.) (affirming departure, from 8–14 month range to 60 months, for defendant convicted of possession of firearms by convicted felon based on "dangerous nature of the firearms [AK47 assault rifle and 9 mm. pistol], the fact that they were fully loaded, and the assaultive nature of [defendant's] 1983 conviction for second degree robbery and second degree assault").

U.S. v. George, 911 F.2d 1028 (5th Cir. 1990) (per curiam) (affirming departure from 15–21 month range to 50-month sentence—defendant convicted of counterfeiting fled jurisdiction when released on bond after conviction and before sentencing, and escape charges were not brought against him).

Mitigating Circumstances

U.S. v. Deane, No. 90-1085 (1st Cir. Sept. 10, 1990) (Campbell, J.) (vacating downward departure for defendant convicted of mailing child pornography: Sentencing Commission adequately considered "the full range of conduct" covered by the relevant guideline, including defendant's "passive" conduct "at the very least serious end of this range"; fact that defendant was otherwise exemplary employee and father was not ground for departure; and concern that Bureau of Prisons does not offer meaningful counseling program "does not justify a downward departure, absent exceptional circumstances and 'a finding that the defendant has an exceptional need for, or ability to respond to, treatment,'" *U.S. v. Studley*, 907 F.2d 254 (1st Cir. 1990)).

Sentencing Procedure

Burden of Proof

U.S. v. Newman, 912 F.2d 1119 (9th Cir. 1990) (when defendant challenges constitutionality of prior conviction used in computing criminal history score, "the ultimate burden of proof . . . lies with the defendant"; "where the Government seeks the inclusion of the prior conviction in a criminal history score calculation, its proof of the fact of conviction would satisfy its initial burden. Then . . . the defendant would have the burden to establish the constitutional invalidity of the prior conviction for purposes of determining the criminal history category"—proof must be by preponderance of the evidence). *Accord U.S. v. Unger*, No. 90-1457 (1st Cir. Sept. 28, 1990) (Selya, J.); *U.S. v. Brown*, 899 F.2d 677 (7th Cir. 1990); *U.S. v. Davenport*, 884 F.2d 121 (4th Cir. 1989); *U.S. v. Dickens*, 879 F.2d 410 (8th Cir. 1989).

Decision to Apply Guidelines

U.S. v. R.L.C., No. 90-5048 (8th Cir. Sept. 12, 1990) (Heaney, Sr. J.) (when sentencing juvenile under 18 U.S.C. § 5037(c), "the phrase 'maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult' prohibits a court from sentencing a juvenile to a term of imprisonment greater than the juvenile could have received had he been sentenced as an adult under the sentencing guidelines"). *Contra U.S. v. Marco L.*, 868 F.2d 1121 (9th Cir.), *cert. denied*, 110 S. Ct. 369 (1989) ("maximum term of imprisonment" is "that term prescribed by the statute defining the offense").

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Departures

AGGRAVATING CIRCUMSTANCES

Third Circuit holds extreme departures require clear and convincing standard for facts underlying departure and higher standard of admissibility for hearsay; endorses use of analogy to relevant guidelines in setting extent of departure for aggravating circumstances. Defendant was convicted of several explosives and passport offenses. The guideline range was 27–33 months, but the district court departed to impose a 30-year term after concluding defendant was a terrorist connected with the Japanese Red Army and had planned to use the explosives in a "terrorist mission . . . to kill and seriously injure scores of people." *See U.S. v. Kikumura*, 706 F. Supp. 331 (D.N.J. 1989) (2 *GSU* #2). The court held that the Guidelines did not account for terrorist activity, that defendant's conduct implicated several grounds for departure listed in U.S.S.G. § 5K2, and that defendant's criminal history category significantly underrepresented the seriousness of his criminal past and the likelihood of further criminal activity.

The appellate court, noting that this was "apparently the largest departure . . . since the sentencing guidelines became effective," affirmed the district court's findings of fact and conclusion that departure was warranted, but held that the extent of departure was not properly determined and remanded for resentencing. In affirming the district court's findings, the court made several rulings on significant procedural issues regarding departures.

First, for a departure of this magnitude the court held that "the factfinding underlying that departure must be established at least by clear and convincing evidence." (Note: The district court had held that a preponderance of evidence was sufficient, but held alternatively—and the appellate court agreed—that its findings met the clear and convincing standard.) The court recognized that "there is overwhelming authority in our sister circuits for the proposition that guideline sentencing factors need only be proven by a preponderance of evidence, . . . but we note that in none of those cases did the operative facts involve anything remotely resembling a twelve-fold, 330-month departure from the median of an applicable guideline range." The court did not further specify how large a departure required this heightened standard.

Similarly, the court concluded that a higher standard of admissibility was required for hearsay statements relied on to make a departure of this size. "Normally, hearsay statements may be considered at sentencing . . . 'if they have some minimal indicium of reliability beyond mere allegation.' . . . However, we believe that [this] standard, like the preponderance standard, is simply inadequate in situations as extreme and unusual as this one." The court held that "at a sentencing hearing where the court departs upwards dramatically from the applicable guideline range . . . the court should examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy." This "intermediate standard" is less strict than that used for hearsay statements at trial, but stronger than that used in the "garden variety sentencing hearing." *Cf. U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990) ("hearsay statements admitted against a defendant . . . violate the Confrontation Clause unless a court finds that the declarant is unavailable and that there are indicia of reliability supporting the truthfulness of the hearsay statements") (3 *GSU* #12). As with the factfinding, the court held that the hearsay evidence admitted by the district court met this heightened standard.

The court also upheld the district court's findings that the guidelines applicable to the offenses of conviction did not adequately account for defendant's conduct, but held that the extent of departure was unreasonable and should have been calculated by comparing the aggravating circumstances to analogous guidelines. The court "endorse[d] th[e] general approach" taken by other circuits that "have recently begun to look to the guidelines themselves for guidance in determining the reasonableness of a departure," and concluded that "analogy to the guidelines is a useful and appropriate tool for determining what offense level a defendant's conduct most closely resembles." *See U.S. v. Landry*, 903 F.2d 334 (5th Cir. 1990); *U.S. v. Pearson*, 911 F.2d 186 (9th Cir. 1990); *U.S. v. Ferra*, 900 F.2d 1057 (7th Cir. 1990); *U.S. v. Kim*, 896 F.2d 678 (2d Cir. 1990). The court recognized that this method cannot always be "mechanically applied" and that analogies to the guidelines "are necessarily more open-textured than applications of the guidelines."

Rather than simply remand, because it was "convinced beyond any doubt that the district court would impose as high a sentence as possible up to 30 years," the appellate court proceeded to consider whether "reasonable analogy existed to support the sentence imposed." The court concluded that the maximum sentence imposable was 262 months, based on an offense level 32 and criminal history category VI, and remanded for resentencing "consistent with this opinion."

U.S. v. Kikumura, No. 89-5129 (3d Cir. Nov. 2, 1990) (Becker, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Pharr, No. 90-1284 (3d Cir. Oct. 19, 1990) (Cowen, J.) (reversing downward departure for theft defendant who after arrest had made "conscientious efforts" to overcome his heroin addiction and whose rehabilitation might be hindered by incarceration: "We read policy statement 5H1.4 to mean

that dependence upon drugs, or separation from such a dependency, is not a proper basis for a downward departure from the guidelines"). *Contra U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989); *U.S. v. Harrington*, 741 F. Supp. 968 (D.D.C. 1990); *U.S. v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990); *U.S. v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).

Criminal History

U.S. v. Fortenbury, No. 89-2291 (10th Cir. Oct. 26, 1990) (Logan, J.) (court erred in departing upward in offense level, instead of criminal history category, for defendant who illegally possessed firearms three times after conviction for possession of firearm by felon—commissions of the same crime "are elements of a criminal history category, not an offense level," and "courts cannot depart by offense level when the criminal history category proves inadequate").

U.S. v. Lawrence, No. 89-30284 (9th Cir. Oct. 10, 1990) (Norris, J.) (holding that neither Sentencing Reform Act nor Guidelines prohibit downward departure for career offender). *Accord U.S. v. Brown*, 903 F.2d 540 (8th Cir. 1990).

Probation and Supervised Release

Revocation of Probation

U.S. v. Tellez, No. 89-6177 (11th Cir. Oct. 30, 1990) (per curiam) (Defendant had been sentenced under pre-Guidelines law to three years' probation after district court held the Guidelines unconstitutional, and the sentence became final when neither party appealed. However, defendant's sentence after probation revocation is still limited by the sentence authorized by the Guidelines for his original offense, 18 U.S.C. § 3565(a)(2). *See U.S. v. Smith*, 911 F.2d 133 (11th Cir. 1990).).

Adjustments

Role in the Offense

U.S. v. McMillen, No. 90-3079 (3d Cir. Oct. 29, 1990) (Stapleton, J.) (vacated and remanded—district court should have found that misapplication of funds defendant, who was a bank manager with authority to approve loan applications, was in "position of private trust," U.S.S.G. § 3B1.3; also, because defendant personally approved his own fraudulent loan applications, his position as manager "significantly facilitated the commission or concealment of the offense").

U.S. v. Hill, 915 F.2d 502 (9th Cir. 1990) (truck driver for moving company, convicted of conspiracy to commit theft of an interstate shipment, was in "position of trust" per § 3B1.3 vis-a-vis the owners of the goods stolen—defendant had unwatched and exclusive control of goods for extended period of time without oversight by owners and used that position to facilitate the offense).

Criminal History

Juvenile Convictions

U.S. v. Unger, 915 F.2d 759 (1st Cir. 1990) (federal rather than state law is used to determine whether a juvenile offense should be counted in criminal history score under U.S.S.G. § 4A1.2(c), and court may "look to the substance of the underlying state offense in order to determine whether it falls within" the guideline).

Offense Conduct

Drug Quantity

U.S. v. Callihan, No. 89-7085 (10th Cir. Oct. 12, 1990) (Anderson, J.) (total weight of amphetamine precursor mixture, not just weight of controlled substance in mixture, is used to calculate base offense level under U.S.S.G. § 2D1.1).

Determining the Sentence

Fines and Restitution

U.S. v. Hickey, No. 89-1459 (6th Cir. Oct. 24, 1990) (Milburn, J.) (remanded—clearly erroneous for court to find that defendant with uncontested net worth of at least $50,000 was unable to pay any fine under U.S.S.G. § 5E1.2).

U.S. v. Labat, 915 F.2d 603 (10th Cir. 1990) (vacating imposition of fine to offset costs of incarceration when punitive fine was not imposed: "an 'additional fine' under § 5E1.2(i) cannot be imposed unless the court first imposes a punitive fine under § 5E1.2(a)").

Sentencing Procedure

Procedural Requirements

U.S. v. Lopez-Cavasos, 915 F.2d 474 (9th Cir. 1990) (upholding District of Idaho local rule that requires parties to lodge objections to presentence report prior to sentencing hearing, leaving later objections to discretion of court—rule is not inconsistent with Fed. R. Crim. P. 32(a) or (c) requirements for opportunity to comment on presentence reports).

Decision to Apply Guidelines

U.S. v. Marmolejo, No. 89-8079 (5th Cir. Oct. 26, 1990) (Clark, C.J.) (Appellate court agreed with *U.S. v. Garcia*, 893 F.2d 250 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1792 (1990), that Guidelines apply to Assimilative Crimes Act (ACA), 18 U.S.C. § 13, but the sentence is limited by state law maximum and minimum sentences. *Accord U.S. v. Young*, No. 89-5016 (4th Cir. Oct. 12, 1990) (Chapman, J.); *U.S. v. Leake*, 908 F.2d 550 (9th Cir. 1990). For defendant sentenced under the ACA whose probation was revoked, the district court properly sentenced him to six-month prison term plus one-year term of supervised release, even though state law provided for parole but not supervised release: "For ACA purposes, we hold that when the applicable state law provides for parole, a sentence of imprisonment plus supervised release is 'like punishment' when the period of imprisonment plus the period of supervised release does not exceed the maximum sentence allowable under state law," which here was ten years.).

U.S. v. Bear, 915 F.2d 1259 (9th Cir. 1990) (for crimes covered by Indian Major Crimes Act, 18 U.S.C. § 1153, Guidelines should be applied only to offenses that are defined and punished under federal law; burglary of a private residence is not defined under federal law, so defendant should be sentenced in accordance with state law). *Cf. U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990) (holding that Guidelines apply to Indian Major Crimes Act, although sentence must be within maximum and minimum sentences imposable under state law).

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Sentencing Procedure

U.S. v. Herrera-Figueroa, No. 89-50660 (9th Cir. Nov. 14, 1990) (Reinhardt, J.) ("Concluding that the exclusion of counsel from presentence interviews serves no rational purpose, we exercise our supervisory power over the orderly administration of justice to hold that when a federal defendant requests that his attorney be permitted to accompany him at a presentence interview, the probation officer must honor that request.").

Offense Conduct

WEAPONS POSSESSION—DURING DRUG OFFENSE

Seventh Circuit holds courts may not, Fifth and Ninth Circuits hold courts may, consider relevant conduct in addition to offense of conviction for U.S.S.G. § 2D1.1(b)(1) enhancement. In the Seventh Circuit case, defendant was involved in drug sales and weapons possession at one residence, but was convicted only of possessing with intent to distribute drugs that were at another residence several miles away where no weapons were found. The district court increased the offense level under § 2D1.1(b)(1), finding that the weapons were used to facilitate "the drug business" at both residences.

The appellate court reversed, holding that the guns found at the first residence could not be used for the enhancement. "Defendant's possession of the weapons was contemporaneous with his commission of the offense, but it is clear from the Guidelines and court decisions that contemporaneity is not enough. There must be some proximity of the weapon to the contraband (if not also to the defendant or some person under his control)." *See U.S. v. Vasquez*, 874 F.2d 250 (5th Cir. 1989) (§ 2D1.1(b)(1) improperly applied—gun that defendant admitted owning during period of drug-dealing was several miles away from drugs in offense of conviction). The Seventh Circuit noted that "[t]here need not be an exact proximity of the contraband and weapons, so long as other evidence connects the weapons to the crime," *see, e.g., U.S. v. Paulino*, 887 F.2d 358 (1st Cir. 1989) (§ 2D1.1(b)(1) properly applied where drug supply in one apartment and guns in different apartment in same building where drugs were sold). The court concluded, however, that "§ 2D1.1(b)(1) says that the weapons must be possessed 'during the commission of the offense,' and this must mean the offense of conviction."

U.S. v. Rodriguez-Nuez, No. 89-2203 (7th Cir. Dec. 3, 1990) (Fairchild, Sr. J.).

The Ninth Circuit defendant pled guilty to a distribution offense involving only drugs found in his car at the time of arrest. Numerous weapons were found "only later at his place of business, some miles distant." Given the number of weapons and the extent of defendant's involvement in drugs, the district court found "it was clearly probable that the weapons were related to this offense" and applied § 2D1.1(b)(1).

Affirming, the appellate court reached the opposite conclusion from that of the Seventh Circuit regarding "whether the statutory language 'during the commission of the offense' refers to the offense of conviction, or to the entire course of criminal conduct." Finding that "the language of the guidelines... make[s] clear that 'specific offense characteristics... shall be determined on the basis of . . . all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction,'" U.S.S.G. § 1B1.3(a)(2), the court determined that "offense" in § 2D1.1(b)(1) "includes all conduct that was part of the same scheme." Therefore, the district court "properly looked to all of the offense conduct, not just the crime of conviction."

U.S. v. Willard, No. 89-30206 (9th Cir. Nov. 27, 1990) (Norris, J.).

In the Fifth Circuit, defendant did not possess a weapon during the commission of the drug offense to which he pled guilty, but was given the § 2D1.1(b)(1) enhancement because he "clearly possessed a firearm" during the related drug conspiracy and co-conspirators possessed guns when arrested. The appellate court affirmed, holding, like the Ninth Circuit, that § 1B1.3(a)(2) applies to § 2D1.1(b)(1) and the sentencing court could "consider related relevant conduct."

U.S. v. Paulk, 917 F.2d 879 (5th Cir. 1990).

SPECIFIC OFFENSES

U.S. v. Nelson, No. 89-50578 (9th Cir. Nov. 27, 1990) (Poole, J.) (upholding application of offense level increase in § 2J1.6(b)(1), based on statutory maximum of underlying offense, for defendant who failed to appear for trial but was eventually acquitted of the underlying charges; distinguished *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989), which invalidated § 2J1.6(b)(1) insofar as it applied to defendant who failed to report to prison *after* trial and sentencing to only a fraction of the statutory minimum).

U.S. v. Rothman, 914 F.2d 708 (5th Cir. 1990) (in conspiracy guideline section calling for three-level reduction "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense," § 2X1.1(b)(2), term "the offense" refers to underlying offense, not the conspiracy—thus defendant convicted of money laundering conspiracy qualified for reduction because conspirators were arrested after receiving money but before they could begin to launder it).

Challenges to Guidelines

U.S. v. Swanger, No. 90-1583 (8th Cir. Nov. 19, 1990) (per curiam) (remanded for resentencing—when use of amended Guidelines in effect at time of sentencing instead of those in effect at time of offense increased defendant's offense level, "sentencing under the amended Guidelines violated the ex post facto clause of the Constitution"). *Accord U.S. v. Suarez*, 911 F.2d 1016, 1021 (5th Cir. 1990).

Departures

Mitigating Circumstances

U.S. v. Short, No. 89-2571WM (8th Cir. Nov. 27, 1990) (Arnold, J.) (reversing downward departure for defendant convicted of building and possessing pipe bomb found in truck of man who was having affair with defendant's wife, holding that as a matter of law U.S.S.G. § 5K2.10, p.s. (Victim's Conduct), could not support a departure in this case: "A concern for the proportionality of the defendant's response is manifested by the terms of § 5K2.10 .... Though certainly wrongful and provocative, adultery does not justify blowing up the adulterers").

U.S. v. Rutlick, No. 89-3080 (8th Cir. Nov. 21, 1990) (Bright, Sr. J.) (district court erroneously believed it could not depart downward under U.S.S.G. § 5K2.13, p.s., because defendant's significantly reduced mental capacity "was not the sole cause of his drug-related offense"—appellate court "interpret[s] section 5K2.13 to authorize a downward departure where, as here, a defendant's diminished capacity comprised a contributing factor in the commission of the offense").

U.S. v. Nelson, No. 89-5270 (6th Cir. Nov. 20, 1990) (Ryan, J.) (affirmed downward departure imposed to avoid "unreasoned disparity" between defendant's sentence and much lower sentences of codefendants who received departures for cooperation with authorities—"district courts ... are not precluded as a matter of law from departing from the guidelines in order to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators"; remanding for resentencing, however, because extent of departure was "unreasonable" in light of "substantial factual differences between [defendant's] case and his confederates'," especially his lack of cooperation).

Criminal History

U.S. v. Collins, 915 F.2d 618 (11th Cir. 1990) (court may consider successful completion of intervening state criminal sentence, which occurred between commission of and sentencing on instant offense, as evidence that defendant "has demonstrated his determination to avoid future crimes" and will be less likely to recidivate; such a departure must be guided by the procedure in U.S.S.G. § 4A1.3).

Computation—Departure Above Category VI

U.S. v. Glas, No. 90 CR 434 (N.D. Ill. Nov. 1, 1990) (Williams, J.) (departing upward for criminal history category VI defendant with 39 criminal history points, court extrapolated from sentencing table to create new criminal history categories for every three criminal history points above 15, with three-month increase in minimum sentence for every new level; defendant's 39 points resulted in criminal history category XIV and, with offense level of 10, a minimum sentence of 48 months). *See also U.S. v. Dycus*, 912 F.2d 466 (6th Cir. 1990) (per curiam) (table, unpublished) (affirming use of hypothetical category VIII for 19 criminal history points).

Adjustments

Acceptance of Responsibility

U.S. v. Piper, No. 89-30325 (9th Cir. Nov. 9, 1990) (per curiam) (agreeing with *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989), that "a defendant must show contrition for the crime of which he was convicted, but he need not accept blame for all crimes of which he may be accused" to qualify for acceptance of responsibility reduction, § 3E1.1). *Accord U.S. v. Oliveras*, 905 F.2d 623 (2d Cir. 1990); *U.S. v. Rogers*, 899 F.2d 917 (10th Cir.) (dicta), *cert. denied*, 111 S. Ct. 113 (1990); *U.S. v. Guarin*, 898 F.2d 1120 (6th Cir. 1990) (dicta). *Contra U.S. v. Mourning*, 914 F.2d 699 (5th Cir. 1990); *U.S. v. Munio*, 909 F.2d 436 (11th Cir. 1990); *U.S. v. Gordon*, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990).

Victim-Related Adjustments

U.S. v. Rocha, 916 F.2d 219 (5th Cir. 1990) (affirmed finding that 17-year-old male kidnap victim "was unusually vulnerable due to age," U.S.S.G. § 3A1.1—"it is reasonable to believe that [he] was chosen as the kidnapping victim because of his young age").

Relevant Conduct

U.S. v. Lawrence, 915 F.2d 402 (8th Cir. 1990) (quantities of cocaine that defendant purchased and distributed during the course of the marijuana conspiracy he was convicted of, but that were not part of the same "common scheme or plan" as the marijuana offense, may still be included as relevant conduct under U.S.S.G. § 1B1.3(a)(2) because the cocaine was "part of the same course of conduct" to possess and distribute drugs).

Criminal History

Career Offender Provision

U.S. v. Becker, No. 89-50240 (9th Cir. Nov. 20, 1990) (Reinhardt, J.) (in determining whether prior felony was "crime of violence" under U.S.S.G. § 4B1.1, "we do not look to the specific conduct which occasioned [defendant's] burglary convictions, but only to the statutory definition of the crime. We hereby adopt the so-called 'categorical approach' that the Supreme Court has held is appropriate for determining whether someone is a career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924. *See Taylor v. United States*, 110 S. Ct. 2143, 2159 (1990)"; affirmed finding that daytime burglary is violent crime).

U.S. v. Houser, 916 F.2d 1432 (9th Cir. 1990) (vacated because it was error to classify defendant as career offender under § 4B1.1—two prior drug offenses were "part of a single common scheme or plan," § 4A1.2(a), comment. (n.3), and were only charged and tried separately because they occurred in different counties). *See also U.S. v. Rivers*, 733 F. Supp. 1003 (D. Md. 1990) (two prior violent felony convictions should not be counted separately because "accident of geography" led to separate sentences for related offenses).

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Departures

Tenth Circuit holds that similarly situated codefendants should receive equivalent departures. Three codefendants pled guilty to maintaining a crack house. They were sentenced separately and all received upward departures based on the amount of drugs involved in the offense. Two defendants received sentences of 36 and 72 months, adjusted upward from ranges of 15–21 and 30-37 months, respectively. Defendant here, however, received a departure from a 30–37 month range to a 120-month sentence.

The appellate court remanded: "Because of the disparity in the sentence given [defendant] as opposed to those given [his codefendants], when each departure was based on the same conduct involving the same quantity of drugs, we must reverse and remand for resentencing. The sentencing guidelines incorporate the principles of equality and proportionality. Their purpose is to narrow the 'disparity in sentences imposed . . . for similar criminal conduct by similar offenders.' . . . The district court's disproportionate upward departure from [defendant's] guideline sentence range thwarts the very purpose of the guidelines and is therefore invalid. Given that the three defendants here were 'similar offenders' engaged in 'similar criminal conduct' with respect to the reason given for their upward departure, they should have received equivalent upward departures."

The court noted that this case "is distinguishable from cases in which disparate sentences were upheld because the disparity was explicable given the facts in the respective records. . . . Here, no distinguishing factors were offered or appear in the record."

The court rejected, however, defendant's claim that an upward departure could not be based on the amount of drugs in the offense of operating a crack house: "quantity of drugs is a valid factor to consider in determining whether an upward departure from the sentence for a premises violation is appropriate." *See also U.S. v. Bennett*, 900 F.2d 204 (9th Cir. 1990) (departure for large quantity of drugs in telephone offense); *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) (same); *U.S. v. Crawford*, 883 F.2d 963 (11th Cir. 1989) (departure for quantity of drugs in simple possession offense); *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989) (same, plus purity and packaging).

U.S. v. Sardin, No. 89-6189 (10th Cir. Dec. 18, 1990) (Seymour, J.).

First Circuit instructs district courts to characterize departure sentences as either upward or downward, even when both upward and downward "interim calculations" are made, in order to determine which party has the right to appeal. Defendant pled guilty to embezzlement charges. The district court departed upward four offense levels from the guideline sentencing range (GSR) because the amount embezzled, over $11 million, was substantially in excess of the highest amount in the applicable guideline. The court also departed downward two levels to reward defendant for his substantial assistance, U.S.S.G. § 5K1.1, p.s. Defendant appealed the upward departure and argued the downward departure should have been greater.

The appellate court upheld the sentence, but rejected "the characterization of appellant's sentence as one embodying dual departures—a characterization employed both by the district court and by the litigants." The court reasoned that "decisions to increase or decrease offense levels prior to the imposition of a sentence, or a court's assessment of countervailing considerations before passing sentence, can only be seen as interim calculations. Whether or not circumstances exist that might support departures in both directions, it is indisputable that the sentence finally imposed can only fall below, within, or above the GSR. In other words, in any given sentencing, there can be at most one departure, up or down—a phenomenon determined by the net result of all interim calculations. Hence, to describe a sentence as consisting of two departures, one up and one down, is necessarily inaccurate."

The distinction is important because, barring error in applying the Guidelines, "a decision to depart can only confer a right of appeal on one party." *See* 18 U.S.C. § 3742(a)(3) and (b)(3). "But in each case, the prime beneficiary of the departure . . . may not appeal." Here, for example, "where the sentence actually imposed was above the GSR, the only cognizable departure was upward and the only party entitled to appeal the departure decision was the defendant." To "avoid confusion in the future," the court instructed district courts "to avoid terminology suggestive of multiple departures within the contours of a single sentence."

U.S. v. Harotunian, No. 90-1393 (1st Cir. Dec. 5, 1990) (Selya, J.).

Aggravating Circumstances

U.S. v. Cox, No. 90-1670 (8th Cir. Dec. 18, 1990) (per curiam) (reversing upward departure given because consolidation for sentencing of bank robbery and escape convictions effectively resulted in no punishment for the escape: "In essence, the guidelines merged [defendant's] escape charge into his robbery charge. This merger effectively barred the court from imposing a separate sentence for the escape charge. Because the Sentencing Commission already has determined how to calculate an offense level when multiple offenses are sentenced in the same proceeding, we conclude that the circumstances in this case are not sufficiently 'unusual' to warrant an upward departure from the guidelines. *See* U.S.S.G. § 3D1.4"). *Accord U.S. v. Miller*, 903 F.2d 341 (5th Cir. 1990).

Mitigating Circumstances

U.S. v. McHan, No. 89-5057 (4th Cir. Dec. 6, 1990) (Wilkinson, J.) (reversing downward departure for drug defendant that was based on his charitable activities: "Not only are the above personal factors ordinarily irrelevant in sentencing determinations, but to depart downward because a successful drug dealer has made charitable contributions to his community is to distort the purpose of the Guidelines").

Criminal History

U.S. v. Williams, No. 90-6085 (10th Cir. Dec. 19, 1990) (Brorby, J.) (affirming U.S.S.G. § 4A1.3, p.s., upward departure to career offender level for bank robbery defendant who had committed four separate bank robberies in 1981, which were consolidated for sentencing and thus counted as only one offense in criminal history score: "a sentencing judge may separate prior related convictions that resulted in a single sentence. The judge may then count the convictions as prior felony convictions for purposes of the Guidelines career offender calculation. . . . We find no provision in the Guidelines preventing a court from departing upward to the career offender section"). *Accord U.S. v. Dorsey*, 888 F.2d 79 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 756 (1990).

Adjustments

Role in Offense

Fifth Circuit reaffirms holding that related conduct may be used in U.S.S.G. § 3B1.1 role in offense determination; Fourth Circuit reaches same conclusion. Both cite recent "clarifying amendment" to guideline as support. In the Fifth Circuit defendant pled guilty to one count of possession with intent to distribute cocaine. A related conspiracy charge was dropped, but based on the defendant's leadership role in the conspiracy the district court imposed a four-level upward adjustment under U.S.S.G. § 3B1.1(a).

The appellate court affirmed, reiterating the holding in *U.S. v. Manthei*, 913 F.2d 1130 (5th Cir. 1990), that "while an upward adjustment for a leadership role under section 3B1.1 must be anchored in the defendant's transaction, we will take a common-sense view of just what the outline of that transaction is. It is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1." *Contra U.S. v. Rodriguez-Nuez*, No. 89-2203 (7th Cir. Dec. 3, 1990) (Fairchild, Sr. J.) (role in offense must be based on offense of conviction, not related conduct; enhancement for supervisory role under § 3B1.1(c) not applicable to defendant who supervised another in drug distribution scheme at one residence but not in offense of conviction, possession of drugs with intent to distribute, that occurred at another residence).

The court added: "Any doubt concerning this conclusion must vanish in the face of a recent clarifying amendment promulgated by the Sentencing Guidelines Commission, effective November 1, 1990. This amendment was not intended to change the law, *see* 55 Fed. Reg. 19,202 (1990), but the clarity of the new language of section 3B1.1 makes it self-evident that the district court correctly calculated [defendant's] offense level." The revised Introductory Commentary to § 3B1.1 states that the role in offense adjustment "is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction."

U.S. v. Mir, No. 89-5695 (5th Cir. Dec. 11, 1990) (Smith, J.).

In the Fourth Circuit defendant was convicted of five counts of distribution of crack. The district court imposed a four-level adjustment under § 3B1.1(a) because defendant was a leader of five individuals in the offenses of conviction. However, two of those individuals were government agents. Defendant argued they could not be counted and thus at most only three other individuals were involved in the offenses.

The appellate court agreed that the two government agents could not be counted: "To be included as a participant, one must be 'criminally responsible for the commission of the offense.' U.S.S.G. § 3B1.1, comment. (n.1). . . . Neither [government agent] . . . can be counted as a participant in [defendant's] organization because as government agents neither was criminally responsible." *Accord U.S. v. DeCicco*, 899 F.2d 1531 (7th Cir. 1990); *U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1990). The court noted, however, that defendant should have been counted as a participant. *Accord U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990); *U.S. v. Preakos*, 907 F.2d 7 (1st Cir. 1990) (per curiam).

The court affirmed the enhancement, however, because the record showed 17 other individuals in defendant's distribution network. The court held that the role in offense adjustment is not limited to the offense of conviction: "The Relevant Conduct guideline, U.S.S.G. § 1B1.3, plainly states that its described scope of conduct applies to Chapter Three adjustments 'unless otherwise specified,' and no language in the Role [in Offense] guidelines specifies or indicates a different intent. . . . A court should look beyond the count of conviction when considering the application of this enhancement and make its determination after considering all conduct within the scope of section 1B1.3." Like the Fifth Circuit, the court noted that the "clarifying November 1, 1990 amendment" demonstrated the Sentencing Commission's intent that relevant conduct be used for the role in offense enhancement.

U.S. v. Fells, No. 89-5649 (4th Cir. Dec. 10, 1990) (Wilkins, J.).

Obstruction of Justice

U.S. v. Teta, 918 F.2d 1329 (7th Cir. 1990) (affirming finding that defendant's intentional failure to appear for arraignment was obstruction of justice, warranting enhancement under U.S.S.G. § 3C1.1).

Criminal History

Calculation

U.S. v. Kirby, No. 90-3058 (10th Cir. Nov. 28, 1990) (McWilliams, Sr. J.) ("the instant offense" in U.S.S.G. § 4A1.2(e) refers to the offense on which defendant is being sentenced, and defendant sentenced for failure to appear should have criminal history calculation based on that offense, not on underlying drug offense; therefore, 1971 offense on which defendant was still imprisoned within 15 years of commencement of underlying offense, but not within 15 years of instant offense of failure to appear, should not be counted in criminal history for failure to appear offense).

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VOLUME 3 • NUMBER 18 • JANUARY 31, 1991

Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds downward departure may be permitted for "aberrant behavior" by first-time offender, but not for defense of "imperfect entrapment." Defendant, who pled guilty to counterfeiting, received a downward departure in his sentence for substantial assistance, 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, p.s. He appealed, arguing that the district court erred by concluding that it could not consider an additional departure based on defendant's claims that his actions constituted "aberrant behavior" and that he had a defense of "imperfect entrapment."

The appellate court remanded, holding that the Guidelines do not preclude a downward departure for aberrant behavior: "It is clear under the Guidelines that 'aberrant behavior' and 'first offense' are not synonymous. The Guidelines make due allowance for the possibility of a defendant being a first offender. . . . Nevertheless, the Guidelines recognize that a first offense may constitute a single act of truly aberrant behavior justifying a downward departure. *See* Guidelines Manual, Ch. 1, Part A, para. 4(d) (with respect to first offenders, 'the Commission . . . has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures')." *Accord U.S. v. Russell*, 870 F.2d 18 (1st Cir. 1989) (district court has discretion to make downward departure for aberrant behavior). *See also U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (holding that check-kiting scheme carried out over 15-month period could not qualify as "a single act of aberrant behavior").

The court held, however, that as a matter of law a defense of imperfect entrapment cannot justify a downward departure, agreeing with the Eighth Circuit's conclusion in *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990).

U.S. v. Dickey, No. 89-50340 (9th Cir. Jan. 23, 1991) (Leavy, J.).

Third Circuit holds departure by analogy may be considered for defendant who cannot qualify for mitigating role in offense adjustment because only other "participant" in offense was undercover agent. Defendant pled guilty to receipt of child pornography through the mail. He had responded to an ad placed by an undercover postal inspector, and after corresponding for several months ordered four magazines. The district court sentenced him to 12 months, the low end of the guideline range, after denying an adjustment under U.S.S.G. § 3B1.2 for a mitigating role in the offense and ruling it could not depart downward for mitigating circumstances.

The appellate court affirmed the denial of the § 3B1.2 adjustment. It agreed with other circuits that have held that role in offense adjustments require other "participants" who are "criminally responsible." *See, e.g., U.S. v. DeCicco*, 899 F.2d 1531 (7th Cir. 1990); *U.S. v. Gordon*, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1989). *But see U.S. v. Anderson*, 895 F.2d 641 (9th Cir. 1990) (§ 3B1.1(c) may be applied because codefendant was tricked into committing offense). Here, defendant was the only "participant" because the government agent was not criminally responsible.

The court held, however, that a departure could be made by analogy to § 3B1.2: "If the Guidelines authorize departure in 'an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm,' Ch. 1, Pt. A, 4(b), a fortiori they authorize departure in an atypical case where an adjustment would otherwise be authorized for the same conduct but, for linguistic reasons, the adjustment Guideline does not apply. That is to say, the fortuitous fact that § 3B1.2 linguistically could not apply to [defendant] because [the undercover agent] was not a criminally responsible 'participant' does not render [defendant's] conduct significantly different from that of a defendant in similar circumstances who might qualify for an offense role adjustment. . . . [W]e hold that when an adjustment for Role in the Offense is not available by strict application of the Guideline language, the court has power to use analogic reasoning to depart from the Guidelines when the basis for departure is conduct similar to that encompassed in the Role in the Offense Guideline." *See also U.S. v. Crawford*, 883 F.2d 963 (11th Cir. 1989) (affirming upward departure for aggravating role in offense even though conduct did not technically meet definition in § 3B1.1).

The court "emphasize[d] the limited nature of the departure" it authorized: it applies only where there is one "participant" because with more "there can be no departure by analogy because the adjustment guideline is applicable of its own force." In remanding, the court noted that defendant "is only entitled to a departure by analogy . . . if the district court finds that he would have been entitled to [a § 3B1.2] adjustment had [the undercover agent] qualified as a participant." Also, any departure "would be limited to the 2 to 4 level adjustment downward on the bases set forth in § 3B1.2."

U.S. v. Bierley, No. 90-5099 (3d Cir. Dec. 28, 1990) (Sloviter, J.).

First Circuit holds that rehabilitation efforts after arrest and indictment may be ground for downward departure, but only in unusual case. Defendant, who pled guilty to two drug offenses, was given a downward departure based on his efforts between indictment and sentencing to end his drug addiction. The government appealed.

The appellate court reversed, holding that departure for rehabilitation may be considered, but that this defendant's efforts were not "unusual enough to merit" departure. "[T]he mere fact of demonstrated rehabilitation between date of arrest and date of sentencing cannot form the basis for a downward departure .... [However], in an appropriate case, a defendant's pre-sentence rehabilitative efforts and progress can be so significant, and can so far exceed ordinary expectations, that they dwarf the scope of pre-sentence rehabilitation contemplated by the sentencing commissioners when formulating section 3E1.1. We hold, therefore, that a defendant's rehabilitation might, on rare occasion, serve as a basis for a downward departure, but only when and if the rehabilitation is 'so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the acceptance of responsibility reduction.'" *Accord U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). *But see U.S. v. Pharr*, 916 F.2d 129 (3d Cir. 1990) ("post-arrest drug rehabilitation efforts and the potential effect of incarceration on these efforts are not appropriate grounds for discretionary departure"); *U.S. v. Van Dyke*, 895 F.2d 984 (4th Cir. 1990) (rehabilitative conduct after arrest accounted for in § 3E1.1, not proper basis for departure).

U.S. v. Sklar, 920 F.2d 107 (1st Cir. 1990).

Aggravating Circumstances

U.S. v. Loveday, No. 89-50388 (9th Cir. Jan. 8, 1991) (Hall, J.) (affirming upward departure for defendant who had manufactured several homemade bombs and was convicted of possession of unregistered firearm and sentenced under U.S.S.G. § 2K2.2 (Oct. 15, 1988)—in drafting § 2K2.2 "the Commission did not have in mind the unique dangers homemade bombs pose to public safety," so departure warranted under either § 5K2.0, p.s. or § 5K2.14, p.s. (Public Welfare)).

U.S. v. Wylie, 919 F.2d 969 (5th Cir. 1990) (affirming upward departure for drug conspiracy defendant based on her "allowing the use of drugs in front of children in her home, her being the chief financial supply for the purchase of cocaine, her coercion of others, and her concealment of her role as a drug trafficker" through intimidation and bribery).

Substantial Assistance

Second Circuit outlines procedure for challenging government refusal to move for substantial assistance departure. Defendant entered into a cooperation agreement with the government that provided the government would move for a substantial assistance departure, 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, p.s., if defendant "made a good faith effort to provide substantial assistance." The agreement explicitly established that evaluation of defendant's performance was in the sole discretion of the government. The government did not move for departure at sentencing and defendant appealed, claiming that the prosecutor was required to respond to defendant's "suggestion" that the refusal was made in bad faith and that he was entitled to a hearing on the issue.

The appellate court first determined that the government's refusal to move for a departure for substantial assistance must be made in good faith: "it is plain that where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the sole discretion of the prosecutor, that discretion is limited by the requirement that it be exercised fairly and in good faith. The government may reject the defendant's performance of his or her obligations only if it is honestly dissatisfied."

The court then outlined the procedure for challenging a refusal: "Defendant must first allege that he or she believes the government is acting in bad faith. Such an allegation is necessary to require the prosecutor to explain briefly the government's reasons for refusing to make a downward motion. Inasmuch as a defendant will generally have no knowledge of the prosecutor's reasons, at this first or pleading step the defendant should have no burden to make any showing of prosecutorial bad faith. Following the government's explanation, the second step imposes on defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue. *See* Guidelines § 6A1.3[, p.s.]."

Here, "the defendant never took the first step." His statements never directly alleged bad faith, and his attorney even admitted at one point that the government's refusal might be meritorious. Thus, defendant was not entitled to an explanation by the government or an evidentiary hearing.

The court also denied defendant's claim that the district court should have departed under § 5K2.0, p.s., even if the government's refusal was in good faith. The court agreed such a departure "would have been theoretically possible" because one of defendant's claimed acts of assistance—saving the life of a DEA informant—"is not a grounds for departure taken into account by the Guidelines," including § 5K1.1. However, defendant failed to properly raise this issue below.

U.S. v. Khan, 920 F.2d 1100 (2d Cir. 1990).

Determining the Sentence

Sentencing Factors

U.S. v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990) (district court erred in holding it could not consider defendant's rehabilitative potential in setting sentence within guideline range: "Guidelines do not preclude consideration of a defendant's rehabilitative potential as a mitigating factor within an applicable range of punishment. Indeed, the Sentencing Guidelines expressly permit the district court to consider all relevant and permissible character traits of the defendant in assessing a sentence within a particular range," U.S.S.G. § 1B1.4).

Offense Conduct

Weapons Possession

U.S. v. Agron, 921 F.2d 25 (2d Cir. 1990) ("stun gun" meets definition of "dangerous weapon" for purposes of U.S.S.G. § 2D1.1(b)(1) enhancement).

Sentencing Procedure

U.S. v. Crecelius, 751 F. Supp. 1035 (D.R.I. 1990) (using Fed. R. Crim. P. 36 (Clerical Mistakes) or "alternative ground ... of the Court's inherent power to amend its sentence," to change 12-month sentence to 12 months and one day—court had "clearly expressed its intent to sentence [defendant] to the minimum sentence" under guideline range of 12–18 months, but a "sentence of 12 months plus 1 day is actually a lesser sentence because it makes the recipient eligible to earn a reduction in the time to be served for good behavior," in this case 54 days, *see* 18 U.S.C. § 3624(b)).

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Relevant Conduct

First Circuit distinguishes between related and unrelated conduct that may be used as relevant conduct in setting offense level. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. In determining the amount of drugs involved, the district court included amounts from four uncharged transactions it concluded were "part of the same common scheme" as the conspiracy. The last of these transactions was consummated solely by defendant's wife without his knowledge, but was included because his wife (who was a co-conspirator) "paid off part of [his] previous debt to the drug supplier, thereby benefiting [defendant]."

The appellate court held that inclusion of the fourth transaction was an improperly broad interpretation of the relevant conduct provision, U.S.S.G. § 1B1.3(a)(2): "In all of the cases cited by the government, a defendant was held responsible under § 1B1.3(a)(2) for other conduct of his or her own that either was an uncharged part of the crime of conviction, or a repetition of the crime. . . . [Defendant's] only connection with the [fourth] transaction was as a beneficiary of someone else's criminal activity, a link that had nothing to do with his conduct. To significantly increase [his] sentence based on a transaction in which he took no part strikes us as such a substantial step away from 'charge offense' sentencing that it could not have been contemplated as within the § 1B1.3(a)(2) exception."

Even if defendant's acceptance of a benefit from the transaction "in some way could be deemed culpable conduct, that conduct was distinctly different from the crime of conviction. . . . His after-the-fact connection to the [fourth] transaction would reveal nothing about his culpability as a drug conspirator, and therefore would not be relevant in determining his offense level for the charged crime." The court cautioned that "§ 1B1.3(a)(2) is not open-ended in allowing a sentencing court to take into account criminal activity other than the charged offense. . . . The goal of the provision . . . is for the sentence to reflect accurately the seriousness of the crime charged, but not to impose a penalty for the charged crime based on unrelated criminal activity."

The court noted, however, that under § 1B1.4 the fourth transaction could be taken into account in setting the sentence within the guideline range or in deciding whether to depart.

U.S. v. Wood, No. 90-1599 (1st Cir. Feb. 1, 1991) (Coffin, Sr. J.).

Offense Conduct

Drug Quantity—Setting Offense Level

U.S. v. Smallwood, 920 F.2d 1231 (5th Cir. 1991) (in calculating offense level for defendant convicted of possession with intent to distribute methamphetamine, court properly estimated "practical yield" of defendant's laboratory based on amount of precursor chemical, even though at time of arrest lab was non-operational and other necessary precursors were not present: "The size or capability of any laboratory involved is relevant to th[e drug quantity] calculation. U.S.S.G. § 2D1.1, comment. (n.12) (directing application of § 2D1.4, comment. (n.2)). Neither immediate nor on-going production is required. Instead, this guideline permits the court to examine the overall scheme and to infer circumstantially either the total drug quantity involved in the offense conduct or the capability of its production. *U.S. v. Ewans*, 891 F.2d 686, 687 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2170 (1990); *U.S. v. Putney*, 906 F.2d 477, 479 (9th Cir. 1990)").

Departures

Extent of Departure

U.S. v. Thornton, 922 F.2d 1490 (10th Cir. 1991) (affirming departure for drug defendant because she gave drugs to her 14-year-old daughter, but vacating computation of departure that used offense level increase as guide; appellate court held that giving drugs to daughter was "prior uncharged criminal conduct" that was not adequately reflected in defendant's criminal history category, and therefore departure should be made by adjusting criminal history category under U.S.S.G. § 4A1.3, p.s.). *See also U.S. v. Fortenbury*, 917 F.2d 477 (10th Cir. 1990).

U.S. v. Fonner, 920 F.2d 1330 (7th Cir. 1991) ("Just as other-crime evidence cannot lead to a departure exceeding the increase that would have resulted had the defendant been charged with and convicted of the additional offenses, [*U.S. v.*] Ferra, 900 F.2d [1057 (7th Cir. 1990)], so a defendant's past cannot justify an increase in criminal history category exceeding the level that would have been appropriate had the facts been counted expressly"; sentence remanded because departure to 120 months from 30–37-month range was unreasonable—had district court included in criminal history score all uncounted criminal acts that formed basis of departure, resulting range would have been only 51–63 months).

U.S. v. Delvecchio, 920 F.2d 810 (11th Cir. 1991) (court may not automatically use career offender sentence to calculate extent of departure for defendant who missed career offender status only because two prior drug convictions were consolidated for sentencing, *see* U.S.S.G. §§ 4A1.2(a)(2), comment. (n.3), and 4B1.2(3)(B); a departure in this instance is appropriate if the consolidation of sentences underrepresents defendant's criminal history, *see* § 4A1.3, p.s., but "the court cannot . . . hold that because the defendant almost falls within the definition of career offender . . . it automatically will treat him as such. . . . [T]he court should examine the defendant's actual criminal history, keeping in mind the con-

cerns underlying the career offender classification, and determine . . . what sentence is warranted given (1) the seriousness of the past offenses and (2) the recidivist tendencies of the defendant."). *Cf. U.S. v. Jones*, 908 F.2d 365 (8th Cir. 1990) (using career offender provision to guide departure for defendant who missed career offender status only because he was not yet sentenced on prior violent felony conviction).

Mitigating Circumstances

U.S. v. Wright, No. 90-5653 (4th Cir. Jan. 31, 1991) (Murnaghan, J.) (reversed—fact that inmate defendant, after conviction on instant offense of drug possession with intent to distribute while in prison, would have parole date for earlier, unrelated crimes deferred 26 months was not factor Sentencing Commission failed to adequately consider and thus could not support downward departure).

Aggravating Circumstances

U.S. v. Pulley, 922 F.2d 1283 (6th Cir. 1991) (affirming departure pursuant to U.S.S.G. § 5K2.7, p.s., "Disruption of Governmental Function," based on defendant's actions in persuading family members to commit perjury and a co-defendant to "walk away from a confession" that he had obtained drugs from defendant; such conduct was not adequately accounted for in obstruction of justice guideline, § 3C1.1, and defendant had already received an enhancement under that section for his own perjury).

U.S. v. Fonner, 920 F.2d 1330 (7th Cir. 1991) ("Mental health is not a solid basis on which to depart upward. U.S.S.G. § 5H1.3 bans resort to mental health except as provided elsewhere, and the only proviso, § 5K2.13, allows downward (but not upward) departures for non-violent offenses. A conclusion that the defendant is unusually likely to commit more crimes (perhaps because of mental problems) is a different matter and, in principle, could be a basis of upward departure; nothing in § 4A1.3 or elsewhere forbids its use. Still, a judge is walking on eggs, for this consideration overlaps (if it does not duplicate) the recidivism penalty built into the guidelines. Judges may not engage in double counting.").

Adjustments

Victim-Related Adjustments

U.S. v. Winslow, No. 90-033-N-HLR (D. Idaho Jan. 17, 1991) (Ryan, C.J.) (denying vulnerable victim enhancement, U.S.S.G. § 3A1.1, because no actual victims were specifically targeted—while evidence indicated that general intent of defendants' conspiracy was "to kill, wound or maim certain victims chosen solely because of their race, religion and/or sexual preferences, . . . there was no evidence of any actual victims, but instead the only evidence was the defendants' talk and speculation concerning the intended victims").

Multiple Counts

U.S. v. Barron-Rivera, 922 F.2d 549 (9th Cir. 1991) (court properly placed count of felon in possession of firearm with count of illegal alien in possession of firearm in one group, and count of being alien unlawfully in U.S. after deportation in separate group, because latter offense did not involve "substantially the same harm" under U.S.S.G. § 3D1.2 as the first two; defendant's argument—that because illegal alien counts could conceivably be grouped together, and weapons counts were, that all three should be grouped together—"is a classic case of bootstrapping" that would distort the aim of § 3D1.2 "by combining dissimilar offenses to reduce punishment").

U.S. v. Wilson, 920 F.2d 1290 (6th Cir. 1991) (reversed—error not to group all six counts of using an interstate commerce facility in attempt to commit murder; grouping of five counts involving telephone discussions to arrange killing and one count involving letter mailed by defendant containing money for hit man was required under § 3D1.2(b) because all "involve the same victim" and were "connected by a common criminal objective"—the death of the victim).

Obstruction of Justice

U.S. v. St. Julian, 922 F.2d 563 (10th Cir. 1990) (affirming U.S.S.G. § 3C1.1 enhancement for failure to appear at sentencing hearing, which delayed sentencing for ten days). *See also U.S. v. Teta*, 918 F.2d 1329 (7th Cir. 1990) (§ 3C1.1 enhancement for intentional failure to appear for arraignment).

Criminal History

Calculation

U.S. v. Vanderlaan, 921 F.2d 257 (10th Cir. 1990) (sentence imposed under provisions of Narcotic Addict Rehabilitation Act, 18 U.S.C. §§ 4251–55 (repealed Nov. 1, 1986), was "sentence of imprisonment" pursuant to U.S.S.G. § 4A1.2(e) that may be counted toward career offender status).

Determining the Sentence

Sentencing Factors

U.S. v. Hatchett, No. 90-8030 (5th Cir. Jan. 30, 1991) (Barksdale, J.) (pursuant to 28 U.S.C. § 994(d) and U.S.S.G. § 5H1.10, p.s., socioeconomic status may not be considered in sentencing under the Guidelines, either within the range or for departure; sentences must be remanded because it was not clear whether district court improperly considered defendants' social position and educational opportunities).

Consecutive or Concurrent Sentences

U.S. v. Brown, 920 F.2d 1212 (5th Cir. 1991) (per curiam) (district court has discretion to order that guideline sentence for bank robbery would be consecutive to any later state sentence imposed on pending state charges from same robbery).

Applying the Guidelines

Amendments

U.S. v. Lam, No. 90-3005 (D.C. Cir. Jan. 25, 1991) (Wald, J.) (holding that version of U.S.S.G. § 1B1.3(a) prior to Nov. 1989 amendment, which contained "scienter requirement," should have been applied to drug conspiracy defendant whose offense, trial, and presentence report occurred before that date—the amendment effected a substantive change in the law that could adversely affect defendant's sentencing and its retroactive application would violate the ex post facto clause of the Constitution; thus, in setting base offense level court must determine quantity of drugs defendant "knew or reasonably could have foreseen . . . was involved in the conspiracy"). *See also U.S. v. Suarez*, 911 F.2d 1016 (5th Cir. 1990) (scienter required for possession of weapon during drug offense, U.S.S.G. § 2D1.1(b), prior to Nov. 1, 1989); *U.S. v. Burke*, 888 F.2d 862 (D.C. Cir. 1989) (same).

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Departures

MITIGATING CIRCUMSTANCES

Second Circuit holds that downward departure for defendant whose cooperation "broke the log jam in a multi-defendant case," and thereby helped district court's "seriously overclogged docket," was neither adequately considered nor precluded by Guidelines §§ 5K1.1 and 3E1.1; district courts retain "sensible flexibility" to depart in such cases. Defendant pled guilty to conspiracy to possess with intent to distribute cocaine. Even before his arrest he entered into an agreement with the government to provide information regarding his drug-related activities, and some of this information led to his indictment. His cooperation led to a guilty plea by a codefendant. Thereafter, defendant disclosed additional information and another codefendant pled guilty.

At sentencing, defendant received a two-level reduction for acceptance of responsibility and was subject to a sentence of 51–63 months. The government did not move for a substantial assistance departure under U.S.S.G. § 5K1.1, p.s., but the district court departed to impose a 36-month term, explaining that: "I don't think the guidelines speak to that kind of cooperation which relates to the defendant who breaks the log jam in a multi-defendant case that's pending in the seriously overclogged dockets of the District Courts of the United States." The court stated that defendant's cooperation was "constituted by a relatively early plea of guilty and a willingness to testify, or at least the public perception of the willingness to testify and what that does with other defendants or can do and, in this case, did in my judgment do." The government appealed on two grounds: that defendant's conduct was covered in § 5K1.1 and the court could not depart absent a government motion; and that the conduct was covered by the acceptance of responsibility reduction.

The appellate court affirmed the departure, holding that "§ 5K1.1 does not preclude a downward departure in this case. As written, § 5K1.1 focuses on assistance that a defendant provides to the government, rather than to the judicial system. . . . Garcia not only helped the government develop the case, his cooperation after the indictment resulted in the disposition of the charges against the remaining two defendants. Garcia's 'activities facilitating the proper administration of justice in the District Courts,' are not encompassed by § 5K1.1."

The court then rejected the argument that § 3E1.1 precludes this departure: "We believe that the acceptance of responsibility differs from 'activities facilitating the proper administration of justice in the District Courts' and that the district court properly determined that cooperation such as Garcia's is not covered by § 3E1.1. Garcia's willingness to testify against his co-defendants is more than mere acceptance of responsibility." Having thus found that defendant's mitigating circumstances have not been adequately considered by the Sentencing Guidelines, the court concluded that they were a permissible basis for departure and the district court was justified in departing downward.

The court added: "In cases such as this, the district court has 'sensible flexibility' to depart in circumstances where departure from the Sentencing Guidelines has a reasonable basis."

U.S. v. Garcia, No. 90-1274 (2d Cir. Feb. 8, 1991) (Lumbard, J.).

U.S. v. Poff, No. 89-3017 (7th Cir. Feb. 14, 1991) (Flaum, J.) (en banc) (holding that U.S.S.G. § 5K2.13, p.s., allowing departure for defendant with "diminished capacity" convicted of "non-violent offense," does not authorize departure for career offender convicted of "crime of violence" as that term is defined in § 4B1.2, even though the crime was making a threat that defendant had no ability to carry out; alternatively, even if offense could be considered non-violent under § 5K2.13, defendant's career offender status "indicates a need for incarceration to protect the public," which also precludes departure under the terms of § 5K2.13).

AGGRAVATING CIRCUMSTANCES

U.S. v. Benskin, No. 90-5707 (6th Cir. Feb. 26, 1991) (Contie, Sr. J.) (affirming upward departure for mail and securities fraud defendant because Guidelines did not adequately account for long duration of the ongoing scheme, large amount of money solicited from over 600 investors, and emotional harm inflicted on investors, some of whom lost life savings or college funds for children; extent of departure, from range of 27–33 months to 60-month term, was reasonable under the circumstances).

U.S. v. Astorri, 923 F.2d 1052 (3d Cir. 1991) (affirming finding that departure under U.S.S.G. § 5K2.3, p.s., "Extreme Psychological Injury," was warranted for fraud defendant whose victims "suffered much more psychological injury than that normally resulting from the commission of a wire fraud offense"; court also noted, "If there is any place in sentencing guidelines analysis where a fact-finder is to be given considerable deference, it is here where the district court is called upon to assess the psychological impact upon victims").

CRIMINAL HISTORY

U.S. v. Simmons, 924 F.2d 187 (11th Cir. 1991) (affirming departure from 15-year statutory minimum to 50-year term for defendant convicted of possession of firearm by three-time felon, 18 U.S.C. § 924(e)—departure was properly based on risk of recidivism, past criminal conduct, and obstruction of justice, factors that were not accounted for because the statutory minimum effectively nullified all guidelines computations for this particular offense: "Neither the statute nor the

guidelines provide any means to factor the enhancement for obstruction of justice into the offense level, or to adjust the defendant's criminal history category based on conduct not used in calculating the statutory sentence"; extent of the departure was "carefully and meticulously set out" and reasonable under the circumstances).

Note: A new provision in the Guidelines, § 4B1.4 (effective Nov. 1, 1990), sets offense levels and criminal history categories for defendants convicted under 18 U.S.C. § 924(e).

U.S. v. Aymelek, No. 90-1510 (1st Cir. Feb. 15, 1991) (Selya, J.) (prior convictions that are too remote in time to be counted in criminal history score, and are not similar to current offense, *see* U.S.S.G. § 4A1.2(e), comment. (n.8), may still be considered as grounds for departure under § 4A1.3, p.s., "when and if those convictions evince some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders"; in this case, defendant's "seven earlier convictions, though outdated, were distinguished by their numerosity and dangerousness," and departure was appropriate). *See also U.S. v. Williams*, 910 F.2d 1574 (7th Cir. 1990); *U.S. v. Russell*, 905 F.2d 1439 (10th Cir. 1990); *U.S. v. Carey*, 898 F.2d 642 (8th Cir. 1990). *But see U.S. v. Leake*, 908 F.2d 554 (9th Cir. 1990) ("we conclude that the Guidelines reject the possibility that an upward departure could be based on remote convictions having no similarity to the [instant] offense," citing § 4A1.2(e), comment. (n.8)).

U.S. v. Polanco-Reynoso, 924 F.2d 23 (1st Cir. 1991) (affirming departure, under U.S.S.G. § 4A1.3, p.s., from criminal history category I to category II for drug defendant who committed instant offenses while on bail awaiting sentencing for unrelated state drug charge that was not counted in criminal history score).

U.S. v. Richardson, 923 F.2d 13 (2d Cir. 1991) (downward departure may not be considered for career offender based on small amount of cocaine in instant offense—one-half gram—or length of time elapsed since prior felony convictions—10 and 12 years; those factors were adequately considered by Sentencing Commission). *See also U.S. v. Hays*, 899 F.2d 515 (6th Cir.) (small amount of drugs and lack of violence not proper grounds for departure for career offender), *cert. denied*, 111 S. Ct. 385 (1990).

Adjustments

Role in Offense

U.S. v. Andrus, 925 F.2d 335 (9th Cir. 1991) (role in offense adjustments, U.S.S.G. § 3B1, should be determined under two-part test: 1) "the relative culpability of the defendants vis-a-vis each other" and 2) "in relation to the elements of the offense," which means "in comparison with an average participant in such a crime"; here, defendant could not qualify for minor participant status under either standard). *Accord U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989).

Vulnerable Victims

U.S. v. Astorri, 923 F.2d 1052 (3d Cir. 1991) (affirming § 3A1.1 enhancement for defendant who defrauded his girlfriend's parents because parents were "particularly susceptible to the criminal conduct"—defendant totally supported girlfriend and used promise of marriage to persuade parents to invest more money in fraudulent scheme).

Obstruction of Justice

U.S. v. Williams, 922 F.2d 737 (11th Cir. 1991) (per curiam) (defendant who received six-month jail term for contempt for refusal to testify at co-conspirator's trial may not also receive obstruction of justice enhancement for that same conduct, *see* U.S.S.G. § 3C1.1, comment. (n.6)).

Acceptance of Responsibility

U.S. v. Tucker, No. 90-5101 (6th Cir. Feb. 19, 1991) (Ryan, J.) (holding that "entry of an *Alford* plea does not, per se, preclude a section 3E1.1 reduction for acceptance of responsibility"; reduction denied, however, because defendant failed to meet burden of proving she accepted responsibility).

Offense Conduct

Specific Offenses

U.S. v. Boyd, 924 F.2d 945 (9th Cir. 1991) (road flare brandished during bank robbery and claimed to be stick of dynamite was "dangerous weapon" under § 2B3.1(b)(2)(C); "consideration of the actual nature of the device used," however, is appropriate in determining where within guideline range to set sentence). *Cf. U.S. v. Smith*, 905 F.2d 1296 (9th Cir. 1990) (inoperable revolver or pellet gun is "dangerous weapon").

U.S. v. Astorri, 923 F.2d 1052 (3d Cir. 1991) (error to increase offense level by four under U.S.S.G. § 2F1.1(b)(2) by giving two-level increases for both "more than minimal planning" and "scheme to defraud more than one victim": "The commentary does not indicate a four level enhancement where both signs of harm are present. A two rather than a four level increase is proper under section 2F1.1 because where, as here, a defendant defrauds more than one victim, the scheme will often involve more than minimal planning, and vice-versa.").

Sentencing Procedure

U.S. v. Cortes, 922 F.2d 123 (2d Cir. 1990) ("a probation officer need not give *Miranda* warnings before conducting a routine presentence interview").

Probation and Supervised Release

Revocation of Probation

U.S. v. White, 925 F.2d 284 (9th Cir. 1991) (reversed three-year sentence imposed after revocation of probation under 18 U.S.C. § 3565(b) for possession of firearm, agreeing with *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) and *U.S. v. Von Washington*, 915 F.2d 390 (9th Cir. 1990), that sentence imposed after revocation is limited by guideline sentence for original offense, which here was 0–6 months; conduct that constituted the violation of probation may not be used to set revocation guideline range, but may be considered in determining appropriate sentence within the range and, if there were factors that warranted departure at the time of initial sentencing, whether to reconsider the initial decision not to depart).

Applying the Guidelines

Amendments

U.S. v. Morrow, 925 F.2d 779 (4th Cir. 1991) (ex post facto clause of Constitution prohibits application of Guidelines section amended after offense but before sentencing when amendment would increase offense level). *Accord U.S. v. Lam*, 924 F.2d 298 (D.C. Cir. 1991); *U.S. v. Swanger*, 919 F.2d 94 (8th Cir. 1990); *U.S. v. Suarez*, 911 F.2d 1016 (5th Cir. 1990).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Index for *Guideline Sentencing Update*, Volume 3

The following is an index of cases reported to date in volume 3 of *GSU*, through issue #14. It is intended to supplement, not replace, the index to volume 2 distributed earlier this year. A composite index covering volumes 1–3 will be issued in 1991.

Some new subheadings have been added to this supplement that are not in the volume 2 index, but the general format remains the same. When there were no cases reported in volume 3 under a particular heading, that heading has been omitted.

ii. Marijuana

U.S. v. Corley, 909 F.2d 359 (9th Cir. 1990) (number for live plants, weight for dried plants) [3, #11].

U.S. v. Bradley, 905 F.2d 359 (11th Cir. 1990) (per curiam) (same) [3, #11].

d. Conspiracies and Incomplete Transactions

U.S. v. Havens, 910 F.2d 703 (10th Cir. 1990) (estimate quantity in attempt to manufacture offense) [3, #10].

4. Other Specific Offenses

U.S. v. Graves, 908 F.2d 528 (9th Cir. 1990) (§2A2.2(b)(3) "victim" means victim of offense of conviction) [3, #12].

U.S. v. Gaddy, 894 F.2d 1307 (11th Cir. 1990) (increase in § 2A4.1(b)(4)(A) applicable to murder of kidnap victim within 24 hours) [3, #4].

C. Adjustments

1. Role in the Offense (§ 3B1)

a. Base Only on Conduct in Offense of Conviction

U.S. v. Manthei, 913 F.2d 1130 (5th Cir. 1990) (may use relevant conduct directly related to offense) [3, #14].

U.S. v. Zweber, 913 F.2d 705 (9th Cir. 1990) [3, #12].

U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) (3, #11].

U.S. v. Pettit, 903 F.2d 1336 (10th Cir. 1990) [3, #8].

U.S. v. Tetzlaff, 896 F.2d 1071 (7th Cir. 1990) [3, #4].

Note: The introductory commentary to § 3B1, effective Nov. 1, 1990, now states that this adjustment should be based on all relevant conduct, as defined in § 1B1.3.

b. Requirement for Other Participants

U.S. v. Reid, 911 F.2d 1456 (10th Cir. 1990) (activity involving four conspirators, two drug suppliers, hundreds of customers, was "otherwise extensive") [3, #13].

U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) (requires specific finding, may count defendant) [3, #11].

U.S. v. Preakos, 907 F.2d 7 (1st Cir. 1990) (per curiam) (defendant counted as one of "five or more participants" under § 3B1.1(a)) [3, #9].

U.S. v. DeCicco, 899 F.2d 1531 (7th Cir. 1990) (§ 3B1.1(c) requires other "criminally responsible" persons) [3, #7].

U.S. v. Gordon, 895 F.2d 932 (4th Cir.) (must have group conduct for adjustment to apply), *cert. denied*, 111 S. Ct. 131 (1990) [3, #2].

U.S. v. Anderson, 895 F.2d 641 (4th Cir. 1990) (applicable when codefendant tricked into offense) [3, #2].

c. Other

U.S. v. Mares-Molina, 913 F.2d 770 (9th Cir. 1990) (reversed—defendant was manager of business used in criminal activity, not of criminal activity itself) [3, #14].

U.S. v. Fuller, 897 F.2d 1217 (1st Cir. 1990) (§ 3B1.1(c) finding clearly erroneous) [3, #5].

d. Position of Trust (§ 3B1.3)

U.S. v. Foreman, 905 F.2d 1335 (9th Cir. 1990) (given for showing police badge in attempt to avoid arrest) [3, #10].

U.S. v. Drabeck, 905 F.2d 1304 (9th Cir. 1990) (to janitor who worked unsupervised, had keys to bank), *rehearing granted and mandate recalled* (Oct. 11, 1990) [3, #10].

2. Obstruction of Justice (§ 3C1)

a. Actions That Constitute Obstruction

U.S. v. Rodriquez-Macias, 914 F.2d 1204 (9th Cir. 1990) (per curiam) (gave false name at time of arrest) [3, #14].

U.S. v. Edwards, 911 F.2d 1031 (5th Cir. 1990) (failed to disclose whereabouts of co-conspirator after told to) [3, #14].

U.S. v. Saintil, 910 F.2d 1231 (1st Cir. 1990) (using false name at arrest and until arraignment) [3, #14].

U.S. v. Gaddy, 909 F.2d 196 (7th Cir. 1990) (false name after arrest, lied about criminal record and fingerprints) [3, #11].

U.S. v. Perry, 908 F.2d 56 (6th Cir. 1990) (fleeing jurisdiction while on bond before sentencing) [3, #11].

U.S. v. Matos, 907 F.2d 274 (2d Cir. 1990) (false testimony at suppression hearing) [3, #10].

U.S. v. Dillon, 905 F.2d 1034 (7th Cir. 1990) (giving false name for drug source, despite recanting next day) [3, #10].

U.S. v. Lofton, 905 F.2d 1315 (9th Cir. 1990) (lying to probation officer re continuing criminal activity) [3, #10].

U.S. v. Blackman, 904 F.2d 1250 (8th Cir. 1990) (attempted obstruction by use of alias) [3, #11].

U.S. v. White, 903 F.2d 457 (7th Cir. 1990) (clear physical endangerment of others while fleeing arrest) [3, #8].

U.S. v. Baker, 894 F.2d 1083 (9th Cir. 1990) (misstatements to probation officer regarding criminal history) [3, #2].

U.S. v. Penson, 893 F.2d 996 (8th Cir. 1990) (threatening witness, providing false information) [3, #2].

b. Not Obstruction

U.S. v. Hagan, 913 F.2d 1278 (7th Cir. 1990) (instinctive flight from arrest) [3, #14].

U.S. v. Garcia, 909 F.2d 389 (9th Cir. 1990) (brief attempt to evade arrest) [3, #11].

Note: Under new guideline amendments avoiding or fleeing from arrest, without reckless endangerment of others, is not obstruction. *See* § 3C1.1, comment. (n.4) (Nov. 1990).

c. Procedural Issues

U.S. v. Luna, 909 F.2d 119 (5th Cir. 1990) (per curiam) (not applicable to conduct occurring before investigation or prosecution of offense) [3, #11].

U.S. v. Wilson, 904 F.2d 234 (5th Cir. 1990) (same) [3, #11].

U.S. v. Lueddeke, 908 F.2d 230 (7th Cir. 1990) (may be given for additional acts of obstruction by perjury and obstruction of justice defendant) [3, #11].

U.S. v. Altman, 901 F.2d 1161 (2d Cir. 1990) (allow medical testimony bearing on mental state) [3, #8].

U.S. v. Werlinger, 894 F.2d 1015 (8th Cir. 1990) (not applicable to action that is element of offense) [3, #2].

3. Multiple Counts (§ 3D1)

U.S. v. Porter, 909 F.2d 789 (4th Cir. 1990) (gambling and money laundering counts not "closely related") [3, #13].

U.S. v. Egson, 897 F.2d 353 (8th Cir. 1990) (per curiam) (offenses arising from same transaction not grouped because not "closely related") [3, #4].

4. ACCEPTANCE OF RESPONSIBILITY (§ 3E1)

a. Reasons for Denial

U.S. v. Watkins, 911 F.2d 983 (5th Cir. 1990) (using drugs on release pending sentencing) [3, #12].

U.S. v. Cross, 900 F.2d 66 (6th Cir. 1990) (per curiam) (refusal to provide financial information) [3, #5].

U.S. v. Evidente, 894 F.2d 1000 (8th Cir.) (propensity for flight, past failure to accept responsibility), *cert. denied*, 110 S. Ct. 1956 (1990) [3, #2].

U.S. v. Sanchez, 893 F.2d 679 (5th Cir. 1990) (continued unlawful conduct on pretrial release) [3, #1].

b. For Offense of Conviction or All Relevant Conduct

U.S. v. Mourning, 914 F.2d 699 (5th Cir. 1990) (must be for all relevant conduct) [3, #14].

U.S. v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (per curiam) (for count of conviction, not dismissed counts) [3, #9].

U.S. v. Gordon, 895 F.2d 932 (4th Cir.) (for all criminal conduct), *cert. denied*, 111 S. Ct. 131 (1990) [3, #2].

c. Procedural Issues

U.S. v. Watkins, 911 F.2d 983 (5th Cir. 1990) (unlawful conduct forming basis of denial need not be related to offense of conviction) [3, #12].

U.S. v. Ramirez, 910 F.2d 1069 (2d Cir. 1990) (affirm denial despite improper ground if valid ground exists) [3, #12].

U.S. v. Watt, 910 F.2d 587 (9th Cir. 1990) (may not base denial on constitutionally protected conduct) [3, #10].

U.S. v. Simpson, 904 F.2d 607 (11th Cir. 1990) (due process does not require judge or probation officer to tell defendant reduction available) [3, #10].

U.S. v. Braxton, 903 F.2d 292 (4th Cir. 1990) (error to deny because rehabilitation unlikely) [3, #8].

U.S. v. Fleener, 900 F.2d 914 (6th Cir. 1990) (not precluded by entrapment defense) [3, #6].

5. VICTIM-RELATED ADJUSTMENTS

U.S. v. Cree, — F.2d — (8th Cir. Sept. 25, 1990) (reversed—no evidence defendant knew extent of or intended to exploit victim's vulnerability) [3, #14].

U.S. v. Boise, — F.2d — (9th Cir. Aug. 29, 1990) (six-week-old baby vulnerable; § 3A1.1 does not require victim be intentionally selected because of vulnerability) [3, #14].

U.S. v. Wilson, 913 F.2d 136 (4th Cir. 1990) (random targets of fraudulent solicitation not vulnerable) [3, #14].

U.S. v. Creech, 913 F.2d 780 (10th Cir. 1990) (recently married individual not vulnerable) [3, #11].

U.S. v. White, 903 F.2d 457 (7th Cir. 1990) (sixty-year-old man with respiratory problems taken hostage was "vulnerable victim") [3, #9].

U.S. v. Schroeder, 902 F.2d 1469 (10th Cir.) ("official victim" must be object of threat, not just receiver), *cert. denied*, 111 S. Ct. 181 (1990) [3, #9].

U.S. v. Jones, 899 F.2d 1097 (11th Cir.) (bank teller "particularly susceptible" to bank larceny), *cert. denied*, 111 S. Ct. 275 (1990) [3, #8].

U.S. v. Moree, 897 F.2d 1329 (5th Cir. 1990) (victim not vulnerable because of prior indictment) [3, #5].

D. Criminal History

1. CALCULATION

a. Proper to Apply § 4A1.1(d) and (e) to Escapee

U.S. v. Lewis, 900 F.2d 877 (6th Cir.) (§ 4A1.1(d) applicable to failure to report defendant, § 2J1.6), *cert. denied*, 111 S. Ct. 117 (1990) [3, #5].

U.S. v. Jimenez, 897 F.2d 286 (7th Cir. 1990) [3, #5].

c. Juvenile Convictions

U.S. v. Hanley, 906 F.2d 1116 (6th Cir. 1990) (juvenile commitment is "imprisonment" for § 4A1.1(e)) [3, #10].

U.S. v. Bucaro, 898 F.2d 368 (3d Cir. 1990) (include juvenile delinquency adjudications) [3, #5].

d. Other

U.S. v. Crosby, 913 F.2d 313 (6th Cir. 1990) (may count prior conviction that is element of CCE offense) [3, #14].

U.S. v. Aichele, 912 F.2d 1170 (9th Cir. 1990) (count reckless driving conviction) [3, #13].

U.S. v. Eckford, 910 F.2d 216 (may consider prior uncounseled misdemeanor convictions for which no term of imprisonment was given) [3, #12].

U.S. v. Gross, 897 F.2d 414 (9th Cir. 1990) (count unrelated convictions consolidated for sentencing separately, limiting § 4A1.2(a)(2), comment. (n.3) [3, #3].

U.S. v. Mackbee, 894 F.2d 1057 (9th Cir.) (may count sentences pending appeal), *cert. denied*, 110 S. Ct. 2574 (1990) [3, #2].

U.S. v. McCrudden, 894 F.2d 338 (9th Cir.) (may apply § 4A1.1(d) to offense committed while on supervised probation for traffic offense), *cert. denied*, 110 S. Ct. 1534 (1990) [3, #2].

U.S. v. Rivers, 733 F. Supp. 1003 (D. Md. 1990) (separately sentenced felonies found to be related, thus not counted separately) [3, #7].

U.S. v. Daddino, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (count full time imposed in prior sentence regardless of time served, § 4A1.1, and count conviction reversed on technical grounds) [3, #3].

2. CAREER OFFENDER PROVISION (§ 4B1.1)

a. "Crime of Violence" Determination

U.S. v. Selfa, — F.2d — (9th Cir. June 14, 1990) (elements of crime, not actual conduct, control crime of violence inquiry; bank robbery is crime of violence) [3, #9].

U.S. v. Goodman, 914 F.2d 696 (5th Cir. 1990) (may explore underlying facts of offenses not in § 4B1.2) [3, #14].

U.S. v. Alvarez, 914 F.2d 915 (7th Cir. 1990) (unlawful weapon possession by felon was crime of violence when defendant struggled with arresting officer) [3, #14].

U.S. v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (look to elements of offense, not actual conduct; fact that offenses involved only threat of, not actual, violence not valid ground for downward departure) [3, #13].

U.S. v. Carter, 910 F.2d 1524 (7th Cir. 1990) (court need not explore underlying facts if offense listed in § 4B1.2 commentary) [3, #13].

U.S. v. O'Neal, 910 F.2d 663 (9th Cir. 1990) (felon in possession of firearm, assault with deadly weapon, and vehicular manslaughter are violent offenses) [3, #13].

U.S. v. McVicar, 907 F.2d 1 (1st Cir. 1990) (considered circumstances of offense not listed in § 4B1.2) [3, #13].

U.S. v. Terry, 900 F.2d 1039 (7th Cir. 1990) (may explore underlying facts of offenses not in § 4B1.2) [3, #13].

U.S. v. McNeal, 900 F.2d 119 (7th Cir. 1990) (firing unlawfully-possessed gun; look to underlying facts when not listed in § 4B1.2) [3, #8].

b. Other

U.S. v. Jones, 910 F.2d 760 (11th Cir. 1990) (per curiam) (nolo plea may be used as prior conviction) [3, #14].

U.S. v. Smith, 909 F.2d 1164 (8th Cir. 1990) (affirming downward departure for career offender) [3, #11].

U.S. v. Jones, 908 F.2d 365 (8th Cir. 1990) (may not count two prior violent felonies defendant pled guilty to but was not yet sentenced for; may depart, however) [3, #11].

U.S. v. Brown, 903 F.2d 540 (8th Cir. 1990) (downward departure may be considered for career offenders) [3, #8].

U.S. v. Wallace, 895 F.2d 487 (8th Cir. 1990) (need not file information under 21 U.S.C. § 851(a)(1) before using prior offenses; upholding penalty range) [3, #3].

U.S. v. Rivers, 733 F. Supp. 1003 (D. Md. 1990) (sentences for two prior felonies not counted separately because related, although separately sentenced) [3, #7].

3. Criminal Livelihood Provision (§ 4B1.3)

U.S. v. Irvin, 906 F.2d 1424 (10th Cir. 1990) (5–7 months is "substantial period of time," comment. (n.4)) [3, #10].

E. Determining the Sentence

1. Consecutive or Concurrent Sentences (§ 5G1)

U.S. v. Garcia, 903 F.2d 1022 (5th Cir. 1990) (discretion to impose consecutive sentences if defendant convicted of Guidelines and pre-Guidelines offenses) [3, #9].

a. Discretion Under Earlier Version of § 5G1.3

U.S. v. Miller, 903 F.2d 341 (5th Cir. 1990) (consecutive sentences required, departure when appropriate) [3, #9].

U.S. v. Nottingham, 898 F.2d 390 (3d Cir. 1990) (sentence for crime committed on parole may be concurrent or consecutive to unexpired term for parole violation) [3, #5].

U.S. v. Rogers, 897 F.2d 134 (4th Cir. 1990) (consecutive sentences may be required, departure allowed) [3, #3].

2. Sentencing Factors

U.S. v. Duarte, 901 F.2d 1498 (9th Cir. 1990) (may use letters attesting to defendant's character) [3, #7].

3. Probation

U.S. v. Delloiacono, 900 F.2d 481 (1st Cir. 1990) (community service cannot substitute for intermittent confinement, § 5C1.1) [3, #6].

4. Restitution (§ 5E1.1)

U.S. v. Owens, 901 F.2d 1457 (8th Cir. 1990) (restitution not mandatory; indigency does not bar restitution) [3, #7].

F. Departures

1. Criminal History

a. Upward Departure Warranted

i. Criminal History Category Inadequate

U.S. v. Thomas, 914 F.2d 139 (8th Cir. 1990) (seriousness of earlier offenses not accounted for) [3, #14].

U.S. v. Dycus, 912 F.2d 466 (6th Cir. 1990) (per curiam) (table) (score of 19, history of serious and repeated firearms offenses) [3, #13].

U.S. v. Williams, 910 F.2d 1574 (7th Cir. 1990) (may use old convictions that are not similar to current offense as part of "overall assessment" of defendant's criminal history) [3, #13].

U.S. v. Jones, 908 F.2d 365 (8th Cir. 1990) (for defendant not sentenced as career offender only because he had not yet been sentenced for two prior violent felony convictions) [3, #11].

U.S. v. McKenley, 895 F.2d 184 (4th Cir. 1990) (past acquittals by reason of insanity) [3, #2].

U.S. v. White, 893 F.2d 276 (10th Cir. 1990) (consolidation of prior offenses) [3, #1].

ii. Criminal Conduct While on Release

U.S. v. George, 911 F.2d 1028 (5th Cir. 1990) (per curiam) (fled jurisdiction while on bond before sentencing) [3, #14].

U.S. v. Franklin, 902 F.2d 501 (7th Cir.) (continued drug activity while out on bond for drug charge), *cert. denied*, 111 S. Ct. 274 (1990) [3, #8].

U.S. v. Fayette, 895 F.2d 1375 (11th Cir. 1990) (post-plea criminal conduct) [3, #4].

U.S. v. Sanchez, 893 F.2d 679 (5th Cir. 1990) (continued unlawful conduct while on pretrial release) [3, #1].

U.S. v. White, 893 F.2d 276 (10th Cir. 1990) (current offense committed while out on bail) [3, #1].

iii. Similarity to Prior Offense

U.S. v. Williams, 910 F.2d 1574 (7th Cir. 1990) (prior similar adult conduct not resulting in conviction) [3, #13].

U.S. v. Barnes, 910 F.2d 1342 (6th Cir. 1990) (committed offense two months after release from prison on prior conviction for same offense) [3, #12].

U.S. v. Gaddy, 909 F.2d 196 (7th Cir. 1990) (pending charges of similar criminal conduct) [3, #11].

U.S. v. Chavez-Botello, 905 F.2d 279 (9th Cir. 1990) (per curiam) (similarity to prior offense) [3, #9].

U.S. v. Stacy, 904 F.2d 38 (7th Cir. 1990) (per curiam) (table) (similarity and proximity in time to prior offense) [3, #9].

U.S. v. Carey, 898 F.2d 642 (8th Cir. 1990) (two prior similar offenses failed to deter; departed above statutory mandatory minimum) [3, #5].

iv. Discipline Problems in Prison

U.S. v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) (discipline problems during earlier prison term) [3, #11], vacating prior opinion at 900 F.2d 1376 [3, #7].

U.S. v. Keys, 899 F.2d 983 (10th Cir.) (prior prison disciplinary record), *cert. denied*, 111 S. Ct. 160 (1990) [3, #5].

b. Upward Departure Not Warranted

U.S. v. Leake, 908 F.2d 550 (9th Cir. 1990) (convictions too old for criminal history score must be similar to current offense to be used for departure) [3, #10].

U.S. v. Robison, 904 F.2d 365 (6th Cir. 1990) (to career offender status based on offenses not counted under that guideline) [3, #8].

U.S. v. Hawkins, 901 F.2d 863 (10th Cir. 1990) ("near miss" on career offender status) [3, #7].

U.S. v. Cantu-Dominguez, 898 F.2d 968 (5th Cir. 1990) (history of arrests without convictions) [3, #6].

U.S. v. Schweihs, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (general ties to organized crime) [3, #4].

c. Downward Departure Warranted

U.S. v. Smith, 909 F.2d 1164 (8th Cir. 1990) (for career offender for minor nature of crimes, brief criminal career, youth, barely qualifying as career offender) [3, #11].

U.S. v. Brown, 903 F.2d 540 (8th Cir. 1990) (may be considered for career offenders) [3, #8].

d. Downward Departure Not Warranted

U.S. v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (for career offender fact that prior offenses involved only threat of, not actual, violence, or that sentence deemed "too harsh," not valid grounds for departure) [3, #13].

e. Computation—Use Category That Best Represents Defendant's Prior Criminal History

U.S. v. Richison, 901 F.2d 778 (9th Cir. 1990) (per curiam) [3, #8].

U.S. v. Allen, 898 F.2d 203 (D.C. Cir. 1990) [3, #5].

U.S. v. Harvey, 897 F.2d 1300 (5th Cir. 1990) (affirming despite failure to consider next higher category) [3, #5].

U.S. v. Kennedy, 893 F.2d 825 (6th Cir, 1990) [3, #1].

U.S. v. White, 893 F.2d 276 (10th Cir. 1990) [3, #1].

f. Computation—Departure Above Category VI

U.S. v. Dycus, 912 F.2d 466 (6th Cir. 1990) (per curiam) (table) (affirmed use of hypothetical category VIII for criminal history score of 19) [3, #13].

U.S. v. Russell, 905 F.2d 1450 (10th Cir.) (declined to impose formula), *cert. denied*, 111 S. Ct. 267 (1990) [3, #9].

U.S. v. Bernhardt, 905 F.2d 343 (10th Cir. 1990) (same) [3, #9].

U.S. v. Gardner, 905 F.2d 1432 (10th Cir.) (proper to use career offender guideline as reference), *cert. denied*, 111 S. Ct. 202 (1990) [3, #9].

U.S. v. Schmude, 901 F.2d 555 (7th Cir. 1990) (procedure when category VI inadequate; recommended consecutive sentences instead of departure) [3, #6].

2. Aggravating Circumstances

a. Upward Departure Warranted

i. Guideline Sentence Does Not Adequately Reflect Seriousness of Offense Conduct

U.S. v. Carpenter, 914 F.2d 1131 (9th Cir. 1990) (giving weapon to juveniles, risk to others) [3, #13].

U.S. v. Barnes, 910 F.2d 1342 (6th Cir. 1990) (guideline sentence would be less than that received for prior conviction for same offense) [3, #12].

U.S. v. Murillo, 902 F.2d 1169 (5th Cir. 1990) (disruption of governmental function, § 5K2.7, p.s.) [3, #8].

U.S. v. Gomez, 901 F.2d 728 (9th Cir. 1990) (dangerous and inhumane treatment of illegal aliens) [3, #7].

U.S. v. Ferra, 900 F.2d 1057 (7th Cir. 1990) (seriousness of offense) [3, #7].

U.S. v. Reeves, 892 F.2d 1223 (5th Cir. 1990) (intended bribe to be much larger than amount paid) [3, #2].

U.S. v. Schweihs, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (ties to organized crime used to facilitate offense) [3, #4].

ii. Factors Not Adequately Covered in Guideline

U.S. v. Thomas, 914 F.2d 139 (8th Cir. 1990) (dangerous nature of fully loaded firearms in illegal possession of weapons offense) [3, #14].

U.S. v. Baker, 914 F.2d 208 (10th Cir. 1990) (use of explosives for intimidation in bank robbery; abduction at gunpoint during explosives offense) [3, #14].

U.S. v. Fousek, 912 F.2d 979 (8th Cir. 1990) (per curiam) (bankruptcy trustee embezzling estate funds) [3, #13].

U.S. v. Pridgen, 898 F.2d 1003 (5th Cir. 1990) (inadequate enhancement for kidnapping during robbery) [3, #7].

U.S. v. Drew, 894 F.2d 965 (8th Cir.) (attempt to murder government witness), *cert. denied*, 110 S. Ct. 1830 (1990) [3, #2].

U.S. v. Chase, 894 F.2d 488 (1st Cir. 1990) (multiple count adjustment inadequate for 15 counts of robbery) [3, #1].

U.S. v. Fuentes, 729 F. Supp. 487 (E.D. Va. 1989) (guideline range for extensive CCE offense inadequate) [3, #2].

iii. Drug-Related Factors

U.S. v. Shuman, 902 F.2d 873 (11th Cir. 1990) (involving son in drug offense) [3, #8].

U.S. v. Bennett, 900 F.2d 204 (9th Cir. 1990) (large quantity of cocaine in telephone offense) [3, #7].

U.S. v. Williams, 895 F.2d 435 (8th Cir. 1990) (involvement in underlying drug offense) [3, #1].

iv. Dangerous Escape Attempt

U.S. v. Chiarelli, 898 F.2d 373 (3d Cir. 1990) (high-speed chase threat to public safety, § 5K.14, p.s.) [3, #5].

U.S. v. Bates, 896 F.2d 912 (5th Cir.) (dangerous conduct during escape attempt), *cert. denied*, 110 S. Ct. 3227 (1990) [3, #5].

v. § 5H1 Factors

U.S. v. Richison, 901 F.2d 778 (9th Cir. 1990) (per curiam) (alcohol and drug abuse if "extraordinary") [3, #8].

U.S. v. Guarin, 898 F.2d 1120 (6th Cir. 1990) (extent of and dependence for livelihood on cocaine dealing, § 5H1.9) [3, #5].

b. Upward Departure Not Warranted

U.S. v. Castro-Cervantes, 911 F.2d 222 (9th Cir. 1990) (on basis that bank robber part of organized group—implicitly accounted for in § 3B1) [3, #13].

U.S. v. Doering, 909 F.2d 392 (9th Cir. 1990) (to secure psychiatric treatment for defendant) [3, #11].
U.S. v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990) (to equalize sentence with codefendant's, for type and number of weapons, greed) [3, #9].
U.S. v. Colon, 905 F.2d 580 (2d Cir. 1990) (drugs in relevant conduct—use in base offense level) [3, #8].
U.S. v. Miller, 903 F.2d 341 (5th Cir. 1990) (prior consolidated sentences, alcohol dependency) [3, #8].
U.S. v. McDowell, 902 F.2d 451 (6th Cir. 1990) (conduct in dismissed count, dangers of crack houses) [3, #6].
U.S. v. Hawkins, 901 F.2d 863 (10th Cir. 1990) (false claim of weapon, threat, drug addiction, "near miss" on career offender status) [3, #7].
U.S. v. Chiarelli, 898 F.2d 373 (3d Cir. 1990) ("magnitude of the thievery") [3, #5].
U.S. v. Robinson, 898 F.2d 1111 (6th Cir. 1990) (for incriminating information prohibited by § 1B1.8) [3, #4].
U.S. v. Ceja-Hernandez, 895 F.2d 544 (9th Cir. 1990) (per curiam) (immigration defendant's anticipated deportation) [3, #1].

c. Computing Extent of Departure

U.S. v. Carpenter, 914 F.2d 1131 (9th Cir. 1990) (linked extent to analogous guidelines) [3, #13].
U.S. v. Pearson, 911 F.2d 186 (9th Cir. 1990) (by analogy to relevant guidelines; do not compare to pre-Guidelines sentences), amending 900 F.2d 1357 [3, #6].
U.S. v. Landry, 903 F.2d 334 (5th Cir. 1990) (link extent of departure to analogous guideline) [3, #8]
U.S. v. Shuman, 902 F.2d 873 (11th Cir. 1990) (reasonable compared to enhancements for similar factors) [3, #8].
U.S. v. Ferra, 900 F.2d 1057 (7th Cir. 1990) (link departure calculations to structure of Guidelines) [3, #7].
U.S. v. Kim, 896 F.2d 678 (2d Cir. 1990) (multiple counts procedure, § 3D1.1–.5, to guide departure based on misconduct not resulting in conviction) [3, #3].
U.S. v. Schweihs, No. 88 CR 763 (N.D. Ill. Feb. 16, 1990) (using analogous specific offense characteristic as reference point) [3, #4].

3. Mitigating Circumstances

a. Downward Departure Warranted

i. Personal Circumstances

U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (employment record, naivete displayed in committing offense) [3, #10].
U.S. v. Morales, 905 F.2d 599 (2d Cir. 1990) (extreme vulnerability to in-prison victimization) [3, #9].
U.S. v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) (unusual personal circumstances, §§ 5H1.5, 5H1.6, p.s.) [3, #4].
U.S. v. Harrington, 741 F. Supp. 968 (D.D.C. 1990) (first-time offender with history of drug addiction whose progress in treatment indicated likelihood of successful rehabilitation) [3, #13].
U.S. v. Mills, No. 88 CR 956 (S.D.N.Y. Jan. 17, 1990) (combination of extraordinary personal circumstances, U.S.S.G. § 5H1.6, p.s.) [3, #2].

ii. Other

U.S. v. Whitehorse, 909 F.2d 316 (8th Cir. 1990) (for escape defendant with alcohol problem because authorities should not have granted unsupervised furlough) [3, #12].

b. Downward Departure Not Warranted

i. Personal Circumstances

U.S. v. Deane, 914 F.2d 11 (1st Cir. 1990) (exemplary employee and father) [3, #14].
U.S. v. Goff, 907 F.2d 1441 (4th Cir. 1990) (cumulation of personal factors) [3, #10].
U.S. v. Brand, 907 F.2d 31 (4th Cir. 1990) (personal circumstances and impact of imprisonment on children) [3, #10].
U.S. v. Pozzy, 902 F.2d 133 (1st Cir. 1990) (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 (6th Cir.) (personal circumstances), *cert. denied*, 111 S. Ct. 127 (1990) [3, #5].
U.S. v. Van Dyke, 895 F.2d 984 (4th Cir.) ("rehabilitative conduct" after arrest, before sentencing), *cert. denied*, 111 S. Ct. 112 (1990) [3, #2].

ii. Other

U.S. v. Deane, 914 F.2d 11 (1st Cir. 1990) (degree of seriousness of child pornography offense, lack of counseling program in prison) [3, #14].
U.S. v. Parker, 912 F.2d 156 (6th Cir. 1990) (to harmonize sentence with codefendant's when conduct and records dissimilar) [3, #12].
U.S. v. Alvarez-Cardenas, 902 F.2d 734 (9th Cir. 1990) (possible deportation) [3, #7].
U.S. v. Hays, 899 F.2d 515 (6th Cir. 1990) (for small amount of drugs and non-violent criminal history of career offender) [3, #5].
U.S. v. Rosen, 896 F.2d 789 (3d Cir. 1990) (combination of typical factors, compulsive gambling) [3, #3].

4. Notice Required Before Departure

U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (to government before downward departure) [3, #10].
U.S. v. Anders, 899 F.2d 570 (6th Cir. 1990) (satisfied when PSI or court identifies factors and allows opportunity for comment) [3, #6].
U.S. v. Hernandez, 896 F.2d 642 (1st Cir. 1990) (satisfied when facts in PSI received before sentencing and argument allowed) [3, #3].
U.S. v. Acosta, 895 F.2d 597 (9th Cir. 1990) (requirement met when factors listed in PSI and commented on by defendant before sentencing) [3, #2].
U.S. v. Michael, 894 F.2d 1457 (5th Cir. 1990) (not required before sentencing hearing even when court ignores PSI recommendation and departs) [3, #2].
U.S. v. Burns, 893 F.2d 1343 (D.C. Cir. 1990) (not required before sentencing hearing if facts in PSI) [3, #1].

5. Statement of Reasons for Departure

U.S. v. Murillo, 902 F.2d 1169 (5th Cir. 1990) (may rely solely on information from PSI) [3, #8].

U.S. v. Gayou, 901 F.2d 746 (9th Cir. 1990) (must give specific reasons for extent of departure) [3, #1].
U.S. v. Michael, 894 F.2d 1457 (5th Cir. 1990) (reasons must be supported by evidence in record) [3, #2].
U.S. v. Newsome, 894 F.2d 852 (6th Cir. 1990) (make specific finding in open court) [3, #2].
U.S. v. Kennedy, 893 F.2d 825 (6th Cir, 1990) ("long history of violation of the law" not sufficiently specific) [3, #1].

6. Substantial Assistance (§ 5K1.1, 18 U.S.C. § 3553(e))

a. Departures

U.S. v. Wilson, 896 F.2d 856 (4th Cir. 1990) (no lower limit on § 3553(e) departure—may impose probation) [3, #3].

b. Procedure

U.S. v. Damer, 910 F.2d 1239 (5th Cir. 1990) (per curiam) (after motion court retains discretion to depart) [3, #13].
U.S. v. Brown, 912 F.2d 453 (10th Cir. 1990) (confidential memo not "functional equivalent" of motion) [3, #12].
U.S. v. Howard, 902 F.2d 894 (11th Cir. 1990) (must rule on § 5K1.1 motion at sentencing, may not postpone) [3, #9].
U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990) (§ 5K1.1 requires government motion; court must consider cooperation in sentencing within range) [3, #4].
U.S. v. Rexach, 896 F.2d 710 (2d Cir. 1990) (§ 5K1.1 requires government motion; plea agreement regarding discretion to move may be reviewed for bad faith) [3, #3].
U.S. v. Lewis, 896 F.2d 246 (7th Cir. 1990) (upholding § 5K1.1 requirement for government motion) [3, #3].
U.S. v. Alamin, 895 F.2d 1335 (11th Cir.) (government motion required; may consider assistance in sentencing within range), *cert. denied*, 111 S. Ct. 196 (1990) [3, #4].
U.S. v. Coleman, 895 F.2d 501 (8th Cir. 1990) (letters not functional equivalent of motion; plea agreement binding government to file motion enforceable) [3, #2].
U.S. v. Peralta, 741 F. Supp. 1197 (D. Md. 1990) (court may only consider factors relating to substantial assistance, not unrelated grounds for departure) [3, #13].

G. Sentencing Procedure

See also Specific Headings

1. Plea Bargaining

U.S. v. Kemper, 908 F.2d 33 (6th Cir. 1990) (error to reject plea agreement that stipulated to amount of drugs, and thus guideline range, without granting defendant opportunity to withdraw plea, § 6B1.3, p.s.) [3, #12].
U.S. v. Roberts, 898 F.2d 1465 (10th Cir. 1990) (use more serious offense established by plea, § 1B1.2(a)) [3, #5].
U.S. v. Salva, 894 F.2d 225 (7th Cir. 1990) (need not inform defendant of guideline minimum before plea; recommends plea be accepted after PSI released) [3, #1].
U.S. v. Foreman, 894 F.2d 1337 (6th Cir. 1990) (per curiam) (table, unpub.) (not required to inform defendant of offense level and criminal history before plea) [3, #1].
U.S. v. Burns, 893 F.2d 1343 (D.C. Cir. 1990) (plea agreements should address possibility of departure) [3, #1].
U.S. v. Moya, 730 F. Supp. 35 (N.D. Tex. 1990) (not bound by amount of drugs in plea agreement) [3, #2].

2. Burden of Proof

U.S. v. Unger, — F.2d — (1st Cir. Sept. 28, 1990) (on defendant to show prior conviction invalid) [3, #14].
U.S. v. Newman, 912 F.2d 1119 (9th Cir. 1990) (on defendant to show prior conviction invalid) [3, #14].
U.S. v. Restrepo, 903 F.2d 648 (9th Cir. 1990) (heightened preponderance standard for enhancement factors) [3, #7].
U.S. v. Frederick, 897 F.2d 490 (10th Cir.) (preponderance of evidence for sentencing factors), *cert. denied*, 111 S. Ct. 171 (1990) [3, #3].
U.S. v. Rodriguez, 896 F.2d 1031 (6th Cir. 1990) (on party seeking adjustment, preponderance of evidence) [3, #3].
U.S. v. Alston, 895 F.2d 1362 (11th Cir. 1990) (preponderance of evidence for drug quantity) [3, #5].
U.S. v. Kirk, 894 F.2d 1162 (10th Cir. 1990) (on party seeking adjustment, by preponderance of evidence) [3, #1].
U.S. v. Howard, 894 F.2d 1085 (9th Cir. 1990) (on party seeking adjustment, by preponderance of evidence; on government for facts establishing offense level) [3, #1].

3. May Use Conduct From Prior Acquittal

U.S. v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir.) (for weapon enhancement under § 2D1.1(b)(1)), *cert. denied*, 111 S. Ct. 127 (1990) [3, #6].

4. Evidence From Another Trial

U.S. v. Notrangelo, 909 F.2d 363 (9th Cir. 1990) (allowed to adjust offense level, requires notice) [3, #10].
U.S. v. Castellanos, 904 F.2d 1490 (11th Cir. 1990) (follow procedural safeguards in § 6A1.3 of Guidelines; vacating and clarifying earlier opinion, 882 F.2d 474) [3, #9].
U.S. v. Chandler, 894 F.2d 463 (D.C. Cir. 1990) (per curiam) (table, unpub.) (may not use for drug quantity) [3, #1].
U.S. v. Luna, 734 F. Supp. 552 (D. Me. 1990) (may be used to determine drug quantity) [3, #6].

5. Factual Disputes

U.S. v. Fortier, 911 F.2d 100 (8th Cir. 1990) (may not make finding based on multiple hearsay without independent finding that hearsay is reliable) [3, #12].
U.S. v. Willard, 909 F.2d 780 (4th Cir. 1990) (may not avoid resolving factual dispute by sentencing within overlapping guideline range without express determination sentence would be same in absence of dispute) [3, #11].
U.S. v. Moreno, 899 F.2d 465 (6th Cir. 1990) (offense level not limited by amount of drugs in jury verdict) [3, #5].

6. Conduct of Sentencing Hearing

U.S. v. Howard, 902 F.2d 894 (11th Cir. 1990) (must rule on § 5K1.1 motion at sentencing, may not postpone) [3, #9].
U.S. v. Jones, 899 F.2d 1097 (11th Cir.) (directing district courts to elicit full objections to sentencing findings), *cert. denied*, 111 S. Ct. 275 (1990) [3, #8].
U.S. v. Wivell, 893 F.2d 156 (8th Cir. 1990) (18 U.S.C. § 3553(c) requirement for statement of reasons met when reasons on record of proceedings in open court) [3, #1].

U.S. v. Ameperosa, 728 F. Supp. 1479 (D. Hawaii 1990) (extending Jencks Act, 18 U.S.C. § 3500, to government witnesses' statements at sentencing hearings) [3, #1].

7. Rule 35

U.S. v. Emanuel, 734 F. Supp. 877 (S.D. Iowa 1990) (extent of reduction under Fed. R. Crim. P. 35(b) cannot be limited by government) [3, #8].

H. Appellate Review

1. Procedure for Review of Departures

U.S. v. Gayou, 901 F.2d 746 (9th Cir. 1990) (standards of review for departures) [3, #1].

U.S. v. Lang, 898 F.2d 1378 (8th Cir. 1990) (three-step procedure of *Diaz-Villafane*) [3, #6].

U.S. v. Lira-Barraza, 897 F.2d 981 (9th Cir. 1990) (five-step procedure) [3, #4].

2. Discretionary Refusal to Depart Downward

a. Not Appealable

U.S. v. Bayerle, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990) [3, #4].

U.S. v. Morales, 898 F.2d 99 (9th Cir. 1990) [3, #4].

U.S. v. Evidente, 894 F.2d 1000 (8th Cir.), *cert. denied*, 110 S. Ct. 1956 (1990) [3, #2].

b. Extent of Departure Not Appealable

U.S. v. Dean, 908 F.2d 215 (7th Cir. 1990) (rule applies equally to substantial assistance departures) [3, #11].

U.S. v. Vizcarra-Angulo, 904 F.2d 22 (9th Cir. 1990) [3, #10].

U.S. v. Parker, 902 F.2d 221 (3d Cir. 1990) [3, #10].

U.S. v. Pighetti, 898 F.2d 3 (1st Cir. 1990) [3, #4].

U.S. v. Wright, 895 F.2d 718 (11th Cir. 1990) (per curiam) [3, #4].

3. Proper and Improper Grounds for Departure

U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (two proper grounds sufficient despite improper ground) [3, #10].

U.S. v. Zamarripa, 905 F.2d 337 (10th Cir. 1990) (must be remanded) [3, #10].

U.S. v. Franklin, 902 F.2d 501 (7th Cir.) (may uphold when proper and improper grounds given), *cert. denied*, 111 S. Ct. 274 (1990) [3, #8].

4. Overlapping Guideline Ranges Dispute

U.S. v. Willard, 909 F.2d 780 (4th Cir. 1990) (may not avoid resolving factual dispute by sentencing within the overlap without making an express determination sentence would be the same in absence of dispute) [3, #11].

U.S. v. Dillon, 905 F.2d 1034 (7th Cir. 1990) (may be unresolved if same sentence would be imposed) [3, #9].

U.S. v. Luster, 896 F.2d 1122 (8th Cir. 1990) (remanding sentence at bottom of erroneous guideline range) [3, #3].

6. Other

U.S. v. Jones, 899 F.2d 1097 (11th Cir.) (directing district courts to elicit full objections to sentencing findings), *cert. denied*, 111 S. Ct. 275 (1990) [3, #8].

I. Challenges to Guidelines and Sentencing Reform Act

3. Rejecting Challenges to Specific Provisions

U.S. v. Foote, 898 F.2d 659 (8th Cir.) (discretion of prosecutor to charge use of firearm in drug offense as substantive crime or enhancement under § 2D1.1), *cert. denied*, 111 S. Ct. 112 (1990) [3, #5].

U.S. v. Roberts, 898 F.2d 1465 (10th Cir. 1990) (§ 1B1.2(a) not unconstitutionally vague) [3, #5].

U.S. v. Belgard, 894 F.2d 1092 (9th Cir.) (role of probation officers), *cert. denied*, 111 S. Ct. 164 (1990) [3, #2].

U.S. v. Evidente, 894 F.2d 1000 (8th Cir.) (escape guideline, § 2P1.1, complies with statute), *cert. denied*, 110 S. Ct. 1956 (1990) [3, #2].

U.S. v. Buckner, 894 F.2d 975 (8th Cir. 1990) ("100 to 1 ratio" of cocaine to cocaine base, § 2D1.1(c)) [3, #2].

4. Upholding Challenges to Specific Provisions

U.S. v. Suarez, 911 F.2d 1016 (5th Cir. 1990) (applying amended § 1B1.3(a)(3), effective before sentencing but after arrest, that could increase sentence, violates ex post facto clause) [3, #12].

J. Decision to Apply Guidelines

U.S. v. R.L.C., — F.2d — (8th Cir. Sept. 12, 1990) (juvenile sentenced under 18 U.S.C. § 5037(c) may not receive term greater than adult under Guidelines) [3, #14].

U.S. v. Norquay, 905 F.2d 1157 (8th Cir. 1990) (apply to Indian Major Crimes Act, limited by state law maximum and minimum sentences) [3, #10].

U.S. v. Leake, 908 F.2d 550 (9th Cir. 1990) (apply to assimilative crimes, limited by state law maximum and minimum sentences) [3, #10].

K. Probation and Supervised Release

1. Revocation of Probation

U.S. v. Von Washington, — F.2d — (8th Cir. Sept. 28, 1990) (per curiam) (agreeing with *Smith, infra*) [3, #14].

U.S. v. Smith, 907 F.2d 133 (11th Cir. 1990) (new sentence, including a departure, limited by sentence authorized for original offense) [3, #11].

2. Revocation of Supervised Release

U.S. v. Scroggins, 910 F.2d 768 (11th Cir. 1990) (per curiam) (may impose full term of release after revocation) [3, #13].

U.S. v. Dillard, 910 F.2d 461 (7th Cir. 1990) (not limited by guideline term for original offense; may sentence to full release term less time served in prison) [3, #12].

U.S. v. Lockard, 910 F.2d 542 (9th Cir. 1990) (may sentence to full term of supervised release) [3, #11].

U.S. v. Behnezhad, 907 F.2d 896 (9th Cir. 1990) (may not impose additional term of supervised release) [3, #11].

Note: The Sentencing Commission has issued new policy statements, effective Nov. 1, 1990, covering violations of probation and supervised release. *See* U.S.S.G. § 7B1.

Guideline Sentencing Update

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VOLUME 4 • NUMBER 1 • APRIL 25, 1991

Sentencing Procedure

D.C. and Third Circuits hold that unlawfully seized evidence that would be excluded at trial may be considered in sentencing under Guidelines. In the Third Circuit case, DEA agents acting on a tip conducted a warrantless search of an apartment and seized 198 grams of cocaine. Defendant arrived at the scene and was arrested; his car was searched and a kilogram of cocaine was seized. The district court ruled the kilogram from the car would be suppressed, but not the 198 grams from the apartment. Defendant and the government then entered into a plea agreement, part of which stipulated that the amount of cocaine for sentencing purposes was 100–200 grams. The agreement also stated the court was not bound by the stipulation. The court included the kilogram of cocaine in the sentencing calculations, despite objections by both defendant and prosecutor, and refused defendant's request to withdraw his guilty plea.

The appellate court affirmed: "Consideration of the suppressed evidence is consistent with the caselaw on the exclusionary rule and follows the well-established practice of receiving evidence relevant to sentencing from a broad spectrum of sources. We hold, therefore, that evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges." The court noted it "need not address the situation . . . where . . . evidence was illegally seized for the purpose of enhancing the sentence."

As to the withdrawal of the guilty plea, the court held that "in the unusual circumstances present here, defendant is entitled to relief." At the plea colloquy the district court had indicated that only the 198 grams would be used in sentencing; it was after preparation of the PSI that the issue of including the kilogram arose. Thus, "a legal issue unforeseen by the prosecution, defense and apparently the court itself, frustrated an agreement clearly contemplated by all concerned. The sentence evolved not from a routine computation per se or newly discovered information, but reflected an unexpected change in a critical factor that for all intents and purposes had been settled during the plea colloquy." It was left to the district court to determine on remand "whether to grant specific performance or allow withdrawal of the plea."

U.S. v. Torres, 926 F.2d 321 (3d Cir. 1991).

In the D.C. Circuit case, undercover police made a controlled buy of $50 worth of crack cocaine at an apartment. Within minutes an awaiting arrest team forcibly entered the apartment without a warrant, arrested defendant, searched the apartment and seized evidence. Defendant moved to suppress evidence obtained from the search. The parties agreed that the contested evidence would not be used at trial, but the government reserved the right to introduce it at sentencing.

The sentencing court allowed the contested evidence—weapons and more drugs—to be used in computing the guideline sentence, with the result that defendant's sentencing range increased from 27–33 months to 235–293 months. Defendant argued that use of evidence seized in the warrantless search violated his Fourth Amendment rights and that the exclusionary rule should be applied at sentencing as well as at trial.

The appellate court, citing *Torres*, held that "evidence inadmissible at trial may be admissible at sentencing," and "under the circumstances of this case the deterrent effect [of the exclusionary rule] would not outweigh the detrimental effect of excluding the evidence. . . . Where there is no showing of a violation of the Fourth Amendment purposefully designed to obtain evidence to increase a defendant's base offense level at sentencing, this police misconduct is not sufficient to justify interfering with individualized sentencing." The court left open "the question whether suppression would be necessary and proper at the sentencing phase where it is shown that the police acted egregiously, e.g., by undertaking a warrantless search for the very purpose of obtaining evidence to increase a defendant's sentence."

U.S. v. McCrory, No. 89-3211 (D.C. Cir. April 12, 1991) (Sentelle, J.).

Departures

Ninth Circuit holds upward departure may not be based on conduct underlying criminal charge on which defendant was acquitted; also reverses imposition of consecutive sentences and rejects departure grounds. Defendant was tried on charges of first degree murder and assault with intent to commit murder, but convicted on the lesser included offenses of voluntary manslaughter and assault with a dangerous weapon. The presentence report included a reduction for acceptance of responsibility and noted that two prior tribal court convictions not included in the criminal history score might warrant departure under U.S.S.G. §§ 4A1.2(i) and 4A1.3(a), p.s. With a departure, the report calculated a maximum sentencing range of 63–78 months.

The district court sentenced defendant to 180 months. The court denied the reduction for acceptance of responsibility, enhanced the sentence for the discharge of a firearm, and departed for inadequate criminal history score. The court also determined that departure was warranted under § 5K2.1, p.s. because it found the facts showed that defendant intended to kill or seriously injure his victims. The court imposed consecutive sentences for the two offenses, thus effectively aggregating the statutory maximum sentences of ten years for voluntary manslaughter and five years for the assault.

The appellate court reversed and remanded, with the majority holding that the grounds for departure and imposi-

tion of consecutive sentences were improper. The court held unanimously that the defendant "should have been notified before sentencing that the court intended (1) to deny him the acceptance of responsibility reduction, (2) to depart from the Guidelines based on [his] state of mind, (3) to enhance the sentence based on the firearm discharge, and (4) to run the sentences consecutively rather than concurrently." The court also stated that sentencing courts should "explain the role each factor played in the departure decision . . . [and] . . . indicate the extent each factor played in increasing the sentence."

On the acceptance of responsibility issue, the court found that "[b]ecause the . . . reduction was included in the presentence report, Brady was led to believe that this issue would not be raised at the sentencing hearing. . . . 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" in order to give defendant "an adequate opportunity to present information to the court on his acceptance of responsibility."

The majority of the court also concluded that the departure itself was improper. It held that the sentencing court could not base the sentence on facts underlying an acquittal, reasoning that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. The Guidelines recognize that voluntary manslaughter is to be punished less severely than murder by setting a lower base offense level for voluntary manslaughter than for murder. A sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact—under any standard of proof—that the jury has necessarily rejected by its judgment of acquittal. . . . We remand this portion of the sentence noting that the jury's determination of Brady's state of mind is dispositive in the sentencing hearing, and that the sentencing court may not circumvent the jury's verdict by departing from the Guidelines on this basis." Nine other circuits have considered this issue and concluded that courts may consider a defendant's conduct despite an acquittal on charges arising out of that conduct. *See U.S. v. Averi*, 922 F.2d 765 (11th Cir. 1991) (per curiam); *U.S. v. Fonner*, 920 F.2d 1330 (7th Cir. 1990); *U.S. v. Duncan*, 918 F.2d 647 (6th Cir. 1990); *U.S. v. Rodriguez-Gonzalez*, 899 F.2d 177 (2d Cir. 1990); *U.S. v. Mocciola*, 891 F.2d 13 (1st Cir. 1989); *U.S. v. Dawn*, 897 F.2d 1444 (8th Cir. 1990); *U.S. v. Isom*, 886 F.2d 736 (4th Cir. 1989); *U.S. v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam); *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989).

The majority also held that "[t]he decision to impose consecutive sentences violates the Guidelines requirements" in § 5G1.2, which "determines whether the sentence should run concurrently or consecutively. . . . The concurrent-consecutive determination boils down to this: consecutive sentences are imposed only if 'no count carries an adequate statutory maximum' to contain the sentence prescribed by the adjusted combined offense level." Because the prescribed guideline range fell within the statutory maximum for voluntary manslaughter, imposing consecutive sentences "is a drastic departure from the Guidelines and an unreasonable sentence."

It was also improper to use the prior tribal convictions to depart. Defendant had been convicted of two misdemeanor assault and battery offenses in 1979 and 1983, and received sentences of $50 or 25 days for the first conviction, $150 or 15 days for the second. Noting that "criminal history departures are warranted only when the criminal history category 'significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes,'" the court held that the tribal convictions "are simply not serious enough to warrant an upgrade in Brady's criminal history category." In addition, the convictions were uncounseled, and the court held that an uncounseled conviction where defendant did not waive counsel could not be used collaterally to impose an increased term of imprisonment on a subsequent conviction. The court did not rule on whether the conduct underlying the prior convictions could provide a basis for departure. *Cf. U.S. v. Eckford*, 910 F.2d 216, 220 (5th Cir. 1990) (may count prior uncounseled misdemeanor convictions in criminal history score).

U.S. v. Brady, No. 89-300074 (9th Cir. Mar. 18, 1991) (Pregerson, J.).

Substantial Assistance

Seventh Circuit holds probation under 18 U.S.C. § 3553(e) is not permitted when specifically prohibited by statute of conviction; delineates method to determine extent of substantial assistance departures. Defendant was arrested for possessing almost four kilograms of heroin. She cooperated with the government, which later moved under § 3553(e) for departure from the ten-year mandatory minimum and recommended a six-year term. The court sentenced defendant to probation and the government appealed.

The appellate court vacated and remanded. Defendant was sentenced under 18 U.S.C. § 841(b), which provides that "[n]otwithstanding any other provision of law, the court shall not place on probation . . . any person sentenced under this subparagraph." This provision, the court held, serves to "trump § 3553(e)," and distinguishes this case from *U.S. v. Diagi*, 892 F.2d 31 (4th Cir. 1990) (general prohibition against probation for Class A and B felonies in 18 U.S.C. § 3561 does not preclude departure to probation under § 3553(e)).

To determine the extent of a departure for substantial assistance, "only factors relating to a defendant's cooperation" may be considered. Here, the district court improperly considered defendant's "extremely burdensome family responsibilities." The court held that § 5H1.6, p.s., allows consideration of family responsibilities only in determining whether to impose restitution and fines or, if it is an option, probation; they may not provide a basis for departure.

The court further instructed that, as with all departures, the sentence "must be linked to the structure of the guidelines," and courts "must employ the rationale and methodology of the guidelines when considering cases not adequately addressed by existing guidelines. The sentencing judge is thus required to articulate the specific factors justifying the extent of his departure." The "government's recommendation should be the starting point for the district court's analysis," and the court should "examine the government's recommendation in light of factors like, but not limited to, those listed in § 5K1.1(a)." The court suggested reference to analogous guidelines provisions, such as § 3E1.1, in determing the weight to be accorded the § 5K1.1(a) factors.

U.S. v. Thomas, No. 90-2183 (7th Cir. Apr. 11, 1991) (Flaum, J.).

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Departure

Second Circuit holds sentencing court may not depart downward because of disparity resulting from prosecutor's plea-bargaining practices. Defendant was originally charged with possession with intent to distribute more than five grams of crack, but pled guilty to possession of an unspecified quantity of crack, an offense with no mandatory minimum. Defendant was allowed to withdraw this plea, however, partly because the court determined defendant did not actually benefit from the agreement to plead to the lesser charge. He was then reindicted on the original charge plus a count of using a firearm during a drug offense, 18 U.S.C. § 924(c), which carries a mandatory consecutive five-year term. Convicted after a jury trial on both counts, his combined sentencing range was 147–168 months.

The district court found that it was "not unusual" for the U.S. Attorney to use § 924(c) "as a chip in plea bargaining"; that is, charging defendants who refuse to plead guilty with § 924(c) if that section is applicable, but allowing similarly situated defendants who plead guilty to avoid § 924(c) charges. Because of the difference between the statutory penalty mandated by § 924(c) and the otherwise applicable—and lower—two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a weapon during a drug offense, the district court concluded that this plea-bargaining practice creates a disparity between those defendants who plead guilty and those who go to trial. Holding that this disparity was "unwarranted" and unforeseen by the Sentencing Commission, the court departed on the narcotics count and imposed a total 120-month sentence, which was within the range that would have applied if there had been no § 924(c) conviction but an enhancement under § 2D1.1(b)(1) instead.

The appellate court vacated the departure: "The Commission certainly considered that both the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) and the five-year mandatory consecutive sentence under § 924(c) could apply to the same defendant, and included in the Guidelines an explicit instruction that in such cases only the statutory penalty should be imposed. U.S.S.G. § 2K2.4(a), application note 2. Theoretically, this creates no 'disparity'; the defendant on whom the two-level enhancement is imposed may have engaged in criminal conduct similar to the conduct underlying a § 924(c) conviction, but he has not been 'found guilty of similar criminal conduct.' 28 U.S.C. § 991(b)(1)(B)."

The court rejected the idea that the plea bargaining practices of the U.S. Attorney created "'unwarranted disparity' in sentencing among similarly situated defendants. The 'disparity' identified by the district court . . . is not limited to the United States Attorney's decision to assert or forgo § 924(c) charges; it exists whenever the prosecutor exercises his broad discretion to forgo a charge on which a defendant could legitimately be prosecuted, convicted and sentenced. Whether the prosecutor declines to bring a charge at all, or, as is not uncommon, selects among a variety of applicable criminal statutes with different penalties, he is creating a 'disparity' between the sentences imposed on different defendants. And he undoubtedly has the authority to do so."

Noting that an upward departure affirmed in *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) had been imposed, in part, to "ameliorate to some extent the skewing occasioned by plea bargaining," the appellate court left open "the possibility that a prosecutor's charging decision or a plea agreement could also result in omitting a mitigating circumstance from the calculation of a guideline range, in which case a downward departure might be appropriate. Here, however, the only 'mitigating circumstance' identified is the fact that defendants who engaged in similar conduct but agreed to plead guilty to lesser charges received less punishment than [this defendant] would receive. No ground for departure pertaining specifically to this individual defendant, his conduct or his offense was identified. There is no viable claim before us of misconduct by the prosecutor or coercion of the defendant. . . . We are left, then, with no remaining basis for departure except the judge's disapproval of the manner in which the United States Attorney for the Eastern District of New York generally exercises his discretion in negotiating plea agreements in narcotics cases involving use of a firearm. We do not believe that substituting the judge's view of the proper general prosecutorial policy for that of the prosecutor constitutes a valid ground for departure."

U.S. v. Stanley, 928 F.2d 575 (2d Cir. 1991).

AGGRAVATING CIRCUMSTANCES

U.S. v. Hoyungowa, No. 89-10485 (9th Cir. Apr. 16, 1991) (Tang, J.) (district court may not depart pursuant to U.S.S.G. § 5K2.3, p.s., for extreme psychological injury to family of murder victim: "this Guideline applies by its plain terms only to the direct victim of the crime and not to others affected by the crime, such as [the victim's] family. . . . We hold that Guideline § 5K2.3 applies only to direct victims of the charged offense").

STATEMENT OF REASONS FOR DEPARTURE

U.S. v. Pergola, No. 90-1564 (2d Cir. April 10, 1991) (Kearse, J.) (although district court did not specifically explain why lesser departure would not suffice, statement that

"upward departure to the maximum term of the law is required by this case" implied that "anything less would be insufficient" and adequately supported departure under § 5K2.3 to statutory maximum of five years for defendant convicted of repeatedly threatening ex-girlfriend even after his parole was revoked for that conduct and he was ordered to stop; court distinguished *U.S. v. Kim*, 896 F.2d 678 (2d Cir. 1990) and *U.S. v. Schular*, 907 F.2d 294 (2d Cir. 1990), which had directed courts considering departures under § 5K to consider next higher offense levels in sequence, by noting that those cases "focused solely on the defendant's conduct" and not on "the effect of the crimes on the victims. Though in considering either type of circumstance the sentencing court should make clear on the record that it has considered lesser departures than the one eventually arrived at, 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 and quantification nearly impossible").

Mitigating Circumstances

U.S. v. Perez, 756 F. Supp. 698 (E.D.N.Y. 1991) (granting downward departure under § 5K2.0, p.s., from 41–51 months to the 15 months served in pretrial detention, for a "despondent and impecunious twenty-five year old woman, who has just experienced the sudden and unexpected death of her only child, a son born while she was in custody after her arrest for dealing in crack .... The Commission did not take into account the emotional blow dealt a mother who gives birth to a child while she is in custody, gives up her infant son to relatives because she cannot adequately care for it during her incarceration, and then is informed, while still in jail, of his sudden and inexplicable death. Even the most inhuman would consider this cruel punishment dealt by the fates sufficient retribution for her transgression. There are occasions where the law's implacability must bend and give homage through compassion to humanity's frailties and nature's cruelties. This is such a case.... The government does not object.").

Offense Conduct

Drug Quantity

U.S. v. Miranda-Ortiz, 926 F.2d 172 (2d Cir. 1991) (defendant, convicted of conspiracy to distribute cocaine after he joined conspiracy for only a single transaction involving one kilogram of cocaine shortly before conspiracy ended, should have offense level determined on basis of that one kilogram without also including 4–5 kilograms of cocaine distributed by conspiracy before he joined: "The late-entering coconspirator should be sentenced on the basis of the full quantity of narcotics distributed by other members of the conspiracy only if, when he joined the conspiracy, he could reasonably foresee the distributions of future amounts, or knew or reasonably should have known what the past quantities were"; fact that defendant was convicted of conspiracy to distribute more than five kilograms of cocaine is not binding at sentencing as to drug amount).

Adjustments

Role in the Offense

U.S. v. Caruth, No. 90-2079 (10th Cir. Apr. 16, 1991) (Anderson, J.) (agreeing with *U.S. v. Andrus*, 925 F.2d 335 (9th Cir. 1991) that "the Guidelines permit courts not only to compare a defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime.... In other words, resort may be had to both internal and external measurements for culpability," *accord U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989); court affirmed reduction for minor participant status, § 3B1.2(b), and denial of minimal participant status, § 3B1.2(c), because although defendant may have been least culpable member of extensive drug ring his actions were not necessarily minimal compared to average participants in this type of drug offense).

U.S. v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991) (even if statute of conviction incorporates managerial role in offense of conviction, defendant may receive § 3B1.1 enhancement for managerial role in related criminal conduct; here, defendant was convicted of renting or managing a building for the purpose of storing, distributing and/or using heroin, 21 U.S.C. 856(a)(2), but enhancement was proper because there was "ample evidence... that he managed other drug-related activities and people").

Victim-Related Adjustments

U.S. v. Smith, No. 90-2017 (10th Cir. Apr. 16, 1991) (Brorby, J.) (vulnerable victim enhancement under § 3A1.1 is not limited to offense of conviction and could be given to bank robbery defendant for related conduct of stealing elderly woman's car that he then used in robbery—it was thus improper for sentencing court to use car theft as basis for departure rather than § 3A1.1 adjustment; however, "'elderly' status" does not per se demonstrate vulnerability, and § 3A1.1 "requires analysis of the victim's personal or individual vulnerability" to defendant's criminal conduct).

Criminal History

Calculation

U.S. v. Query, 928 F.2d 386 (11th Cir. 1991) (drug amounts from related state offense were properly added to offense level rather than using the state conviction to increase criminal history score even though state sentence was imposed prior to federal sentence—under § 4A1.2(a)(1) a "prior sentence" must be "for conduct not part of the instant offense," and here the state and federal offenses were part of the same course of conduct).

Sentencing Procedure

Hearsay

U.S. v. Query, 928 F.2d 386 (11th Cir. 1991) (not error for district court to rely solely on hearsay testimony from presentence reports of non-testifying co-conspirator to support findings as to amount of drugs, role of defendant, acceptance of responsibility, and obstruction of justice—defendant failed to show statements were unreliable, and "both the Sentencing Guidelines and case law from this circuit permit a district court to consider reliable hearsay evidence at sentencing").

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Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit holds government may not limit substantial assistance motion to § 5K1.1 departure—sentencing court may also depart from statutory minimum pursuant to 18 U.S.C. § 3553(e). Defendant was subject to a ten-year mandatory minimum after pleading guilty to conspiracy to possess and distribute 437 kilograms of cocaine. The government moved for a substantial assistance departure, and at the sentencing hearing attempted to clarify that it was moving pursuant to § 5K1.1 but not § 3553(e). The court, however, departed below both the guideline range of 188–235 months and the ten-year minimum to impose a three-year term. The government appealed, contending the court lacked discretion to depart below the statutory minimum absent a motion specifying that the defendant had provided substantial assistance under § 3553(e) as well as § 5K1.1.

The court concluded that § 5K1.1 merely implements the statutory directive of § 3553(e) and 28 U.S.C. § 994(n) and does not create a separate method of departure: "[A]lthough 5K1.1 speaks initially in terms of 'departures' from the guidelines, section 994(n) and the Application Notes to 5K1.1 refer more generically to 'sentence reductions' and specifically refer to reductions below the statutory minimum as provided by 3553(e). In light of the substantial cross references between 5K1.1, 3553(e) and 994(n), we conclude that 994(n) and 5K1.1 do not create a separate ground for a motion for reduction below the guidelines exclusive of 3553(e)'s provision for reduction below the statutory minimum. Rather, 5K1.1 implements the directive of 994(n) and 3553(e), and all three provisions must be read together in order to determine the appropriateness of a sentence reduction and the extent of any departure."

"If we were to accept the government's position . . . we would have to find that Congress intended to vest with the prosecutor not only the authority to make the motion, but also the authority to set the parameters of the court's discretion. There is nothing in the legislative history, nor in the language of section 3553 or section 994 that suggests such a result. Thus, we reject the government's argument that this statutory scheme ultimately gives the prosecutor the power not only to notify the court of a defendant's substantial assistance, but to limit the judge's discretion to set the sentence by choosing to file its motion under 5K1.1 rather than § 3553(e)."

The court noted that this issue "appears to be one of first impression."

U.S. v. Keene, No. 89-50617 (9th Cir. Apr. 29, 1991) (Marsh, D.J.).

MITIGATING CIRCUMSTANCES

Ninth Circuit affirms downward departure, partly on basis of "aberrant behavior" and one defendant's "outstanding good deeds"; also holds that "unique combination of factors" may constitute a mitigating circumstance. Defendants pled guilty to conspiring to bribe and bribing an official of the Immigration and Naturalization Service. The guideline range for both defendants was 8–14 months, which required imposition of at least four months' imprisonment. *See* U.S.S.G. § 5C1.1(d)(2). The district court departed downward one offense level, giving defendants 6–12-month ranges and allowing the court to impose four months in home detention, *see* § 5C1.1(c)(2), five years' probation, and $15,000 fines (the amount of the bribe). The court held that several factors warranted departure: defendants did not seek or receive pecuniary gain, and there was no evidence of any other kind of benefit; the INS official influenced defendants to continue the scheme; one defendant attempted to back out after learning the scheme was illegal, and in the past had "gone to great personal expense to assist victims of crime or earthquake"; and defendants' conduct constituted "single acts of aberrant behavior," U.S.S.G. Ch. 1, Pt. A at 1.7.

The appellate court affirmed, finding that these circumstances were unusual and had not been adequately considered by the Sentencing Commission. In analyzing whether defendants' acts could be characterized as "single acts of aberrant behavior," the court reasoned that "it is fair to read 'single act' to refer to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime. In this case there are two crimes—the forming of the conspiracy and the offer of the money. The conspiracy and the offer are so closely related that for purposes of deciding whether they were aberrant they constitute a single act." The court "agree[d] with the government that absence of prior convictions is not enough to show that the act in question was single and aberrant," but held that the finding was warranted under the facts of this case.

As to the role of the government official in the offense, the court distinguished this case from one of "imperfect entrapment," which "is not a mitigating factor. *U.S. v. Dickey*, 924 F.2d 836 (9th Cir. 1991)." Here, "the person who solicited the acts was a government official whom the defendants had every reason to believe was aware of the law; he was not an undercover agent or other informant whose government status was not visible to the defendants. And the defendants themselves were 'innocents.' The conduct of the government official must be assessed not abstractedly in the air but in conjunction with the persons on whom the conduct has an impact."

The court also concluded that "the case of a defendant who had performed outstanding acts of benevolence" was not considered by the Commission and departure on that ground was not prohibited. The court reasoned that such acts "are not a necessary consequence of socio-economic status or community ties. The government conceded at oral argument that if Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence. With the principle established, it is only a matter of degree, and it seems entirely appropriate for outstanding good deeds ... to be considered as a relevant factor in determining whether there are mitigating circumstances."

Alternatively, the court held that "we may affirm on the basis of the record on the distinct and alternative ground that it is the convergence of all the factors that the court enumerated that constitutes the circumstances that led to its decision."

"The statute speaks in the singular of 'mitigating circumstance,' 18 U.S.C. § 3553(b). There is no reason to be so literal-minded as to hold that a combination of factors cannot together constitute a 'mitigating circumstance.' Given the Sentencing Commission's acknowledgement of 'the vast range of human conduct' not encompassed by the Guidelines, a unique combination of factors may constitute the 'circumstance' that mitigates. This conclusion is, indeed, required by the Guidelines themselves. The Commission says ... that the departure is to occur when 'a court finds an atypical case,' one 'where conduct differs significantly from the norm.' U.S.S.G. Ch.1, Pt.A, § 4(b). What the Commission has focused on is 'the case' conduct. Neither case nor conduct can be reduced to a single factor. Case and conduct are a total pattern of behavior."

This appears to be the first appellate decision to endorse a combination of factors approach. Two circuits specifically rejected a "totality of the circumstances" method for downward departures when the individual factors were not proper grounds for departure. *See U.S. v. Goff*, 907 F.2d 1441 (4th Cir. 1990); *U.S. v. Pozzy*, 902 F.2d 133 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990). *See also U.S. v. Rosen*, 896 F.2d 789 (3d Cir. 1990) ("combination of typical factors does not present an unusual case" warranting departure); *U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (vacating downward departure partly based on "cumulative effect" of factors that alone did not justify departure).

U.S. v. Takai, No. 90-10157 (9th Cir. Apr. 19, 1991) (Noonan, J.).

Aggravating Circumstances

U.S. v. Valle, 929 F.2d 629 (11th Cir. 1991) (per curiam) (affirming 716 F. Supp. 1452 (S.D.Fla. 1989) [2 *GSU* #11], wherein court departed from ranges of 30–37 months and 37–46 months to impose 15-year terms on defendants who robbed Wells Fargo truck of $17 million, hid all but $50,000 (which was recovered at the time of arrest), and refused to return remainder of money: "[T]he Guidelines do not contemplate a scenario such as this where the appellants expect to exploit the criminal justice system and enjoy the fruits of their crime following a relatively short period of incarceration. . . . To permit the appellants to keep the monetarily lucrative proceeds of their crime and yet serve no more prison time than if the money had been surrendered or otherwise recovered, would make a mockery of our system of justice. . . . Although 180 months is a severe departure from the applicable range . . . , we believe the sentences are appropriate and even necessary to insure respect for the law and, more specifically, to see that our system of punishment retains its deterrent effect").

Appellate Review

Proper and Improper Grounds for Departure

U.S. v. Diaz-Bastardo, 929 F.2d 798 (1st Cir. 1991) (holding that "a departure which rests on a combination of valid and invalid grounds may be affirmed so long as (1) the direction and degree of the departure are reasonable in relation to the remaining (valid) ground, (2) excision of the improper ground does not obscure or defeat the expressed reasoning of the district court, and (3) the reviewing court is left, on the record as a whole, with the definite and firm conviction that removal of the inappropriate ground would not be likely to alter the district court's view of the sentence rightfully to be imposed"). *Accord U.S. v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990); *U.S. v. Franklin*, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *Contra U.S. v. Zamarippa*, 905 F.2d 337 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989) (per curiam).

Probation and Supervised Release

(Note: No cases cited in this section were subject to the Nov. 1, 1990 amendments to Chapter Seven of the Guidelines, which set forth procedures for determining sentences after revocation of probation and supervised release.)

Revocation of Supervised Release

U.S. v. Smeathers, 930 F.2d 18 (8th Cir. 1991) (per curiam) (in imposing two-year sentence for violation of supervised release on defendant originally sentenced to 14 months and three-year term of release, district court did not abuse its discretion by considering the conduct that caused the revocation, the factors listed in 18 U.S.C. § 3553(a), and the guideline range for the new criminal conduct; sentence was within maximum provided under 18 U.S.C. § 3583(e)(3) and was not limited by Guideline sentence for original offense, *accord U.S. v. Dillard*, 910 F.2d 461 (7th Cir. 1990); *U.S. v. Lockard*, 910 F.2d 542 (9th Cir. 1990); *U.S. v. Scroggins*, 910 F.2d 768 (11th Cir. 1990) (per curiam)).

Revocation of Probation

U.S. v. Alli, 929 F.2d 995 (4th Cir. 1991) ("upon resentencing, following revocation of probation, the court is limited to a sentence within the guidelines available at the time of the initial sentence"; the conduct that caused revocation may be considered in determining whether to revoke or modify probation, what sentence to select within the guideline range, and whether to depart if the grounds for departure were available at the initial sentencing). *Accord U.S. v. White*, 925 F.2d 284 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) (per curiam).

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VOLUME 4 • NUMBER 4 • JUNE 18, 1991

The U.S. Supreme Court recently decided three cases involving the Sentencing Guidelines. All are summarized in this issue of *GSU*.

Relevant Conduct

STIPULATION TO MORE SERIOUS OFFENSE

Supreme Court declines to decide whether § 1B1.2(a) "stipulation" may be oral, finds that facts did not "specifically establish" a more serious offense. When U.S. marshals went to arrest defendant they had to kick the door open twice in an attempt to enter his apartment. Both times defendant fired a gun in the direction of the door, and both bullets lodged in the door. The marshals withdrew, and eventually defendant surrendered. He was charged with attempting to kill a deputy U.S. marshal, assault on a deputy marshal, and use of a firearm during a crime of violence. At the plea hearing pursuant to Fed. R. Crim. P. 11(f), defendant pled guilty to the latter two counts, but not guilty to attempted murder. There was no plea agreement, but during the hearing defendant generally agreed with the facts described by the government.

At sentencing on the assault and firearm charges, the district court held that defendant's oral agreement to the government's rendition of the facts amounted to a "stipulation that specifically establishe[d] a more serious offense than the offense of conviction," U.S.S.G. § 1B1.2(a), and applied the guideline for an attempt to kill a U.S. marshal. The appellate court affirmed, holding that a formal written stipulation as part of a plea agreement is not required and it is "only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts." *U.S. v. Braxton*, 903 F.2d 292, 298 (4th Cir. 1990) [3 *GSU* #8]. *But cf. U.S. v. McCall*, 915 F.2d 811, 816 n.4 (2d Cir. 1990) ("Without expressing any opinion as to whether a Section 1B1.2(a) stipulation must be in writing, we note that our decision in [*U.S. v.*] *Guerrero*[, 863 F.2d 245 (2d Cir. 1988)] requires that any stipulation 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) (indicating a "formal stipulation of [defendant's] guilt" is required under § 1B1.2(a)).

The Supreme Court did not resolve the question of how to interpret "stipulation" in § 1B1.2(a). Instead, the Court determined that the facts simply did not support a finding that defendant had the requisite intent for attempted murder: "[E]ven if one could properly conclude that the stipulation 'specifically established' that Braxton had shot 'at the marshals,' it would also have to have established that he did so with the intent of killing them. Not only is there nothing in the stipulation from which that could even be inferred, but the statements of Braxton's attorney at the hearing flatly deny it."

The Court also determined that clarification of § 1B1.2(a) could be left to the Sentencing Commission. The enabling legislation indicates that Congress intended the Commission to "periodically review the work of the courts, and . . . make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." The statute also grants the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." After certiorari was granted in this case the Commission requested public comment on whether § 1B1.2(a) should be amended to resolve this issue. These factors, plus the ability to decide the specific controversy here on other grounds, led the Court to "choose not to resolve" the issue of what is required by the phrase "containing a stipulation."

Braxton v. U.S., 111 S. Ct. 1854 (1990).

Offense Conduct

CALCULATING WEIGHT OF DRUGS

Supreme Court holds that weight of "mixture or substance" containing LSD includes weight of carrier medium. Petitioners were convicted of selling 1,000 doses of LSD on ten sheets of blotter paper. The drug alone weighed 50 milligrams, but the paper and drug together weighed 5.7 grams. The district court used the total weight to determine the sentences under the Guidelines and under the relevant statute, 21 U.S.C. § 841(b)(1)(B)(v), which mandates a minimum sentence of five years for distribution of "1 gram or more of a mixture or substance containing a detectable amount of" LSD. The Seventh Circuit affirmed, holding that "mixture or substance" includes the carrier medium. *U.S. v. Marshall*, 908 F.2d 1312, 1317–18 (7th Cir. 1990) (en banc).

The Supreme Court also affirmed: "We hold that the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, and this construction is neither a violation of due process, nor unconstitutionally vague." The Court noted that every appellate court that had ruled on this issue held that the carrier medium should be included.

Chapman v. U.S., 111 S. Ct. 1919 (1991).

U.S. v. Shabazz, No. 90-3244 (D.C. Cir. May 28, 1991) (Thomas, J.) (offense level for distribution of dilaudid pills, whose active ingredient is the schedule II substance

hydromorphone, is based on gross weight of pills, not net weight of hydromorphone). *Accord U.S. v. Lazarchick*, 924 F.2d 211 (11th Cir. 1991); *U.S. v. Meitinger*, 901 F.2d 27 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990). *See also U.S. v. Callihan*, 915 F.2d 1462 (10th Cir. 1990) (amphetamine mixture); *U.S. v. McKeever*, 906 F.2d 129 (5th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 790 (1991); *U.S. v. Murphy*, 899 F.2d 714 (8th Cir. 1990) (methamphetamine); *U.S. v. Gurgiolo*, 894 F.2d 56 (3d Cir. 1990) (schedule II, III, and IV substances).

Departures

Notice Required Before Departure

Supreme Court holds that Fed. R. Crim. P. 32 requires "reasonable notice" of specific grounds before district court departs from Guidelines. Defendant pled guilty to three charges relating to theft of government funds. The plea agreement stated the expectation that defendant would be sentenced within a certain guideline range. Consistent with this expectation, the presentence report found the applicable range to be 30–37 months and specifically stated that there were no factors warranting departure. At the conclusion of the sentencing hearing, however, the district court departed upward to impose a 60-month sentence. The appellate court affirmed, reasoning that neither the Guidelines nor Fed. R. Crim. P. 32 required advance notice of the decision to depart, the facts providing the basis for departure were contained in the presentence report (although not identified as such), and the defendant had both the opportunity to challenge the departure during allocution and the right to appeal his sentence. *U.S. v. Burns*, 893 F.2d 1343, 1348 (D.C. Cir. 1990).

The Supreme Court reversed, holding that under Rule 32 some form of prior notice is required. The Court noted that in "the ordinary case, the presentence report or the Government's own recommendation will notify the defendant that an upward departure will be at issue and of the facts that allegedly support such a departure," and reasoned that allowing district courts "to depart from the Guidelines sua sponte without first affording notice to the parties" would be "contrary to the text of Rule 32(a)(1) because it renders meaningless the parties' express right 'to comment upon . . . matters relating to the appropriate sentence.'"

The 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, Rule 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." In a footnote the Court indicated that the same rule should apply for the prosecution in downward departures because "it is clear that the defendant and the Government enjoy equal procedural entitlements" under Rule 32.

The Court did not, however, answer "the question of the timing of the reasonable notice required by Rule 32 . . . . Rather, we leave it to the lower courts, which, of course, remain free to adopt appropriate procedures by local rule." Most appellate courts have held that the requirements of Rule 32 are met in one of two ways: the factors warranting departure are identified as such in the presentence report, or the sentencing court advises defendant before or at the sentencing hearing that it is considering departure and gives defendant opportunity to comment before imposition of sentence. *See, e.g., U.S. v. Contractor*, 926 F.2d 128 (2d Cir. 1991); *U.S. v. Williams*, 901 F.2d 1394 (7th Cir. 1990); *U.S. v. Anders*, 899 F.2d 570 (6th Cir.), *cert. denied*, 111 S. Ct. 532 (1990); *U.S. v. Hernandez*, 896 F.2d 642 (1st Cir. 1990); *U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989).

Burns v. U.S., No. 89-7260 (U.S. June 13, 1991) (Marshall, J.).

Aggravating Circumstances

U.S. v. Roth, No. 90-4028 (10th Cir. May. 24, 1991) (Logan, J.) (Upward departure was warranted for Air Force security policeman convicted of theft of government property from military base, including four F-16 jet engines: the amount of loss involved, $10 million, was sufficiently "unusual" compared to maximum of $5 million considered by guidelines; the deleterious effect of thefts on the "morale and pride of the military" resulted in a "significant disruption of a governmental function," U.S.S.G. § 5K2.7, p.s.; and the sale of the jet engines "could have endangered national security," § 5K2.14, p.s. The extent of the departure, however, to 120 months from the guideline maximum of 37 months, was not sufficiently explained to allow the appellate court to review for reasonableness: "[T]he sentencing court should draw analogies to offense characteristic levels, criminal history categories, and other principles in the guidelines to determine the appropriate degree of departure.").

Substantial Assistance

U.S. v. Doe, No. 90-3027 (D.C. Cir. May 24, 1991) (Mikva, C.J.) (rejecting constitutional and statutory challenges to requirement for government motion in U.S.S.G. § 5K1.1, p.s., but noting that "review by the district court remains available in cases where the government's refusal to move for a 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"; also noting that a "court may always consider a defendant's assistance in selecting a sentence from within the guideline range").

Adjustments

Role in Offense

U.S. v. Andrus, 925 F.2d 335 (9th Cir. 1991) (original opinion [3 *GSU* #20], which established two-part test for determining role in offense using relative culpability of defendant compared to codefendants and also to average participant in that type of crime, was amended March 25 prior to publication in bound volume—court deleted that part of opinion and held that it need not decide whether two-part test was proper because district court's refusal to grant minor participant status was proper under any test).

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Departures

MITIGATING CIRCUMSTANCES

D.C. Circuit holds that "socio-economic status," U.S.S.G. § 5H1.10, p.s., does not include defendant's personal history. Defendant pled guilty to conspiring to distribute cocaine and requested downward departures on three grounds: his criminal history was significantly overstated; his youth—he was 18 when arrested; and his personal history, which included domestic violence and other traumatic experiences. The district court reduced the criminal history category pursuant to § 4A1.3, p.s., but denied the other two requests, concluding that defendant's youth was not sufficiently unusual to warrant departure under § 5H1.1, p.s., and that it had no discretion under § 5H1.10, p.s. to depart on the basis of defendant's "socioeconomic standing or background."

The appellate court held that the district court properly exercised its discretion not to depart on the basis of youth. The court further held that the Guidelines do not violate due process by restricting consideration of age and that defendant could not challenge, under 28 U.S.C. § 994(x), the adequacy of the Sentencing Commission's reasons for this restriction.

However, the court set aside the refusal to consider departure for personal history, finding that the district court "mischaracterized certain elements of that history as 'socio-economic.'" The court reasoned that "the phrase 'socio-economic status' refers to an individual's status in society as determined by objective criteria such as education, income, and employment; it does not refer to the particulars of an individual life." The district court had expressed concern about "the tragic circumstances that make up what we call the socioeconomic class, that is, the death of his mother by his stepfather murdering her, [the stepfather's] threats, that he had to leave town to avoid problems, his growing up in the slum areas of New York and of Puerto Rico and not fitting in because of his . . . dual background," but concluded that "socioeconomic standing or background . . . can make no difference to the Court."

The appellate court held that consideration of these factors is not precluded by § 5H1.10: "It is undoubtedly true that individuals in certain social strata are apt to be exposed to far more violence and human ugliness than those who enjoy more privileged lives, but the court erred in concluding that all the experiences he described as 'tragic' fell within the rubric of 'socio-economic status.' . . . The characteristics listed in section 5H1.10 . . . are all objective; they reflect the kind of data that might be found in a census taker's checklist. They do not take cognizance of the traumatic experiences to which offenders of whatever characteristics might have been exposed. Violence among family members and its attendant dislocations do not follow class lines, nor should class lines determine whether a sentencing judge may consider them."

The court left to the district court to decide on remand whether consideration of such factors might be limited by other sections of the Guidelines, including § 5H1.3 (Mental and Emotional Conditions), or, conversely, whether the "not ordinarily relevant" language in § 5H1.3 might, "in extraordinary circumstances," provide sentencing courts with "a general authority to depart." *Cf. U.S. v. Deigert*, 916 F.2d 916, 918–19 (4th Cir. 1990) (district court has discretion to determine whether defendant's "tragic personal background and family history" is "extraordinary" and thus ground for downward departure).

U.S. v. Lopez, No. 90-3020 (D.C. Cir. June 28, 1991) (Buckley, J.).

Second Circuit upholds downward departure for "less than minimal" role in offense and extraordinary family circumstances. Defendant pled guilty to drug conspiracy charges. He received a reduction for minimal role in the offense, and his guideline range was 41–51 months. The district court departed and imposed a sentence of six months in a halfway house because (1) defendant did not realize he was involved in a drug transaction until it was almost completed and his participation was very limited; (2) his incarceration could result in the destruction of his family; (3) he was not aware of the specific amount of drugs involved; and (4) a discrepancy between his guideline sentence and that of another defendant appeared unwarranted.

The appellate court upheld the first two grounds. "The sentencing court did not abuse its discretion when it downwardly departed based in part on the extremely limited nature of [defendant's] involvement in the transaction. . . . [A] departure based on a factor envisioned by the Commission is permissible if the degree to which it was contemplated was inadequate . . . . [T]his record presents an instance in which . . . the defendant's role in the offense was less than minimal and [the court could] depart further downward from the guidelines."

The court also held that defendant's family circumstances were extraordinary and that § 5H1.6, p.s. did not preclude their consideration for departure. Defendant's wife, two daughters, disabled father, and grandmother depended upon him for support, and he worked two jobs to provide for them. "Clearly his is a close-knit family whose stability depends upon [defendant's] continued presence," and the district court's conclusion that departure was warranted because his incarceration "might well result in the destruction of an otherwise strong family unit" was "not an abuse of discretion."

The court held that the other two bases for departure were not proper. Defendant's lack of knowledge of the amount of drugs was part of his minimal involvement and thus not a separate ground. As to the sentencing disparity, the court noted it had "recently held that disparity of sentences between

co-defendants may not properly serve as a reason for departure." *See U.S. v. Joyner*, 924 F.2d 454, 459–61 (2d Cir. 1991).

On the issue of whether remand is automatically required when departure is based on both proper and improper grounds, the court determined that "the adoption of a per se rule seems imprudent. Instead, we hold the reviewing court should decide on a case-by-case basis whether remand is required." Here, the court held that remand was necessary because it could not conclude that the same sentence would have been imposed absent the improper factors. There is a split in the circuits as to whether remand is always required or a case-by-case decision should be made. See cases cited in 4 *GSU* #3 summary of *U.S. v. Diaz-Bastardo*, 929 F.2d 798 (1st Cir. 1991).

U.S. v. Alba, No. 90-1523 (2d Cir. May 23, 1991) (Cardamone, J.).

U.S. v. Prestemon, 929 F.2d 1275 (8th Cir. 1991) (District court erred in departing, from 33–41-month range to 24 months, on basis of 21-year-old first-time offender's background—he was bi-racial child adopted at age three months by white couple who did not know he was bi-racial. The appellate court acknowledged there is some evidence that bi-racial adopted children "often experience severe identity crises" and have more trouble with the law, but held that "race or racial background cannot be a basis for departure," U.S.S.G. § 5H1.10, p.s. Court also held that "adoption, even cross-racial or cross-cultural adoption, . . . is [not] so unusual or atypical that the Sentencing Commission did not adequately take such circumstances into consideration," and thus it is not a basis for departure for unusual family circumstances, § 5H1.6, p.s.).

Substantial Assistance

Fourth Circuit holds that, absent commitment to move for departure in plea agreement, defendant has no right to explanation of government's refusal to move for substantial assistance departure. Defendant began cooperating with the government shortly after arrest, without benefit of a plea bargain, and provided valuable assistance in other prosecutions. The government, however, did not move for downward departure under U.S.S.G. § 5K1.1, p.s., and defendant was sentenced to the mandatory statutory minimum sentences for his two offenses. He argued on appeal that the district court had authority to depart on the basis of his substantial assistance notwithstanding the government's refusal to move for departure, and that he should be allowed to inquire into the government's reasons for its refusal in order to determine whether the government acted arbitrarily or in bad faith.

The appellate court rejected both arguments: "Our reading of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) . . . leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. . . . [Thus] § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperation efforts. . . . [It also] follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government."

The court noted that defendants could "negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for the government's commitment to file a motion for a downward departure. [By doing so], the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. *See U.S. v. Connor*, 930 F.2d 1073, 1076 (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn." *See also Connor, supra* (defendant has burden of proving, by preponderance of evidence, that government breached agreement).

The court also noted its agreement with *U.S. v. Keene*, 933 F.2d 711 (9th Cir. 1991) [4 *GSU* #3], stating: "Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e)."

U.S. v. Wade, No. 90-5805 (4th Cir. June 12, 1991) (Niemeyer, J.).

Fifth Circuit holds that government commitment in plea agreement cover letter to move for departure if defendant provided substantial assistance is enforceable. The assistant U.S. Attorney sent defendant's attorney a proposed plea agreement with a cover letter that stated: "In addition, I will recommend departure to the court based upon your client's full and complete debriefing and substantial assistance to the government." The plea agreement itself, which was accepted, was silent on the issue of departure. At sentencing the AUSA told the court defendant had complied with the terms of the plea agreement, but did not move for departure and none was granted by the court. Defendant appealed, arguing that the government breached the agreement.

The appellate court remanded: "This matter turns on the legal significance we give to the AUSA's transmittal letter. . . . Although the letter is not part of the plea agreement proper it does contain an offer by the government which [defendant] ostensibly accepted. . . . 'The two documents, when read together, demonstrate the agreement that if Appellant gave a full debriefing and his full cooperation then the government would recommend a downward departure.'" The court could not determine from the record whether defendant did fully cooperate, but held that if defendant, "in reliance on the letter, 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 obliged to move for a downward departure."

U.S. v. Melton, 930 F.2d 1096 (5th Cir. 1991).

Sentencing Procedure

U.S. v. Melton, 930 F.2d 1096 (5th Cir. 1991) (Remanded for specific reasons for refusal to grant § 3B1.2 reduction for minor participant status. When defendant sought factual basis and reasoning for court's refusal, court "merely reiterated the finding that Melton was an average participant." Appellate court held: "The sentencing court must state for the record the factual basis upon which it concludes that a requested reduction for minor participation is, or is not, appropriate.").

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General Application Principles

Sixth Circuit holds that sentencing steps prescribed in U.S.S.G. § 1B1.1 are inconsistent with 18 U.S.C. § 3553; directs courts to follow statute, not Guidelines, if there are aggravating or mitigating circumstances not taken into account by Sentencing Commission. An undercover agent agreed to sell defendant 500 grams of cocaine, but instead gave defendant 85 grams in a plastic bag that was inside another bag containing 985 grams of plaster of paris. Defendant was charged with and pled guilty only to possession with intent to distribute an unspecified quantity of cocaine. On appeal defendant argued that he should have been sentenced only on the basis of the 85 grams he actually possessed, not the 500 grams he attempted to buy or the total weight of the cocaine and plaster package (note: the guideline range is the same for 500 or 1,070 grams of cocaine).

The majority of the court first held that the "sequence of nine sentencing steps prescribed" in § 1B1.1 is "inconsistent with the enabling statute governing guideline sentencing," 18 U.S.C. § 3553. The court determined that "the statute itself establishes the sentencing sequence and the way a district court shall go about applying the Sentencing Guidelines. The Commission does not follow the congressional scheme." The court held that "instead of waiting until the very end of the nine-step sentencing process to determine if a 'departure' is permissible, as the Sentencing Commission directs in § 1B1.1.... the [district] court should determine at the outset of the sentencing process whether the case presents circumstances 'not adequately taken into consideration' by the Commission in proposing its offense level for the crime.... If the District Court determines at the outset that the facts and circumstances of the case should render the Guidelines inapplicable, the Court 'shall impose an appropriate sentence having . . . due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses.' [18 U.S.C. § 3553(b).] The Court should compare the Commission's proposed offense level for the crime to the first principles outlined by Congress [in § 3553(a)] and determine at the outset whether the Commission's proposed level for the crime adequately takes into account the circumstances of the case in light of the need for a 'just punishment not greater than necessary.'"

"The legal effect of the more flexible approach to the guidelines outlined here is to transform mandatory rules into the more 'modest name "guidelines"' in those cases in which the Commission's proposed guideline sentence is 'greater than necessary' or in which the parties present a legitimate 'aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration.' When such a circumstance is presented, the guidelines become inapplicable as mandatory rules to be followed by the District Court without regard to its own judgment. Instead, the guidelines become more general principles of sentencing to be used in light of the principles of sentencing outlined in § 3553(a)."

Using this approach, the issue in the instant case is "whether the guidelines specify an applicable offense guideline section or range that takes into account either of the two aggravating circumstances which the government asserts should raise the offense level," namely the weight of the plaster or the negotiation for 500 grams. As to the first, "[t]here is no evidence that the Commission considered a case in which the cocaine is separately wrapped in a plastic bag inside a mixture of plaster and not adulterated or alloyed with the plaster." It was error to conclude "that the sentencing sequence under the statute and the sentencing guidelines mechanically requires an offense level of 26 for this reason."

With respect to the 500 grams, the issue was "whether the Commission has stated with clarity how it proposes to deal with a defendant who is charged with and convicted only of possession of a small quantity of drugs but who also may have committed other conspiracy or attempt crimes." The court concluded that "[i]t is not clear to us that the Commission intended . . . to raise the punishment by including as a mandatory aggravating circumstance uncharged conduct that amounts to a conceptually different offense from the offense of conviction. Attempts or conspiracies are inchoate crimes not of the same character as the substantive offense of possession, and they are not covered by the same guideline section. . . . It is true, as our dissenting colleague maintains, that the relevant conduct provisions in Application Note 12 to § 2D1.1 say that the 'quantities of drugs not specified in the count of conviction may be considered in determining the base offense level,' but it does not say that they 'may' be considered if the additional amounts involve a conceptually distinct drug offense, let alone that they 'must' be considered."

On remand, the district court should "follow the sentencing process established by Congress in § 3553(a) and (b), as outlined above. This process provides for a mandatory guidelines sentence at a particular level if, but only if, in specifying the offense level to be applied the Commission took into account all of the aggravating and mitigating circumstances in the case. If there is such a circumstance not taken into account, . . . the District Court 'shall impose an appropriate sentence having due regard' for the Guidelines.... The District Court should resentence the defendant under the more flexible procedure and the qualitative standards set out in the last two sentences of 18 U.S.C. § 3553(b)."

U.S. v. Davern, No. 90-3681 (6th Cir. June 20, 1991) (Merritt, C.J.).

Departures

Extent of Departure

Ninth Circuit en banc holds that extent of departure for atypical circumstances must be determined by reference to "the structure, standards and policies" of the Sentencing Reform Act and Guidelines. Defendant pled guilty to illegal transportation of aliens. His guideline range was 0–6 months, but the district court departed to a 36-month sentence because defendant attempted to evade arrest in a dangerous high-speed chase. The appellate court affirmed the departure and set forth a five-step procedure for review of departures. *See U.S. v. Lira-Barraza*, 897 F.2d 981 (9th Cir. 1990). The Ninth Circuit granted rehearing en banc.

The en banc court first determined that the five-step review process could be combined into three steps, essentially following the procedure set forth in *U.S. v. Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989), and followed by several circuits. In this case the first two steps were satisfied: the district court had "legal authority to depart" because it identified an aggravating circumstance not adequately considered by the Sentencing Commission, and its factual finding that the circumstance existed was not clearly erroneous.

The third step is "whether the extent of departure from the applicable Guideline range was 'unreasonable' within the meaning of 18 U.S.C. § 3742(e)(3) and (f)(2)." The court held that it could not review the departure for reasonableness because the district court had not explained the extent of the departure. The court determined that the provisions of the Sentencing Reform Act and the Guidelines "support the conclusion that departure sentences are limited by the sentencing structure established by the Act." In particular, the directive in 18 U.S.C. § 3553(a)(6), that courts shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," applies to departures "and requires, at a minimum, that departure sentences be consistent with other sentences fixed by the Guidelines or suggested by Commission standards and policies."

"The essential factor is that the extent of departure be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines. Possible criteria include comparison of the seriousness of the atypical circumstances to offenses or enhancements in the Guidelines, . . . treatment of the circumstance as a separate offense covered by the Guidelines, . . . and consideration of the structure of the sentencing table, in particular, the increments between guideline ranges."

The court stated that "a reasonableness standard assumes a range of permissible sentences. We give weight to the district court's choice within a permissible range. Reversal is required only if the choice is 'unreasonable' in light of the standards and policies incorporated in the Act and the Guidelines." To facilitate appellate review, sentencing courts "should include a reasoned explanation of the extent of the departure founded on the structure, standards and policies of the Act and Guidelines." *Cf. U.S. v. Roth*, 934 F.2d 248 (10th Cir. 1991) (indicating that departure by analogy to guidelines may be necessary to enable review for reasonableness). The case was remanded for an explanation of the district court's reasons for choosing 36 months.

Among the other circuits, only the Seventh Circuit appears to require departure by analogy for atypical circumstances. *See U.S. v. Ferra*, 900 F.2d 1057, 1062–63 (7th Cir. 1990). The Second, Third, and Tenth Circuits have strongly recommended use of analogies when appropriate, but do not require it. *See U.S. v. Jackson*, 921 F.2d 985, 990–91 (10th Cir. 1990) (en banc); *U.S. v. Kikumura*, 918 F.2d 1084, 1113 (3d Cir. 1990); *U.S. v. Kim*, 896 F.2d 678, 683–85 (2d Cir. 1990). Other circuits have indicated approval of departure by analogy. *See U.S. v. Hummer*, 916 F.2d 186, 194 n.7 (4th Cir. 1990); *U.S. v. Landry*, 903 F.2d 334, 340–41 (5th Cir. 1990); *U.S. v. Shuman*, 902 F.2d 873, 877 (11th Cir. 1990).

U.S. v. Lira-Barraza, No. 88-5161 (9th Cir. July 22, 1991) (Browning, J.) (en banc).

Mitigating Circumstances

U.S. v. Wogan, No. 91-1214 (1st Cir. July 18, 1991) (Selya, J.) (improper to depart downward to equalize sentence with that of codefendant, who had received shorter sentence because government failed to produce sufficient evidence of total amount of heroin involved in offense, which evidence was produced at defendant's later sentencing and resulted in longer term—"a perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from a properly calculated guideline sentencing range"). *Accord U.S. v. Joyner*, 924 F.2d 454, 459–61 (2d Cir. 1991).

Criminal History

Career Offender Provision

U.S. v. Rivers, 929 F.2d 136 (4th Cir. 1991) (Reversing 733 F. Supp. 1003 (D. Md. 1990) [3 *GSU* #7], which held that defendant was not a career offender because two prior felonies that occurred within twelve days and in adjacent jurisdictions were sentenced separately only because of "accident of geography" or, alternatively, that they were "committed pursuant to a single plan" (i.e., robbing gas stations to get money for drugs), and for either reason should not be counted as separate offenses. Appellate court held there was "no factual or legal support for the district court's findings and conclusions." The prior offenses were "unrelated" within the meaning of § 4A1.2, and to consider them "part of a single common scheme or plan" pursuant to § 4A1.2, comment. (n.3), "would have the effect of making related offenses of almost all crimes committed by one individual. The fact that both offenses were committed to support one drug habit does not make the offenses related under § 4A1.2." And the fact that the second judge made the second sentence concurrent to first does not matter.). *But cf. U.S. v. Houser*, 929 F.2d 1369, 1374 (9th Cir. 1990) (reversing finding that two prior drug convictions were not related under § 4A1.2 and defendant was thus career offender—convictions resulted from single investigation, both drug sales were to same undercover agent, and defendant was charged with separate offenses only because sales occurred in different counties: "[Defendant] was charged and convicted of two offenses merely because of geography and not because of the nature of the offenses. . . . There was significant evidence . . . that these two drug sales were part of a 'single common scheme or plan.' There was no evidence before the court to contradict this finding.").

Guideline Sentencing Update

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General Application Principles

En banc panel of Ninth Circuit determines weight to give to Commentary; holds that U.S.S.G. § 3B1.1(c) adjustment may not be given if defendant was the only criminally responsible participant. Anderson robbed a bank, escaping in a getaway car driven by a codefendant. Both were charged with bank robbery, but the driver pled guilty to misprision of a felony (for failure to notify authorities after the bank robbery), and he and Anderson both claimed that he did not know Anderson was robbing the bank. Anderson pled guilty to the robbery, and the district court enhanced his offense level by two under § 3B1.1(c) for his leadership role, finding the adjustment appropriate regardless of whether Anderson was the only criminally responsible participant in the robbery. A divided panel of the Ninth Circuit affirmed. *U.S. v. Anderson*, 895 F.2d 641 (9th Cir. 1990) [3 *GSU* #2].

The en banc court reversed. Section 3B1.1(c) "says nothing about any required number of criminally responsible persons. The Introductory Commentary, however, says that '[w]hen an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply,' and Application Note 1 explains that '[a] "participant" is a person who is criminally responsible for the commission of the offense.'" The court "consider[ed] the guideline and the commentary together, construing them so as to be consistent with each other and with [Part B of Chapter 3] as a whole," and concluded that "§ 3B1.1 (including subsection (c)) appears to apply only when the offense involves more than one person who is criminally responsible for the commission of the offense." *Accord 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); *U.S. v. Carroll*, 893 F.2d 1502, 1507–09 (6th Cir. 1990).

To reach this result, the court first had to decide "the appropriate weight to give to the commentary when interpreting the guidelines." This case involved commentary that "may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." U.S.S.G. § 1B1.7. (The court noted that other types of commentary not at issue here—those suggesting circumstances that may warrant departure and those providing background information—"are to be treated like policy statements, which courts must consider in imposing a sentence, 18 U.S.C. § 3553(a)(5).")

After examining the statements of the Sentencing Commission, which suggested that courts look to commentary "for guidance" and treat it "much like legislative history," and analogizing the commentary to "the advisory committee notes that accompany the federal rules of practice and procedure," the court concluded that "commentary cannot be treated as equivalent to the guidelines themselves but also cannot be treated merely as legislative history . . . . [I]t must be treated as something in between." The court set forth three principles to "guide courts in steering the middle course": "(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." 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).

U.S. v. Anderson, No. 89-10059 (9th Cir. Aug. 6, 1991) (Rymer, J.) (en banc).

Adjustments

Obstruction of Justice

U.S. v. Barry, No. 90-3251 (D.C. Cir. July 12, 1991) (Wald, J.) (alleged false testimony to grand jury in January 1989 regarding defendant's drug use cannot provide basis for § 3C1.1 obstruction of justice enhancement for later drug possession conviction, unless court finds that false testimony was part of willful attempt to impede or obstruct investigation or prosecution of "the instant offense"—obstructive conduct need not actually occur during investigation or prosecution of instant offense; agreeing with other circuits that "the instant offense" in § 3C1.1 means the offense of conviction, *see 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.), *cert. denied*, 110 S. Ct. 175 (1989)).

U.S. v. Lato, 934 F.2d 1080 (9th Cir. 1991) (obstruction of state investigation into insurance fraud scheme was properly used for § 3C1.1 enhancement in sentencing on later federal mail fraud conviction based on same scheme—"there is no state-federal distinction for obstruction of justice" and enhancement is not limited to acts aimed at federal authorities; court stated this was an issue of first impression, but noted other cases, cited at 1082, that "have at least implied that section 3C1.1 contains no such federal limitation").

Criminal History

Career Offender Provision

U.S. v. John, 936 F.2d 764 (3d Cir. 1991) (pursuant to § 4B1.2, comment. (n.2), when prior offense is neither specifically listed as crime of violence nor "has as an element the use, attempted use, or threatened use of physical force," the sentencing court is required to examine whether defendant's actual conduct during that offense "pos[ed] a serious potential risk of physical injury to another" and was thus a "crime of violence" for career offender purposes; federal, not state, law

governs this analysis, *accord U.S. v. Brunson*, 907 F.2d 117, 120–21 (10th Cir. 1990), *see also U.S. v. Nimrod*, No. 90-1389 (8th Cir. Aug. 8, 1991) (whether second degree burglary was "violent felony" under Missouri law does not matter for career offender purposes: "burglary" is defined "independent of the label employed by the various state criminal codes")). Other circuits have also held that underlying conduct in a prior offense may be considered in such circumstances. *See U.S. v. Goodman*, 914 F.2d 696, 699 (5th Cir. 1990); *U.S. v. McVicar*, 907 F.2d 1, 1–2 (1st Cir. 1990); *U.S. v. Terry*, 900 F.2d 1039, 1041–43 (7th Cir. 1990); *U.S. v. Baskin*, 886 F.2d 383, 389 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1831 (1990).

Departures

Criminal History

U.S. v. Bowser, No. 90-3234 (10th Cir. July 19, 1991) (per curiam) (joining Eighth and Ninth Circuits in holding that departure for career offenders is not prohibited by Guidelines, upholding downward departure for career offender based on defendant's youth (age 20) at time of two prior felonies, proximity in time of those offenses (within two months), and fact that concurrent sentences were imposed; reasonable to sentence defendant within guideline range that applied absent career offender enhancement, *accord U.S. v. Senior*, 934 F.2d 149, 151 (8th Cir. 1991); although no factor standing alone may have warranted departure, "this unique combination of factors in defendant's criminal history was not considered sufficiently by the Sentencing Commission to justify rigid application of the career offender criminal history categorization. . . . [W]e emphasize that it is all three factors in conjunction which satisfy the trial court's judgment. We cannot parse the factors, holding each one separately for consideration, without unfairly abusing the trial court's judgment," *see also U.S. v. Takai*, 930 F.2d 1427, 1433–34 (9th Cir. 1991) ("unique combination of factors may constitute" mitigating circumstance) [4 *GSU* #3]; *contra U.S. v. Goff*, 907 F.2d 1441, 1445–47 (4th Cir. 1990); *U.S. v. Pozzy*, 902 F.2d 133, 138–40 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990)).

U.S. v. Adkins, 937 F.2d 947 (4th Cir. 1991) ("We join the Eighth and Ninth Circuits and hold that a district court may, in an atypical case, downwardly depart where career offender status overstates the seriousness of the defendant's past conduct. We emphasize that such departures, like all departures, are reserved for the truly unusual case.").

Mitigating Circumstances

U.S. v. Lauzon, No. 90-1661 (1st Cir. July 16, 1991) (Bownes, Sr. J.) (agreeing with *U.S. v. Ruklick*, 919 F.2d 95, 99 (8th Cir. 1990), that under § 5K2.13, p.s., a defendant's "significantly reduced mental capacity" need not be the "but-for" or "sole" cause of the offense before departure may be warranted; however, court also concluded that in general "a person with borderline intelligence or mild retardation who is easily persuaded to follow others" does not present a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," § 5K2.0).

Substantial Assistance

U.S. v. Goroza, No. 90-10142 (9th Cir. Aug. 8, 1991) (per curiam) (Reversed because district court improperly departed under § 5K2.0, p.s., after government refused to move for substantial assistance departure under § 5K1.1, p.s. Defendant cooperated, but government believed he also made false statements. The district court departed because defendant was acquitted of perjury charge based on the alleged false statements, concluding that the Sentencing Commission had not considered this situation. The appellate court disagreed, holding that "cooperation with the government, regardless of whether the government in its discretion moves for a downward departure, is a circumstance that has been adequately taken into account by the Sentencing Commission," and that "so long as the government does not exceed the bounds of its discretion, departure under 5K2.0 for cooperation with the government is inappropriate.").

Extent of Departure

U.S. v. Little, No. 90-6244 (10th Cir. July 22, 1991) (Ebel, J.) (in making upward departure under § 4A1.3(d), p.s., because defendant had committed the instant offense while awaiting trial for an earlier crime, court reasonably added two points to criminal history score by analogizing to § 4A1.1(d), which adds two points for offense committed while under any criminal justice sentence).

Offense Conduct

Drug Quantity

U.S. v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991) (district court properly found weight of cocaine "mixture or substance" to be entire weight of suitcase made of 2.5 kilograms of cocaine chemically bonded to 9.5 kilograms of acrylic material, less weight of metal fittings; appellate court acknowledged that "the suitcase material obviously cannot be consumed; and the cocaine must be separated from the suitcase material before use. . . . Regardless, the suitcase/cocaine 'mixture' or 'substance' fits the statutory and Guideline definitions as the Supreme Court has recently interpreted them in *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)].").

Possession of Weapon During Drug Offense

U.S. v. Garner, No. 90-3361 (6th Cir. July 23, 1991) (Martin, J.) (reversing § 2D1.1(b)(1) finding because "it was clearly improbable that the gun was connected with [defendant's] drug offense": gun was an antique style, single-shot Derringer, unloaded and with no ammunition in defendant's house, it was locked in a safe twelve feet away from the safe where drugs were found, and is "not the type normally associated with drug activity"; court noted that "any one of these factors, standing alone, would not be sufficient to compel this conclusion," but the "cumulative effect of these factors" does).

Supreme Court—Review Granted

U.S. v. R.L.C., 915 F.2d 320 (8th Cir. 1990) [3 *GSU* #14], *cert. granted*, 111 S. Ct. 2850 (1991). Government appeals ruling that for juvenile sentenced pursuant to 18 U.S.C. § 5037(c)(1), which provides that sentence imposed on juvenile may not extend beyond "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," the sentence is limited by the "maximum term of imprisonment" authorized under the Guidelines for a similarly situated adult. *See* 49 Crim. Law Rep. 3077 (June 26, 1991).

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Relevant Conduct

Eighth Circuit holds sentencing statute does not authorize use of conduct relating to distinct, uncharged property crimes in setting offense level; narrows scope of U.S.S.G. § 1B1.3(a)(2). Defendant, indicted on two counts, pled guilty to one count of theft from an interstate shipment (tires valued at $37,000) and the second count of transporting a stolen vehicle was dropped. The presentence report alleged that defendant was part of an organization that stole over $1 million from interstate commerce, and "listed seven separate interstate property offenses for which the Government had neither charged nor indicted Galloway and included these offenses in the sentencing calculation." Inclusion of the uncharged thefts would have nearly tripled the guideline range, from 21–27 months to 63–78 months. The district court held that use of the uncharged conduct would violate the Fifth and Sixth Amendments by allowing defendant to be punished for conduct that he was neither indicted nor tried on.

The appellate court, following "the familiar rubric that courts do not unnecessarily decide constitutional issues," affirmed on statutory grounds and overturned "subsection (a)(2) of the relevant conduct guideline only insofar as it applies to separate property crimes that, like Galloway's, occurred on separate days, at separate places, targeted separate victims and involved a variety of merchandise. We draw no conclusions about the validity of section 1B1.3(a)(2) with respect to other types of offenses presenting other factual circumstances. . . . We also make clear that our holding in no way infringes on the traditional authority of sentencing courts to consider unconvicted criminal conduct for an applicable sentence within the guideline range."

The court based its holding on two grounds. First, citing 28 U.S.C. § 994(l)(1), which "authorizes incremental punishment 'in each case where a defendant is convicted of' multiple criminal offenses," the court concluded: "The clear implication is that Congress did not intend the guidelines to punish separate instances of unconvicted conduct incrementally. . . . Any other interpretation would render the words chosen by Congress meaningless." The legislative history supported this view, the court found, and implied "that Congress intended to afford defendants the full panoply of constitutional, statutory and procedural protections before subjecting them to incremental punishment for multiple offenses."

Second, the court determined that § 991(b)(1)(B), which cites § 994(f), "requires the Commission to establish policies and practices that avoid 'unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct.' . . . The plain language of this subsection indicates that Congress sought, in large part, to equalize sentences based on convicted criminal conduct. . . . The legislative history confirms this interpretation."

In sum, then, the court held that § 1B1.3(a)(2) is "unenforceable insofar as it permits offenders to be systematically penalized for factually and temporally distinct property crimes that have neither been charged by indictment nor proven at trial."

U.S. v. Galloway, No. 90-3034 (8th Cir. Sept. 9, 1991) (Bright, Sr. J.).

Criminal History

Career Offender

Seventh Circuit holds "simple possession of a weapon, without more," is not a "crime of violence" for career offender purposes. Defendant was sentenced as a career offender under § 4B1.1. One of the prior convictions used to reach career offender status was a state offense for possession of a firearm. Possession of a firearm is not specifically listed as a crime of violence in § 4B1.2, comment. (n.2), nor is force an element of the offense, so the question, pursuant to note 2(B), was whether the actual offense conduct "by its nature, presented a serious potential risk of physical injury to another." *See U.S. v. Terry*, 900 F.2d 1039, 1042–43 (7th Cir. 1990). *Accord U.S. v. John*, 936 F.2d 764, 769–70 (3d Cir. 1991); *U.S. v. Walker*, 930 F.2d 789, 793–94 (10th Cir. 1991); *U.S. v. Goodman*, 914 F.2d 696, 698–99 (5th Cir. 1990); *U.S. v. McVicar*, 907 F.2d 1, 1–2 (1st Cir. 1990).

The appellate court reversed: "While we agree that the potential for a dangerous, violent act is enhanced by the possession of any weapon . . . unless the use of the weapon is overtly implied it is not a crime of violence under the Sentencing Guidelines." Defendant was arrested while "riding in a Chicago taxi in daylight hours with a handgun tucked in the waistband of his pants. The gun was not displayed or brandished. There is no evidence that even any touching, gesturing or reference to the gun occurred. . . . [T]he threat posed by a simple possession of a weapon, without more, does not rise to the level of an act that 'by its nature, presented a serious potential risk of physical injury to another.' [U.S.S.G. § 4B1.2, comment. (n. 2).] It is a very fine line, however . . . . The facts here present a most passive case. A prior conviction involving any overt action by a defendant pointing a weapon, drawing a weapon, openly displaying a weapon, brandishing a weapon, holding a weapon, gesturing towards a weapon, or any act other than mere passive possession, would . . . present a sufficient potential for physical injury to constitute a crime of violence."

One circuit has held that the "offense of being a felon in possession of a firearm by its nature" is a crime of violence. *U.S. v. O'Neal*, 910 F.2d 663, 665–67 (9th Cir. 1990). Other courts have held that possession is a crime of violence when other threatening or violent behavior occurs. *See Walker, supra*, 930 F.2d at 794–95 (also fired gun); *U.S. v. Alvarez,*

914 F.2d 915, 918–19 (7th Cir. 1990) (also struggled with arresting officer); *U.S. v. McNeal*, 900 F.2d 119, 123 (7th Cir. 1990) (also fired gun); *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) (also pointed firearm at person).

U.S. v. Chapple, No. 90-1544 (7th Cir. Aug. 20, 1991) (Kanne, J.) (Posner, J., dissenting).

Juvenile Sentences

U.S. v. Samuels, 938 F.2d 210 (D.C. Cir. 1991) (with two exceptions, juvenile sentences not counted in criminal history score under § 4A1.2(d) may not be used as basis for departure under § 4A1.3, p.s.—"Given the inconsistencies in record keeping noted by the Commission [in Application Note 7 to § 4A1.2], permitting courts to base departures on the existence of 'reliable' juvenile records would plainly exaggerate the sentencing disparities that section 4A1.2(d) is meant to curb"; the only exceptions to this rule are found in Application Note 8, for sentences that provide evidence of similar misconduct or criminal livelihood; also, court may not consider under § 4A1.3, p.s., whether leniency of juvenile sentences that are not included in criminal history merit upward departure, but may consider leniency of prior adult sentences).

Offense Conduct

Drug Quantity

Eleventh Circuit distinguishes *Chapman*, holds that "mixture" in U.S.S.G. § 2D1.1 does not include "unusable mixtures." Defendant pled guilty to importation of cocaine. She carried sixteen bags filled with cocaine and a liquid. The bags weighed 241.6 grams, of which 7.2 grams was cocaine base and 65 grams a cutting agent, with "liquid waste" the remainder. The district court sentenced defendant on the basis of the total "mixture" pursuant to § 2D1.1, comment. (n.1).

The appellate court reversed: "The inclusion of the weight of unusable mixtures in the determination of sentences under section 2D1.1 leads to widely divergent sentences for conduct of relatively equal severity.... [T]he appellant was sentenced based on a total weight of 241.6 grams, despite the fact that only 72 grams of the mixture constituted a usable or consumable drug mixture. This hypertechnical and mechanical application of the statutory language defeats the very purpose behind the Sentencing Guidelines and creates an absurdity in their application: the disparate and irrational sentencing arising out of a 'rational and uniform' scheme of sentencing."

The court distinguished *Chapman v. U.S.*, 111 S. Ct. 1919 (1991): "In *Chapman*, the LSD and other drugs in carrier mediums considered by the Court were usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper, gel, and sugar cubes.... [T]he cocaine mixture in this case was obviously unusable while mixed with the liquid waste material."

The court further held that "the rule of lenity should be applied to the statute to avoid absurdity and irrationality in the application of the Sentencing Guidelines. We therefore hold that the term 'mixture' in U.S.S.G. § 2D1.1 does not include unusable mixtures." *But cf. U.S. v. Mahecha-Onofre*, 936 F.2d 623, 625–26 (1st Cir. 1991) (suitcase made of cocaine and acrylic material chemically bonded together was "mixture or substance" and total weight of suitcase used) [4 *GSU* #7].

U.S. v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991).

Departures

Substantial Assistance

U.S. v. Drown, No. 91-1118 (1st Cir. Aug. 14, 1991) (government could not defer filing of § 5K1.1 motion until after sentencing because defendant's cooperation was not yet complete—such strategy would "impermissibly merge" the boundaries of § 5K1.1, p.s., designed to reward cooperation prior to sentencing, and Fed. R. Crim. P. 35(b), which covers cooperation after sentencing; also reiterated that court may not depart under § 5K1.1 in absence of government motion "despite meanspiritedness, or even arbitrariness, on the government's part" (quoting *U.S. v. Romolo*, 937 F.2d 20, 24 (1st Cir. 1991)), but 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"). *Cf. U.S. v. Howard*, 902 F.2d 894, 896–97 (11th Cir. 1990) (court must rule on § 5K1.1 motion at sentencing hearing, may not postpone).

Aggravating Circumstances

U.S. v. Faulkner, 934 F.2d 190 (9th Cir. 1991) (may not depart upward, for defendant who pled guilty to five bank robberies, on basis of three robbery counts dismissed in plea bargain and five others government agreed not to charge; following *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1082 (9th Cir. 1990), which held "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").

Extent of Departure

U.S. v. Faulkner, 934 F.2d 190 (9th Cir. 1991) (courts may not analogize to career offender guideline when departure is warranted because defendant fails to qualify as career offender only by virtue of technicality). *Contra U.S. v. Williams*, 922 F.2d 578, 583 (10th Cir. 1990); *U.S. v. Jones*, 908 F.2d 365, 367 (8th Cir. 1990). *Cf. U.S. v. Delvecchio*, 920 F.2d 810, 814–15 (11th Cir. 1991) (should not automatically depart to career offender levels without analysis of actual criminal history and purpose of the guideline).

Adjustments

Obstruction of Justice

U.S. v. Madera-Gallegos, No. 90-50108 (9th Cir. Sept. 18, 1991) (Pregerson, J.) (reversing enhancement given to defendants who fled to Mexico to avoid arrest when they suspected something went wrong with drug deal and were arrested after they returned nine months later—fact that defendants avoided arrest for nine months does not counteract general rule that flight from arrest, without more, does not warrant obstruction of justice enhancement, *see* § 3C1.1, comment. (n.4(d)); *U.S. v. Garcia*, 909 F.2d 389, 392 (9th Cir. 1990); court distinguished *U.S. v. Mondello*, 927 F.2d 1463, 1465–67 (9th Cir. 1991), because there defendant had been arrested, knew he was expected to turn himself in later, but hid out for two weeks and attempted to avoid capture when authorities found him).

Note to readers: Beginning with this issue, *GSU* will list at the end of case citations or parenthetical summaries the names of judges who dissented, or dissented in part, from the holding or holdings summarized.

Guideline Sentencing Update

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VOLUME 4 • NUMBER 9 • OCT. 10, 1991

Constitutional Challenges

Tenth Circuit holds that the Double Jeopardy Clause may be violated when a conviction is based on conduct that was used to increase a Guidelines sentence in a prior case. Defendant was convicted in South Dakota for distributing methamphetamine. The court included as relevant conduct 963 grams found in a search of defendant's Utah residence, which raised his offense level by two, and imposed a two-level enhancement for possessing weapons during a drug offense for weapons found during the same search. Defendant was sentenced to the statutory maximum of 240 months, within the guideline range but five months higher than the guideline maximum if the 963 grams had been excluded.

The government then prosecuted defendant in Utah federal court for possession with intent to distribute the same 963 grams of methamphetamine and for being a felon in possession of firearms (the same weapons used to enhance the South Dakota sentence). Defendant appealed after the district court refused his motion to dismiss the indictment, but the Tenth Circuit affirmed, holding that because defendant had not been charged in South Dakota for these offenses the Double Jeopardy Clause's ban on multiple *prosecutions* was not implicated. Also, because defendant had not yet been convicted and punished, his claim based on the Clause's ban against multiple *punishments* was not ripe for review. *U.S. v. Koonce*, 885 F.2d 720, 722 (10th Cir. 1989). Defendant was found guilty on both charges, and sentenced to 97 months on the drug charge and 12 months on the weapons charge, to be served concurrently with the South Dakota sentence. He also received a 6-year term of supervised release, to be concurrent with the 5-year South Dakota term.

The appellate court held that the Utah sentence for possession violated the "punishment component" of double jeopardy, basing its conclusion on three factors. First: "In both the Utah proceeding and the South Dakota proceeding, defendant was punished for the exact same conduct, the possession of Utah methamphetamine with intent to distribute. Absent evidence that Congress intended such double punishment, this runs afoul of the Double Jeopardy Clause."

Second, the court determined that "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." The court found "strong support" for this conclusion in the Guidelines themselves. Under the "grouping" procedure of the multiple counts guideline, "had the government charged Koonce in the South Dakota district court with two separate counts—one based upon the methamphetamine mailed to [South Dakota] and one based upon the methamphetamine found in [Utah]—he would have received a sentence identical to the one that was imposed in the South Dakota prosecution .... It is difficult to believe that Congress would have intended the punishment to be larger if the government chose to proceed with two different proceedings ... than if it chose to consolidate all of the counts in one proceeding."

Lastly, the sentence for the Utah offense violates the punishment component of the Double Jeopardy Clause "even though the sentence runs concurrently with the South Dakota sentence." Following *Ball v. U.S.*, 470 U.S. 856, 864–65 (1985), the court reasoned that punishment includes "all of the consequences that flow from a conviction without limiting the concept of punishment to incarceration time, fines, and other penalties and restraints explicitly ordered by the court," and thus "the absence of an additional prison sentence does not render the second conviction constitutional."

On the firearms charge, however, the Double Jeopardy Clause was not triggered because, under the test in *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932), defendant was not punished in the different courts for the same offense. Although the weapons enhancement and the felon in possession offense "both require proof of possession of a firearm, U.S.S.G. 2D1.1(b)(1) requires proof that the firearm was possessed . . . during the commission of the drug offense, while U.S.C. 922(g) requires proof that the accused was a felon at the time he possessed the firearm."

U.S. v. Koonce, No. 90-4081 (10th Cir. Sept. 23, 1991) (Ebel, J.).

Sentencing Procedure

Evidentiary Issues

Sixth Circuit holds that courts should conduct an evidentiary hearing in accordance with the Confrontation Clause when disputed evidence could increase the Guideline sentence. In each of three cases that were consolidated for appeal, "the defendant pleaded guilty to a drug offense and the District Court was required to increase his sentence significantly under the Guidelines because the Court found on the basis of disputed facts that he had committed other drug offenses for which he had not been convicted. In each case the other offenses were proved by the hearsay testimony—often double or triple hearsay—of out-of-court declarants who remain unidentified. In each case the sentences were increased under the 'relevant conduct' or other similar provisions of the Guidelines, and in each case the defendant has

objected that the testimony causing his sentence to be increased is unreliable." For two defendants, the disputed evidence was used to significantly increase the amount of drugs and to impose role in the offense enhancements; the other had his criminal history score increased from category I to VI.

The appellate court noted a conflict between the two circuits that have specifically addressed whether factfinding under the Guidelines is subject to the Confrontation Clause. The Eighth Circuit held that "the Confrontation Clause, which operates independently of the rules of evidence, does apply." *U.S. v. Fortier*, 911 F.2d 100, 103 (8th Cir. 1990). The Third Circuit declined to apply the Clause to sentencing, but did hold that a heightened standard of scrutiny is required for factual findings and hearsay when a court "departs upwards dramatically" from the guideline range. *U.S. v. Kikumura*, 918 F.2d 1084, 1102–03 (3d Cir. 1990). The Sixth Circuit agreed with the Eighth, finding that because of "the vast difference between the formal, fact-based system of sentencing under the new code and the old informal system, ... the reliability of the district courts' findings of fact must be tested under the principles established by the Confrontation Clause."

"This should not present a serious problem for district courts in most cases. In cases that go to trial, disputed facts can usually be resolved on the basis of the facts presented at trial, facts subject to the test of the Confrontation Clause. In guilty plea situations, the facts are usually undisputed and can often be stipulated before the sentencing hearing under § 6B1.4 of the Guidelines. In the cases in which there is a disputed material fact, the government can decide whether it will attempt to prove the fact under the Confrontation Clause. In each such case the government can decide whether it will seek to enhance the sentence otherwise prescribed by the new code by proffering and attempting to prove such disputed facts. Upon receiving the government's proffer, district courts may decide whether the government's proffer of facts—if proved—would constitute grounds requiring an increased sentence. If the district court rejects the proffer as immaterial, it should sentence the defendant on the basis of the undisputed facts of the charged offense, the defendant's criminal history, and any other aggravating or mitigating factor provided for in the code. If the district court decides that the proffered evidence in dispute would constitute grounds for an increased sentence, it should then conduct an evidentiary hearing in accordance with the Confrontation Clause."

U.S. v. Silverman, No. 90-3205 (6th Cir. Sept. 17, 1991) (Merritt, C.J.) (Wellford, Sr. J., dissenting).

Burden of Proof

U.S. v. Restrepo, No. 88-3207 (9th Cir. Oct. 4, 1991) (en banc) (Wiggins, J.) (By 7–4 vote, court held that, "for factors enhancing a sentence under Sentencing Guideline § 1B1.3(a)(2)," including uncharged conduct, "due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines. We emphasize that the preponderance of the evidence standard is a meaningful one that requires the judge to be convinced 'by a preponderance of the evidence that the fact in question exists.' ... 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.'"") (dissenting opinions by Judges Pregerson and Norris, concurring opinion by Judge Tang).

Offense Conduct

Drug Quantity

Sixth Circuit holds that non-distributable, poisonous by-products should not be included in weight of methamphetamine "mixture." Defendants were convicted on several charges related to illegal manufacture of methamphetamine. The district court based their sentences on the entire weight of the unfinished "mixture" containing "a detectable amount" of methamphetamine, *see* U.S.S.G. § 2D1.1(c) (note at end of Drug Quantity Table), that was found in a "Crockpot." Defendants argued that using the entire amount of the mixture was irrational because only a much smaller amount of methamphetamine could have been produced and the mixture as found contained only a small amount of methamphetamine along with unreacted chemicals and by-products that are poisonous if ingested.

The appellate court agreed: "As *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] makes clear, 'Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes....' *Id.* at 1924. By diluting the drug with some other substance, the distributor is increasing the amount of the drug he has available to sell to consumers and therefore is appropriately subject to punishment for the entire weight of the mixture. Such is clearly not the case here. If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable by-products of its manufacture."

The court remanded "for the district court to conduct an evidentiary hearing on this issue. If, as we suspect, the defendants are correct in their assertions as to the chemical properties of the contents of the Crockpot, it would be inappropriate for the district court to include the entire weight of the mixture for sentencing purposes. Instead, the district court would be limited to the amount of methamphetamine the defendants were capable of producing. *See* Guidelines Manual, § 2D1.1, comment. (n.12)." The Eleventh Circuit recently reached a similar result when it held that the "unusable" portion of a mixture containing cocaine should not be included in the offense level computation. *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991) (4 GSU #8).

U.S. v. Jennings, No. 90-3503 (6th Cir. Sept. 16, 1991) (Martin, J.).

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Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit affirms downward departure based on "youthful lack of guidance." Defendant was convicted of conspiracy to distribute cocaine and rock cocaine. His guideline range of 360 months to life partly resulted from inclusion in the criminal history score of a 1979 manslaughter conviction when he was 17 years old, but for which he was sentenced as an adult. The district court, however, found mitigating circumstances and departed to impose a 17-year sentence. As the appellate court described it: "The mitigating circumstance in this case may fairly be characterized as 'youthful lack of guidance.' Lack of guidance and education, abandonment by parents and imprisonment at age 17 constitute the elements of this mitigating circumstance. . . . [T]he district court departed downward because it believed that Floyd's youthful lack of guidance had a significant effect both on his past criminality and on his commission of the present offense. Thus, the district court thought (i) that Floyd's criminal history category significantly overrepresents the actual seriousness of his past criminality; and (ii) Floyd's base offense level overrepresents the actual seriousness of his criminality in the commission of the present offense."

The appellate court held that "use of youthful lack of guidance as a mitigating circumstance is not precluded by any provision of the [Sentencing Reform] Act or the Guidelines." The government argued that two sections in Chapter 5 of the Guidelines preclude the mitigating circumstances used here. Section 5H1.6, p.s., for example, states that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether" to depart. The court concluded, however, that this section "recommend[s] against relying on the present existence of family obligations as a basis for departure because they reflect the Congressional concern that convicted criminals with family ties not receive lighter sentences than convicted criminals without such ties. . . . To construe a provision clearly intended to prohibit heavier sentences for people lacking family ties as prohibiting lighter sentences for such people is imputing to Congress an intent it has not manifested."

"In any case, the district court did not depart downward because Floyd presently lacks family ties, but departed, in part, because he was abandoned by his parents as a youth. The provision recommending against departure based on the present existence of family obligations does not even speak to a departure based on the absence of family guidance at an earlier age. . . . [T]he mitigating circumstance of youthful lack of guidance refers to a past condition that may have led a convicted defendant to criminality. That both mitigating circumstances involve the presence or absence of familial relationships should not obscure this basic difference between them—a difference which is sufficient to place youthful lack of guidance outside the purview of U.S.S.G. § 5H1.6 and to make it a mitigating factor that is not prohibited under Chapter Five, Part H of the Guidelines."

The court also held that the district court's reference to defendant's lack of education did not conflict with § 5H1.2, p.s., which states that "[e]ducational and vocational skills are not ordinarily relevant" to departure decisions: "[T]he district court merely referred to lack of education in support of its finding that Floyd lacked guidance as a youth. A provision recommending against departure based on educational level does not speak to a departure based on youthful lack of guidance. In any case, however, in passing 28 U.S.C. § 994(e), Congress was preoccupied with ensuring that people who lack educational skills do not receive heavier sentences than people who do have such skills. . . . To use this provision to prohibit a downward departure based on youthful lack of guidance would be, once again, to impute to Congress an intent it never manifested."

The court concluded that because the Guidelines do not prohibit departure based on youthful lack of guidance, it would use the "general background rule," as summarized in § 1B1.4, that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law. . . . We thus decline the invitation to place additional limitations on mitigating circumstances based on personal characteristics of the defendant and hold that a district court may consider youthful lack of guidance in determining the appropriate sentence."

U.S. v. Floyd, No. 89-50295 (9th Cir. Sept. 25, 1991) (Norris, J.).

U.S. v. Gonzalez, No. 90-1704 (2d Cir. Sept. 23, 1991) (Oakes, C.J.) (relying on *U.S. v. Lara*, 905 F.2d 599 (2d Cir. 1990), affirming downward departure to 33 months from minimum guideline term of 96 months on basis of extreme vulnerability to assault in prison for 19-year-old defendant who was "extremely small and feminine looking, and . . . had the appearance of a fourteen or fifteen year old boy"; rejecting government arguments, court held that evidence of bisexuality (as was the case in *Lara*) was not necessary, that defendant need not have been previously victimized or threatened, and that prison conditions may present permissible basis for departure) (Winter, J., dissenting).

CRIMINAL HISTORY

U.S. v. Morrison, No. 89-2284 (7th Cir. Oct. 10, 1991) (Flaum, J.) (reversing upward departure to category VI based on district court's belief that, because one of defendant's prior convictions was for a "brutal, execution-style murder," place-

ment in category II "seriously underestimated" the severity of that crime; appellate court held that Sentencing Commission "consciously chose to award defendants three criminal history points for every [felony conviction], regardless of the nature of the underlying offense conduct. *See* § 4A1.1. To sanction the district court's upward departure would fly in the face of that choice, and invite sentencing courts to create their own weighing schemes for prior criminal convictions.").

Aggravating Circumstances

U.S. v. Uccio, 940 F.2d 753 (2d Cir. 1991) (kidnapping and assault of co-conspirator undertaken in furtherance of offense was proper ground for upward departure pursuant to § 5K2.4, p.s.—that section is not limited to actions against innocent bystanders or targets of the crime).

Adjustments

Obstruction of Justice

Fourth Circuit holds obstruction of justice enhancement may not be applied to testifying defendant's denial of guilt that is not believed by jury. Defendant, charged with conspiracy to distribute cocaine, "took the stand and denied everything." After the government's "devastating rebuttal," the jury convicted the defendant. Her offense level was increased for obstruction of justice because the trial court found she testified untruthfully at the trial. As the appellate court noted, "[c]ommitting or suborning perjury has always been identified as 'obstruction of justice' in the Guidelines Commentary. U.S.S.G. § 3C1.1, comment. (n.1(c)) (Nov. 1989); *Id.*, comment. (n.3(b)) (Nov. 1990)." Every other circuit to consider the issue has upheld the constitutionality of applying § 3C1.1 to untruthful testimony. *See 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. Barbarosa*, 906 F.2d 1366, 1369–70 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (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.), *cert. denied*, 111 S. Ct. 160 (1990); *U.S. v. Wagner*, 884 F.2d 1090, 1098 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990); *U.S. v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), *cert. denied*, 110 S. Ct. 255 (1989).

The Fourth Circuit, however, held that applying the enhancement in this situation unconstitutionally impinged on defendant's right to testify: "[W]e fear that this enhancement will become the commonplace punishment for a convicted defendant who has the audacity to deny the charges against him. The government maintained at oral argument that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement. . . . It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury."

"We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a 'clearly erroneous' standard. . . . Of course, in light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot."

"The rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf."

U.S. v. Dunnigan, No. 90-5668 (4th Cir. Aug. 30, 1991) (Hall, J.) (as amended Sept. 12, 1991).

U.S. v. Thompson, No. 90-1305 (7th Cir. Sept. 18, 1991) (Flaum, J.) (improper to give enhancement to defendants who, during presentence investigations, falsely denied they had used drugs while on bail during the course of trial—revised Application Note 1 to § 3C1.1, effective Nov. 1, 1990, states that "defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision," and thus "makes clear" that previous holding to the contrary in *U.S. v. Jordan*, 890 F.2d 968, 973 (7th Cir. 1989), should not be followed; however, enhancement for lying to probation officer about violation of condition of release while awaiting sentencing was proper—information in respect to presentence or other investigation for court "comprises a broader range of inquiries than those pertaining to the defendant's guilt or innocence," and the court "unquestionably had a legitimate interest in monitoring [defendant's] compliance with the release conditions it had imposed").

Criminal History

Career Offender Provision

U.S. v. Stinson, No. 90-3711 (11th Cir. Oct. 4, 1991) (Edmondson, J.) (illegal weapons possession by a convicted felon "by its nature, presented a serious potential risk of physical injury to another," U.S.S.G. § 4B1.2, comment. (n.2(B)), and is therefore "crime of violence" for career offender purposes). *Accord U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990).

Probation and Supervised Release

Revocation of Probation

U.S. v. Williams, No. 91-1219 (8th Cir. Sept. 6, 1991) (per curiam) (because sentence following probation revocation must be one that was available at time of original sentencing, court may not use new guideline chapter seven, effective Nov. 1, 1990, for defendants originally sentenced before that date).

Revocation of Supervised Release

U.S. v. Fallin, No. 91-1017 (8th Cir. Sept. 23, 1991) (per curiam) (for defendant who violated supervised release after Nov. 1, 1990, court "should have considered the policy statements in chapter seven of the guidelines when sentencing Fallin after the revocation of his supervised release"; court's error was harmless, however, because this was defendant's second, identical violation, and "[g]iven Fallin's blatant defiance of the court-ordered terms of his supervised release, we believe the district court properly sentenced Fallin to an appropriate term of imprisonment within the statutory maximum. . . . Thus, no useful purpose would be served by remanding Fallin's case to the district court for resentencing.").

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Adjustments

ACCEPTANCE OF RESPONSIBILITY

Third Circuit holds Fifth Amendment protection against self-incrimination applies to reduction for acceptance of responsibility with respect to related conduct. Defendant pled guilty to robbing a bank by intimidation. As part of the plea agreement, a second count of bank robbery with a dangerous weapon was dismissed. He denied using a gun during the robbery and the count of conviction did not require use of a weapon, but the court increased his offense level for possessing a weapon during a robbery and denied a §3E1.1 decrease because defendant did not accept responsibility for possession of the gun. Defendant was sentenced accordingly and appealed, arguing that § 3E1.1 requires acceptance of responsibility only for conduct in the count of conviction and requiring a defendant to admit conduct beyond the offense of conviction in order to receive the reduction would violate the self-incrimination clause of the Fifth Amendment.

The appellate court rejected the first argument: "We agree with the courts that interpret § 3E1.1's reference to 'criminal conduct' and the application note's reference to 'offense and related conduct' as indicating that the sentencing court may consider whether the defendant has admitted or denied conduct beyond the specific conduct of the offense of conviction in the course of determining whether to grant a two-level reduction for acceptance of responsibility. . . . Accordingly, we here hold that the terms 'criminal conduct' and 'offense and related conduct' in Chapter 3 refer to the same bundle of conduct: all conduct that is 'relevant' under § 1B1.3 of the Guidelines." *Accord U.S. v. Mourning*, 914 F.2d 699, 705–06 (5th Cir. 1990); *U.S. v. Munio*, 909 F.2d 436, 439–40 (11th Cir. 1990) (per curiam); *U.S. v. Gordon*, 895 F.2d 932, 936–37 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990). *See also U.S. v. Herrera*, 928 F.2d 769, 774–75 (6th Cir. 1991) (affirming denial of reduction because defendant did not accept responsibility for related conduct). *Contra U.S. v. Piper*, 918 F.2d 839, 840–41 (9th Cir. 1990) (per curiam); *U.S. v. Oliveras*, 905 F.2d 623, 626–27 (2d Cir. 1990) (per curiam); *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989).

On the Fifth Amendment issue, defendant had the right to refuse to answer questions in the presentence interview about whether he possessed a weapon during the robbery because he could have faced state weapons charges. Whether a denial of the § 3E1.1 reduction for exercising this right violates the Fifth Amendment turns on whether that denial is a "penalty" or a "denied benefit." The appellate court held it was a penalty: "The characterization of a denied reduction in sentence as a 'denied benefit' as opposed to a 'penalty' cannot be squared with the reality of the sentencing calculation and conflicts with decisions of the Supreme Court and pre-Guidelines decisions of this court. . . . [D]enial of leniency is a penalty which cannot be imposed for the defendant's assertion of his or her Fifth Amendment privilege." *Accord U.S. v. Oliveras*, *supra*, at 627–28; *Perez-Franco*, *supra*, at 463. *See also U.S. v. Watt*, 910 F.2d 587, 590–93 (9th Cir. 1990) ("sentencing court cannot consider *against* a defendant any constitutionally protected conduct"). Several circuits have held that denial of the reduction is not a penalty and thus § 3E1.1 does not implicate the Fifth Amendment. *See Mourning*, *supra*, at 706–07; *U.S. v. Trujillo*, 906 F.2d 1456, 1461 (10th Cir. 1990); *Gordon*, *supra*, at 936–37; *U.S. v. Henry*, 883 F.2d 1010, 1011–12 (11th Cir. 1989).

The Third Circuit noted, however, that "the Fifth Amendment privilege against self-incrimination is not self-executing and thus must be claimed when self-incrimination is threatened." There are "a few limited exceptions to the rule," such as "when the government threatens to penalize the assertion of the privilege, and thereby 'compels' incriminating testimony," but the court concluded that "requiring a defendant to accept responsibility in order to obtain a sentence reduction is not a threat to impose punishment for an assertion of the privilege. . . . [T]he person being questioned may fear that he or she will be more likely to suffer a penalty if the questions go unanswered, but the penalty will not be imposed for the claiming of the privilege. . . . [I]f a defendant does not claim the privilege when asked during the sentencing process about acts beyond the acts of the offense of conviction, any subsequent statements are considered voluntary and may be considered by the sentencing judge in determining whether to grant a reduction for acceptance of responsibility." Here, the court ruled, defendant did not claim the privilege and his statements to the probation officer were not compelled. Thus, his denial that he possessed a gun during the robbery could be considered by the district court in determining he had not accepted responsibility. (Note: One judge dissented on this point.)

The court "emphasize[d] the limited scope of our decision. This case involves a defendant who voluntarily responded to questions and denied a portion of the criminal conduct that the court found to have taken place. This case does not involve a defendant who remained silent when questioned about related conduct beyond the offense of conviction without claiming the Fifth Amendment privilege. Nor does it involve a defendant who consistently relied upon his privilege when questioned about related conduct beyond the offense of conviction. We express no opinion concerning such cases." The court did, however, "venture several words of advice" concerning such cases: "[W]here the defendant has consistently asserted the privilege as to acts beyond those of the offense of conviction, a sentencing judge . . . obviously must not draw any inference from the fact that the privilege has been claimed. . . . [T]he judge cannot rely on the defendant's failure to admit to such acts as a basis for denying the two-level reduction. But that in no way implies an automatic two-level reduction for such a defendant. The sentencing judge must address the acceptance of responsibility issue on the basis of all of the

record evidence relevant to that issue." *See U.S. v. Skillman*, 922 F.2d 1370, 1378–79 (9th Cir. 1990) (assertion of Fifth Amendment rights does not *entitle* defendant to reduction—there must be some affirmative acceptance of responsibility).

The court further observed: "It is at least questionable whether a sentencing judge in a case where the defendant has acknowledged responsibility for the offense of conviction but has claimed the privilege with respect to aggravating related conduct can deny the two point reduction based solely on the defendant's failure to carry his burden of proof with respect to the acceptance of responsibility for his criminal conduct."

U.S. v. Frierson, No. 90-3382 (3d Cir. Oct. 1, 1991) (Stapleton, J.) (Garth, J., dissenting in part).

Abuse of Position of Trust

U.S. v. Kosth, 943 F.2d 798 (7th Cir. 1991) (reversing § 3B1.3 enhancement for abuse of position of trust given to businessman who used his merchant account with bank to commit credit card fraud: "There was no special element of private trust involved.... As with all credit transactions, there was an element of reliance present. However, the relationship described by the facts in this case was a standard commercial relationship. The fraud described here does not differ from any other commercial credit transaction fraud. The defendant was not an 'insider' . . . [but rather] an ordinary merchant customer of the bank who committed fraud by abusing his contractual and commercial relationship with it.").

Multiple Counts

U.S. v. Bruder, No. 90-1931 (7th Cir. Sept. 27, 1991) (en banc) (Ripple, J.) (five judges dissenting on this issue). Court reversed failure to group offenses of convicted felon in possession of firearm and possession of unregistered firearm that involved the same weapon. Because these offenses were not specifically listed in § 3D1.2(d), the main inquiry was whether they "involved substantially the same harm." Court held they did, reasoning that "society" was the victim of both crimes, both statutes that were violated have the same goal, and a convicted felon—who cannot legally register a firearm—will "necessarily violate[] the registration statute as well as the felon in possession statute." The court also determined that this case fit "the guidelines' directive that some counts 'are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range.' U.S.S.G. Ch. 3, Part D, Introductory Commentary." *See also U.S. v. Riviere*, 924 F.2d 1289, 1306 (3d Cir. 1991) (unlawful delivery of firearms should be grouped with unlawful possession of weapon by felon). The court distinguished *U.S. v. Pope*, 871 F.2d 506, 509–10 (5th Cir. 1989) (unlawful possession of weapon need not be grouped with unlawful possession of silencer for different weapon), and *U.S. v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (unlawful possession of weapon need not be grouped with possession of silencer for same weapon).

Relevant Conduct

Stipulation to a More Serious Offense

U.S. v. Day, 943 F.2d 1306 (11th Cir. 1991) (defendant's written stipulation in formal plea agreement to facts that described burning of boat to fraudulently collect insurance proceeds as "the arson job" was "a stipulation that specifically establishe[d the] more serious offense" of arson, and the district court properly used § 1B1.2(a) to sentence defendant under arson rather than fraud guideline; appellate court reasoned that, in light of Supreme Court's analysis of § 1B1.2(a) in *Braxton v. U.S.*, 111 S. Ct. 1854 (1991), a defendant need not expressly agree that the stipulated facts establish the more serious offense, and the relevant inquiry is "whether, as a matter of law, the facts provided the essential elements of the more serious offense").

Departures

Mitigating Circumstances

U.S. v. Glick, No. 91-5505 (4th Cir. Oct. 8, 1991) (Wilkins, J.) (conduct over ten-week period involving number of actions and extensive planning cannot be construed as "single act of aberrant behavior" that warrants downward departure, U.S.S.G. Ch. 1, Pt. A, 4(d), p.s., disagreeing with *U.S. v. Takai*, 930 F.2d 1427, 1433–34 (9th Cir. 1991) (conduct during bribery offense that occurred over eight-day period was "single act of aberrant behavior"); also held that significantly reduced mental capacity, § 5K2.13, p.s., "need not be the sole cause of the offense to justify departure, but should 'comprise[] a contributing factor in the commission of the offense.' *U.S. v. Rucklick*, 919 F.2d 95, 97–98 (8th Cir. 1990)," *accord U.S. v. Lauzon*, 938 F.2d 326, 331 (1st Cir. 1991)).

U.S. v. Bruder, No. 90-1931 (7th Cir. Sept. 27, 1991) (en banc) (Ripple, J.) (defendant's "post-offense rehabilitation" was "'equivalent' to acceptance of responsibility" and sentencing court "properly refused to depart" downward). *Accord U.S. v. Van Dyke*, 895 F.2d 984, 987 (4th Cir.), *cert. denied*, 111 S. Ct. 112 (1990). *See also U.S. v. Williams*, 891 F.2d 962, 966 (1st Cir. 1989) (desire to reform not basis for departure).

Extent of Departure

U.S. v. Baez, 944 F.2d 88 (2d Cir. 1991) (affirming use of analogy to multiple counts guideline, pursuant to *U.S. v. Kim*, 896 F.2d 678, 684–85 (2d Cir. 1990), to impose upward departure on counterfeiting defendant who kidnapped and threatened potential witness—sentencing court concluded obstruction of justice enhancement was inadequate, analogized conduct to offense of witness tampering, and sentenced defendant under guideline range that would have applied under § 3D1.2; appellate court also explained that "the multi-count analysis is to provide only guidance as to the extent of a departure, not a rigid formula.... The point of *Kim* is to use the multi-count analysis and the sentencing table as useful guidance . . . , not to precipitate a time-consuming analysis of every possible calculation of arguably relevant circumstances.").

Appellate Review

Departures

U.S. v. Glick, No. 91-5505 (4th Cir. Oct. 8, 1991) (Wilkins, J.) (departure based on proper and improper factors may be upheld if proper factor justifies magnitude of departure, adopting approach set forth in *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991) (*see* 4 *GSU* #3)). *Accord U.S. v. Alba*, 933 F.2d 1117 (2d Cir. 1991); *U.S. v. Franklin*, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *Contra U.S. v. Zamarippa*, 905 F.2d 337 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989) (per curiam).

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Offense Conduct

DRUG QUANTITY

Seventh Circuit emphasizes that quantity of drugs attributed to co-conspirators must be calculated for each individual based on what was "reasonably foreseeable" within the scope of that defendant's agreement. Defendants were part of a large-scale heroin distribution scheme that operated over a three-year period. Some were in the conspiracy from the start while others joined at various stages. All appealed their sentences, claiming that the district court improperly used the entire amount of heroin distributed during the course of the conspiracy to calculate their base offense levels under U.S.S.G. § 1B1.3(a). The appellate court affirmed some sentences, but remanded others for individualized consideration of those defendants' scope of involvement in the conspiracy and the amount of heroin for which they could be held responsible.

Under the relevant conduct guideline, a co-conspirator is held accountable for "conduct of others in furtherance of the [conspiracy] that was reasonably foreseeable by the defendant." § 1B1.3(a), comment. (n.1). The commentary further states that "the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct 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, such conduct is not included in establishing the defendant's offense level under this guideline."

Based on the Guidelines and parallel case law on conspiracy, the appellate court concluded that "there are two limiting factors on the use of conduct in calculating the sentence of a conspiracy defendant. The conduct must be 1) in furtherance of the conspiracy and 2) reasonably foreseeable to the defendant." In a drug conspiracy, a defendant "will not be held accountable for prior or subsequent conduct that was not a reasonably foreseeable element of the criminal activity agreed to by the defendant, even if the conduct involved the distribution of the same controlled substance by other defendants. . . . [T]he most relevant factor in determining the reasonable foreseeability of conduct engaged in by co-conspirators in an intricate and longstanding conspiracy is the scope of the defendant's agreement with the other conspirators."

Accordingly, the court held that a defendant who was a member of the conspiracy for less than two months but allegedly "knew of" the scope of the conspiracy prior to joining (he had been a heroin user and lived across the street from the leader of the conspiracy) should not have had his offense level based on all of the drugs distributed: "Reasonable foreseeability refers to the scope of the agreement that the defendant entered into when he joined the conspiracy, not to the drugs defendant may have known about as a function of his individual consumption. . . . To sentence a defendant based on the entire amount of drugs distributed requires that this amount be reasonably foreseeable with respect to the agreement that the defendant entered into. He may not be held responsible for the total quantity of drugs simply because he might have been aware that [the leader of the conspiracy] operated a large-scale drug organization."

Remanding, the court instructed the sentencing court "to scrutinize the agreement that [each] individual defendant entered into to determine whether he actually agreed to become involved in a conspiracy to distribute a given quantity of drugs—here more than 10 kilograms of heroin. . . . In order to sentence a defendant based on the entire quantity of drugs distributed in a conspiracy, when the defendant has joined the conspiracy in its late stages, it must be shown that those earlier transactions were reasonably foreseeable to him. The Government must show that the defendant agreed to a conspiracy whose scope included so large a distribution of heroin. The judge may sentence a late entrant on the basis of all the drugs distributed only if the earlier distributions occurred as part of the conspiracy to which the defendant agreed. . . . Furthermore, he may not be sentenced according to all of the heroin distributed after he agreed to join the conspiracy if in agreeing to conspire, he reasonably foresaw a lesser amount."

The court added that the sentencing court must "set[] forth the reasons why [a] particular amount of drugs was reasonably foreseeable" to each defendant for sentencing purposes.

U.S. v. Edwards, 945 F.2d 1387 (7th Cir. 1991).

U.S. v. Restrepo-Contreras, 942 F.2d 96, 99 (1st Cir. 1991) (following *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) (weight of LSD "mixture" includes carrier), and *U.S. v. Mahecha-Onofre*, 936 F.2d 623, 626 (1st Cir. 1991) (suitcase made from cocaine chemically bonded with acrylic was "mixture"), holding that total weight of statues made of twenty-one kilograms of beeswax and five kilograms of cocaine should be counted under § 2D1.1 as "mixture or substance" containing cocaine). *But see U.S. v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991) (unusable, poisonous by-products should not be included in weight of methamphetamine mixture); *U.S. v. Rolande-Gabriel*, 938 F.2d 1231, 1238 (11th Cir. 1991) (weight of "unusable" part of cocaine mixture should not be included).

Relevant Conduct

INCRIMINATING STATEMENTS DURING COOPERATION

Fourth Circuit holds that sentencing court may not use information protected under U.S.S.G. § 1B1.8(a) as basis for denying substantial assistance departure. Defendant pled guilty to possession of cocaine with intent to distribute. The plea agreement stated that defendant would assist the government in the investigation of others, and, pursuant to

U.S.S.G. § 1B1.8(a), any self-incriminating evidence revealed as part of his cooperation would not be used against him in any further criminal proceedings. In return the government would recommend a departure for substantial assistance, a sentence at the low end of the guideline range, and a reduction for acceptance of responsibility. The defendant and government fulfilled their respective parts of the bargain. However, during defendant's cooperation he admitted to selling sizable quantities of marijuana over several years, and the district court took this into account in denying the substantial assistance motion and sentencing defendant at the top of the guideline range. Defendant appealed, arguing that § 1B1.8(a) precluded the use of this information.

The appellate court agreed and reversed. Application Note 1 to § 1B1.8(a) states in part that "the policy of the Commission is that where a defendant as a result of [such] a cooperation agreement... reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." The court found that "there is no question that, contrary to the guidelines' expressed policy, Malvito has been 'subjected to an increased sentence by virtue of [his] cooperation where the government agreed that the information revealed would not be used for such purpose.' Were we to allow Malvito's sentence to stand, not only would this policy be frustrated, but an important and common investigative tool would lose some potency."

The court concluded: "The district court is not bound by the government's recommendation that it make a substantial assistance departure. On the other hand, U.S.S.G. § 1B1.8 requires it to honor the government's promise that self-incriminating information volunteered by the defendant under a cooperation agreement will not subject the defendant to a harsher sentence. In short, the district court could have denied Malvito the downward departure for almost any reason, but not for the reason it gave." The court noted the general rule that refusals to depart "are ordinarily not appealable," but held that this sentence "was imposed as a result of an incorrect application" of the guidelines, and as such was appealable under 18 U.S.C. § 3742(a)(2). Because resentencing was required on this ground, the court did not decide the issue of sentencing at the top of the guideline range.

U.S. v. Malvito, 946 F.2d 1066 (4th Cir. 1991) (Wilkins, J., dissenting).

Departures

Mitigating Circumstances

U.S. v. Harrington, No. 90-3176 (D.C. Cir. Oct. 25, 1991) (Ginsburg, J.) (Silberman, J., dissenting; Edwards, J., concurring) (reversing 741 F. Supp. 968 (D.D.C. 1990)—"post-offense [drug] rehabilitation is the type of conduct properly considered in determining whether [defendant] is eligible for a reduction in sentence under U.S.S.G. § 3E1.1" for acceptance of responsibility and therefore not a proper ground for downward departure, *accord U.S. v. Van Dyke*, 895 F.2d 984, 986–87 (4th Cir.), *cert. denied*, 111 S. Ct. 112 (1990); but agreeing with *U.S. v. Sklar*, 920 F.2d 107, 115–17 (1st Cir. 1990), that an "extraordinary" case of rehabilitation could warrant departure). *See also U.S. v. Martin*, 938 F.2d 162, 163–64 (9th Cir. 1991) (departure for drug rehabilitation precluded by § 5H1.4, p.s.); *U.S. v. Pharr*, 916 F.2d 129, 133 (3d Cir. 1990) (same), *cert. denied*, 111 S. Ct. 2274 (1991). *Contra U.S. v. Maddalena*, 893 F.2d 815, 818 (6th Cir. 1989).

U.S. v. White, 945 F.2d 100, 102 (5th Cir. 1991) (reversing downward departure based on defendant's youth: "The guidelines have adequately taken into consideration the defendant's age in § 5H1.1, specifying extremely limited circumstances under which a sentencing court may use age in departing from the applicable range. The circumstance of being young is not a permissible consideration under the guidelines."). *Accord U.S. v. Diagi*, 892 F.2d 31, 34 (4th Cir. 1990).

Aggravating Circumstances

U.S. v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991) (U.S.S.G. § 5K1.2, p.s.—"A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor"—precludes upward departure for failure to assist authorities but "does not forbid a judge to consider the extent of assistance when selecting a sentence within the guideline range").

Adjustments

Obstruction of Justice

U.S. v. Austin, No. 91-1245 (1st Cir. Oct. 8, 1991) (Hill, J.) (reversed—district court improperly refused to impose enhancement despite finding that defendant committed perjury during hearing on his motion to withdraw guilty plea: "[W]e hold that, upon finding Appellant had perjured himself during the Fed. R. Crim. Pro. 32(d) hearing, the district court was, without discretion, mandated to enhance the Appellant's base offense level by two levels as prescribed by ... § 3C1.1. The offense level enhancement applies to unsuccessful and foolish attempts as well as the more savvy attempts at perjury. The enhancement applies regardless of whether the perjury was attempted before a judge or jury."). *Accord U.S. v. Avila*, 905 F.2d 295, 297 (9th Cir. 1990) (enhancement mandatory once court finds facts sufficient to constitute obstruction); *U.S. v. Roberson*, 872 F.2d 597, 602 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

Appellate Review

U.S. v. Jones, No. 90-3266 (D.C. Cir. Oct. 25, 1991) (Wald, J.) (adopting three-part test set forth in *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991) (*see* 4 *GSU* #3), for reviewing departure based on both proper and improper grounds). *Accord U.S. v. Glick*, 946 F.2d 335 (4th Cir. 1991). For other circuits' positions see 4 *GSU* #11.

Note: *U.S. v. Galloway*, 943 F.2d 897 (8th Cir. 1991), which narrowed the scope of the relevant conduct provision, § 1B1.3(a), was vacated Nov. 20, 1991, and rehearing en banc granted with argument set for Jan. 6, 1992.

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Departures

MITIGATING CIRCUMSTANCES

Eleventh Circuit holds downward departure for diminished capacity properly precluded for violent offense. Defendant pled guilty to bank robbery and a related weapon charge. He argued for a downward departure, claiming that he committed the offense while suffering from severe depression and diminished capacity as a result of serious financial problems. The district court indicated that "diminished capacity . . . would apply to this case," but ruled that it had no discretion to grant a departure because § 5K2.13, p.s., prohibits departure for diminished capacity in violent offenses. The appellate court affirmed.

Defendant claimed on appeal that his mental state could be considered under 18 U.S.C. § 3661, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant when imposing sentence. Under 28 U.S.C. § 994(d), however, the Sentencing Commission was required to place limits on the consideration at sentencing of certain information, including "mental and emotional condition." Any conflict or inconsistency between the two sections is resolved, the appellate court held, by 18 U.S.C. § 3553(b), which directs courts to impose sentence within the guideline range barring circumstances not adequately considered by the Commission: "By reading § 3661 together with § 3553(b) it becomes clear that § 3661 is designed to make sure that no limitation is placed on information available to the district court, as long as the information was not already considered by the Sentencing Commission in formulating the guidelines. . . . Hence, § 3661 is a safety net. . . . [T]he Sentencing Commission determined that mental and emotional conditions could not be considered as a mitigating factor if the defendant committed a violent crime. Since Fairman committed armed bank robbery, a crime of violence, his mental and emotional condition could not be considered" for departure.

U.S. v. Fairman, 947 F.2d 1479 (11th Cir. 1991).

EXTENT OF DEPARTURE

U.S. v. Rosado-Ubiera, 947 F.2d 644 (2d Cir. 1991) (per curiam) (vacating sentence and remanding: even though sentencing court intended to depart downward, it failed to determine whether defendant should receive downward adjustment under § 3B1.2(a) for minimal role in offense—applicable guideline range is starting point for departure, and here the downward departure resulted in longer sentence than lower end of guideline range that would have applied if role in offense dispute was resolved in defendant's favor). *See U.S. v. McCall*, 915 F.2d 811, 813 (2d Cir. 1990) (guideline range is point of reference for any departure and should be correctly calculated); *U.S. v. Talbott*, 902 F.2d 1129, 1134 (4th Cir. 1990) (same); *U.S. v. Roberson*, 872 F.2d 597, 608 (5th Cir.) (same), *cert. denied*, 110 S. Ct. 175 (1989).

SUBSTANTIAL ASSISTANCE DEPARTURE

U.S. v. Robinson, No. 89-3262 (11th Cir. Dec. 9, 1991) (per curiam) (vacated and remanded because district court granted downward departure without ruling on government's § 5K1.1, p.s., motion or otherwise articulating reasons for departure as required by 18 U.S.C. § 3553(b): "[T]he sentencing judge, when faced with a section 5K1.1 motion, must rule on it before imposing sentence. . . . On remand, therefore, the court shall, after finding the relevant sentencing facts and the appropriate guideline range, rule on the Government's motion. If the court denies the motion, it shall then give the defendant an opportunity to articulate grounds, if any he has, for a downward departure . . . .").

Offense Conduct

DRUG QUANTITY

U.S. v. Tabares, No. 91-1273 (1st Cir. Nov. 14, 1991) (Breyer, C.J.) (court properly included in base offense level quantities of drugs evidenced by entries in notebook found in conspiracy defendant's apartment at time of arrest, where evidence indicated those amounts were part of conduct related to offense of conviction, *see* § 2D1.4, comment. (n.2) ("judge may consider . . . financial or other records")). *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. Straughter*, No. 91-3002 (6th Cir. Nov. 14, 1991) (Brown, Sr. J.) (records of drug payments found in co-conspirator's purse provided support for finding of larger amount of cocaine than that seized during arrests).

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) (sentencing court properly converted cash seized from defendant, which had come from drug sales related to offense of conviction, into estimated cocaine quantity to calculate base offense level under §§ 2D1.1(a)(3), 2D1.4, comment. (n.2)). *Accord U.S. v. Gerante*, 891 F.2d 364, 368-69 (1st Cir. 1989). *See also U.S. v. Duarte*, No. 91-1203 (7th Cir. Dec. 10, 1991) (Flaum, J.) (dividing cash amount by price per kilogram to estimate quantity of cocaine "is perfectly acceptable under the Guidelines").

Relevant Conduct

U.S. v. Duarte, No. 91-1203 (7th Cir. Dec. 10, 1991) (Flaum, J.) (vacating sentence and remanding: district court found defendant accountable for 5 kilograms of cocaine, not just 1.177 kilograms actually seized, but did not explicitly find additional cocaine was "part of the same course of conduct or common scheme or plan" as conspiracy and possession offenses of conviction, §1B1.3(a)(2)—"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").

Adjustments

Acceptance of Responsibility

U.S. v. Reed, No. 90-6502 (6th Cir. Dec. 4, 1991) (Milburn, J.) (§ 3E1.1 reduction properly denied defendant who continued credit card fraud while in jail awaiting sentencing: "continued criminal conduct is incompatible with the idea of acceptance of responsibility"; willingness to acknowledge offense and accept punishment insufficient absent contrition, which "has been recognized by this court as a component of a defendant's acceptance of responsibility. Contrition may be the best predictor of a successful rehabilitation, and those who . . . continue their crimes in jail and do not voluntarily withdraw from their criminal conduct demonstrate the opposite").

Role in Offense

U.S. v. Rotolo, No. 91-1436 (1st Cir. Dec. 3, 1991) (Breyer, C.J.) (Affirming enhancement for aggravating role under § 3B1.1(c) and holding that sentencing court may, but is not required to, compare defendant's role to "average" participant in that type of offense. Court distinguished *U.S. v. Daughtrey*, 874 F.2d 213, 216 (4th Cir. 1989), which concerned adjustment under § 3B1.2 for mitigating role and stated that "each participant's individual acts and relative culpability [should be measured] against the elements of the offense of conviction." The court here noted that language in the commentary to § 3B1.2, which indicates a defendant's mitigating role is to be compared to "the average participant," is absent from the guideline and commentary for aggravating roles in § 3B1.1. The court concluded: "We do not read the 'aggravating role' guideline as absolutely forbidding a court from making comparisons to the 'average' participant. . . . But, the Guideline does not legally require it to do so."). *See also U.S. v. Palinkas*, 938 F.2d 456, 460 (4th Cir. 1991) (applying *Daughtrey*, adding: "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. Caruth*, 930 F.2d 811, 815 (10th Cir. 1991) (in "minimal participant" case, holding "Guidelines permit courts . . . to compare a defendant's conduct . . . with the conduct of an average participant in that type of crime").

Obstruction of Justice

U.S. v. De Felippis, No. 90-3603 (7th Cir. Dec. 6, 1991) (Moran, Chief Dist. J., by desig.) (reversed: false statements to probation officer about employment history were not "material" because "the factual inaccuracies in his representations could not have influenced his sentence, even if believed," *see* § 3C1.1, comment. (nn.3(h) & 4(c); note, however, that even if not "material," "false information does . . . have a bearing on the trial court's rejection of a . . . reduction for acceptance of responsibility"). *See also U.S. v. Tabares*, No. 91-1273 (1st Cir. Nov. 14, 1991) (Breyer, C.J.) (reversed: obstruction under § 3C1.1 must be both willful and material—here defendant had provided false social security number to probation officer, but there was no evidence he did so "willfully" or materially impeded presentence investigation).

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) (proper to apply § 3C1.1 enhancement to defendant who threw cocaine out of car during high-speed chase, even though he later helped recover the drugs, and it was not inconsistent to apply § 3C1.1 and then grant § 3E1.1 reduction for cooperation, *see* § 3E1.1, comment. (n.4); enhancement under § 3C1.1 also warranted for false financial information, which would have affected imposition of fine, even though information was later corrected).

Sentencing Procedure

Presentence Interview

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) ("*Miranda* warnings are not required prior to routine presentence interviews." *Accord U.S. v. Cortes*, 922 F.2d 123, 126–27 (2d Cir. 1990); *U.S. v. Rogers*, 921 F.2d 975, 979–80 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (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) (per curiam). Similarly, "there is no [Sixth Amendment] right at a routine presentence interview because [it] is not a critical stage of the criminal proceedings." *Accord U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 792 (1991); *Jackson*, 886 F.2d at 845. *Contra U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1433 (9th Cir. 1990) (must allow attorney if requested by defendant). In any event, defendant had no right to make false statement to probation officer: "At best, Hicks could have refused to answer the question or requested the presence of his attorney. Under no circumstances was he free to give a false answer.").

Criminal History

Career Offender Provision

U.S. v. Wilson, No. 90-5203 (4th Cir. Dec. 3, 1991) (Wilkinson, J.) (Guidelines mandate "categorical approach" to whether predicate offense constitutes "crime of violence" under § 4B1.1 "rather than a particularized inquiry into the facts underlying the conviction," and district court properly refused to look into actual circumstances of defendant's 1976 robbery conviction because robbery is listed as violent crime in § 4B1.2, comment. (n.2) (1991): "Under the plain language of the Guidelines, we conclude that Wilson's robbery offense constitutes a 'crime of violence' and that we need not—indeed, must not—look to the specific facts and circumstances underlying it."). *Accord U.S. v. McAllister*, 927 F.2d 136, 138–39 (3d Cir. 1991); *U.S. v. Selfa*, 918 F.2d 749, 751 (9th Cir.), *cert. denied*, 111 S. Ct. 521 (1990); *U.S. v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2056 (1991); *U.S. v. Carter*, 910 F.2d 1524, 1532–33 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1628 (1991).

Remanded for Rehearing En Banc, Vacated:

U.S. v. Davern, 937 F.2d 1041 (6th Cir. 1991) (sentencing steps prescribed in § 1B1.1 are inconsistent with 18 U.S.C. § 3553, courts directed to follow statute rather than guideline for departures) (vacated Sept. 26, 1991). *See* 4 *GSU* #6.

U.S. v. Silverman, 945 F.2d 1337 (6th Cir. 1991) (courts should conduct evidentiary hearing in accordance with Confrontation Clause when disputed evidence could increase sentence) (vacated Dec. 4, 1991). *See* 4 *GSU* #9.

Certiorari Granted:

U.S. v. Wade, 936 F.2d 169 (4th Cir. 1991) (absent commitment in plea agreement to move for substantial assistance departure, government need not explain refusal to make motion) (cert. granted Dec. 9, 1991). *See* 4 *GSU* #5.

Guideline Sentencing Update

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VOLUME 4 • NUMBER 14 • JANUARY 17, 1992

Sentencing Procedure

PRESENTENCE INTERVIEW

Sixth Circuit holds there is no Sixth Amendment right to counsel at presentence interview, but advises probation officers to honor such requests. Defendant met with the probation officer on three occasions, twice without counsel. Although nothing in the record indicated that he requested counsel or that his counsel advised the probation officer that no interviews should be conducted in the absence of counsel, defendant claimed on appeal that he was deprived of his Sixth Amendment right to counsel.

The appellate court affirmed, joining the Fourth, Fifth, and Seventh Circuits in holding that in a non-capital case the presentence interview is not a "critical stage of the prosecution" where the right to counsel attaches. *See U.S. v. Hicks*, 948 F.2d 877, 885–86 (4th Cir. 1991); *U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 792 (1991); *U.S. v. Jackson*, 886 F.2d 838, 845 (7th Cir. 1989) (per curiam).

However, the court agreed with the reasoning of *U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1437 (9th Cir. 1990) (as amended Feb. 5, 1991), in which the Ninth Circuit exercised its supervisory powers to require probation officers to honor requests for attorneys at presentence interviews. Because defendant had not made such a request here, the court did not specifically establish a similar rule, although it stated that it "would be prepared, in the exercise of our supervisory powers," to do so. The court did recommend that, "[i]f a defendant requests the presence of counsel—or if an attorney indicates that his client is not to be interviewed without the attorney being there—the probation officer should honor the request."

U.S. v. Tisdale, No. 90-3302 (6th Cir. Jan. 2, 1992) (Nelson, J.).

PROCEDURAL REQUIREMENTS

Eighth Circuit urges district courts to give "tailored explanations" for sentence when guideline range exceeds 24 months in order to avoid unnecessary appeals and remands. Defendant was sentenced at the top of the applicable guideline range of 168–210 months. He appealed, arguing that the district court had not adequately stated the "reason for imposing a sentence at a particular point within the range" as is required under 18 U.S.C. § 3553(c)(1) for ranges exceeding 24 months.

The appellate court affirmed, holding that the district court adequately explained the sentence in this case, but expressed concern "about the rising number of appeals involving section 3553(c)(1). In the interest of judicial economy, we urge sentencing courts to refer to the facts of each case and explain why they choose a particular point in the sentencing range. *U.S. v. Veteto*, 920 F.2d 823, 826 & n.4 (11th Cir. 1991); *see also U.S. v. Chartier*, 933 F.2d 111, 117 (2d Cir. 1991) (sentencing judge should demonstrate thoughtful discharge of obligation imposed by section 3553(c)(1) with degree of care appropriate to severity of punishment selected). In addition to informing the defendant and public why the sentencing court selected a particular sentence, the court's explanation 'provides information to criminal justice researchers' and 'assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.' . . . We believe tailored explanations by sentencing courts will preclude many appeals and pointless remands. *See U.S. v. Georgiadis*, 933 F.2d 1219, 1223 (3d Cir. 1991)."

U.S. v. Dumorney, No. 91-1719 (8th Cir. Nov. 21, 1991) (Fagg, J.).

Seventh Circuit advises courts to refrain from imposing sentence on any Guidelines counts until judgment is reached on all counts. A jury found defendant not guilty on two counts, guilty on one count, and was unable to reach a verdict on two other counts. The district court granted a mistrial on the hung jury counts and sentenced defendant to 46 months on the count of conviction, but stayed execution of sentence pending appeal. The defendant did appeal his conviction and sought dismissal of the outstanding indictments on the hung jury counts. The appellate court held it did not have jurisdiction because there is no final, appealable judgment until the two outstanding counts are resolved. In addition, the sentence on the count of conviction "cannot be executed . . . until there is a final judgment on all counts of the indictment."

The court went on to emphasize that the Guidelines "have introduced a new problem into a situation like the one before us. When a defendant has been convicted on more than one count, certain grouping rules apply in determining the offense level. . . . Where conviction on one count of an indictment has occurred at an earlier time than conviction on other counts, we think that logic requires that § 3D1.1 be applied to all counts. . . . We suggest that in future cases like the present one the district court should not pronounce any sentence until it has disposed of all counts."

U.S. v. Kaufmann, No. 91-2294 (7th Cir. Jan. 7, 1992) (Fairchild, Sr. J.).

Supervised Release

Eighth Circuit holds that it was not "plain error" to impose 10-year term of supervised release agreed to in plea bargain; affirms rejection of plea agreement as too lenient compared to co-conspirators' sentences. Defendant pled guilty to drug and tax evasion charges as part of a non-binding plea bargain. The government agreed to move for a downward departure under U.S.S.G. § 5K1.1, p.s., from the agreed-upon guideline range of 97–121 months to a sentence of 27–33 months and 10 years of supervised release. The court

rejected the agreement, explaining that the maximum sentence of 33 months was unfairly low compared to sentences given to less culpable co-conspirators. A second plea agreement was reached with the same terms, except that the sentencing range was capped at 42 months. The district court accepted this agreement and sentenced defendant to concurrent terms of 39 months on the drug charge with 10 years of supervised release, 36 months on the tax evasion with one year of supervised release.

Defendant appealed, claiming that the district court abused its discretion by refusing the first plea agreement and that the 10-year term of supervised release exceeded the guideline maximum of 5 years. The appellate court affirmed, holding first that under § 6B1.2(b), p.s., the court properly used its discretion to reject the first agreement: "Prior to the Guidelines, a district court had broad discretion under Rule 11(e) to reject a negotiated plea agreement.... Here, the district court's reason for rejecting LeMay's first plea agreement was clearly an acceptable basis for exercising that discretion .... The Guidelines were not intended 'to make major changes in plea agreement practices.' U.S.S.G. § 1A.4(c). Although Chapter 6B imposes new substantive standards on the district court's task of accepting or rejecting plea agreements, it remains a discretionary task, reviewable on an abuse of discretion standard. Moreover, the district court's reason for rejecting LeMay's first plea agreement—that it provided an excessive downward departure from the Guidelines range—is a non-reviewable Guidelines decision."

As to the term of supervised release on the drug conviction, defendant "did not raise this issue in the district court, so it has been waived unless the district court committed plain error, resulting in a miscarriage of justice, by imposing a sentence in violation of law." Defendant was sentenced under 21 U.S.C. § 841(b)(1)(A), which for this defendant required a supervised release term of "at least" five years. Under the Guidelines, however, § 5D1.2(a) provides for a term of "at least three years but not more than five years." The court held that § 841(b)(1)(A) and § 5D1.2(a) "are easily reconciled if the term of supervised release authorized in § 5D1.2(a) is construed as a guideline range—three to five years—that is subject to the same departures that are applicable to the Chapter 5C imprisonment range." Also, the five-year limitation on supervised release in 18 U.S.C. § 3583(b) does not preclude a longer term because that section's "[e]xcept as otherwise provided" language allows for longer terms under § 841(b)(1)(A). The court concluded that the ten-year term "was consistent with the plea agreement, was within the court's statutory authority under § 841(b)(1)(A), and was part of a sentence that was accepted under § 6B1.2(b)(2) of the Guidelines because it 'departs from the applicable guideline range for justifiable reasons.' In these circumstances, even if LeMay did not waive this issue ..., we conclude that the resulting sentence was not illegal." *But cf. U.S. v. Esparsen*, 930 F.2d 1461, 1476–77 (10th Cir. 1991) (accepting government concession that six-year term of supervised release was improper for defendant sentenced under 21 U.S.C. § 841(b)(1)(B), which requires "at least" four-year term, because of 5-year limitation in 18 U.S.C. § 3583(b)(1)).

U.S. v. LeMay, No. 91-1604 (8th Cir. Dec. 24, 1991) (per curiam).

Departures

Mitigating Circumstances

U.S. v. Harpst, No. 91-3078 (6th Cir. Nov. 21, 1991) (Jones, J.) (Reversed—improper to depart downward because defendant's mental and emotional condition raised concerns that incarceration "might well end in his suicide." The court concluded that "the Bureau of Prisons is legally charged with providing adequate facilities and programs for suicidal inmates," and therefore "suicidal tendencies" are not a legally proper ground for departure. *See U.S. v. Studley*, 907 F.2d 254, 259 (1st Cir. 1990) (departure for mental and emotional reasons proper only where "defendant has an exceptional need for, or ability to respond to treatment [and] the Bureau of Prisons does not have adequate treatment services"). In addition, the fact that incarceration would make restitution and future employment less likely is not a valid ground for departure. *See U.S. v. Rutana*, 932 F.2d 1155, 1159 (6th Cir. 1991) ("economic considerations ... do not provide a basis for downward departure," reversing downward departure made because defendant's incarceration might result in loss of his employees' jobs).).

Extent of Departure

U.S. v. Molina, No. 90-3261 (D.C. Cir. Jan. 7, 1992) (Edwards, J.) (remanded—joining First, Fifth, and Tenth Circuits in "declin[ing] to adopt any specific procedure for use by sentencing courts in determining the appropriate extent of departure above criminal history category VI," holding only that "trial courts must supply some reasoned basis for the extent of post-category VI departures.... [and] follow some reasonable methodology, consistent with the purposes and structure of the Guidelines"). *See 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.), *cert. denied*, 111 S. Ct. 267 (1990); *U.S. v. Roberson*, 872 F.2d 597, 607 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989). *Cf. U.S. v. Schmude*, 901 F.2d 555, 560 (7th Cir. 1990) (instructing courts to use "percentage" approach to guide departure above category VI); *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1990) (en banc) (approving *Schmude* approach).

Relevant Conduct

U.S. v. Barton, No. 90-2670 (8th Cir. November 21, 1991) (Beam, J.) (reversed—quantity of marijuana that was basis of 1983 state drug conviction (for which probation was imposed) could not be used as relevant conduct under U.S.S.G. § 1B1.3(a)(2) to determine base offense level for 1989 marijuana conviction, even though district court found that defendant had continued marijuana distribution activities during entire period: "[W]e are confident that the words 'all such acts and omissions' [in § 1B1.3(a)(2)] were not intended ... to include Barton's previous conviction.... The commentary to section 1B1.3 alludes to the limited scope of subsection (a)(2): '"Such acts and omissions" ... refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable.' ... Under no circumstances could Barton now be criminally liable or 'accountable' in 1989 for the conduct that resulted in his conviction in 1983"; district court should have factored 1983 conviction into criminal history score instead).

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Probation and Supervised Release

REVOCATION OF PROBATION

Ninth Circuit holds that when probation must be revoked for drug possession and defendant sentenced to "not less than one-third of the original sentence," the "original sentence" means the term of probation, not guideline range. Defendant pled guilty to counterfeiting in 1989. His guideline range was 1-7 months and he was sentenced to three years' probation. The next year he was arrested on a drug charge and a urinalysis showed traces of methamphetamine. The court determined defendant had violated probation by possessing drugs and revoked probation. The Anti-Drug Abuse Act of 1988 had amended 18 U.S.C. § 3565(a) by adding the following: "Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The district court read this section to require a term of imprisonment not less than one-third of the original sentence of probation, and sentenced defendant to one year in prison. Defendant appealed, but the appellate court affirmed.

The circuit court analyzed the statutory language and legislative history and determined that a sentence of probation is a "sentence" for purposes of the reference in § 3565(a) to "one-third of the original sentence": "Penologically and semantically, probation is a sentence under the Sentencing Reform Act [of 1984]. It is no longer an alternative to sentencing; it is a sentence in and of itself." The court noted that "this schema is also used in language Congress added to 18 U.S.C. § 3583(g) as part of the same Anti-Drug Abuse Act of 1988," which states that if supervised release is revoked for drug possession "the court shall . . . require the defendant to serve in prison not less than one-third of the term of supervised release."

The court distinguished cases interpreting the general revocation provision in § 3565(a)(2). Four circuits, including the Ninth, have held that the language "any other sentence that was available . . . at the time of the initial sentencing" means the guideline sentence that applied to the original offense of conviction, and a sentence imposed upon revocation of probation is limited thereby. *See U.S. v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *U.S. v. White*, 925 F.2d 284, 286–87 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390, 391–92 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990). The 1988 amendment begins with "Notwithstanding any other provision of this section . . . ," which the court concluded "indicates that the added provision was intended to take precedence over the general language of subsection (a)(2) in cases where the probationer violates probation by possessing a controlled substance."

The court also held that "the validity of the 12-month sentence imposed here" was supported by the district court's use of the Guidelines' policy statements on revocation of probation, §§ 7B1.1, 7B1.3, and 7B1.4 (Revocation Table). Under those sections, a sentencing range of 12–18 months applied.

U.S. v. Corpuz, No. 91-10132 (9th Cir. Jan. 8, 1992) (Aldisert, Sr. J.).

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit holds that extraordinary restitution may warrant downward departure, and that criminal conduct spanning one year and several transactions was not "single act of aberrant behavior." Defendant, a car dealer, pledged the same vehicles as collateral for separate loans from two banks over a one-year period. Charged with 44 counts of bank fraud, he pled guilty to one count and was sentenced to twelve months and one day. He asserted on appeal that several factors warranted downward departure, including the fact that he had liquidated all his assets to ensure full restitution to the banks more than a year before indictment (he entered into settlement agreements with both banks and turned over his assets of $1.4 million) and, because he had a good reputation in the community, was consistently employed, and continued to lead a respectable life, his criminal conduct was "aberrant behavior," U.S.S.G. Ch. 1, Pt. A, 4(d), p.s.

The appellate court remanded for reconsideration of the first ground, holding that "the guidelines provide the district judge with authority to depart downward based on extraordinary restitution." The court acknowledged that voluntary payment of restitution before adjudication of guilt is a factor considered for acceptance of responsibility, § 3E1.1, comment. (n.1(b)), but held that the district court "should consider whether the extent and timing of Garlich's restitution are sufficiently unusual to warrant a downward departure. . . . If . . . the two-level reduction for acceptance of responsibility inadequately addresses Garlich's restitution, the district court may impose a reasonable sentence outside the guidelines range." *See also U.S. v. Brewer*, 899 F.2d 503, 509 (6th Cir.) ("unusual" restitution could warrant departure), *cert. denied*, 111 S. Ct. 127 (1990); *U.S. v. Carey*, 895 F.2d 318, 322–23 (7th Cir. 1990) (same).

The court affirmed the denial of departure for "single act of aberrant behavior," concluding that defendant's "actions in planning and executing the financing scheme over a one-year period were not 'spontaneous and seemingly thoughtless,'" quoting *U.S. v. Glick*, 946 F.2d 335, 338 (4th Cir. 1991) (conduct over ten-week period involving numerous actions and extensive planning is not single act of aberrant behavior). *See also Carey, supra*, 895 F.2d at 325 (check-kiting scheme over 15-month period not single act of aberrant behavior).

But cf. U.S. v. Takai, 930 F.2d 1427, 1433–34 (9th Cir. 1991) (conduct over eight-day period in bribery offense properly construed as "single act of aberrant behavior").

U.S. v. Garlich, 951 F.2d 161 (8th Cir. 1991).

Substantial Assistance

Eastern District of New York holds that § 5K1.1, p.s. does not apply to downward departure based on Congress' request for clemency for defendant who assisted Congressional investigation. Defendant pled guilty to violating munitions export laws and was subject to a guideline range of 8–14 months. The Chief Counsel of the Committee on Foreign Affairs of the House of Representatives sent a letter to the sentencing court requesting it to consider defendant's cooperation with the Committee in an ongoing investigation. The letter noted that defendant's cooperation had been helpful, even though it might not lead to any criminal prosecutions.

The court held that a §5K1.1, p.s. departure was not proper because there was no government motion and the defendant did not aid the prosecution of another. The court reasoned, however, that in the Second Circuit § 5K1.1 does not *prohibit* departure under § 5K2.0, p.s. when a defendant provides substantial assistance outside the confines of § 5K1.1. It noted that the Second Circuit allowed a downward departure for a defendant whose cooperation helped the district courts' seriously overcrowded docket. *See U.S. v. Garcia*, 926 F.2d 125, 128 (2d Cir. 1991) (§ 5K1.1 covers cooperation with prosecution and does not prohibit departure for assistance to courts). *See also U.S. v. Agu*, 949 F.2d 63, 67 (2d Cir. 1991) (summarizing Second Circuit law: "cooperation with the Government in respects other than the prosecution of others or cooperation with the judicial system can, in appropriate circumstances, warrant a departure notwithstanding the absence of a Government motion"); *U.S. v. Khan*, 920 F.2d 1100, 1106–07 (2d Cir. 1991) (in dicta, assistance to government other than information relevant to prosecution of others may provide basis for § 5K2.0 departure). The district court concluded that "courts have sentencing authority to reward cooperation of a defendant with an agency other than the prosecution when the United States Attorney has not requested a downward departure."

U.S. v. Stoffberg, No. CR 91-524 (E.D.N.Y. Jan. 21, 1992) (Weinstein, J.).

Adjustments

Obstruction of Justice

U.S. v. Williams, No. 90-6600 (6th Cir. Dec. 17, 1991) (Milburn, J.) (reversed: district court's factual finding that defendant's false statements, made while not under oath to law enforcement officers during investigation of offense, significantly impeded the investigation was clearly erroneous, and pursuant to § 3C1.1, comment. (nn. 3(g) and 4(b)), an obstruction of justice enhancement was improper—"The focus of the guideline is on whether defendant, by actively making material false statements (and not by a passive refusal to cooperate), succeeded in significantly impeding the investigation. Failed attempts to shift the investigative searchlight elsewhere are not covered by the guidelines.... It is true that defendant Williams lied to investigating agents..., but Application Note 4(b) specifically permits lies to investigating agents provided they do not significantly obstruct or impede the investigation") (Joiner, Sr. Dist. J., dissented from holding that district court's factual finding was clearly erroneous). *Accord U.S. v. Moreno*, 947 F.2d 7, 9–10 (1st Cir. 1991) (obstruction enhancement improper for defendant who, while not under oath, gave alias to law enforcement officers during investigation, because there was no showing that it actually impeded investigation, § 3C1.1, comment. (nn. 3(g) and 4(b)).

U.S. v. Bell, No. 91-1479 (1st Cir. Jan. 2, 1992) (Campbell, J.) (reversed: failure to appear defendant should not receive obstruction enhancement for using false name to obtain post office box during time he was avoiding capture (citing *Moreno, supra*, and n.3(g)); also, fact that defendant carried gun and ammunition at time of recapture, and briefly paused before obeying police officers' command to "get down, freeze," did not, without more, warrant enhancement under § 3C1.2 for "recklessly creat[ing] a substantial risk of death or serious bodily injury . . . in the course of" resisting arrest).

Determining the Sentence

Fines

Fifth Circuit holds that cost-of-imprisonment fine under § 5E1.2(i) is constitutional and does not violate Sentencing Reform Act. Defendant was convicted on several drug charges and given a lengthy prison term. He was also fined $280,823.80, of which $180,823.80 was imposed pursuant to the requirement in U.S.S.G. § 5E1.2(i) that a sentencing court "impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release," subject to § 5E1.2(f) (ability to pay/burden on dependents).

The appellate court rejected defendant's claim that the imposition of "an additional fine amount" under § 5E1.2(i), beyond the amounts set forth in the fine table at § 5E1.2(c), violates 18 U.S.C. § 3553(a)(2) of the Sentencing Reform Act by imposing punishment "greater than necessary." The court reasoned that "the Commission developed a two-level system: the court must first look to the fine table to determine the initial range and then complete its calculation by looking to the cost of imprisonment. . . . Together, these calculations comprise the Commission's effort to realize section 3553(a)(2)'s goals."

The court also rejected defendant's argument that the cost-of-imprisonment fine is irrational—because the fines collected are actually used for a crime victim fund rather than to defray costs of imprisonment—and therefore amounts to a deprivation of property without due process in violation of the Fifth Amendment: "[W]e find . . . that the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted on society—is a rational means to assist the victims of crime collectively." *Cf. U.S. v. Doyan*, 909 F.2d 412, 414-16 (10th Cir. 1990) ("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," and § 5E1.2(i) does not violate the equal protection component of the Due Process Clause of the Fifth Amendment).

U.S. v. Hagmann, 950 F.2d 175 (5th Cir. 1991).

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Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds "incomplete duress" may be considered for downward departure under § 5K2.12, p.s.; also, jury's rejection of duress defense on count of conviction does not preclude that defense for relevant conduct. The cases here arose from the prosecution of a large drug ring, some of whose members were coerced to work for the ring by means of brutal violence and intimidation. At trial several defendants claimed the defense of duress, but the jury returned guilty verdicts. The district court held that, because the jury rejected the duress defense, it could not consider duress for sentencing purposes. The appellate court affirmed the convictions, but remanded for resentencing and explained how duress should be considered.

Like the Eighth Circuit in *Whitetail* below, the court followed the reasoning of *U.S. v. Cheape*, 889 F.2d 477, 480 (3d Cir. 1989) [2 GSU #16], where the Third Circuit held that a jury's rejection of a defense of coercion and duress did not preclude departure under § 5K2.12, p.s. The Ninth Circuit determined that the defense of duress at trial requires an objective analysis, whereas for sentencing purposes subjective elements should be considered: "Evidently the Commission had in mind the showing of duress less than what constitutes a defense to a crime; for if the defense were 'complete,' there would have been no crime requiring a sentence.... Moreover, the Commission emphasizes not only 'the reasonableness of the defendant's actions,' but 'the circumstances as the defendant believed them to be.' U.S.S.G. § 5K2.12."

The court also held that duress should be considered for relevant conduct and could preclude use of that conduct for sentencing; or, departure may be warranted if "incomplete duress" is proved. A defendant convicted of a single distribution count was sentenced on the basis of all drugs she distributed over a two-and-a-half-month period. She admitted the distributions, but claimed they were made under duress. The appellate court held that this defense should be considered: "The jury verdict as to her act on September 14, 1989 does not speak to her state prior to this date. If her contention is correct, she committed no crime prior to this date. The sentencing court cannot hold her responsible without first deciding whether she was in fact under duress. If the court should conclude that [she] has not carried her burden of proving duress because her evidence of duress is not credible, it is still open to the court to consider whether there was duress that did not amount 'to a complete defense.' U.S.S.G. § 5K2.12." The court added that expert testimony regarding battered-woman syndrome was relevant to this defense. Also, evidence of incomplete duress may be presented at sentencing even if a defendant failed to make out a prima facie case of duress during trial.

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.).

Eighth Circuit holds that evidence of "battered-woman syndrome" may be considered for downward departure under § 5K2.10, p.s., even if jury rejects self-defense claim. Defendant was found guilty of second degree murder of her long-time, live-in boyfriend. She admitted killing him, but contended that at the time of the killing she suffered from battered-woman syndrome, that he was beating her or was about to begin beating her, and that she stabbed him in self-defense. The jury, however, found her guilty and she was sentenced to 108 months. Defendant claimed on appeal that the sentencing court improperly concluded that it could not consider battered-woman syndrome in sentencing once the jury had rejected her claim of self-defense.

The appellate court agreed and remanded for resentencing. The court followed *Cheape, supra*, which reasoned that proof of coercion as a complete defense at trial involves substantially different elements than proof of coercion as a mitigating circumstance in sentencing—otherwise the issue would never arise in sentencing because a defendant who proved the defense would be acquitted.

The Eighth Circuit held that "[t]he same reasoning applies here. Whitetail submitted evidence of battered-woman syndrome, not as a defense in itself, but as the primary component of her claim of self-defense.... If her claim of self-defense had been accepted by the jury, this defense would have resulted in her acquittal. Thus, to the extent that the guidelines permit consideration of the battered-woman syndrome as a mitigating factor at sentencing, we must read them as 'providing a broader standard' for proof of the syndrome than that which is 'required to prove a complete defense at trial.'"

The court stated that § 5K2.10, p.s. "permits the district court to 'reduce the [defendant's] sentence below the guideline range' if it finds that 'the victim's wrongful conduct contributed significantly to provoking the offense behavior.'... Thus, to the extent that U.S.S.G. § 5K2.10, p.s., permits consideration of battered-woman syndrome as a basis for departure from the guidelines, it does not require proof of the same elements necessary to establish a claim of self-defense at trial." The jury's rejection of that defense does not preclude consideration of battered-woman syndrome for departure under § 5K2.10, p.s. *See also Johnson, supra.*

U.S. v. Whitetail, No. 91-1400 (8th Cir. Feb. 12, 1992) (Bowman, J.).

SUBSTANTIAL ASSISTANCE

En banc Eighth Circuit rejects claim that because § 5K1.1 is a policy statement it is not binding. The Eighth Circuit affirmed a district court's holding that it did not have power to depart downward for the defendants' substantial assistance to the government in the absence of either a government motion or a claim that the government's refusal to make such a motion was arbitrary, in bad faith, or in breach of a plea agreement. Defendants' sole argument was that § 5K1.1, as a

policy statement rather than a guideline, is not binding on district courts and can therefore be repudiated on policy grounds.

The circuit court held that § 5K1.1, p.s. is binding. The court found that Congress intended that "policy statements be considered and that the courts' actions be consistent with policy statements." Further, although amendments to policy statements need not be submitted for congressional approval, § 5K1.1, p.s. was submitted to Congress before its enactment. The court also concluded that "[n]othing could be more contrary to Congress' intent in providing for the Sentencing Guidelines than to permit the courts to second-guess the Commission" and reject § 5K1.1, p.s. because its approach is "simply not the best way to handle the problem at hand." The court also noted that holding policy statements to be nonbinding could have a "spill over" effect into the weight of commentary, thus "introduc[ing] the most far-ranging element of uncertainty into the application of the Guidelines."

U.S. v. Kelley, No. 90-1081 (8th Cir. Feb. 5, 1992) (en banc) (Gibson, J.) (Beam, J. concurring in part, dissenting in part, joined by McMillian, J. in dissent) (Lay, C.J., dissenting, joined by McMillian, J.) (Heaney, Sr. J., dissenting, joined by Lay, C.J., McMillian, J., Arnold, J.)

Probation and Supervised Release

Tenth Circuit holds that policy statements in Chapter Seven regarding probation and supervised release are not mandatory, but still must be considered by courts. Defendant violated the terms of his two-year period of supervised release and after revocation was sentenced to two years in prison. On appeal he claimed that he was subject to a 3–9 month term under the Revocation Table in § 7B1.4, p.s., and that the district court erred in sentencing above that range. The government countered that the court was not bound by the policy statements and that the sentence was reasonable.

The appellate court affirmed, and held that "under 18 U.S.C. 3583 and U.S.S.G. Ch. 7 Pt. A1 & A5, the policy statements regarding revocation of supervised release contained in Chapter 7 . . . are advisory rather than mandatory in nature. This holding is specifically limited to U.S.S.G. Ch. 7. Other policy statements in the . . . Guidelines must be examined separately in the context of their statutory basis and their accompanying commentary. We see no conflict between our holding today and our cases applying and interpreting U.S.S.G. 5K1.1, which is also a policy statement. . . . The cases noting the mandatory nature of . . . 5K1.1 recognize that the motion requirement is suggested, if not compelled, by the underlying statute; they do not hold that policy statements are binding as a general rule. A provision set out in a policy statement may be binding because required by the underlying statutes."

"Although we conclude that policy statements generally are not mandatory, they must be considered by the trial court in its deliberations concerning punishment for violation of conditions of supervised release."

In this case, although the sentencing court did not specifically reference § 7B1.4 in its order, its "explanation of the sentence it imposed was sufficiently reasoned to satisfy the requirements of 18 U.S.C. 3553," and "even failure to consider Chapter 7 policy statements . . . is harmless error when the sentence is clearly reasonable and justified." *Accord U.S. v. Fallin*, 946 F.2d 57, 58 (8th Cir. 1991) [4, #10].

U.S. v. Lee, No. 91-6079 (10th Cir. Feb. 19, 1992) (Logan, J.).

Revocation of Probation

U.S. v. Dixon, 952 F.2d 260 (9th Cir. 1991) (Any sentence imposed after revocation of probation is limited to the sentence available at the time defendant was first sentenced to probation. *See* 18 U.S.C. § 3565(a)(2). The revised policy statements at U.S.S.G. Chapter 7 direct courts to consider the probation-violating conduct to calculate a sentencing range after revocation. That conduct may only be considered in selecting the appropriate sentence within the range available pursuant to § 3565(a)(2), and "[t]o the extent that the Guidelines conflict with the statute, we find them invalid." Here, defendant's 15-month sentence, calculated under Chapter 7 and partly based on the bank robbery that led to revocation, must be vacated and remanded for resentencing within the 4–10 month range that was available at his initial sentencing.).

Adjustments

Acceptance of Responsibility

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.) (The acceptance of responsibility reduction may not be denied on the basis of lack of timeliness for defendants who went to trial and used duress as a defense, which in effect denied their responsibility for the offenses. "The Guidelines make clear that the reduction for acceptance of responsibility is available 'without regard to whether [a] conviction is based upon a guilty plea or a finding of guilt by the court or jury. . . .' U.S.S.G. § 3E1.1." To the extent that the commentary's statements that the reductions should be given after trial only in "rare situations" or that after trial acceptance is not "timely" may conflict with the guideline, "the text of the guideline must prevail." The court also pointed out that defendants here had little choice but to go to trial: "The government refused to consider plea offers from any single defendant unless all of the defendants pleaded guilty. . . . [Under] these circumstances it is inappropriate to deny [the reduction] based solely on the timing of the acceptance."

After conviction "the defendants continued to maintain that at least they had been subjected to incomplete duress. But unlike a claim of complete duress, a claim of incomplete duress does not deny criminal guilt—it merely asks for leniency because of the coercion to which the defendant had been subjected. There is consequently no barrier to getting one reduction for incomplete duress [by departure] and another reduction for acceptance of responsibility."). *Cf. U.S. v. Fleener*, 900 F.2d 914, 918 (6th Cir. 1990) (§ 3E1.1 reduction not automatically precluded for defendant claiming entrapment defense).

Offense Conduct

Co-Conspirator Drug Quantities

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.) ("As a general rule, the fact that a conspirator is taken into custody does not automatically indicate disavowal of the conspiracy. [Defendant], however, has been found by the court to be a 'minor' participant in the conspiracy. . . . Once in custody, she was in no position to continue her role as a drug distributor. It stretches a legal fiction to the breaking point to hold her accountable for the drugs [other conspirators] distributed after [she was jailed]. Consequently, she can be sentenced only on the basis of drugs distributed by the conspiracy before this date.").

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Appellate Review

Supreme Court holds that remand is not required for departure based on both valid and invalid factors when same sentence would have been imposed absent invalid factors. In so holding the Court resolved a split among the circuits. Several circuits had held that a departure based in part on invalid factors may be affirmed on a case-by-case basis if there are valid factors that warrant departure and it appears the same sentence would have been imposed absent the invalid factors. *See U.S. v. Jones*, 948 F.2d 732, 741 (D.C. Cir. 1991); *U.S. v. Glick*, 946 F.2d 335, 339–40 (4th Cir. 1991); *U.S. v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991); *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991); *U.S. v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990); *U.S. v. Franklin*, 902 F.2d 501, 508 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059, 1068 (6th Cir. 1989). Two circuits had held that remand was automatically required in such a situation. *See U.S. v. Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314, 1315–16 (9th Cir. 1989) (per curiam).

In the case before the Court, defendant received an upward departure in his criminal history category based upon several prior arrests that were not reflected in his criminal history score and two prior convictions that were too old to be counted. Although the first ground was an improper basis for departure, *see* U.S.S.G. § 4A1.3, p.s., the appellate court affirmed the sentence because it held the latter factor was valid and justified the increase. *U.S. v. Williams*, 910 F.2d 1574, 1580 (7th Cir. 1990).

The Supreme Court remanded because it was unable to determine whether the appellate court had concluded that the same sentence would have been imposed absent the invalid factor. However, the Court held that remand is not *automatically* required in such circumstances. In reaching its conclusion, the Court determined that "the reviewing court is obliged to conduct two separate inquiries. First, was the sentence imposed either in violation of law or as a result of an incorrect application of the Guidelines? If so, a remand is required under § 3742(f)(1). . . . [A] reviewing court may not affirm a sentence based solely on its independent assessment that the departure is reasonable under § 3742(f)(2)." However, a remand under (f)(1) is not required "every time a sentencing court might misapply a provision of the Guidelines . . . . When a district court has intended to depart from the guideline range, a sentence is imposed 'as a result of' a misapplication of the Guidelines if the sentence would have been different but for the district court's error. Accordingly, in determining whether a remand is required under § 3742(f)(1), a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."

"If the court concludes that the departure is not the result of an error in interpreting the Guidelines, it should proceed to the second step: is the resulting sentence an unreasonably high or low departure from the relevant guideline range? If so, a remand is required under § 3742(f)(2)." Whether a departure sentence is reasonable is determined by "the amount and extent of the departure in light of the grounds for departing. . . . A sentence . . . can be 'reasonable' even if some of the reasons given by the district court . . . are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure."

Note that "the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather . . . a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed. *See* Fed. Rule. Crim. Proc. 52(a)."

The Court added instruction on "the degree of an appellate court's authority to affirm a sentence when the district court, once made aware of the errors in its interpretation of the Guidelines, may have chosen a different sentence. Although the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court. U.S.S.G. § 5K2.0, p.s. The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'"

Because the issue was not properly presented for argument, the Court declined to review whether outdated convictions that are not similar to the instant offense may be considered for departure. *Compare U.S. v. Aymelek*, 926 F.2d 64, 73 (1st Cir. 1991) (may be appropriate in some cases); *U.S. v. Williams*, 910 F.2d 1574, 1578–79 (7th Cir. 1990) (same); *U.S. v. Russell*, 905 F.2d 1439, 1443–44 (10th Cir. 1990) (same); *U.S. v. Carey*, 898 F.2d 642, 646 (8th Cir. 1990) (same) *with U.S. v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990) (only if similar). *See also* U.S.S.G. § 4A1.2, comment. (n.8) ("evidence of similar misconduct" in outdated convictions may be considered for departure).

Williams v. U.S., No. 90-6297 (U.S. Mar. 9, 1991) (O'Connor, J.) (White, Kennedy, JJ., dissenting).

Relevant Conduct

Ninth Circuit holds relevant conduct is not limited to conduct that would constitute federal offense. Defendant, an employee of a government contractor, pled guilty to submitting two false petty cash vouchers, totaling less than $200, which were later charged to the United States. He also admitted to submitting false vouchers worth $214,705.39 over the years to his employer. There was no proof that the United States was charged for these expenses and thus no indication that these submissions violated federal law. The district court included all the vouchers in calculating defendant's base offense level under U.S.S.G. § 1B1.3(a)(2). Defendant appealed, claiming that because the federal government had no jurisdiction over the $214,000 worth of false vouchers they should not have been used to compute his sentence.

The appellate court affirmed, holding that actions amounting to state offenses but not federal offenses may be considered under the relevant conduct provisions: "We find no intention by the Sentencing Commission to narrow §§ 1B1.3(a)(2) and (a)(3) to federal conduct only. Those subsections specifically direct the consideration of all acts that were part of the same course of conduct or common scheme or plan, as well as all harm that resulted from those acts. . . . [A]ll of Newbert's actions took place in the same general course of conduct. There was no difference in the way he committed the state offenses compared to the federal offenses. . . . There is no indication the Sentencing Commission intended to distinguish among the jurisdictional components of a clearly common pattern of criminal conduct. Rather, the Sentencing Guidelines evidence a clear intent that persons who commit a scheme of fraud be punished in accordance with the total harm caused by the fraud." *See* § 1B1.3(a)(2), comment. (backg'd).

U.S. v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991).

Criminal History

Career Offender Provision

Fourth Circuit holds that, in determining whether offense is a "crime of violence," courts should look only to conduct charged in the indictment, not underlying conduct. Defendant pled guilty to being a convicted felon in possession of firearms after police discovered firearms buried in his backyard. He had two prior convictions for violent offenses and was sentenced as a career offender under U.S.S.G. § 4B1.1. He appealed that designation, claiming the instant offense was not "a crime of violence" as defined by § 4B1.2. The appellate court agreed and remanded. It first held that, in determining whether an offense is "violent," "the sentencing court is limited to an evaluation of the conduct explicitly charged in the indictment" and may not look to other facts surrounding the offense, even for offenses not specifically listed in § 4B1.2. *See* U.S.S.G. § 4B1.2, comment. (n.2) (Nov. 1991) (court may look to "conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted").

The court also held that "the offense, felon in possession of a firearm, in the absence of any aggravating circumstances charged in the indictment, does not constitute a per se 'crime of violence.'" *Accord U.S. v. Chapple*, 942 F.2d 439, 441–42 (7th Cir. 1991) [4, #8]. *Contra 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) (amending and superseding 910 F.2d 663 [3, #13])). Other circuits have held that possession plus other threatening or violent behavior constitutes a crime of violence. See cases listed in 4 *GSU* #8 summary of *Chapple*.

Note: Effective Nov. 1, 1991, U.S.S.G. § 4B1.2, comment. (n.2) states, "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."

U.S. v. Johnson, 953 F.2d 110, 113–15 (4th Cir. 1991).

Third Circuit holds that in determining whether an offense involved "serious potential risk of physical injury to another," inquiry into underlying conduct is not required if the statute of conviction indicates such a risk. Defendant was sentenced as a career offender, partly on the basis of a prior state felony conviction for first degree reckless endangering that resulted from pushing and slapping a store clerk during a shoplifting attempt. Defendant offered to testify at the sentencing hearing that he did not commit those acts and that there was little likelihood of serious injury to the clerk. The district court refused to hear the testimony and ruled that the conviction was a "crime of violence" under § 4B1.1. Despite "grave doubts about the . . . extremely broad definition of 'crime of violence'" that may cover "a crime whose mens rea is no worse than recklessness," the appellate court affirmed.

In the prior state conviction defendant pled guilty to "recklessly engag[ing] in conduct which creates a substantial risk of death to another person." The court held that constituted a crime of violence under the language of § 4B1.2(1)(ii) that encompasses an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Further, the district court did not err when it refused to "hold a mini-trial on what actually happened." The appellate court held, "where the language of the criminal statute so closely tracks the language of the Guideline that the defendant's conviction necessarily meets the Guideline standard, the district court need look no further than the statute and need not inquire into the underlying conduct charged. . . . [A]lthough a per se approach based on the statute alone is not required in every case, *see U.S. v. John*, 936 F.2d 764 (3d Cir. 1991), such an approach is generally preferable to inquiry into the facts of each case."

Note: This case involved the pre-1991 amendment version of § 4B1.2(1)(ii), comment. (n.2), used in *Johnson*, *supra*.

U.S. v. Parson, No. 91-3059 (3d Cir. Jan. 31, 1992) (Becker, J.).

Offense Conduct

Calculating Weight of Drugs—Marijuana

U.S. v. Hash, No. 91-5340 (4th Cir. Feb. 3, 1992) (Phillips, J.) (vacating sentence imposed on defendant, convicted of manufacturing and cultivating six marijuana plants, that was based on assigning each plant a weight of 100 grams pursuant to § 2D1.1(c) n.* (at p.82): "For offenders possessing fewer than 50 plants, we believe Congress intended to remain true to the general rule of [21 U.S.C.] § 841, which makes actual weight determinative for purposes of sentencing. Under this interpretation, U.S.S.G. § 2D1.1(c) n.* is invalid insofar as it equates one plant with 100 grams of marijuana in offenses involving fewer than 50 plants. . . . [A]ctual weight, not presumed weight, [must] be the sentencing measure"). *Accord U.S. v. Streeter*, 907 F.2d 781, 790 (8th Cir. 1990).

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Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit upholds downward departures for drug-smuggling "mules" for whom § 3B1.2 mitigating role adjustment was unavailable. In two separate cases consolidated for appeal, a Mexican citizen with no prior criminal record received money ($1,000 and $2,000) to drive a carload of marijuana (190 pounds and 50–100 kilograms) into the U.S. from Mexico. Both pled guilty to possession with intent to distribute. Neither was eligible for a mitigating role adjustment, § 3B1.2, because each was the only participant in the offense. *See U.S. v. Zweber*, 913 F.2d 705, 708–09 (9th Cir. 1990) (may not receive § 3B1.2 reduction for role in uncharged or unconvicted conspiracy). They were separately sentenced by the same judge, who departed from their 41–51-month ranges to impose 15- and 8-month terms. The judge departed because the guideline ranges overstated the seriousness of the defendants' conduct as mere "mules" in the drug trade along the Arizona-Mexico border, particularly in light of guideline sentences, including probation, the court was imposing in more serious drug smuggling cases.

The appellate court affirmed, relying on *U.S. v. Bierley*, 922 F.2d 1061, 1065–66 (3d Cir. 1990), which held that departure may be considered for a defendant who could not qualify for an adjustment under § 3B1.2 because he was the only "criminally responsible 'participant'" in the offense of conviction. "Applying *Bierley* . . . we find that the marginal roles played by [defendants] in the drug trade, coupled with the unavailability of the section 3B1.2 downward adjustment, could well represent a permissible basis for a downward departure."

The court also held that the district court could consider "the socioeconomics and the internal politics of the drug trade along the Mexican border and the sentencing patterns in other drug cases arising from trafficking across that border. . . . '[M]ules' along the Mexican border are uniquely situated in terms of their role in the drug trade, being even less involved in the overall drug business and with less to gain from the success of the drug enterprise than ordinary underlings in conspiracy cases. This is a peculiar condition that the Sentencing Commission did not address." *Cf. U.S. v. Alba*, 933 F.2d 1117, 1121–22 (2d Cir. 1991) (even with § 3B1.2 reduction, departure for "less than minimal" role may be warranted for "extremely limited nature of [defendant's] involvement" in offense).

Note: *Bierley* held that such a departure "would be limited to the 2 to 4 level adjustment" allowed under § 3B1.2. Here, the court did not rule on the issue because the government did not appeal the extent of the departures.

U.S. v. Valdez-Gonzalez, No. 89-1027 (9th Cir. Feb. 19, 1992) (Tang, J.) (Fernandez, J., dissenting).

U.S. v. Boshell, 952 F.2d 1101, 1106–09 (9th Cir. 1991) (Affirming downward departure for defendant who faced much longer sentence under Guidelines than comparable and more culpable co-conspirators who, unlike defendant, were allowed to plead to pre-Guidelines offenses: "[T]he need to avoid unwarranted sentencing disparities among co-defendants involved in the same criminal activity has long been considered a legitimate sentencing concern. . . . [W]here unusual circumstances are present, departure for equalization of co-defendants' sentences may be warranted." *Cf. U.S. v. Ray*, 930 F.2d 1368, 1372–73 (9th Cir. 1990) (departure warranted where co-defendants received much lower sentences in period Ninth Circuit held Guidelines unconstitutional).

The sentencing court also departed based on defendant's personal characteristics, background, and job history. The appellate court remanded for articulation of the specific reasons for departure and the underlying factual basis: "Only in extraordinary circumstances may a court rely on one of the six factors listed in [U.S.S.G. §§ 5H1.1–1.6, p.s.] to depart from the guidelines range.").

Sentencing Procedure

EVIDENTIARY ISSUES

Second Circuit holds courts must consider illegally seized evidence at sentencing. "We conclude that the benefits of providing sentencing judges with reliable information about the defendant outweigh the likelihood that allowing consideration of illegally seized evidence will encourage unlawful police conduct. Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment." *See also U.S. v. Lynch*, 934 F.2d 1226, 1234–37 (11th Cir. 1991) (illegally seized evidence may be considered), *cert. denied*, 112 S. Ct. 885 (1992); *U.S. v. Torres*, 926 F2d. 321, 325 (3d Cir. 1991) (same); *U.S. v. McCrory*, 930 F.2d 63, 68 (D.C. Cir. 1991) (same, adding that evidence unlawfully seized for the purpose of increasing sentence may require suppression), *cert. denied*, 112 S. Ct. 885 (1992).

U.S. v. Tejada, No. 91-1071 (2d Cir. Feb. 21, 1992) (Meskill, J.).

PLEA AGREEMENTS

Fourth Circuit holds that Chapter 6 of the Sentencing Guidelines did not change the standard for withdrawal of guilty pleas. Defendant pled guilty to one count pursuant to a plea agreement where the government agreed to dismiss a second count and recommend sentencing at the low end of the guideline range. At the plea hearing the court accepted defendant's guilty plea but deferred acceptance of the plea agreement pending the PSR. Before the court accepted the agreement, defendant moved to withdraw his guilty plea. The district court denied the motion, holding that defendant had not established a "fair and just reason" for withdrawal under Fed. R. Crim. P. 32(d), and later imposed sentence in accordance with the agreement. On appeal defendant claimed that sections of Chapter 6 "require a new, less rigorous standard to govern motions for withdrawal made before the district court accepts a plea agreement."

The appellate court rejected that contention: "Ewing essentially argues that since sections 6B1.1–.3[,p.s.] prevent the sentencing court from accepting a plea agreement until the court has reviewed the presentence report, the rule should be the same for a guilty plea. Until then, he argues, the court has not accepted the plea, and thus he should be able to withdraw his plea upon some showing of cause less demanding than the current fair and just reason standard.... The flaw in Ewing's position is its failure to acknowledge the distinction between a plea of guilty and a plea agreement." The plea agreement here was made under Rule 11(e)(1)(A) and (B), and "the rule in no way suggests that the plea of guilty may be withdrawn as a matter of right... at any time after its acceptance except when a type (e)(1)(A) or (C) plea agreement is rejected by the court. Thus, once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea in only two ways relevant here, either by showing a fair and just reason under Rule 32(d), or by withdrawing under Rule 11(e)(4) after a rejected plea agreement."

The Sentencing Guidelines did not change this. Section 6B1.1(c), p.s. "requires the sentencing court to defer its decision whether to accept a plea agreement until there has been an opportunity to examine the presentence report; Rule 11 standing alone gives the court the discretion as to whether to defer.... We have no occasion here to resolve the patent conflict between the Rule and the Guideline, for the district court did not abuse its discretion in accepting the guilty plea and later approving the plea agreement as it was permitted to do under the Rule and required to do under the Guidelines."

U.S. v. Ewing, No. 91-5250 (4th Cir. Feb. 20, 1992) (Widener, J.).

Relevant Conduct

Eighth Circuit analyzes interplay of relevant conduct and plea bargains in fraud loss case. Defendant pled guilty to three counts of mail fraud for selling three cars with altered odometers. In exchange, the government dismissed other counts, including a conspiracy count involving over 300 cars with altered odometers sold at auction for other car dealers. Defendant was sentenced on the basis of the loss in the three counts of conviction, but the government argued on appeal that the amount of loss should have included the amount from the dismissed conspiracy count as relevant conduct.

The appellate court remanded: "To determine the amount of loss in this case, the district court considers all harm resulting from 'all... acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.' U.S.S.G. § 1B1.3(a)(2).... The mail fraud counts to which Morton pleaded guilty included a preamble incorporating by reference assertions contained in the conspiracy count." The court held this was not sufficient proof for relevant conduct: "[T]he 'offense of conviction' is the substantive offense to which the defendant pleads guilty. ... There is no written plea agreement in this case. Instead, Morton pleaded guilty to three counts of mail fraud in open court and specifically denied knowledge that the cars involved in the conspiracy count had rolled-back odometers. The transcript of the plea hearing does not show anyone informed Morton he was conceding facts underlying the conspiracy. Under the circumstances, '[t]o permit a greater offense to be incorporated by reference into each count of the indictment destroys the plea bargain process.' *U.S. v. Sharp*, 941 F.2d 811, 815 (9th Cir. 1991). By incorporating the entire scheme into each count, the Government concedes little when it agrees to dismiss many counts in exchange for a plea including the entire scheme. *Id.*"

The Court concluded: "[W]e agree with the district court that Morton's guilty plea is not a basis for including the conspiracy's cars in the loss calculation. [However], the loss resulting from the conspiracy's cars may still be included under U.S.S.G. § 1B1.3 if the conspiracy is 'part of the same course of conduct or common scheme or plan' as the mail fraud. '[T]his is a fact intensive inquiry in which the district court is given broad discretion to assess the relevant facts.'... The relevancy of conduct and the amount of loss under the fraud guidelines are factual findings reversible only for clear error."

U.S. v. Morton, No. 91-2618 (8th Cir. Feb. 24, 1992) (Fagg, C.J.).

Adjustments

Victim-Related Adjustments

U.S. v. Sutherland, No. 91-1961 (7th Cir. Jan. 28, 1992) (Eschbach, Sr. J.) (Reversed—there was insufficient evidence to find that World War I and II veterans and families were, as a group, "unusually vulnerable" under § 3A1.1 to fraud scheme based on collecting and converting their personal war memorabilia, or that defendant specifically targeted the elderly. "In a fraud case where the defendant issues an appeal to a broad group, the court should focus on whom the defendant targets, not on whom his solicitation happens to defraud.... § 3A1.1 is designed to punish criminals who choose vulnerable victims, not criminals who target a broad group which may include some vulnerable persons." There must be specific evidence showing vulnerability of the victim—the enhancement may not be based on a "broad and unsupported generalization.") *See also U.S. v. Cree*, 915 F.2d 352, 353–54 (8th Cir. 1990) (enhancement improper where defendant did not know extent of or intend to exploit victim's vulnerability); *U.S. v. Wilson*, 913 F.2d 136, 138 (4th Cir. 1990) (random targets of solicitation not vulnerable); *U.S. v. Creech*, 913 F.2d 780, 781 (10th Cir. 1990) (no evidence that recently-married husbands are unusually vulnerable to threats to family). *But cf. U.S. v. Boise*, 916 F.2d 497, 506 (9th Cir. 1990) (defendant need not intentionally select victim because of vulnerability).

Obstruction of Justice

U.S. v. Capps, 952 F.2d 1026, 1028–29 (8th Cir. 1991) (Affirming § 3C1.1 enhancement for obstruction of justice based on defendant's statement to third party in a bar that a co-conspirator—who had become a confidential government informant—"was snitching on her and that she was bringing in some bikers to kick his ass and deal with the snitch." Defendant argued that because the threat was never communicated to the informant the enhancement was improper. The appellate court disagreed and held that "since the adjustment applies to attempts to obstruct justice, it is not essential that the threat was communicated to [the informant] if it reflected an attempt by Capps to threaten or intimidate her conspirators into obstructing the government's investigation." The threat was "more than idle bar talk," and there was also evidence defendant had threatened others in the conspiracy.).

U.S. v. Amos, 952 F.2d 992 (8th Cir.1991) (Reversed—defendant who withdrew guilty plea and then denied guilt at trial should not have received a two-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1: "The fact that Amos admitted to the crime and accepted responsibility when he entered his guilty plea became irrelevant once he proceeded to trial and denied the offense.").

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Departures

SUBSTANTIAL ASSISTANCE

Eighth Circuit holds that § 5K1.1, p.s. motion does not permit departure below statutory minimum under 18 U.S.C. § 3553(e). Defendant was subject to a ten-year mandatory minimum sentence after pleading guilty to possession with intent to distribute 50 or more grams of cocaine base. The government filed a motion under § 5K1.1, p.s. for departure below the guideline range of 235–295 months, and specifically noted that its motion was pursuant to § 5K1.1 only and was not meant to affect the mandatory minimum. The district court departed below both the range and the minimum to impose a sentence of 36 months.

On the government's appeal, the issue was "whether a sentencing judge can depart below the statutory mandatory minimum sentence when the government has moved for a downward departure for substantial assistance pursuant to . . . section 5K1.1, and not pursuant to 18 U.S.C. § 3553(e). The underlying question is whether sections 5K1.1 and 3553(e) provide for two different types of departure . . . or whether they are intended to perform the same function."

The appellate court reversed, concluding that the two sections are distinct. The sentencing statutes "plainly empower the Sentencing Commission to provide for departures below the statutory minimum. However, section 5K1.1 does not state that a 5K1.1 motion applies to mandatory minimum sentences, or is the equivalent of a section 3553(e) motion. Thus, the only authority for the district court to depart below the statutorily mandated minimum sentence exists in the plainly stated limitation in section 3553(e). The government made it clear that it was not filing a motion pursuant to that statute. Because a section 3553(e) motion is the key to unlocking the door to consideration of this issue by the sentencing judge, we can only conclude that the district court erred in departing below the mandatory minimum absent such a motion. . . . [T]he sentencing judge may not depart below the statutory minimum pursuant to a motion under section 5K1.1 alone."

The Second and Ninth Circuits held the opposite—courts may depart below both the guideline range and statutory minimum once a § 5K1.1 motion is made. *U.S. v. Ah-Kai*, 951 F.2d 490, 493–94 (2d Cir. 1991); *U.S. v. Keene*, 933 F.2d 711, 715 (9th Cir. 1991). *See also U.S. v. Wade*, 936 F.2d 169, 171 (4th Cir.) (agreeing with *Keene* in dicta), *cert. granted*, 112 S. Ct. 635 (1991) (arguments heard March 23, 1992).

U.S. v. Rodriquez-Morales, No. 91-2355 (8th Cir. Mar. 11, 1992) (Gibson, J.) (Heaney, Sr. J., dissenting).

CRIMINAL HISTORY

U.S. v. Gammon, No. 91-1832 (7th Cir. Mar. 9, 1992) (Flaum, J.) (Affirming upward departure partly based on inadequate reflection in the criminal history score of "the seriousness of [defendant's] record as evidenced by the sheer number of juvenile offenses." The court held that although the juvenile convictions were too "old" to be counted under § 4A1.2(d)(2) and were not similar to the offense of conviction, § 4A1.2, comment. (n.8), they were a proper ground for departure under § 4A1.3, p.s. because they showed "his serious history of criminality and the likelihood that he would commit crimes in the future."). *Contra U.S. v. Samuels*, 938 F.2d 210, 215–16 (D.C. Cir. 1991) (uncounted juvenile sentences may be used for departure only if evidence of similar misconduct or criminal livelihood) [4, #8]. *Cf. U.S. v. Nichols*, 912 F.2d 598, 604 (2d Cir. 1990) (departure under § 4A1.3, p.s. proper for violent juvenile offense for which defendant received lenient treatment).

Adjustments

ABUSE OF POSITION OF TRUST

Ninth Circuit distinguishes "breach" from "abuse" of trust. Although the § 3B1.3 enhancement for abuse of position of trust may not be applied when elements of the offense include abuse of trust, there is "a qualitative difference between a breach of trust and abuse of trust," and thus § 3B1.3 may be "applied to embezzlers when the breach of trust was particularly egregious." *Accord U.S. v. Georgiadis*, 933 F.2d 1219, 1225 (3d Cir. 1991). "In determining whether particular conduct constitutes a breach or an abuse of trust, courts must look to the role the position of trust played in facilitating the offense. The Commentary states that the enhancement may be applied only when the position of trust contributed in some 'substantial' way to facilitating the crime. 'Substantial' in this context has been interpreted to mean that, in addition to the elements of the crime, the defendant exploited the trust relationship to facilitate the offense." Because defendant's position "not only allowed her access to large amounts of cash, but also made it possible for her to conceal the theft for an extended period of time . . . her position of trust facilitated her embezzlement in a manner not accounted for in the underlying offense" and the enhancement was properly given.

The court also held that an enhancement for "more than minimal planning," § 2B1.1(b)(5), could be imposed in addition to § 3B1.3 because the extensive planning required for repeated thefts over a two and a half year period involved concerns other than abuse of trust. *Accord U.S. v. Marsh*, 955 F.2d 170 (2d Cir. 1992); *Georgiadis, supra*, at 1225–27.

U.S. v. Christiansen, No. 91-30155 (9th Cir. Mar. 3, 1992) (Wright, J.).

USE OF SPECIAL SKILL

U.S. v. Connell, No. 91-1700 (1st Cir. Feb. 26, 1992) (Selya, J.) (affirmed: "the specialized knowledge required of a stockbroker, when combined with the ability to access financial markets directly, can qualify as a special skill" under § 3B1.3 where, as here, it was not an element of the offense).

Victim-Related Adjustments

U.S. v. Caterino, No. 90-50049 (9th Cir. Feb. 21, 1992) (Hall, J.) (remanded: error to apply two "vulnerable victim" enhancements under § 3A1.1, for total increase of four offense levels, for vulnerable victims in two separate fraud counts arising from same fraud scheme—under the multiple counts guidelines in Chapter Three "the offense characteristics for a fraud conviction are applied to the overall scheme rather than by reference to individual counts or victims," and thus the § 3A1.1 adjustment is "counted once for convictions arising out of a single fraudulent scheme"). *See also* U.S.S.G. § 3D1.3, comment. (n. 3) ("When counts are grouped pursuant to § 3D1.2(d), the offense guideline applicable to the aggregate behavior is used.... Determine 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.").

Obstruction of Justice

U.S. v. Brooks, No. 90-5240 (4th Cir. Feb. 28, 1992) (Luttig, J.) (Remanding imposition of § 3C1.1 enhancement for threatening comment made to third party but not heard by the target of the threat. "At a minimum, section 3C1.1 requires that the defendant either threaten the codefendant, witness, or juror in his or her presence or issue the threat in circumstances in which there is some likelihood that the codefendant, witness, or juror will learn of the threat. Not only is there no evidence in this record that Patterson ever learned of Brooks' threat, there is no basis for concluding from the circumstances in which the threat was made that Patterson might learn of the threat. It is not even clear that Brooks actually intended that Patterson learn of the threat."). *But cf. U.S. v. Capps*, 952 F.2d 1026, 1028–29 (8th Cir. 1991) (affirming enhancement based on threat made to third party: "since the adjustment applies to attempts to obstruct justice, it is not essential that the threat was communicated to [the target] if it reflected an attempt by Capps to threaten or intimidate her conspirators") [4, #18].

Criminal History

Career Offender

Eleventh Circuit reaffirms that unlawful possession of firearm by convicted felon is "crime of violence" and holds that change in commentary cannot overrule circuit precedent. Defendant's sentence as a career offender was affirmed in *U.S. v. Stinson*, 943 F.2d 1268 (11th Cir. 1991), which held that possession of a firearm by a convicted felon categorically constitutes a "crime of violence" for career offender purposes. Later, the Commentary to § 4B1.2 was changed to state that such offense was not a crime of violence. Defendant petitioned for rehearing, arguing that the amendment should be given retroactive effect.

The appellate court denied the petition, reaffirmed its earlier holding, and examined "the appropriate weight to be afforded to the commentary. . . . This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created 'legislative history'—by the Sentencing Commission." Noting that, unlike guidelines, the commentary "is never officially passed upon by Congress," the court determined that "we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. . . . We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as 'a crime of violence.'"

U.S. v. Stinson, No. 90-3711 (11th Cir. Mar. 20, 1992) (per curiam).

General Application Principles

Amendments

U.S. v. Connell, No. 91-1700 (1st Cir. Feb. 26, 1992) (Selya, J.) (Remanded because offense guideline level was lowered after sentencing: "The guidelines provide that '[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment [listed in § 1B1.10(d)] . . . , a reduction in the defendant's term of imprisonment may be considered.' U.S.S.G. § 1B1.10(a), p.s. (1991).... Hence, while Connell is not necessarily entitled to a reduction in the offense level—section 1B1.10(a) does not mandate the use of the lesser enhancement, but merely affords the sentencing court discretion to utilize it—he is entitled to have his sentence reviewed in light of the amendment."). *Cf. U.S. v. Park*, 951 F.2d 634, 635–36 (5th Cir. 1992) (under facts of this case amendment listed in § 1B1.10(d) "should be applied retroactively").

Juvenile Sentencing

Supreme Court holds juvenile sentences are limited by maximum Guidelines sentence that similarly situated adult could receive. "We hold . . . that application of the language in [18 U.S.C.] § 5037(c)(1)(B) permitting detention for a period not to exceed 'the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult' refers to the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines, 18 U.S.C. § 3553(b). Although determining the maximum permissible sentence under § 5037(c)(1)(B) will therefore require sentencing and reviewing courts to determine an appropriate guideline range in juvenile-delinquency proceedings, we emphasize that it does not require plenary application of the Guidelines to juvenile delinquents. Where that statutory provision applies, a sentencing court's concern with the Guidelines goes solely to the upper limit of the proper guideline range as setting the maximum term for which a juvenile may be committed to official detention, absent circumstances that would warrant departure under § 3553(b)."

The Court's holding resolves the conflict between *U.S. v. R.L.C.*, 915 F.2d 320, 325 (8th Cir. 1991) (maximum sentence limited by guideline range), and *U.S. v. Marco L.*, 868 F.2d 1121, 1124 (9th Cir.) (maximum term limited only by "the statute defining the offense"), *cert. denied*, 110 S. Ct. 369 (1989).

U.S. v. R.L.C., No. 90-1577 (U.S. Mar. 24, 1992) (Souter, J.) (concurring ops. by Scalia and Thomas, JJ.; dissenting op. O'Connor, J.).

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Relevant Conduct

Ninth Circuit holds that relevant conduct must meet test of "similarity, regularity, and temporal proximity." Defendant was convicted by a jury on two drug and two firearms counts, based on possession of a firearm and less than one gram of methamphetamine in March 1989. The presentence report relied on defendant's admission that he sold an ounce of methamphetamine every three days between June and September 1988, to calculate a total of forty ounces. He was sentenced on that basis to 97 months on the drug charges, whereas the guideline range would have been 10–16 months for the amount found at his arrest. Defendant argued on appeal that the 1988 conduct should not have been used in sentencing.

The appellate court remanded and set forth the analysis district courts should use to decide whether conduct is "relevant" for sentencing purposes. Citing *U.S. v. Santiago*, 906 F.2d 867, 872 (2d Cir. 1990), the court determined that the "pertinent factors to be considered are . . . 'the nature of the defendant's acts, his role, and the number and frequency of repetitions of those acts, in determining whether they indicate a behavior pattern.' . . . There must be '"sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct."' Thus, the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." (Citations omitted.)

"When one component is absent, however, courts must look for a stronger presence of at least one of the other components. In cases such as the present one, 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. *Compare [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 [the defendant's] arrest' must be 'clearly established' in order to be considered relevant)[, *cert. denied*, 111 S. Ct. 702 (1991)] *with U.S. v. Cosineau*, 929 F.2d 64, 68 (2d Cir. 1991) ('Because of the continuous nature of the conduct and the circumstances of this case, we are not reluctant to consider relevant the conduct that occurred during the course of a two year period.')." When "the relevance of the extraneous conduct depends primarily on its similarity to the conviction, it is not enough that the extraneous conduct merely amounts to the same offense as the offense for which the defendant was convicted. . . . [A] district court must consider whether specific similarities exist between the offense of conviction and the temporally remote conduct alleged to be relevant under . . . section 1B1.3(a)(2)."

"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." *Cf. U.S. v. Nunez*, No. 91-2752 (7th Cir. Mar. 25, 1992) (Bauer, C.J.) (affirmed: uncharged cocaine sales that occurred from 1986–88 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); *Santiago, supra*, at 871–73 (drug sales 8–14 months before sale of conviction properly considered—all sales were similar and to same individual). The 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.'" *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").

In remanding for reconsideration of the 1988 conduct, the court concluded that the government must show "similarity, regularity, and temporal proximity in sufficient proportions so that a sentence may fairly take into account conduct extraneous to the events immediately underlying the conviction. This test is especially important in cases where the extraneous conduct exists in 'discrete, identifiable units' apart from the conduct for which the defendant is convicted."

U.S. v. Hahn, No. 89-10592 (9th Cir. April 7, 1992) (Tang, J.).

Departures

Substantial Assistance

Ninth Circuit holds that when departure below statutory minimum is made under 18 U.S.C. § 3553(e), further departure for other mitigating circumstances is not authorized. Defendant pled guilty to a drug charge that carried a ten-year mandatory minimum sentence, which was greater than his guideline range (range not specified in opinion). The government made a motion under § 3553(e) and § 5K1.1, p.s. for downward departure based on defendant's substantial assistance and recommended a three-year sentence. The district court departed downward to impose a 39-month sentence. Defendant argued on appeal that the court should have departed further based on his claim of aberrant behavior.

The appellate court affirmed the sentence and held that the district court had no authority to depart for any reason other than defendant's substantial assistance. The court reasoned that generally "district courts do not have discretion to depart downward from mandatory minimum sentences imposed by statute." Section 5K1.1 "is the only section [of the Guidelines] that allows [such] a downward departure . . . . All other sections in part K address departures from the 'guidelines.' U.S.S.G. §§ 5K2.0–5K2.15."

"Here, the district court departed downward from the mandatory minimum sentence in response to a motion by the government based on Valente's substantial assistance. . . . There is no question this downward departure was proper. But the court had no authority to depart downward below the statutory minimum on the basis of Valente's aberrant behavior, nor for that reason to depart below the government's recommended downward departure once the minimum sentence level had been breached."

This is the first appellate court to apparently suggest that a § 3553(e) departure is limited by the government's recommended sentence. The Seventh Circuit has stated that the government's recommendation "should be the starting point" for the extent of departure. *U.S. v. Thomas*, 930 F.2d 526, 530–31 (7th Cir. 1991). *But cf. U.S. v. Pippin*, 903 F.2d 1478, 1485 (11th Cir. 1990) (once government makes § 5K1.1 motion it "has no control over whether and to what extent the district court departs from the Guidelines," except that it may argue on appeal that the sentence was "unreasonable"); *U.S. v. Wilson*, 896 F.2d 856, 859–60 (4th Cir. 1990) (under § 3553(e) "the limit of the district court's discretion is the question of whether or not the sentence imposed was reasonable," and court may depart down to probation).

One other court has specifically held that "only factors relating to a defendant's cooperation" may be considered in determining the extent of a departure under § 3553(e). *Thomas, supra*, at 529–30 (improper to factor in family responsibilities, § 5H1.6, p.s., when choosing extent of departure).

Note that in the instant case the guideline range was *below* the mandatory minimum. The holding here may not apply when the guideline range is *above* the mandatory minimum. That is, a court could depart for mitigating circumstances down to the minimum, then below it for substantial assistance.

U.S. v. Valente, No. 91-10256 (9th Cir. April 1, 1992) (Thompson, J.).

Criminal History

U.S. v. Glas, No. 90-3522 (7th Cir. Mar. 16, 1992) (Kanne, J.) (affirmed upward departure from 24–30 months to 48 months for defendant with 39 criminal history points: it was reasonable to "create" new criminal history categories above VI by adding one for every three points above 13 and increasing the minimum sentence by three months—the pattern for a defendant at offense level 10—thus resulting in new category XIV and 48–54 month range).

Offense Conduct

Possession of Weapon During Drug Offense

U.S. v. Sivils, No. 90-6366 (6th Cir. Mar. 31, 1992) (Jones, J.) (it was not clearly erroneous to give § 2D1.1(b)(1) enhancement to defendant who was a county sheriff and carried a gun as part of his job—carrying the firearm "as part of his status as a sheriff . . . does not mean . . . that the weapon could not be connected with the offense"). *Accord U.S. v. Ruiz*, 905 F.2d 499, 508 (1st Cir. 1990).

U.S. v. Soto, No. 91-1653 (2d Cir. Mar. 24, 1992) (Altimari, J.) (rejecting claim that § 2D1.1(b)(1) enhancement could not be applied unless defendant had personal knowledge of existence of weapons in apartment where he and codefendants were arrested, joining other circuits in holding that this "enhancement may be applied to a defendant's sentence based on possession of a weapon so long as the possession of the firearm was reasonably foreseeable to the defendant"). *Accord U.S. v. McFarlane*, 933 F.2d 898, 899 (10th Cir. 1991); *U.S. v. Blanco*, 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, 1349–50 (9th Cir. 1990); *U.S. v. Aguilera-Zapata*, 901 F.2d 1209, 1212–15 (5th Cir. 1990); *U.S. v. White*, 875 F.2d 427, 433 (4th Cir. 1989).

Sentencing Procedure

Plea Bargains

Second Circuit sets forth options on remand when sentence exceeds plea agreement that only specified amount of fines. Defendants and the government entered plea bargains that specified the amounts of the fines to be imposed but contained no other language limiting the sentence. The sentencing judge imposed fines several times higher than the agreement specified, stating that he did so because he imposed probation rather than prison terms. Defendants and the government agreed on appeal that both sentences should be remanded, but disagreed as to whether the district court should simply lower the fine amounts or also could replace the sentences of probation with terms of imprisonment.

The appellate court held that the defendants must be given the opportunity to withdraw their guilty pleas or the sentencing court "must conform the sentence to th[e] bargain by reducing the fine to the bargained amount." However, because the fine was the only component of the sentence that was stipulated, the district judge may, "if he elects to enforce the sentence bargains and reduce the fines, . . . exercise his discretion to impose terms of imprisonment with respect to the same counts for which the fine component of the sentence will be reduced. The extent of such terms, however, must not be so severe as to create an undue risk of deterring others from subsequent challenges to sentence components that might be unlawful." The court noted that defendants' "appellate 'victory' risks consequences that they might well regard as adverse," and therefore gave them the option to withdraw this appeal should they prefer "to accept their current sentences instead of facing the risk of imprisonment."

U.S. v. Bohn, No. 91-1433 (2d Cir. Mar. 19, 1992) (Newman, J.).

Imposition of Supervised Release

U.S. v. Saunders, No. 91-1501 (8th Cir. Mar. 2, 1992) (McMillian, J.) (remanded: court may depart to impose longer term of supervised release, but departure from 2–3-year term to 5-year term was improper here because statutory maximum term was three years; however, defendant was convicted of multiple counts and court may impose consecutive terms of supervised release to reach same result).

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Perez, 956 F.2d 1098 (11th Cir. 1992) (affirmed: even when concurrent sentences are called for under § 5G1.2, "the district court has the authority to impose consecutive rather than concurrent sentences if it follows the procedures for departing from the Guidelines"). *Accord U.S. v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991).

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Probation and Supervised Release

REVOCATION OF PROBATION

Third Circuit holds that when probation is revoked for drug possession, "not less than one-third of the original sentence" in 18 U.S.C. § 3565(a) refers to the original guideline range, not the term of probation imposed. Defendant's guideline range for her original offense was 0–4 months and she was sentenced to three years on probation. Her probation was later revoked, partly because she failed two drug tests. She was sentenced to prison for one year, in accordance with the 1988 amendment to 18 U.S.C. 3565(a), which states: "Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The district court interpreted the term "original sentence" to mean the three year probation term rather than the 0–4 month range for the original offense.

The appellate court disagreed and held that, consistent with circuit court interpretation of "initial sentencing" in § 3565(a)(2) (see case summaries below), "original sentence" means the guideline range for the original offense of conviction. The court explicitly disagreed with *U.S. v. Corpuz*, 953 F.2d 526 (9th Cir. 1992), which held that "original sentence" means the term of probation (*see* 4 *GSU* #15). "The Ninth Circuit attempted to resolve the conflict between the 1988 drug amendment and section 3565(a)(2) by noting that the two provisions are alternative means of sentencing, since only the former applies when the possession of a controlled substance is involved. . . . [W]e conclude that a better reading of the 'notwithstanding' clause is that it establishes a 'floor' below which the district court cannot resentence despite section 3565(a)(2) otherwise allowing the imposition of any sentence within the original sentencing range. In the case now before us, that 'floor' would be one and one-third month imprisonment since the original range was zero to four months."

In *Corpuz* the Ninth Circuit noted that "[p]enologically and semantically, probation is a sentence under the Sentencing Reform Act [of 1984]. It is no longer an alternative to sentencing; it is a sentence in and of itself." The Third Circuit disagreed, finding that "[a]lthough the statutory provisions enacted as part of the 1984 act refer to the 'sentence of probation,' . . . this is merely a change in form, rather than substance. The fundamental nature of probation remains unaltered." The court added that if it followed "the Ninth Circuit's reasoning that probation is a type of sentence, we would be forced to conclude that one-third of three years probation is one year probation, not one year imprisonment."

The court remanded, stating that "the proper way to resentence [after] a probation violation for possession of drugs is to revoke probation and impose a sentence not less than one-third of the maximum sentence for the original offense."

U.S. v. Gordon, No. 91-3605 (3d Cir. Apr. 13, 1992) (Cowen, J.) (Greenberg, J., concurring in result only).

Third Circuit holds statute, rather than Chapter 7 policy statements, controls revocation sentence, which is limited by guideline range for original offense. Defendant was sentenced to probation and then had probation revoked, both after the Nov. 1990 amendments to U.S.S.G. Chapter 7 took effect. Defendant's original guideline range was 0–6 months, but in sentencing him after revocation the district court followed the Revocation Table at § 7B1.4, p.s., which called for 3–9 months. The court departed upward, however, and imposed a 12-month term.

The appellate court held that the "plain wording" of 18 U.S.C. § 3565(a)(2) controls. The "sentence that was available . . . at the time of the initial sentencing" refers to the guideline range applicable to a defendant's original offense, and the revocation sentence is limited to that range. Every other circuit to rule on this issue has held the same, although those cases involved revocations that occurred before Nov. 1990. *See U.S. v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *U.S. v. White*, 925 F.2d 284, 286–87 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390, 391–92 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990).

The court then held that, to the extent § 7B1.4 conflicts with the statute, "the two standards must be reconciled with the statute always prevailing. . . . Therefore, the appropriate resentencing range in this case following revocation of probation was three to six months, representing a revocation table minimum of three months and a statutory maximum of six months." The Ninth Circuit has held that "[t]o the extent that the Guidelines conflict with [§ 3565(a)(2)], we find them invalid." *U.S. v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991) (revocation sentence within 12–18 month range called for by § 7B1.4, p.s. must be vacated and sentence reimposed within original guideline range of 4–10 months) [4 *GSU* #16].

Because the sentence was remanded the court did not rule whether departure was appropriate, but stated that the notice requirements set forth in *Burns v. U.S.*, 111 S. Ct. 2182 (1991) "would apply in this case had a departure been permissible." *U.S. v. Boyd*, No. 91-3597 (3d Cir. Apr. 13, 1992) (Cowen, J.).

U.S. v. Maltais, No. 91-8060 (10th Cir. Apr. 15, 1992) (Brorby, J.) (Defendant sentenced to probation before the Nov. 1990 amendments to § 7B1, p.s., but whose probation was revoked after that date, should be sentenced within guideline range that applied to his original offense, not under the "Revocation Table" at § 7B1.4, p.s. "Taking the law which recognizes probation as a sentence itself . . . a sentencing court must impose a sentence as calculated at the time of the initial sentencing to fix the applicable guideline range. Obviously, a sentencing court could still depart up or down from the Guideline range if the proper circumstances exist. Thus, as the policy statements concerning probation revocation were not in effect at the time Mr. Maltais was originally sentenced to a term of probation, they are inapplicable."). Where the revocation sentence was imposed before § 7B1.4 became effective, other circuits have held the same. See citations in *Boyd, supra.*

General Application Principles

Amendments

Second Circuit holds that whether to apply amendment to commentary that could benefit defendant—but was adopted after sentencing—should be considered in district, not appellate court. Defendant pled guilty to drug charges and was sentenced on the basis of the heroin involved in the offenses of conviction as well as drug amounts from two prior state convictions that involved related conduct. After he was sentenced the commentary to § 1B1.3 was amended (effective Nov. 1, 1991) by the addition of application note 7, which states that offense conduct for which a sentence was imposed prior to the conduct in the instant offense is not to be considered related conduct. The drug amounts from the state offenses would likely have been excluded had the amended commentary been in effect at sentencing.

The issue on appeal was "whether guideline amendments that are adopted after imposition of a sentence and that might benefit defendants are to be applied retroactively by a court of appeals to cases pending on direct review." Generally an appellate court should "apply the law in effect at the time it renders its decision... [but] there exists sufficient statutory direction 'to the contrary' to preclude appellate courts, in the first instance, from entertaining requests to apply post-sentence guideline amendments retroactively to cases pending on direct review. Our conclusion, however, would not preclude the application to pending cases of amendments that merely clarify."

The court concluded that by imposing upon the Sentencing Commission, in 18 U.S.C. § 3582(c)(2), "a continuing duty to revise the guidelines, and by authorizing, but not requiring, sentencing courts to reduce sentences in light of guideline revisions, Congress appears to have expressed a preference for discretionary district court action in response to Commission changes, rather than mandatory appellate court application of all post-sentence Commission changes to pending appeals. We need not decide at this point whether section 3582(c)(2) applies broadly... or whether it applies more narrowly only to those changes that precisely reduce an actual sentencing range." The court noted that the amendment here is not listed in § 1B1.10(d), p.s., but left "the effect of this policy statement,... its relationship to section 3582(c)(2)," and the extent and exercise of the district court's discretion under either section, for the district court to determine on application of the defendant or sua sponte.

U.S. v. Colon, No. 91-1360 (2d Cir. Apr. 6, 1992) (Newman, J.).

Adjustments

Obstruction of Justice

U.S. v. Benson, No. 91-2732 (8th Cir. Apr. 7, 1992) (Larson, Sr. Dist. J.) (Remanded: § 3C1.1 enhancement for obstruction of justice "may not be based solely upon [defendant's] failure to convince the jury of his innocence, [but] it may be 'based on the experienced trial judge's express finding, based on the judge's personal observations, that [defendant] lied to the jury.'... [T]he analysis does not call for the specific fact finding and statements of particularity urged by Benson, but does call for an independent evaluation and determination by the court that Benson's testimony was false." Here, the district court simply stated that the jury verdict demonstrated that defendant gave perjured testimony.). *But cf. U.S. v. Dunnigan*, 944 F.2d 178, 183–85 (4th Cir. 1991) (to apply enhancement because defendant's testimony was disbelieved by jury unconstitutionally places "an intolerable burden upon the defendant's right to testify in his own behalf").

U.S. v. Gardiner, 955 F.2d 1492, 1499 (11th Cir.1992) (Reversed: "We conclude as a matter of law that the defendant's assertions do not justify [§ 3C1.1] enhancement because a pre-sentence assertion cannot be material to sentencing if the assertion's truth requires the jury's verdict to be in error.... Clearly, the probation officer would have to disregard the jury's determination, that the defendant agreed to and did possess cocaine with intent to distribute, in order to believe the defendant's assertion to him that he knew nothing about the cocaine." The appellate court considered notes 4(c) and 5 of the commentary even though they were amended Nov. 1990, after defendant was sentenced, because they "serve merely to clarify the meaning of the 1989 and current versions of section 3C1.1."). *See also U.S. v. Tabares*, 951 F.2d 405, 410 (1st Cir. 1991) (enhancement reversed because no evidence giving false social security number to probation officer materially impeded presentence investigation); *U.S. v. DeFelippis*, 950 F.2d 444, 447 (7th Cir. 1991) (enhancement reversed because misstatements to probation officer about employment history were immaterial and could not influence sentence). *See* 4 *GSU* #13.

Acceptance of Responsibility

U.S. v. Valencia, 957 F.2d 153, 156 (5th Cir. 1992) (Remanded: District judge, who was "about halfway convinced" defendant had accepted responsibility, could not reduce offense level by one for "partially accepting" responsibility. "U.S.S.G. § 3E1.1 does not contemplate either a defendant's mere partial acceptance of responsibility or a district court's being halfway convinced that a defendant accepted responsibility. The 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 for his criminal conduct.... To allow... a one-level reduction permits the district court to straddle the fence in close cases without explicitly finding whether the defendant did or did not accept responsibility." The appellate court noted that if the § 3E1.1 reduction is denied, "partial acceptance" may be considered in determining the sentence within the guideline range.).

Criminal History

Career Offender Provision

U.S. v. Garrett, No. 90-3210 (D.C. Cir. Mar. 17, 1992) (Henderson, J.) (Affirmed: In the § 4B1.1 offense level table, "Offense Statutory Maximum" includes any applicable statutory sentencing enhancements that increase the maximum sentence. Under 21 U.S.C. § 841(b)(1)(B)(iii), the maximum sentence is 40 years for first offenders but life for those, like defendant, with certain prior drug convictions. Thus, for this defendant the "Offense Statutory Maximum" is life.). *Accord 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).

Amendment and Correction:

U.S. v. Valente, No. 91-10256 (9th Cir. Apr. 1, 1992) (Thompson, J.), reported in 4 *GSU* #20 (April 21, 1992), was amended on April 29. Please make the following changes to your copy of that *GSU*: (1) end the quotation in the first paragraph on p.2 with "Valente's aberrant behavior" by deleting the remaining language of that quote; (2) delete the first sentence of the next paragraph (note: the rest of the paragraph is correct but no longer relevant to *Valente*).

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Departures

SUBSTANTIAL ASSISTANCE

Supreme Court holds that district courts have authority to review for unconstitutional motives government's refusals to file substantial assistance motions. Defendant faced a 10-year mandatory minimum sentence on a drug charge. He provided information to the government that led to the arrest of another drug dealer, but the government refused to move for a substantial assistance departure under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, p.s. The Fourth Circuit affirmed, holding that defendants "may not inquire into the government's reasons and motives." *U.S. v. Wade*, 936 F.2d 169, 172 (4th Cir. 1991) [4 *GSU* #5].

The Supreme Court affirmed the decision because defendant had failed to raise and support a claim of improper motive, but held that district courts may review for constitutional violations the government's refusal to move for a substantial assistance departure. While recognizing that "in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted," the Court agreed with defendant that "a prosecutor's discretion when exercising that power is subject to constitutional limitations that district courts can enforce. Because we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions, . . . we hold that federal 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. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." *Accord U.S. v. Drown*, 942 F.2d 55, 59–60 (1st Cir. 1991) [4 *GSU* #8]; *U.S. v. Doe*, 934 F.2d 353, 358 (D.C. Cir. 1991) [4 *GSU* #4]; *U.S. v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (dicta). *Cf. 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), *cert. denied*, 110 S. Ct. 1493 (1990).

Defendant sought a remand "to allow him to develop a claim that the Government violated his constitutional rights by withholding a substantial-assistance motion 'arbitrarily' or 'in bad faith.' . . . As the Government concedes, . . . Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." However, defendant failed to adequately raise and support such a claim, and "a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional but generalized allegations of improper motive. . . . [A] defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'"

Wade v. U.S., No. 91-5771 (U.S. May 18, 1992) (Souter, J.).

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Andruska, No. 91-2748 (7th Cir. May 18, 1992) (Flaum, J.) (holding that government must receive notice before district court may depart downward on ground not raised by either party, following reasoning of *Burns v. U.S.*, 111 S. Ct. 2182 (1991), which held that defendant must receive "reasonable notice" before district court may depart upward on ground not previously identified). *Accord U.S. v. Jagmohan*, 909 F.2d 61, 64 (2d Cir. 1990); U.S.S.G. § 6A1.2, p.s., comment. (n.1) (Nov. 1991).

MITIGATING CIRCUMSTANCES

District court holds departure warranted because government agent delayed arrest to trigger mandatory minimum and discover source of drugs. Defendant was convicted on distribution of cocaine base charges. The government argued that 50.4 grams were involved in the eight counts of conviction, but the district court found there were 49.8 grams. Fifty or more grams would have required a ten-year minimum term by statute. The guideline range was 97–121 months, but the court departed downward to 72 months.

The court reasoned departure was warranted because the Sentencing Commission "has failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest. The agent in this case was undoubtedly aware that defendant's sentence would be increased two-fold if he continued to transact business until over 50 grams of cocaine base were sold. The court finds it not at all fortuitous that the agent arrested the defendant only after he had arranged enough successive buys to reach the magic number."

"For drug offenses, one factor dominates the . . . guideline sentence—'the grade of the offense' as evidenced by the quantity of drugs involved. . . . [However,] the circumstances under which the offense was committed should be considered, especially where undercover agents persevere in their transactions until a suspect provides the aggregate amount of drugs to trigger a mandatory minimum sentence or where the undercover agent's investigation shifts from the identified-seller to the undiscovered 'source.' Both of these circumstances occurred in this offense." The court noted Eighth Circuit dicta alluding to "'sentencing entrapment' as a potential mitigating circumstance which could warrant departure." *See U.S. v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991).

U.S. v. Barth, No. 4-91-103 (D.Minn. Apr. 9, 1992) (Rosenbaum, J.).

Criminal History

CALCULATION

Fifth and Eleventh Circuits hold that district court has discretion to allow defendant to challenge validity of prior conviction at the sentencing hearing. In the Fifth Circuit, the district court had included a 1982 Texas conviction in defendant's criminal history score, and indicated that it did not have discretion to consider defendant's claim that the convic-

tion was constitutionally invalid. Between defendant's instant offense and sentencing, Application Note 6 to § 4A1.2 was amended. The original note excluded from the criminal history score convictions "which the defendant shows to have been constitutionally invalid." The amendment excludes "convictions that a defendant shows to have been *previously ruled* constitutionally invalid" (Nov. 1990) (emphasis added). At the same time background commentary to § 4A1.2 was added, which stated in part: "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

The Fifth Circuit held that the 1990 amendments applied and note 6 does not prohibit a challenge to a prior conviction. The court read note 6 and the background commentary as complementary, rather than conflicting, and concluded that "a court is only required to exclude a prior conviction . . . if the defendant shows it to 'have been previously ruled constitutionally invalid'; otherwise, the district court has discretion as to whether or not to allow the defendant to challenge the prior conviction at sentencing." *Accord U.S. v. Jakobetz*, 955 F.2d 786, 805 (2d Cir. 1992). *Contra U.S. v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991) (holding, without discussing the background commentary, that under amended note 6 defendants may no longer collaterally attack prior convictions).

The appellate court remanded because it was unsure if the district court simply refused to let defendant challenge the 1982 conviction or allowed the challenge and ruled against it. The court set forth factors the district court may consider "in deciding whether to entertain the challenge to the prior conviction. These include 'the scope of the inquiry that would be needed to determine the validity of the conviction,' . . . comity, . . . [and] whether the defendant has a remedy other than the sentencing proceeding through which to attack the prior conviction." As to the last, the court stated that "a district court should ordinarily entertain a challenge to a prior conviction in a sentencing hearing if it does not appear that the defendant has an alternative remedy through which to challenge the conviction." The court added that "[i]f the challenged prior conviction is one which the district court determines will not affect its sentencing decision in any event, it may so state on the record and decline to hear the challenge on that basis."

U.S. v. Canales, No. 91-5644 (5th Cir. May 7, 1992) (Garwood, J.)

In the Eleventh Circuit, defendant was convicted of conspiracy to possess with intent to distribute cocaine. As in *Canales* above, he was sentenced after the 1990 amendment to § 4A1.2's notes. He contended that a prior state burglary conviction, although facially valid, was based on an unconstitutional guilty plea and should not be factored into his criminal history score. The district court refused to hold an evidentiary hearing on the matter and factored in the prior conviction.

The Eleventh Circuit held that amended note 6 applied to defendant and observed that the new language "seems clearly to indicate that the Sentencing Commission did not intend to provide for collateral attack of a prior conviction at sentencing." However, the court also recognized that "this suggestion is clouded by the 'Background' section" added at the same time, which leaves collateral attack to the discretion of the district court. Relying on *U.S. v. Cornog*, 945 F.2d 1504, 1510–11 (11th Cir. 1991), which held that under the amended notes a defendant could attack the validity of a prior parole revocation, the court held that "the rule in this circuit is that district courts have the discretion to collaterally examine the constitutionality of facially valid prior convictions when determining whether to consider them in computing a defendant's criminal history score." The case was remanded because "the district court abused its discretion in failing to properly determine whether to consider Roman's challenge and hold an evidentiary hearing."

U.S. v. Roman, 960 F.2d 130 (11th Cir. 1992) (per curiam).

Sentencing Procedure

U.S. v. Canada, No. 91-1691 (1st Cir. Apr. 2, 1992) (Campbell, Sr. J.) (Affirming § 3B1.1(b) adjustment for role in offense even though presentence report did not recommend it and government did not request it. *Burns v. U.S.*, 111 S. Ct. 2182 (1991), which required notice to defendant prior to sua sponte departure by district court, does not apply: "We do not read *Burns* to require special notice where, as here, a court decides that an upward adjustment is warranted based on offense or offender characteristics delineated within the Sentencing Guidelines themselves, at least where the facts relevant to the adjustment are already known to the defendant. . . . [T]he guidelines themselves provide notice to the defendant of the issues about which he may be called upon to comment."). *See also U.S. v. McLean*, 951 F.2d 1300, 1302 (D.C. Cir. 1991) (*Burns* does not require advance notice of denial of § 3E1.1 reduction that was recommended in PSR); *U.S. v. Palmer*, 946 F.2d 97, 100 (9th Cir. 1991) (same but not citing *Burns*); *U.S. v. White*, 875 F.2d 427, 431–32 (4th Cir. 1989) (defendant was on notice that evidence surrounding obstruction of justice might be introduced).

Adjustments

Obstruction of Justice

U.S. v. Thompson, No. 91-3091 (D.C. Cir. May 8, 1992) (D.H. Ginsburg, J.) (Wald, J., dissenting) (Affirmed obstruction of justice enhancement where jury did not believe defendant's testimony—although it was "not implausible" and was corroborated by witnesses—and district court specifically found defendant testified untruthfully at trial. The appellate court stated: "On its face, § 3C1.1 does not require that a defendant's false testimony be implausible or particularly flagrant. Rather, . . . 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." The court also noted that "[t]he admonition in Application Note 1 [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' standard that applies to most other sentencing determinations . . . —but it does not require proof of something more than ordinary perjury.").

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Cohen, No. 91-1786 (6th Cir. May 22, 1992) (Siler, J.) (Affirmed sentence of 2 years, rather than the 6–12 months called for by § 7B1.4, p.s., after revocation of supervised release: "we hold that policy statements in § 7B1.4 of the Guidelines are not binding upon the district court, but must be considered by it in rendering a sentence for a violation of supervised release. . . . Therefore, as the district court in this case considered (and declined to follow) the provisions of § 7B1.4 . . . its judgment is affirmed."). *Accord U.S. v. Lee*, 957 F.2d 770, 773 (10th Cir. 1992) [4 *GSU* #16]; *U.S. v. Blackston*, 940 F.2d 877, 893 (3d Cir.), *cert. denied*, 112 S. Ct. 611 (1991).

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Offense Conduct

DRUG QUANTITY

Second Circuit holds that uningestible, unmarketable portions of drug mixtures should not be counted, but Fifth Circuit reaffirms earlier holding that they should. The defendant in the Second Circuit had attempted to import cocaine dissolved in bottles of creme liqueur. The cocaine was distillable from the liqueur and weighed less than half of the total mixture, but the district court concluded that *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) [4 *GSU* #4], mandated use of the entire drug mixture in setting the offense level.

The appellate court reversed and remanded, holding that *Chapman* was distinguishable and that the weight of unusable portions of a drug mixture should not be used under U.S.S.G. § 2D1.1: "In stark contrast to the LSD in *Chapman*, the 'mixture' here was useless because it was not ready for distribution . . . It could not be ingested or mixed with cutting agents unless and until the cocaine was distilled from the creme liqueur. After distillation, it could be sold . . . [and o]nly at that point, could Congress' rationale for penalizing a defendant with the entire amount of a 'mixture' sensibly apply." The court also stated that, "[b]ecause the creme liqueur must be separated from the cocaine before the cocaine may be distributed, it is not unreasonable to consider the liquid waste as the functional equivalent of packaging material, . . . which quite clearly is not to be included in the weight calculation. *See Chapman*, 111 S. Ct. at 1926." The court did, however, "emphasize the limited nature of our holding. The . . . creme liqueur is not a cutting agent or dilutant which, when mixed with cocaine, is ingestible. Cutting agents, of course, must always be factored into the weight calculation."

The Second Circuit is the third court of appeals to distinguish *Chapman* and exclude unusable portions of drug mixtures. *See also U.S. v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991) (methamphetamine mixture) [4 *GSU* #9]; *U.S. v. Rolande-Gabriel*, 938 F.2d 1231, 1237 (11th Cir. 1991) (cocaine mixture) [4 *GSU* #8]. But see cases below.

U.S. v. Acosta, No. 91-1527 (2d Cir. May 13, 1992) (McLaughlin, J.) (Van Graafeiland, J., dissenting). *See also U.S. v. Salgado-Molina*, No. 91-1644 (2d Cir. May 29, 1992) (per curiam) (following *Acosta*).

In the Fifth Circuit, defendants were sentenced on the basis of the entire weight of a methamphetamine mixture comprised of 95% waste product and 5% methamphetamine. The appellate court upheld the sentences, concluding that it was bound by its earlier decisions requiring use of the total weight of a drug mixture. *See, e.g., U.S. v. Baker*, 883 F.2d 13 (5th Cir. 1989) (use total weight of mixture containing methamphetamine even though most of mixture was waste material), *cert. denied*, 111 S. Ct. 82 (1990). Defendants claimed that *Chapman* "effectively overruled *Baker* and its progeny," but the court disagreed: "To the contrary, much of the language in *Chapman* supports this court's decision in *Baker*." *See also U.S. v. Restrepo-Contreras*, 942 F.2d 96, 99 (1st Cir. 1991) (use total weight of cocaine mixed with beeswax) [4 *GSU* # 12]; *U.S. v. Mahecha-Onofre*, 936 F.2d 623, 625-26 (1st Cir. 1991) (use total weight of cocaine and acrylic material chemically bonded together) [4 *GSU* #7].

U.S. v. Walker, 960 F.2d 409 (5th Cir. 1992).

Ninth Circuit holds that inclusion of drugs distributed by others before defendant's involvement requires specific finding that defendant could have reasonably foreseen earlier transactions. Defendant and five others were initially charged under a multiple-count drug conspiracy indictment, but defendant was later reindicted on, and pled guilty to, only one count of aiding and abetting a single drug distribution of 252 grams of cocaine on June 28, 1990. No evidence connected defendant with distribution of cocaine before that date, but the probation officer recommended that cocaine sales by other defendants on June 11 and 20 be included as relevant conduct under § 1B1.3(a)(2). The district court sentenced defendant on the basis of the 840 grams from all three transactions.

The appellate court remanded "for express findings regarding whether Chavez-Gutierrez was accountable for the June 11th and June 20th transactions." The court held that "under Section 1B1.3(a)(2), a district court must include the total amount of a controlled substance alleged in multiple counts if the defendant could have reasonably foreseen that other persons would commit the alleged crimes in furtherance of a joint agreement. The district court could not include the amount of cocaine distributed on June 11, 1990 and June 20, 1990, in calculating Chavez-Gutierrez's base offense level, unless the presentence report set forth facts showing that the defendant aided and abetted these sales or was a member of a conspiracy to distribute cocaine prior to June 28, 1990." *See also U.S. v. Edwards*, 945 F.2d 1387, 1391–97 (7th Cir. 1991) (in conspiracy, must make specific findings as to amount of drugs "reasonably foreseeable" to each conspirator) [4 *GSU* #12]; *U.S. v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir.) (late-entering coconspirator responsible only for amounts reasonably foreseen), *cert. denied*, 112 S.Ct. 347 (1991) [4 *GSU* #2].

U.S. v. Chavez-Gutierrez, No. 91-30025 (9th Cir. April 24, 1992) (Alarcon, J.).

Adjustments

ACCEPTANCE OF RESPONSIBILITY

Eleventh Circuit holds that district court may not deny § 3E1.1 reduction for defendants' exercise of Fifth Amendment rights or the right to appeal. Defendants were convicted of various drug offenses. They argued on appeal that, although they had previously admitted their involvement in drug trafficking and expressed remorse, "the district court improperly conditioned the two level [§ 3E1.1] reduction on their accepting responsibility for their wrongs in open court and on their giving up their right to appeal."

The appellate court agreed and remanded for reconsideration: "The court's comments during sentencing demonstrate

that it balanced the evidence of acceptance of responsibility against the Appellants' exercise of their Fifth Amendment rights and their intent to exercise their right to appeal; this was improper.... The 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 through his actions or statements.... However, if a defendant has shown some sign of remorse but has also exercised constitutional or statutory rights, the sentencing judge may *not* balance the exercise of those rights against the defendant's expression of remorse to determine whether the 'acceptance' is adequate." (Emphasis in original.)

"Stated another way, the sentencing court may consider all of the criteria set out in the commentary to section 3E1.1 as well as any other indications of acceptance of responsibility and weigh these in the defendant's favor.... The exercise of [constitutional or statutory] rights may diminish the defendant's chances of being granted the two level reduction, not because it is weighed against him but because it is likely that there is less evidence of acceptance to weigh in his favor."

U.S. v. Rodriguez, 959 F.2d 193, 195–98 (11th Cir. 1992) (per curiam).

Departures

Mitigating Circumstances

Second Circuit upholds departure for extraordinary family circumstances, calls policy statements "interpretive guides" that are not the equivalent of Guidelines. In sentencing defendant for theft and bribery convictions, the district court departed downward ten offense levels because of defendant's family circumstances, which included sole responsibility for raising four young children. Defendant was sentenced to six months of home detention, plus supervised release and substantial restitution. The government appealed, arguing that under § 5H1.6, p.s.—"family ties and responsibilities... are not ordinarily relevant" for departures—family circumstances alone can never justify downward departure.

The appellate court upheld the departure and examined "the weight courts should give to such policy statements." The court concluded that "the policy statements cannot be viewed as equivalent to the Guidelines themselves," and that "courts must carefully distinguish between the Sentencing Guidelines and the policy statements that accompany them, and employ policy statements as interpretive guides to, not substitutes for, the Guidelines themselves." As to departures, "[t]he central question in any departure decision must be the one imposed by the statute: Is there an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission?" Policy statements are to be considered, but "do not render the statutory standard superfluous."

Applying "that standard to the question of family circumstances," the court concluded that the wording of § 5H1.6—that family circumstances are "not ordinarily relevant"—indicates it is "a 'soft' policy statement, rather than one with unequivocal language. If the Commission had intended an absolute rule that family circumstances may never be taken into account in any way, it would have said so.... Section 5H1.6's phrasing confirms the Commission's understanding that ordinary family circumstances do not justify departure but extraordinary family circumstances may." Here, the circumstances amply supported the district court's "finding that Johnson faced extraordinary parental responsibilities."

U.S. v. Johnson, No. 91-1515 (2d Cir. May 14, 1992) (Oakes, C.J.).

Criminal History

Career Offender Provision

U.S. v. Sahakian, No. 91-10199 (9th Cir. May 26, 1992) (Schroeder, J.) (Remanded: "following the November 1, 1989 revision of the definitional provision of U.S.S.G. § 4B1.2, being a felon in possession of a firearm is not a crime of violence for purposes of applying the Career Offender guideline." *See also* U.S.S.G. App. C (amendment 433) (Nov. 1991) ("'crime of violence' does not include the offense of unlawful possession of a firearm by a felon"). The Ninth Circuit previously held that under the pre-Nov. 1989 definition, felon in possession of a firearm was "by its nature" a crime of violence. *U.S. v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1990). However, the 1989 amendment "shifted the emphasis from an analysis of the 'nature' of the crime charged to an analysis of the elements of the crime charged or whether the actual charged 'conduct' of the defendant presented a serious risk of physical injury to another." Here, defendant was only charged with "possessing a firearm," which "does not have as an element the actual, attempted or threatened use of violence nor does the actual conduct it charges involve a serious potential risk of physical injury to another."). *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). *Contra U.S. v. Stinson*, 957 F.2d 813, 814–15 (11th Cir. 1992) (reaffirming prior holding that unlawful possession is crime of violence despite amendments). *Cf. U.S. v. Doe*, 960 F.2d 221 (1st Cir. 1992) (citing § 4B1.2 and amendment 433 as support for holding that "the felon-in-possession crime is not a 'violent felony'" for purposes of 18 U.S.C. § 924(e)).

Probation and Supervised Release

Revocation of Probation

U.S. v. Byrkett, No. 91-3808 (8th Cir. Apr. 24, 1992) (per curiam) (Affirming 8-month prison term after revocation of probation for possession of drugs where guideline range for original forgery offense was 0–6 months and defendant was sentenced to 2 years probation. "We agree with the Ninth Circuit's analysis [in *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) (*see* 4 *GSU* #15)]... that the last sentence of [18 U.S.C.] section 3565(a) mandates a sentence of at least one-third of the original sentence of probation when the probationer violates the conditions of his probation by possessing controlled substances."). *Contra U.S. v. Gordon*, No. 91-3605 (3d Cir. Apr. 13, 1992) (as amended Apr. 30, 1992) ("original sentence" in § 3565(a) refers to original guideline range, not to term of probation imposed) [4 *GSU* # 21].

Revocation of Supervised Release

U.S. v. Cooper, No. 91-5455 (4th Cir. Apr. 24, 1992) (Sprouse, J.) (reversed: under 18 U.S.C. § 3583(e), "district court is without statutory authority to reimpose, after revoking, a term of supervised release"). *Accord U.S. v. Holmes*, 954 F.2d 270, 272 (5th Cir. 1992); *U.S. v. Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990). *Contra U.S. v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991).

Certiorari Granted:

U.S. v. Dunnigan, 944 F.2d 178 (4th Cir.-1991) [4 *GSU* #10], *cert. granted*, 112 S. Ct. — (May 26, 1992) (No. 91-1300). Question presented: Does the Constitution prohibit district court from enhancing defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that defendant committed perjury by denying guilt at trial?

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Departures

SUBSTANTIAL ASSISTANCE

Second Circuit remands case for further proceedings on whether government acted in bad faith in refusing to move for substantial assistance departure. Defendant entered into a plea agreement under which the government would move for a departure under § 5K1.1, p.s. if, in its "sole and unfettered discretion," it was satisfied with his cooperation. As requested, defendant testified at the trial of a codefendant, but the codefendant was acquitted and the government refused to make the § 5K1.1 motion. At the sentencing hearing defendant claimed the refusal was in bad faith, but the district court accepted the government's reasons for refusing and ruled, without making specific findings, that the government acted in good faith.

The appellate court remanded for further proceedings. The record indicated that the only cooperation sought from defendant was his truthful testimony, and there was no evidence or claim by the government that he testified untruthfully. Of the six reasons offered by the government for its refusal, only one—that defendant's testimony was "inconsistent" with that of another testifying codefendant—might be valid as a matter of law. However, remand was required because no specific finding was made on that issue. The appellate court indicated that the inquiry on remand would be affected by the particular circumstances of this case: "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."

U.S. v. Knights, No. 92-1016 (2d Cir. June 23, 1992) (Pratt, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Vilchez, No. 91-50429 (9th Cir. June 23, 1992) (Tang, J.) (Remanded: District court had no authority to depart downward to reduce disparity between this defendant and another participant in the same heroin distribution scheme who was arrested several months earlier, was tried in state court, and received a shorter sentence. Government's decision to leave one case in state court and try the other in federal court was not an unusual circumstance and "the desire to equalize state and federal sentences does not constitute a permissible basis for departure."). *See also U.S. v. Reyes*, No. 91-50301 (9th Cir. June 8, 1992) (Pregerson, J.) (affirmed: district court properly held it did not have authority to grant downward departure where defendant's "co-accused" was tried in state court and received much lower sentence); *U.S. v. Mejia*, 953 F.2d 461, 468 (9th Cir.) (may not depart downward to avoid unequal treatment of codefendants), *cert. denied*, 112 S. Ct. 1983 (1992). *Cf. U.S. v. Sitton*, No. 91-50154 (9th Cir. July 2, 1992) (O'Scannlain, J.) (affirmed: fact that defendants would have received substantially shorter sentences had they been tried in state court is not proper basis for departure); *U.S. v. Dockery*, (D.C. Cir. June 9, 1992) (R. Ginsburg, J.) (reversed: may not depart because U.S. Attorney first brought charges in D.C. Superior Court, then dropped them and recharged defendant in federal court to take advantage of harsher penalties).

U.S. v. Higgins, No. 91-1877 (3d Cir. June 16, 1992) (Hutchinson, J.) (Affirmed in part, remanded: "To the extent that the disparity of sentences among the co-defendants is alleged to be a mitigating factor, . . . this is not a proper basis for a downward departure." However, the district court erred in holding it could not consider defendant's claim that his youth, significant family ties and responsibilities, and stable employment record warranted departure—court has discretion to depart if one of these factors "can be characterized as extraordinary," and should consider whether defendant's circumstances "fall within the very narrow category of extraordinary.").

EXTENT OF DEPARTURE

U.S. v. Streit, No. 90-10509 (9th Cir. May 19, 1992) (as amended) (Goodwin, J.) (Affirmed in part and remanded: Defendant inflicted bodily injury on arresting officers that was not accounted for in his offense guideline. The district court properly departed, under § 5K2.2, p.s., by analogizing to § 2A2.2(b)(3)(A) (aggravated assault), but incorrectly gave two two-level increases—one for each officer injured—because under the rules for grouping offenses only one two-level increase would have resulted.).

DEPARTURE ABOVE CATEGORY VI

U.S. v. Spears, No. 89-3154 (7th Cir. June 9, 1992) (Bauer, C.J.) (Affirmed: Defendant, who was already in criminal history category VI, would have been a career offender had two prior assaults not been consolidated. It was "eminently reasonable" and "related to the structure of the Guidelines" to depart upward and sentence defendant within the range for the offense level midway between his offense level and level he would have been assigned as a career offender.).

U.S. v. Streit, No. 90-10509 (9th Cir. May 19, 1992) (as amended) (Goodwin, J.) (Affirmed in part and remanded: "We decline to mandate that sentencing judges adhere to any one particular approach to departures beyond [criminal history] category VI. We do require, however, that the sentencing court follow some reasonable, articulated methodology consistent with the purposes and structure of the guidelines." For career offender, district court could calculate departure by "horizontal analogy" to hypothetical categories above VI. *Accord U.S. v. Schmude*, 901 F.2d 555, 560 (7th Cir. 1990) [3 *GSU* #6]. *See also U.S. v. Molina*, 952 F.2d 514, 522 (D.C. Cir. 1992) (approach in *Schmude* "appears to make the most

sense"); *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1990) (en banc) (*Schmude* method acceptable). However, the sentence must be remanded because the court did not adequately explain how it calculated the hypothetical categories or why it found category IX appropriate rather than VII or VIII.

Also, the district court improperly increased the offense level, a "vertical analogy," in setting the departure: "[F]actors to be considered in departing from applicable criminal history categories are distinct from those relevant to departing from inappropriate offense levels," and thus prior criminal conduct reflecting an inadequate criminal history score "'does not provide the basis for an offense level departure.'"). *Accord U.S. v. Jones*, 948 F.2d 732, 739 (D.C. Cir. 1991); *U.S. v. Thornton*, 922 F.2d 1490, 1494 (10th Cir. 1990).

Criminal History

U.S. v. Spears, No. 89-3154 (7th Cir. June 9, 1992) (Bauer, C.J.) (Affirmed upward departure: District court held that defendant's criminal history category—fifteen prior convictions and confinement for 20 out of past 32 years—did not adequately reflect the seriousness of his past criminal conduct or the likelihood that he would commit future crimes, § 4A1.3, p.s. The court also held that defendant "fit[s] the classic profile of a career recidivist" who is a threat to the public welfare and safety under § 5K2.14, p.s., and the appellate court found "no error in the judge's factual findings.").

Adjustments

Acceptance of Responsibility

U.S. v. Frazier, No. 91-5865 (4th Cir. June 12, 1992) (Luttig, J.) (Affirmed: "[C]onditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege against self-incrimination does not penalize the defendant... in violation of the Fifth Amendment." The § 3E1.1 reduction was properly denied to defendant who stole 1,200 money orders worth over five million dollars, admitted stealing them and cooperated with the government in returning most of the remaining uncashed money orders, but refused to further assist the government in locating the rest of the orders on the ground that doing so required providing information that might expose him to further prosecution.). *Accord U.S. v. Mourning*, 914 F.2d 699, 706–07 (5th Cir. 1990). *Contra U.S. v. Rodriguez*, 959 F.2d 193, 195–98 (11th Cir. 1992) (per curiam) ("section 3E1.1 does not allow the judge to weigh against the defendant the defendant's exercise of constitutional or statutory rights") [4 *GSU* #23]; *U.S. v. Frierson*, 945 F.2d 650, 658–60 (3d Cir. 1991) (denial of reduction for refusal to admit conduct beyond offense of conviction violates Fifth Amendment) [4 *GSU* #11]; *U.S. v. Watt*, 910 F.2d 587, 592 (9th Cir. 1990) ("court cannot consider *against* a defendant any constitutionally protected conduct") [3 *GSU* #10]; *U.S. v. Oliveras*, 905 F.2d 623, 626–28 (2d Cir. 1990) (per curiam) (denying reduction for refusal to admit to crimes outside offense pled to violates Fifth Amendment); *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989) [2 *GSU* #6].

U.S. v. Shipley, 963 F.2d 56 (5th Cir. 1992) (per curiam) (Affirmed: Proper to deny § 3E1.1 reduction to defendant who "clearly admitted and accepted full responsibility" for the offense but denied he was a leader under § 3B1.1. "Even though leadership role in the offense of conviction is covered in a different section of the guidelines than is acceptance of responsibility for committing that crime, such a role is conduct related to the offense and thus proper grist for the 'acceptance of responsibility' mill.").

Abuse of Position of Trust

U.S. v. Williams, No. 91-1371 (10th Cir. June 1, 1992) (Moore, J.) (Affirmed § 3B1.3 enhancement for a military pay account technician and auditor who embezzled funds. Court noted: "In determining whether a defendant was in a 'position of trust' courts have considered a number of factors. These include: the extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed; 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." (Citations omitted.)).

General Application Principles

Incriminating Statements As Part of Cooperation Agreement

U.S. v. Marsh, 963 F.2d 72 (5th Cir. 1992) (per curiam) (Remanded: When defendant, pursuant to § 1B1.8(a), enters into cooperation agreement with government that states he would "not be prosecuted further for activities that occurred or arose out of [his] participation in the crime charged," self-incriminating information provided to probation officer may not be used against him in sentencing.). *See also* U.S.S.G. § 1B1.8, comment. (n.5) (Nov. 1991) (§ 1B1.8(a) limits use of self-incriminating information in determining guideline range, "e.g., where the defendant, subsequent to having entered into a cooperation agreement, repeats such information to the probation officer preparing the presentence report").

More Than Minimal Planning

U.S. v. Maciaga, No. 91-3075 (7th Cir. June 8, 1992) (Kanne, J.) (Reversed: Part-time bank security guard who stole night deposit bag did not engage in "more than minimal planning," §§ 2B1.1(b)(5) and 1B1.1, comment. (n.1(f)). Defendant's offense was "much less complicated and show[ed] much less premeditation" than other cases where the enhancement has been applied, involved little activity outside of his normal duties, and did not involve "repeated acts over a period of time." Furthermore, defendant's steps to conceal his crime were not out of the ordinary and there was "no evidence of any advance planning in Maciaga's efforts at concealment.").

U.S. v. Williams, No. 91-1371 (10th Cir. June 1, 1992) (Moore, J.) (Affirmed: Noting that "more than minimal planning is deemed present in any case involving repeated acts over a period of time," see § 1B1.1, comment. (n.1(f)), court held that embezzler engaged in more than minimal planning under § 2B1.1(b)(5) where embezzlements occurred over period of six months and involved numerous computer entries. Defendant also took "significant steps" to conceal the crimes.).

Sentencing Procedure

Unlawfully Seized Evidence

U.S. v. Jessup, No. 91-6296 (10th Cir. June 11, 1992) (Belot, Dist. J.) (Affirmed: In denying § 3E1.1 reduction for failure to accept responsibility, the district court could consider evidence obtained in violation of state law that indicated defendant had continued to engage in similar criminal activity after his arrest and indictment.).

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Criminal History

CONSOLIDATED OR RELATED CASES

Second Circuit rejects bright line rules for deciding when prior convictions are "related," holds relatedness is question of fact. Defendant was convicted of robbing a store and using a firearm during the robbery. The district court found he was a career offender, § 4B1.1, based on two prior robberies of gasoline stations committed within a fifteen-minute period, and imposed a 270-month sentence. Defendant appealed, claiming that the two prior robberies were committed pursuant to a common scheme or plan and thus should not have been treated separately, see § 4A1.2, comment. (n.3).

The Second Circuit determined that the district court erroneously held that "as a matter of law, robberies committed over a span of several days could not be part of a common scheme or plan, and that hence it would not 'make much sense' to find that robberies committed in a single day could be part of a common scheme or plan." The appellate court held that "[w]hether the defendant had a scheme or plan, or whether the defendant committed crimes that were otherwise related, are questions of fact." The court remanded the case because "[h]aving adopted the view . . . that temporally separated crimes are not part of the same common scheme or plan as a matter of law, the district court did not purport to explore whether [defendant's] robberies had been committed pursuant to a single common scheme or plan, or were otherwise 'related,' as matters of fact." *Cf. U.S. v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992) ("whether two prior offenses are related under § 4A1.2 is a mixed question of law and fact subject to de novo review").

The court also noted that temporal proximity alone does not mean offenses are related: "Though the closer two events are in time the more credible the assertion may be that they occurred as part of the same plan, we cannot conclude that two similar robberies were part of a single common scheme or plan as a matter of law solely because they were committed 15 minutes apart."

U.S. v. Butler, No. 91-1369 (2d Cir. June 23, 1992) (Kearse, J.).

U.S. v. Chartier, No. 91-1619 (2d Cir. June 23, 1992) (Kearse, J.) (Affirmed career offender status based on four prior robbery convictions that the district court determined were not "a single common scheme or plan" under § 4A1.2, comment. (n.3). Defendant employed the same modus operandi in each robbery and committed them to support his heroin addiction, but at least one robbery was a "spur-of-the-moment decision." The appellate court explained that "the term 'single common scheme or plan,' must have been intended to mean something more than simply a repeated pattern of criminal conduct. . . . The mere fact . . . that, in engaging in a pattern of criminal behavior, the defendant has as his purpose the acquisition of money to lead a particular lifestyle does not mean either that he had devised a single common scheme or plan or, if he had, that his course of conduct was necessarily part of it. . . . While the four robberies . . . fit a pattern, . . . they were not part of a single common scheme or plan."). For other cases finding prior, similar robberies were not part of a single plan or scheme, see *U.S. v. Rivers*, 929 F.2d 136, 139–40 (4th Cir.) (robberies of two gasoline stations in different states, twelve days apart), *cert. denied*, 112 S. Ct. 431 (1991) [4 *GSU* #6]; *U.S. v. Jones*, 899 F.2d 1097, 1101 (11th Cir.) (robbery and attempted robbery of two banks ninety minutes apart), *cert. denied*, 111 S. Ct. 275 (1990) [3 *GSU* #8]; *U.S. v. Kinney*, 915 F.2d 1471, 1472 (10th Cir. 1990) (robberies of three banks, two in one state, over three months, to support drug addiction). *But cf. U.S. v. Houser*, 929 F.2d 1369, 1374 (9th Cir. 1990) (two prior drug sales were part of single common scheme or plan—convictions resulted from single investigation, sales were to same undercover agent and were charged separately only because they occurred in different counties) [4 *GSU* #6].

Ninth Circuit holds that there must be formal order or other indication that prior convictions were "consolidated for sentencing." The appellate court affirmed a criminal history calculation that treated separately three state convictions for which defendant was sentenced in the same proceeding. It held that the sentences were not "consolidated for . . . sentencing" under § 4A1.2, comment. (n.3), and explained that "it's not enough that the defendant has been sentenced for two or more cases in the same proceeding. . . . [W]e hold that there must be a formal order of consolidation, or some other indication that the trial court considered the prior convictions to be tantamount to a singe offense for purposes of sentencing." *See also U.S. v. Lopez*, 961 F.2d 384, 386–87 (2d Cir. 1992) ("the 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. Paulk*, 917 F.2d 879, 884 (5th Cir. 1990) (same); *U.S. v. Villareal*, 960 F.2d 117, 120–21 (10th Cir. 1992) (sentencing both offenses in one hearing by itself not sufficient). *But cf. U.S. v. Watson*, 952 F.2d 982, 990 (8th Cir. 1991) ("look to the court records of the defendant's prior offenses to see whether a decision was made to consolidate those offenses for trial or sentencing. . . . [T]he decision to consolidate sentencings is expressed by the dedication of a single proceeding to imposing punishment for verdicts reached in two or more trials"), *cert. denied*, 112 S. Ct. 1694 (1992).

As an example of an "other indication," the Ninth Circuit noted that "if a court enters an order transferring a case for sentencing with another case, and then the defendant receives identical concurrent sentences, the cases are deemed consolidated for sentencing" (citing *U.S. v. Chapnick*, 963 F.2d 224, 228–29 (9th Cir. 1992) (circumstances indicate that state judge handling sentencing considered prior offenses "related enough to justify treating them as one crime")). *Cf. U.S. v. Garcia*, 962 F.2d 479, 482–83 (5th Cir. 1992) (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).

U.S. v. Bachiero, 964 F.2d 896 (9th Cir. 1992) (per curiam).

Departures

Third Circuit sets standards for departures beyond criminal history category VI and departures for uncounted juvenile convictions; holds departure cannot be based on criminal conduct government agreed not to charge. Defendant pled guilty to four counts of making false statements in connection with acquisition of firearms in exchange for the government's promise not to charge him with possession of a firearm by a convicted felon, which carried a minimum fifteen-year sentence. Defendant's criminal history category VI and offense level 10 resulted in a range of 24–30 months. The district court imposed a 48-month sentence, finding that category VI underrepresented defendant's criminal history because of uncounted juvenile convictions for burglary, likelihood of recidivism, and parole revocations. Defendant appealed the departure, and the government claimed that, even if the above grounds were invalid, departure was warranted because it could have charged the more serious offense. The appellate court held that only defendant's likelihood of recidivism could have justified a departure, but because adequate findings were not made remand was necessary.

The court first stated that departure above category VI is warranted only if defendant's criminal record is "'egregious,' 'serious' or 'extraordinary.'" *See also U.S. v. Coe*, 891 F.2d 405, 413 (2d Cir. 1989) ("'[o]nly the most compelling circumstances ...' would justify a [section] 4A departure above Category VI"). Here, defendant's fifteen criminal history points "would fall within the two or three point range of category VI were such a range to exist. Given the nature of Thomas' criminal record, we cannot say that his criminal history is 'significantly more serious than that of most defendants in the same criminal history category.' U.S.S.G. 4A1.3, p.s. ... Therefore, an upward departure beyond category VI is presumptively unjustified in this case, unless there clearly exist circumstances" that were not adequately considered by the Sentencing Commission. As explained below, the court held there were no such circumstances.

As for defendant's uncounted juvenile convictions, the court held that departure was improper because they were not similar to this offense, adopting the rule in *U.S. v. Samuels*, 938 F.2d 210, 214–15 (D.C. Cir. 1991) (juvenile convictions not listed in § 4A1.2(d) can be basis for departure only if they involved conduct similar to instant offense) [4 *GSU* # 8]. *But cf. U.S. v. Gammon*, 961 F.2d 103, 107–08 (7th Cir. 1992) (departure proper for dissimilar juvenile convictions that "illustrate a significant history of criminality") [4 *GSU* #19]; *U.S. v. Nichols*, 912 F.2d 598, 604 (2d Cir. 1990) (departure proper for lenient punishment for prior, violent, dissimilar juvenile offense).

Regarding defendant's parole revocations, the court stated that although "a defendant with a long history of violating parole would be a prime candidate for an enhanced sentence, particularly if his instant offense is similar to the offenses for which he had been paroled in the past," defendant's parole revocations were adequately taken into account by the Guidelines and thus did not warrant departure.

Finally, the court held that departure could not be based on the government's decision not to charge a more serious crime: "[T]his upward departure involves the offense level, rather than the criminal history. ... [B]road discretion is not available in offense level departures, since nowhere do the Guidelines permit consideration of uncharged offenses." *See also U.S. v. Faulkner*, 952 F.2d 1066, 1069–71 (9th Cir. 1991) (upward departure based on eight dismissed or uncharged bank robberies improper) [4 *GSU* #8]. The court distinguished *U.S. v. Mobley*, 956 F.2d 450 (3d Cir. 1992), where it upheld an enhancement for stolen firearms under § 2K2.1(b)(2) even though defendant was not charged with the more serious crime of receiving or transporting stolen firearms. "The government's 'end run' was tolerable in *Mobley* since that case involved a mandatory enhancement clearly specified in the Guidelines. The case currently before us involves a discretionary departure in which the Guidelines are silent as to whether an upward departure can be based on an uncharged crime. ... [W]e will not allow the government to take a 'convenient detour' by seeking additional punishment for an uncharged crime ...."

U.S. v. Thomas, 961 F.2d 1110, 1115–22 (3d Cir. 1992).

Aggravating Circumstances

U.S. v. Ponder, 963 F.2d 1506, 1509–10 (11th Cir. 1992) (Affirmed six level upward departure under § 5K2.0, p.s. based on seriousness of crime—possessing marijuana and methamphetamine with intent to distribute while a prisoner in a county jail. Assessment of two criminal history points for "committ[ing] the offense while under any criminal justice sentence, including ... imprisonment," § 4A1.1(d), did not preclude a departure: "[C]ommentary to [§ 4A1.1] indicates that the purpose of this provision is merely to account for the recency of the subsequent crime. ... There is no indication that the Sentencing Commission took into consideration the serious nature of distributing drugs within a jail facility itself.").

Substantial Assistance

U.S. v. Mitchell, 964 F.2d 454 (5th Cir. 1992) (per curiam) (Remanded: Holding § 5K1.1, p.s. motion open until after sentencing was error—district court must rule on it before imposing sentence.). *Accord U.S. v. Drown*, 942 F.2d 55, 58 (1st Cir. 1991) [4 *GSU* #8]; *U.S. v. Howard*, 902 F.2d 894, 896–97 (11th Cir. 1990) [3 *GSU* #9].

Offense Conduct

Calculating Weight of Drugs

U.S. v. Robins, No. 91-50286 (9th Cir. June 24, 1992) (Thompson, J.) (Remanded: Defendant purchased two "bricks" of cornmeal weighing 2,779 grams. To trick customers into thinking they were cocaine, he carefully wrapped them, made small incisions and poured a total of one-tenth of a gram of cocaine inside. The appellate court held it was error to include the weight of the cornmeal as part of a drug "mixture or substance" under § 2D1.1. Using *Chapman v. U.S.*, 111 S. Ct. 1919 (1991), as a guide, the court reasoned that the cornmeal and cocaine were easily distinguishable, cornmeal is not a "tool of the trade" or a carrier medium or cutting agent for cocaine, and it "did not facilitate the distribution of the cocaine." The court concluded the cornmeal "was thus the functional equivalent of packaging material, which the Court in *Chapman* recognized was not to be included in the weight calculation."). *Accord U.S. v. Acosta*, 963 F.2d 551, 553–56 (2d Cir. 1992) (creme liqueur that was uningestible and unmarketable was "the functional equivalent of packaging material" and should not be counted) [4 *GSU* #23].

Criminal History

Career Offender Provision

U.S. v. Bell, No. 91-1965 (1st Cir. June 10, 1992) (Selya, J.) (Remanded: Following, *inter alia*, amended Note 2 of § 4B1.2, the court held that "where the offense of conviction is the offense of being a convicted felon in knowing possession of a firearm, the conviction is not for a 'crime of violence' and ... the career offender provision ... does not apply."). For other cases, see 4 *GSU* #23.

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VOLUME 5 • NUMBER 1 • AUGUST 26, 1992

General Application Principles

Sixth Circuit reissues *Davern* after rehearing en banc, finds that "the Guidelines are a sentencing imperative." The original panel had held that a district court should determine "at the outset of the sentencing process" whether there were aggravating or mitigating circumstances. If so, the court should then follow the statute, 18 U.S.C. § 3553, not the Guidelines, in sentencing defendant. *See* 4 *GSU* #6.

The en banc court held that a district court "must first determine a guideline sentence," which "is mandatory," and then may depart only if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b). In addition, a court does not have discretion to disregard the Guidelines if it considers the guideline sentence "greater than necessary to comply" with the purposes of sentencing in 18 U.S.C. § 3553(a). The court also held that the Guidelines accounted for a defendant who attempted to purchase 500 grams of cocaine but who received only 85 grams. The district court properly sentenced defendant based on 500 grams.

U.S. v. Davern, No. 90-3681 (6th Cir. July 21, 1992) (en banc) (Kennedy, J.) (Merritt, C.J., and Keith, Martin, Jones, JJ., dissenting), *superseding* 937 F.2d 1041 (6th Cir. 1991).

Departures

Mitigating Circumstances

Third Circuit affirms departure for "unusual degree" of acceptance of responsibility and for "inappropriate manipulation of the indictment." Defendant pled guilty to one count each of bank embezzlement and attempted income tax evasion. The sentencing court departed downward for two reasons. First, it reduced the offense level by one because defendant's acceptance of responsibility was unusual. The court stated that defendant "affirmatively c[a]me forward, as soon as he was confronted and started making restitution. Admitted the full amount that he thought was owed, but indeed, has even agreed to a larger amount that the bank has asserted, including interest. He has done everything conceivable. Voluntary and truthful admission to the authorities. I don't know anything more that he could do . . . ." Defendant also showed bank officials how to detect improper transactions in the accounts he had embezzled.

Second, the court departed downward two levels because it could not group the embezzlement and tax evasion charges under § 3D1.2. The court explained that it had never seen a defendant charged both with embezzlement and with tax evasion for the same embezzled sums, and noted that "the result . . . is unusual and disparate and constitutes, albeit, not in bad faith, an inappropriate manipulation of the indictment, which the Sentencing Commission asserts that I can control through the use of departure power."

The appellate court affirmed, first holding that "a sentencing court may depart downward when the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present. . . . [W]e believe that Lieberman's post-offense ameliorative conduct adequately justified the district court's decision." *Cf. U.S. v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991) (district court should have considered whether timing and extent of restitution were sufficiently unusual to warrant departure: "the guidelines provide the district court with authority to depart downward based on extraordinary restitution"); *U.S. v. Carey*, 895 F.2d 318, 323 (7th Cir. 1990) (departure for acceptance of responsibility beyond two-level decrease in § 3E1.1 possible, but only in "unusual circumstances").

The court also held that "a sentencing court possesses the authority to depart downward based on the manipulation of the indictment" in a situation such as this, to "correct unwarranted sentencing disparities caused by charging decisions in those instances when grouping, which could also have compensated for the multiple charges, is unavailable. . . . [T]here is no indication either that the [Sentencing] Commission rejected the manipulation of the indictment charges as a basis for departure or that it intended to foreclose departures on this basis. On the contrary, . . . [it] 'recognized that a charge offense system has drawbacks' and that 'a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power.' U.S.S.G. Ch. 1, Pt. A, (4)(a), Policy Statement. . . . The adjective 'inappropriate' does not necessarily suggest bad intent on the part of the prosecutor, but can apply to prosecutorial zeal that results in charging a particular defendant disproportionately to others similarly situated."

U.S. v. Lieberman, No. 91-5687 (3d Cir. July 24, 1992) (Sloviter, C.J.).

Substantial Assistance

U.S. v. Urbani, 967 F.2d 106 (5th Cir. 1992) (Affirmed district court's refusal to hold an evidentiary hearing to examine the extent of assistance by defendant who claimed government arbitrarily refused to make a § 5K1.1 motion where government agreed to notify the court of defendant's cooperation, but did not obligate itself to file motion. The appellate court concluded that *Wade v. U.S.*, 112 S. Ct. 1840 (1992) [4 *GSU* #22], "made plain . . . that absent a substantial threshold showing of [] a constitutionally improper motive, district courts lack authority to scrutinize the level of the defendant's cooperation and interpose their own assessment of its value. Moreover, this limited scope of review forecloses even the need for an evidentiary hearing solely to document defendant's assistance. . . . [Defendant] has not at any point alleged an illicit motivation underlying the government's refusal to request a 5K1.1 departure. The entirety of his argument . . . has been that given his level of cooperation with the government, withholding a 5K1.1 motion was arbitrary and without justification. Thus, it is exactly the type of claim . . . that *Wade* indicates is unavailing and does not warrant an evidentiary hearing.").

Offense Conduct

Drug Quantity—Relevant Conduct

Eighth Circuit holds that original weight of drugs in package is not included as relevant conduct if defendant reasonably believed package contained less. Postal inspectors intercepted a package containing 243 grams of cocaine base, replaced all but ten grams with a substitute, and made a controlled delivery to defendant's sister. The same day, defendant asked a cousin for one-half gram of crack. The cousin agreed, informing defendant she had crack at his sister's house and would sell him some if he went with her to get it. She drove defendant to the house and parked a few blocks away. While his cousin waited, defendant located the package and began walking down the street to meet her, all as she directed. Before he reached her, he was arrested. He pled guilty to conspiracy to distribute cocaine base, was given a mandatory minimum ten-year sentence based on the 243 grams, and appealed.

The appellate court remanded, holding that defendant should be sentenced for the amount he "reasonably believed that the package contained." Defendant "was not found responsible for the conduct of others. Rather, the court based its drug calculation on Hayes' own act of picking up the package containing crack and walking down the street to meet his cousin.... Hayes testified that he never opened the package, and at no time prior to his arrest did he know that it contained a large quantity of crack. Additionally, Hayes apparently did not know that his act of bringing the package to his cousin was aiding the further distribution of the package's contents. Rather, ... it is possible that Hayes reasonably believed the package contained a much smaller quantity of cocaine, intended primarily for his cousin's personal use. If this is the case, we do not believe that the entire amount of crack originally contained in the package should be attributable to Hayes .... The rationale for linking sentence length to the amount of drugs is that the more dangerous the drug and the larger its quantity, the more culpable the defendant. If Hayes at all times reasonably believe that the package contained a small amount of drugs, the 243 grams ... does not reflect Hayes' culpability."

U.S. v. Hayes, No. 91-3843 (8th Cir. July 24, 1992) (Magill, J.).

U.S. v. Mitchell, 964 F.2d 454, 458–61 (5th Cir. 1992) (per curiam) (Remanded: Drug conspiracy defendant was not accountable for full twenty kilograms of cocaine in conspiracy. He had previously purchased small amounts from some of the conspirators, and tried to purchase two ounces from last shipment, but there was no evidence that he knew the extent of the conspiracy. "It is well established that district courts must consider the extent to which a larger drug enterprise is reasonably foreseeable to defendants involved in smaller or isolated transactions.").

Calculation of Loss

Sixth Circuit holds that where completed fraud could not possibly cause a loss, offense level cannot be increased by estimated loss. Defendant was convicted of several counts in a scheme to defraud insurance companies by getting false certification of his death and having his wife file claims for benefits. In addition, his wife applied for Social Security survivor's benefits using the false documents. The Social Security Administration (SSA) did not discover the fraud, but refused payment because defendant's wife was not eligible. As relevant conduct, the estimated potential loss to the SSA of $69,000 was added to the loss from the offenses of conviction.

The appellate court held that the $69,000 estimate should not have been included and remanded for resentencing: "We have before us the rare case where, in the face of complete success, the fraud generated no loss.... In such a case as this, where no dollar loss is possible for reasons entirely unrelated to the fraud or its discovery, the court does not have available to it the increases in sentencing level based on fraud loss.... The Government could, however, have sought an upward departure if the sentence based on the insurance loss amount did not reflect the seriousness of the harm caused by [defendant.]"

U.S. v. Khan, No. 91-1626 (6th Cir. July 14, 1992) (Merritt, C.J.).

U.S. v. Curran, 967 F.2d 5, 6 (1st Cir. 1992) (Affirmed: Amount of interest that would have been earned on embezzled funds may be used in calculating loss.).

Adjustments

Role in the Offense

U.S. v. Sostre, No. 91-1918 (1st Cir. June 29, 1992) (Fuste, Dist. J.) (Remanded: Defendant who brought drug buyers to sellers, made some arrangements and telephone calls, and possibly controlled a lookout, was not a manager or supervisor under § 3B1.1(b). 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: "While [he] certainly played an essential role in the overall criminal conduct, we do not think that he acted in a managerial or supervisory capacity.").

Obstruction of Justice

U.S. v. Bernaugh, No. 91-6127 (10th Cir. June 24, 1992) (Anderson, J.) (Affirming adjustment where the district court found that defendant perjured himself under oath at his guilty plea hearing regarding the participation in a drug transaction of four codefendants who were proceeding to trial. Section 3C1.1 applies to obstruction "in the instant offense" and "'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.").

Probation and Supervised Release

Imposition of Supervised Release

U.S. v. Pico, 966 F.2d 91, 92 (2d Cir. 1992) (per curiam) (Courts have authority to depart for supervised release. *Accord U.S. v. LeMay*, 952 F.2d 995, 998 (8th Cir. 1991) (per curiam) [4 *GSU* #14]. However, because court did not follow proper departure procedures, life term of supervised release must be remanded.).

U.S. v. Maxwell, 966 F.2d 545, 551 (10th Cir. 1992) (Affirmed: district court may impose consecutive terms of supervised release for multiple convictions.). *Accord U.S. v. Saunders*, 957 F.2d 1488, 1494 (8th Cir. 1992) [4 *GSU* # 20].

Criminal History

Consolidated or Related Cases

Note: The Ninth Circuit opinion in *U.S. v. Bachiero*, 964 F.2d 896 (9th Cir. 1992) (per curiam), reported in 4 *GSU* #25, was withdrawn and a substitute opinion was issued Aug. 4, 1992. The court remanded for resentencing, holding that the prior sentences at issue should be considered consolidated despite the lack of a formal order of consolidation.

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VOLUME 5 • NUMBER 2 • SEPTEMBER 17, 1992

Note to readers: The revised *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* has been mailed to all *GSU* recipients. You should receive a copy this week or next. Beginning with this issue of the *Update*, we will refer to relevant *Outline* sections in the case summaries.

Sentencing Procedure

DISMISSED COUNTS

En banc Ninth Circuit joins other circuits in holding that counts dismissed as part of plea bargain should be considered for relevant conduct in setting offense level. Defendant was indicted on fourteen counts relating to mail fraud. He pled guilty to two counts and the others were dismissed as part of the plea agreement. The district court included the loss from some dismissed counts in setting the offense level. In *U.S. v. Fine*, 946 F.2d 650 (9th Cir. 1991), the original appellate panel reversed, basing its holding on *U.S. v. Castro-Cervantes*, 927 F.2d 107 (9th Cir. 1990) (counts dismissed as part of plea bargain may not be used for departure).

The en banc court withdrew that part of the panel's opinion and affirmed the use of the dismissed counts. "The guidelines, interpreted in light of the application notes, are unambiguous. The fraud section of the guidelines says . . . that '[t]he cumulative loss produced 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.S.G. § 2F1.1, comment. (n.6). . . . The relevant conduct guideline . . . controls whether the dismissed counts should be used to measure the amount of loss . . . . The application note explicitly provides that 'multiple convictions are not required' for acts to be counted . . . .' U.S.S.G. § 1B1.3, comment. (n.2) . . . The relevant conduct provisions . . . , taken together with the fraud and grouping provisions, mean that conduct which was part of the scheme is counted, even though the defendant was not convicted of crimes based upon the related conduct."

The court stated this holding did not conflict with *Castro-Cervantes* or *U.S. v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991). "Both cases involve departures and non-groupable offenses, so they are distinguishable from cases involving groupable offenses and no departure. . . . In *Castro-Cervantes*, we recognized an implicit assurance that if the court accepted a plea bargain, then it would not depart upward from the sentence provided for by the Guidelines. The reasonable expectation upheld by *Castro-Cervantes*, of a sentence in accord with the Guidelines, was honored by the sentence imposed on Fine."

U.S. v. Fine, No. 90-50280 (9th Cir. Sept. 14, 1992) (Kleinfeld, J.) (en banc).
See *Outline* at II.D.4 and IX.A.1.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit holds district court has authority to review sua sponte government's decision not to file a substantial assistance motion and may depart, but remands for more specific findings. Defendants pled guilty to possession of heroin with intent to distribute, and each faced a range of 97–121 months and a ten-year mandatory minimum. They made several attempts to assist the government, but none of their information was confirmable or useful. The plea agreement did not require the government to move for departure under 18 U.S.C. § 3553(e) or § 5K1.1, p.s., and it did not do so. At the sentencing hearing the district court, on its own motion, continued sentencing, stated it would not sentence defendants to ten years, and ordered the government to "work something out." Later, though the government had not filed a motion, the court imposed 72-month sentences, stating departure was warranted because "factors that are being considered here are ones that are violative of due process and equal protection," and found that the government abused its discretion.

The appellate court remanded. It noted that in *Wade v. U.S.*, 112 S. Ct. 1840 (1992) [4 *GSU* #22], the Court stated that "'a prosecutor's discretion [under §§ 3553(e) and 5K1.1] is subject to constitutional limitations that district courts can enforce.' . . . Thus, a district court can review a prosecutor's refusal to file a substantial assistance motion and grant relief if the court finds that the refusal was based upon an unconstitutional motive . . . or upon due process grounds that the refusal was not rationally related to any legitimate state objective."

"Generally, a defendant has no right to discovery, to an evidentiary hearing, or to a remedy unless she makes a substantial threshold showing with specific allegations of the improper reasons for the prosecutor's failure to move for departure. No evidence that the Government refused to move for departure because of suspect reasons, or reasons not rationally related to any legitimate government end, was presented by [defendants]. However, the supervisory powers of the court provide the authority to raise sua sponte matters that may affect the rights of criminal defendants. . . . That Judge Hatter raised the issue of whether departure would be appropriate was not error. Here, unlike the record in *Wade*, there is some indication of an unconstitutional basis for the Government's refusal to move for a downward departure as well as evidence of the defendants' assistance . . . . However, the precise nature of the constitutional violations noticed by the district court is unclear." Thus, remand is required for the district court to "clarify the legal basis of its sentencing decision [and] make such findings as . . . *Wade* requires."

U.S. v. Delgado-Cardenas, No. 91-50253 (9th Cir. Sept. 3, 1992) (Hug, J.).
See *Outline* at VI.F.1.b.iii.

U.S. v. Mittelstadt, 969 F.2d 335 (7th Cir. 1992) (Appeal dismissed: Court recognized that it would have been improper to delay ruling on § 5K1.1, p.s. motion in order to later assess defendant's cooperation at a Rule 35(b) proceeding, but held the transcript showed that the district court had in fact ruled on the motion at sentencing and refused to depart. "As is plain from the text of Rule 35(b) (which allows a reduction of sentence only 'to reflect a defendant's subsequent, substantial assistance'), and has been held by several courts, the rule is designed to recognize assistance rendered after the defendant

is sentenced. . . . It is not a substitute for section 5K1.1."). See *Outline* at VI.F.3.

U.S. v. Lockyer, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (per curiam) (Affirmed: Downward departure for "substantial assistance to the judiciary" was not warranted for defendant who pled guilty at initial appearance and waived pretrial motions. The court distinguished *U.S. v. Garcia*, 926 F.2d 125, 127–28 (2d Cir. 1991) (affirmed downward departure for assistance to judiciary that "broke the log jam in a multi-defendant case") [3 *GSU* #20], holding that "to apply the *Garcia* reasoning to this case, which involves a single defendant who has pleaded guilty to a crime that he alone committed, would rob 'acceptance of responsibility' of substance and render it meaningless.").
See *Outline* at VI.F.1.b.i.

Offense Conduct

Calculation of Loss

U.S. v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992) (per curiam) (Affirmed: 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, § 1B1.3(a)(1). Also, it is proper to use intended loss rather than actual loss, even though actual loss is easily calculated, § 2F1.1, comment. (n.7).).
See *Outline* at II.D.1 and 2.

More Than Minimal Planning

U.S. v. Doherty, 969 F.2d 425 (7th Cir. 1992) (Remanded: District court committed clear error in declining to consider whether "[d]rafting 40 overdue checks during a single month, few if any of which appear to have been purely opportune," constituted "repeated acts over a period of time," § 1B1.1, comment. (n.1(f)), thereby warranting more than minimal planning enhancement.). *Cf. U.S. v. Williams*, 966 F.2d 555, 558–59 (10th Cir. 1992) ("more than minimal planning is deemed present in any case involving repeated acts over a period of time") [4 *GSU* #24].
See *Outline* at II.E.

U.S. v. Romano, No. 91-1999 (6th Cir. July 16, 1992) (Merritt, C.J.) (Siler, J., dissenting) (Remanded: Error to apply enhancements both for leadership role under § 3B1.1(a) and for more than minimal planning. "[I]f certain conduct is used to enhance a defendant's sentence under one enhancement provision, the defendant should not be penalized for that same conduct again under a separate provision whether or not the Guidelines expressly prohibit taking the same conduct into consideration under two separate provisions. . . . We are persuaded that § 3B1.1(a) already takes into account the conduct penalized in § 2F1.1(b)(2) because, by its very nature, being an organizer or leader of more than five persons necessitates more than minimal planning."). *But cf. U.S. v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991) (not double-counting); *U.S. v. Boula*, 932 F.2d 651, 654–55 (7th Cir. 1991) (same).
See *Outline* at II.E and III.B.6.

Drug Quantity

U.S. v. Lanni, No. 91-1597 (2d Cir. July 24, 1992) (Meskill, J.) (Remanded: "[B]ecause 'the scope of conduct for which a defendant can be held accountable under the Sentencing Guidelines is significantly narrower than the conduct embraced by the law of conspiracy,' . . . a sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy. It is essential that a sentencing judge in a narcotics conspiracy make findings of fact regarding the amount of narcotics reasonably foreseeable by each defendant."). See *Outline* at II.A.2.

Adjustments

Role in Offense

U.S. v. Belletiere, No. 91-5615 (3d Cir. July 22, 1992) (Hutchinson, J.) (Remanded: Clear error to find defendant was 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. . . . Where an individual is convicted of a series of solitary, non-related crimes, such as a series of drug sales by one drug seller to various buyers, and there is no 'organization' or 'scheme' between the drug seller and buyers, or between the buyers themselves, that the defendant could be said to have 'led' or 'organized,' section 3B1.1 cannot apply."). *Accord U.S. v. Reid*, 911 F.2d 1456, 1465 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991).
See *Outline* at III.B.2.

Obstruction of Justice

U.S. v. Belletiere, No. 91-5615 (3d Cir. July 22, 1992) (Hutchinson, J.) (Remanded: Clear error to find drug defendant attempted to obstruct justice by transferring his interest in marital property to estranged wife as part of separation agreement. Section 3C1.1 requires willfulness, and there was no indication defendant transferred property to try to avoid forfeiture. Also, fact that defendant tested positive for drugs after telling probation officer he did not use them was not proper basis for § 3C1.1 enhancement: "The commentary to section 3C1.1 makes it clear that the section's focus is on willful acts or statements intended to obstruct or impede the government's investigation of the offense at issue. . . . Belletiere's misstatement had nothing to do with the offenses for which he was convicted. Furthermore, [it] was not material to the probation officer's investigation in this particular case."). *See also U.S. v. Yates*, No. 91-1778 (1st Cir. Aug. 13, 1992) (Campbell, Sr. J.) (error to give § 3C1.1 enhancement to defendant who gave false name and thereby hindered investigation of charge that was dropped but not offense of conviction).
See *Outline* at III.C.1 and 4.

U.S. v. Ashers, 968 F.2d 411 (4th Cir. 1992) (Affirmed: "[P]roviding a falsified voice exemplar to an expert witness for the purpose of inducing him to testify that it was unlikely that it was Ashers' voice on an incriminating tape recording is encompassed within the obstruction of justice guideline." The district court also cited an improper ground for the enhancement, but the appellate court held remand was not required because there was a valid ground. The court noted that *Williams v. U.S.*, 112 S. Ct. 1112, 1118–19 (1992) [4 *GSU* #17], which held that remand is not required for a departure based on both valid and invalid factors if the same sentence would have been properly imposed absent the invalid factor, need not be applied because departures and enhancements "are fundamentally different under Guidelines jurisprudence," and thus *Williams* "is not applicable . . . when an appellate court is called upon to review a . . . decision to apply an enhancement to the offense level on alternative grounds.").
See *Outline* at III.C.2 and 4; X.D.

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VOLUME 5 • NUMBER 3 • SEPTEMBER 29, 1992

General Application Principles

RELEVANT CONDUCT

En banc Eighth Circuit reissues *Galloway*, holds relevant conduct provision is authorized by statute and is constitutional. Defendant pled guilty to one count of theft from interstate shipment. The PSR included seven similar but uncharged offenses as relevant conduct, which roughly tripled the guideline range. The district court held that use of the uncharged conduct would violate the Fifth and Sixth Amendments and did not consider it in sentencing defendant. An appellate panel affirmed, but did not address the constitutional issues. Instead, it held that the sentencing statute did not authorize the Sentencing Commission to promulgate the relevant conduct provisions of § 1B1.3(a)(2) to encompass separate uncharged property crimes. *U.S. v. Galloway*, 943 F.2d 897 (8th Cir. 1991) [4 *GSU* #8].

The en banc court reversed and remanded for resentencing. The court first determined that statutory authority exists for adoption of a relevant conduct guideline that includes uncharged conduct: "[T]he reference to 'circumstances... which ... aggravate the seriousness of the offense,' 28 U.S.C. 994(c)(2), is direct language showing clear intent ... to support enactment of ... § 1B1.3(a)(2). Even if it is not so clear, we have no doubt that, taken with the more general language in section 994(c) and 18 U.S.C. § 3553(a)(2) and § 3661, there is sufficient and permissible statutory underpinning to support section 1B1.3(a)(2) and its required consideration of all 'acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.'" The court noted that "[t]hree other circuits have concluded that statutory authority exists for enacting a relevant conduct guideline." *See U.S. v. Davern*, 970 F.2d 1490 (6th Cir. 1992) (en banc); *U.S. v. Thomas*, 932 F.2d 1085, 1089 (5th Cir.), *cert. denied*, 112 S. Ct. 264 (1991); *U.S. v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990).

As to the constitutional issues, the court held that "section 1B1.3, as applied here, does not transgress the limits of due process. Because a defendant's uncharged crimes are treated as sentencing factors, the rights to indictment, jury trial, and proof beyond a reasonable doubt simply do not come into play. *McMillan* [*v. Pennsylvania*, 477 U.S. 79 (1986)] explicitly rejected the argument that the sentencing phase requires a more stringent standard of proof than a preponderance of evidence.... Our conclusion ... is further bolstered by the opinions of the Third, Seventh, and Ninth Circuits in *U.S. v. Mobley*, 956 F.2d 450 (3d Cir. 1992), *Ebbole* and" *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992). "All three of these decisions rest on an interpretation of *McMillan*, and all conclude that a sharp distinction exists between conviction and sentencing." The court stated that "due process may be violated if the punishment meted out following application of the sentencing factors overwhelms or is extremely disproportionate to the punishment that would otherwise be imposed," but held that the increase here was not "so extreme or overwhelming as to raise due process concerns."

The court concluded by noting that while the Guidelines "certainly channel the court's discretion in sentencing, ... significant responsibility ... remains with the district judge. ... When uncharged conduct is alleged as relevant conduct to substantially increase the sentencing range, district judges are authorized to require the United States Attorney to undertake the burden of presenting evidence to prove that conduct. In the final analysis, the determination of what is relevant conduct is a factual question to be decided by the district judge."

U.S. v. Galloway, No. 90-3034 (8th Cir. Sept. 17, 1992) (en banc) (Gibson, J.) (Arnold, C.J., Beam and McMillian, JJ., Lay and Bright, Sr. JJ., dissenting).
See *Outline* generally at I.A.

SENTENCING FACTORS

U.S. v. Jones, No. 91-3025 (D.C. Cir. Aug. 14, 1992) (Williams, J.) (Mikva, C.J., dissenting) (Affirmed: District court may impose higher sentence within guideline range because defendant elected to go to trial instead of pleading guilty. The government refused to plea bargain, defendant was convicted at trial and, after receiving a reduction for acceptance of responsibility, had a guideline range of 121–151 months. The court imposed a sentence of 127 months, stating that it would have imposed the minimum had defendant pled guilty. The appellate court held that sentencing courts have authority "to consider the institutional value of guilty pleas as an explicit, independent basis of sentence adjustment.").
See *Outline* at I.C.

Challenges to Guidelines

Third Circuit holds that § 5E1.2(i) cost of imprisonment fine is not authorized by Sentencing Reform Act. Defendant pled guilty to bribery offenses. At sentencing the district court imposed a fine for the cost of defendant's imprisonment under § 5E1.2(i) ("... the court shall impose an additional fine that is at least sufficient to pay the costs to the government of any imprisonment..."). Defendant claimed the fine was not authorized by statute and was unconstitutional.

The appellate court agreed that § 5E1.2(i) is invalid because it is not authorized by statute: "[T]he Act does not authorize the assessment of a fine to pay for the costs of a defendant's imprisonment. Certainly, there is no specific reference in the statute to recouping the costs of imprisonment as an appropriate goal of sentencing. Nor do we believe that assessing fines for that purpose is subsumed within the more general provisions of the Act." The court rejected the government's argument that the fines, which actually go to victim compensation via the Crime Victims Fund, are justified as restitution: "On its very face, the guideline states that the costs will be paid to the government in an amount based on the costs of imprisonment. It stretches credulity to assume that the 'purpose' of this fine is other than to compensate the government ... for the costs it incurs for incarcerating a defendant."

The court thus did not have to determine whether the fine violates due process, but noted that "if the guideline is a method for assessing restitution, it runs the risk of being irrational."

The Fifth and Tenth Circuits have upheld § 5E1.2(i). See *Outline* at V.E.2 and generally at XI.B.

U.S. v. Spiropoulos, No. 91-6058 (3d Cir. Sept. 25, 1992) (Becker, J.).

Sentencing Procedure

Evidentiary Issues

En banc Eighth Circuit holds that Confrontation Clause does not apply to sentencing hearing. Defendant's offense level was increased for being an organizer, § 3B1.1(a), on the basis of hearsay testimony. In *U.S. v. Wise*, 923 F.2d 86 (8th Cir. 1991), the original appellate panel reversed the sentence because the district court had not undertaken the Confrontation Clause analysis required by *U.S. v. Streeter*, 907 F.2d 781, 792 (8th Cir. 1990). Because *Streeter* "conflicts with previous decisions of this court," the en banc court addressed "what we assumed in *Streeter*, that is, whether sentencing under the Guidelines is so different from previous practice that the Confrontation Clause should apply to evidence introduced at sentencing proceedings."

The court concluded that, while the Guidelines have "wrought substantial changes in federal sentencing procedures, . . . the sharp distinction between conviction and sentencing that antedated the Guidelines still exists." Alluding to *Galloway, supra*, the court stated that "[j]ust as increasing a defendant's sentence on the basis of relevant conduct does not constitute a conviction for a separate offense, so also establishing a defendant's role in the offense on which he has been convicted does not constitute a criminal prosecution within the meaning of the Confrontation Clause. . . . The right to confront witnesses, therefore, does not attach. . . . We therefore overrule our holdings to the contrary in" *Streeter* and *U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990) [3 *GSU* #12].

As in *Galloway*, the court recognized "that in certain instances a sentence may so overwhelm or be so disproportionate to the punishment that would otherwise be imposed absent the sentencing factors mandated by the Guidelines that due process concerns must be addressed." In this case, however, the increase based on the hearsay approximately doubled the sentencing range (to 37–46 months), which was "less than that which *Galloway* held did not trigger due process concerns."

The court also endorsed the Guideline's "standard for the consideration of hearsay testimony at sentencing" as set forth in § 6A1.3, p.s. and the commentary. The parties must have the opportunity to present information on any disputed factor and any information used must have "sufficient indicia of reliability to support its probable accuracy. . . . Unreliable allegations shall not be considered."

U.S. v. Wise, No. 90-1070 (8th Cir. Sept. 17, 1992) (en banc) (Wollman, J.) (Arnold, C.J., Lay, Sr. J., and McMillian, J., dissenting).

See *Outline* at IX.D.1.

Offense Conduct

Drug Quantity—Relevant Conduct

Third Circuit outlines principles for "accomplice attribution" of drug quantities. Defendants were convicted on one count of conspiracy to distribute heroin and six telephone counts. The sentencing court attributed to both defendants drug amounts distributed by the conspiracy before they joined it and amounts supplied to the conspiracy by other conspirators. It also attributed to one defendant amounts supplied by the other. The appellate court remanded, holding that while the latter attribution was supported by the evidence, it could not determine from the record whether the other attributions were appropriate. The court also set forth "general principles for determining relevant conduct" in cases of "accomplice attribution" under § 1B1.3(a)(1).

Noting that early cases had often "interpreted the relevant conduct provision very broadly," the court determined that the 1989 amendment to application note 1 of § 1B1.3 "makes clear that the standard for accomplice attribution is significantly more stringent . . . . [R]ather than evaluating accomplice attribution in light of the scope of the conspiracy as described in the count of conviction and the defendant's awareness of the possibility that co-conspirators would distribute amounts in addition to those amounts distributed by the defendant, courts should look to the defendant's role in the conspiracy. . . . [W]hile it is appropriate to hold a defendant who exhibits a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement was much more limited." The court noted that illustration e in the commentary to § 1B1.3 "confirms our view that the crucial factor in accomplice attribution is the extent of the defendant's involvement in the conspiracy." The court emphasized that "in deciding whether accomplice attribution is appropriate, it is not enough to merely determine that the defendant's criminal activity was substantial. Rather, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to ensure that the defendant's sentence accurately reflects his or her role."

As to amounts distributed before the defendants entered the conspiracy, "the relevant conduct provision is not coextensive with conspiracy law. . . . In the absence of unusual circumstances, not present here, conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of" the activity that the defendant agreed to undertake.

U.S. v. Collado, No. 91-1492 (3d Cir. Sept. 16, 1992) (Becker, J.).

See *Outline* at II.A.2.

Departures

Substantial Assistance

U.S. v. Spiropoulos, No. 91-6058 (3d Cir. Sept. 25, 1992) (Becker, J.) (Affirmed: District court could limit extent of § 5K1.1, p.s. departure on the ground that defendant's cooperation, through no fault of his own (target of investigation died), was not valuable. Section 5K1.1 "makes crystal clear that . . . a court should examine the 'usefulness' of the defendant's cooperation. . . . [I]t was consistent with the [Sentencing Reform] Act and the Guidelines for the district court to temper the extent of its downward departure because the defendant's cooperation proved unhelpful to the government." The court emphasized, however, "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. The critical point is that the Guidelines preserve the discretion of the district court with respect to the extent of section 5K1.1 departures." The court also noted that, once a § 5K1.1 motion is filed, "the government cannot dictate the extent to which the court will depart.").

See *Outline* at VI.F.2 and 3.

Guideline Sentencing Update

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Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds district court erred in finding defendant's childhood abuse was not "extraordinary." Defendant pled guilty to bank robbery. The district court determined that the Guidelines covered the effects of childhood abuse in § 5H1.3, p.s., and that defendant's history of abuse, although "shocking," was not so extraordinary as to warrant downward departure.

The appellate court agreed that § 5H1.3 covers "the psychological effects of childhood abuse" and thus departure was warranted only in extraordinary circumstances. *Accord U.S. v. Vela*, 927 F.2d 197, 199 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991). However, the court reversed because it was clear error to hold that defendant's circumstances were not extraordinary. The court found that defendant was severely abused in childhood and after, over a period of fifteen years. Several medical experts examined defendant and "[e]ach agreed that her history of abuse was exceptional. . . . [One] reported that West's abuse was so severe she had become 'virtually a mindless puppet.'" The court remanded and also suggested that, because defendant's history indicated the lack of any "meaningful guidance" during her childhood, the district court consider whether departure was warranted under *U.S. v. Floyd*, 942 F.2d 1096, 1099–1102 (9th Cir. 1991) (affirmed departure based on defendant's "youthful lack of guidance") [4 *GSU* #10]. *Cf. U.S. v. Lopez*, 938 F.2d 1293, 1298 (D.C. Cir. 1991) (§ 5H1.10, p.s., does not preclude consideration of defendant's tragic personal history) [4 *GSU* #5]; *U.S. v. Diegert*, 916 F.2d 916, 918–19 (4th Cir. 1990) (district court has discretion to determine whether defendant's "tragic personal background and family history" is "extraordinary" and warrants departure). **Note:** A new policy statement at § 5H1.12, effective Nov. 1, 1992, states that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" for departure.

U.S. v. West, No. 91-30085 (9th Cir. Sept. 18, 1992) (Thompson, J.).

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

In two cases, Second Circuit holds that drug rehabilitation efforts or "extraordinary acceptance of responsibility" may warrant downward departure. In one case, defendant pled guilty to heroin distribution. Sentencing was postponed over a year to allow her to pursue drug rehabilitation. The guideline range was 51–63 months, but the district court concluded that defendant's rehabilitation efforts, and her need for further treatment, warranted departure to a four-year term of probation that included mandatory drug treatment.

The appellate court affirmed. Noting that the circuits are split as to whether drug rehabilitation efforts may warrant downward departure (see *Outline* at VI.C.2.a and b), the court concluded "that the position opposed to rehabilitation-based departures is not persuasive. In the first place, this position rests in large part on the view . . . that 'rehabilitation is no longer a direct goal of sentencing.' . . . That view is simply mistaken. . . . 28 U.S.C. 994(k) stands for the significantly different proposition that rehabilitation is not an appropriate ground for imprisonment. . . . Since rehabilitation may not be a basis for incarceration but must be considered as a basis for a sentence [under 18 U.S.C. § 3553(a)(2)(D)], Congress must have anticipated that sentencing judges would use their authority, in appropriate cases, to place a defendant on probation in order to enable him to obtain 'needed . . . medical care, or other correctional treatment in the most effective manner.'"

The court disagreed that the Sentencing Commission "adequately considered" drug rehabilitation. "The Commission concluded that drug dependence is not a reason for a downward departure. U.S.S.G. 5H1.4. Whether or not that flat assertion is 'adequate' consideration of the factor it 'considers'—drug dependence, it is surely not any consideration . . . of . . . defendant's efforts to end her drug dependence through rehabilitation." The court also rejected the argument that § 3E1.1 adequately covers drug rehabilitation. "[T]he conduct that indicates acceptance of responsibility 'for [a defendant's] criminal conduct' must relate directly to the offense. To permit section 3E1.1 to serve as the Commission's adequate consideration of all mitigating 'post-offense conduct,' . . . thereby precluding departures regardless of anything constructive that the defendant might do after his arrest that benefits himself, his family, or his community, undermines the statutory standard for departure, 18 U.S.C. § 3553(b), as well as the statutory requirement to consider the 'characteristics of the defendant,' *id.* § 3553(a)(1)." **Note:** An amendment to the commentary for § 3E1.1, effective Nov. 1, 1992, adds "post-rehabilitative efforts (e.g., counseling or drug treatment)" as a factor demonstrating acceptance of responsibility.

The court cautioned that rehabilitation programs, "easily entered but difficult to sustain, cannot be permitted to become an automatic ground for obtaining a downward departure." In this case, however, the district court "conscientiously examined all of the pertinent circumstances" and appropriately concluded departure was warranted.

U.S. v. Maier, No. 92-1143 (2d Cir. Sept. 23, 1992) (Newman, J.).

In the other case, defendant robbed a bank while under the influence of crack. The next day he voluntarily surrendered and confessed, explaining that his previous attempts at drug rehabilitation had failed and he hoped to get help in prison. The district court held it had no authority to depart downward for these actions.

The appellate court remanded, holding that "extraordinary acceptance of responsibility" may be grounds for departure. "We find nothing in the Guidelines which contemplates a defendant like Rogers, who, emerging from a drug-induced state and realizing his wrongdoing, turns himself over to the police and confesses. . . . [C]onduct such as this raises a colorable basis for a downward departure." See *Outline* at VI.C.2.a and 4.

The appellate court also held that defendant's career offender status did not bar departure. "[T]here is nothing unique to career offender status which would strip a sentencing court of its 'sensible flexibility' in considering departures. . . . If a career offender is eligible for departure based on past conduct, which is the basis for his status as a career offender, we can see no reason why he should not be similarly eligible for a departure based on present conduct, which is the basis for his conviction and sentence." Some circuits have held that departure for career offenders is permissible when the criminal history category overrepresents the seriousness of past conduct. See *Outline* at VI.A.2.

U.S. v. Rogers, 972 F.2d 489 (2d Cir. 1992).

U.S. v. Slater, 971 F.2d 626, 634–35 (10th Cir. 1992) (per curiam) (Remanded: District court erred in holding that departure under § 5H1.4, p.s., is 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.). *Accord U.S. v. Hilton*, 946 F.2d 955, 958 (1st Cir. 1991); *U.S. v Ghannam*, 899 F.2d 327, 329 (4th Cir. 1990).
See generally *Outline* at VI.C.1.

Aggravating Circumstances

U.S. v. Wint, No. 91-3831 (8th Cir. Aug. 28, 1992) (Wollman, J.) (Affirmed four-level upward departure for defendants—convicted of drug offenses and threatening a witness—for making death threats against a codefendant and his family to influence his testimony. Although the obstruction enhancement in § 3C1.1 covers threats against witnesses, it does not adequately address "the nature of [defendants'] conduct. Here, the threats were of death, not simply physical injury. The threats were ongoing and apparently sincere. . . . The targets of the threats included not only [the codefendant], but also innocent third parties. . . . Finally, the threats occurred while [the codefendant] was incarcerated, unable to protect his family or even free to flee himself."). *See also U.S. v. Baez*, 944 F.2d 88, 90 (2d Cir. 1991) (affirmed departure for abducting and threatening to kill informant); *U.S. v. Wade*, 931 F.2d 300, 306 (5th Cir.) (affirmed departure made partly on basis that defendant had coconspirator threaten and shoot at person), *cert. denied*, 112 S. Ct. 247 (1991); *U.S. v. Drew*, 894 F.2d 965, 974 (8th Cir.) (affirmed departure for attempt to murder witness), *cert. denied*, 110 S. Ct. 1830 (1990) [3 *GSU* #2].
See *Outline* at VI.B.1.

Sentencing Procedure

Hearsay

En banc Sixth Circuit affirms that Confrontation Clause does not apply at sentencing. In three cases consolidated for appeal, defendants' sentences were increased for drug amounts in relevant conduct that were proved by hearsay testimony. The en banc court affirmed and rejected defendants' claims that the Confrontation Clause precluded the use of hearsay testimony at sentencing: "[C]onfrontation rights do not apply in sentencing hearings. . . . When defendants have pleaded guilty . . . sentencing does not mandate confrontation and cross-examination on information submitted to the court through the presentence reports and law enforcement sources. Following the mandates of Fed. R. Crim. P. 32 is constitutionally sufficient because they are fundamentally fair and afford the defendant adequate due process protections." *Accord U.S. v. Wise*, — F.2d — (8th Cir. Sept. 17, 1992) (en banc) [5 *GSU* #3]. See *Outline* at IX.D.1.

The court also noted that "[i]t is the law that even illegally obtained or other inadmissible evidence may be considered by the sentencing judge unlike at a trial involving guilt or innocence." Other circuits agree. See *Outline* at IX.D.4.

U.S. v. Silverman, No. 90-3205 (6th Cir. Sept. 22, 1992) (en banc) (Wellford, Sr. J.) (Merritt, C.J., Keith, Jones, and Martin, JJ., dissenting).

Offense Conduct

Calculating Weight of Drugs

U.S. v. Rodriguez, No. 91-5455 (3d Cir. Sept. 18, 1992) (Roth, J.) (Remanded: Court joined four other circuits in holding unusable ingredients should not be included as part of drug "mixture" under Note * in § 2D1.1(c). Defendants conspired to sell three one-kilogram packages of cocaine, which actually consisted of compressed boric acid with a small amount of cocaine (65.1 grams total) carefully wrapped around the boric acid to fool buyers. Distinguishing *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) [4 *GSU* #4], the court held that defendants should not have been sentenced on the total weight: "*Chapman* concerned a true mixture," whereas "the cocaine here was not mixed in among the particles of boric acid." Furthermore, "the compressed boric acid was not used either as a cutting agent or routine transport medium for the cocaine such that its proximity to the cocaine here would constitute a 'mixture' as *Chapman* elucidates that term."

The court also rejected the government's argument that "the object of the conspiracy was three kilograms of cocaine," finding "that the government produced no evidence of availability to the defendants of three kilograms of cocaine and that the district court made no finding that a higher guideline range was justified by any ability of defendants to deliver in fact three kilograms of cocaine to the proposed purchasers" as is required under § 2D1.4, comment. (n.1).).
See *Outline* at II.B.1 and 3.

Violation of Supervised Release

Revocation of Supervised Release

U.S. v. Koehler, No. 91-1585 (2d Cir. Aug. 21, 1992) (Mahoney, J.) (Remanded: Error to reimpose supervised release term after it was revoked and a sentence of imprisonment was imposed. Once a term of supervised release has been revoked under 18 U.S.C. § 3583(e)(3), "there is nothing left to extend, modify, reduce, or enlarge under § 3583(e)(2).").

U.S. v. Bermudez, No. 92-1236 (2d Cir. Sept. 1, 1992) (per curiam) (Remanded: After revocation of supervised release for defendant who was originally sentenced before the Guidelines became effective but after supervised release went into effect, district court should still consider Guidelines Chapter 7 when resentencing. "It seems clear that a violation of supervised release is, for this purpose, a separate 'offense' from the crime that led to the initial imprisonment. . . . Revocation or modification of supervised release is authorized by 18 U.S.C. § 3583(e), which requires the court to consider certain factors set forth in § 3553(a), including '. . . the guidelines that are in effect on the date the defendant is sentenced' and 'any pertinent policy statement. . . .' Thus, on remand, the current Guidelines should be consulted in resentencing Bermudez." The court noted that, although courts should "take the [Chapter 7] policy statements into account when sentencing for a violation of supervised release," the statements "'are advisory rather than mandatory.'"
See *Outline* at VII.B.1.

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General Application Principles

AMENDMENTS

Third Circuit holds that clarifying commentary that was added after defendant's sentencing may be considered on appeal even if it conflicts with circuit precedent, unless it is inconsistent with the guideline. Defendant, convicted of armed bank robbery and possession of a firearm by a convicted felon, received a longer sentence because the sentencing court determined that the unlawful possession offense was a "crime of violence" under § 4B1.2(1)(ii). At the time, the Third Circuit held that unlawful possession could be a crime of violence and courts could look beyond the indictment to the underlying circumstances of the offense to make that determination. *See U.S. v. John*, 936 F.2d 764, 767–68 (3d Cir. 1991); *U.S. v. Williams*, 892 F.2d 296, 304 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3221 (1990). Between defendant's sentence and appeal, however, an amendment to § 4B1.2, comment. (n.2) "clarifie[d] that the application of § 4B1.2 is determined by the offense of conviction (i.e., the conduct charged in the count of which the defendant was convicted); [and] that the offense of unlawful possession of a weapon is not a crime of violence." *See* U.S.S.G. App. C, Amendment 433 (1991). Defendant argued that because the amendment merely clarified the guideline, he should be resentenced.

The appellate court remanded, holding that "we may consider a new commentary regarding an ambiguous guideline in determining how that guideline should be applied. We further hold that a panel may consider new commentary text where another panel of this court has already resolved the ambiguity and that a second panel is entitled to defer to the new commentary even when it mandates a result different from that of the prior panel." Finding § 4B1.2(1)(ii) was ambiguous as to whether underlying or only charged conduct could be considered, the court concluded that "the reading of § 4B1.2 reflected in the new commentary is a permissible reading of that guideline and . . . a sentencing court should look solely to the conduct alleged in the count of the indictment charging the offense of conviction in order to determine whether that offense is a crime of violence."

The court also held, however, that if "the Commission adopts an interpretive commentary amendment that the text of the guideline cannot reasonably support, . . . we should decline to follow its lead. . . . Therefore, to the extent the amendment in question purports to make possession of a firearm by a felon never a crime of violence, we conclude that the text of the guideline will not support this interpretation. Thus, we decline to give it any effect."

Other circuits have followed the amendment, but the Eleventh Circuit concluded that the amendment did not nullify circuit precedent that held unlawful possession by a felon is "by its nature" a crime of violence. *See U.S. v. Stinson*, 957 F.2d 813, 814–15 (11th Cir. 1992) (per curiam). *Cf. U.S. v. Saucedo*, 950 F.2d 1508, 1512–17 (10th Cir. 1991) (do not retrospectively apply clarifying amendment to commentary that conflicts with circuit precedent and would disadvantage defendant in violation of ex post facto clause).

U.S. v. Joshua, No. 91-3286 (3d Cir. Oct. 5, 1992) (Stapleton, J.).

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

INCRIMINATING STATEMENTS AS PART OF COOPERATION AGREEMENT

U.S. v. Fant, 974 F.2d 559, 562–65 (4th Cir. 1992) (Remanded: It was "plain error" to base obstruction of justice enhancement on statements made to probation officers where plea agreement, pursuant to § 1B1.8(a), stated self-incriminating information provided to government would not be used to determine the guideline range. Application Note 5 (Nov. 1, 1991), added after defendant was sentenced but "intended merely to clarify . . . the proper operation of § 1B1.8," indicates that the restriction in § 1B1.8(a) "applies to statements made to probation officers which are later incorporated into presentencing reports."). *Accord U.S. v. Marsh*, 963 F.2d 72, 73–74 (5th Cir. 1992) (per curiam) [4 *GSU* #24]. *But cf. U.S. v. Miller*, 910 F.2d 1321, 1325–26 (6th Cir. 1990) (holding, prior to addition of Note 5, that statements to probation officer are not covered by § 1B1.8).

See *Outline* at I.D.

Sentencing Procedure

EVIDENTIARY ISSUES

Sixth Circuit holds that illegally seized evidence may not be considered in sentencing under the Guidelines unless it is unrelated to the offense of conviction. Defendant pled guilty to a 1990 drug conspiracy charge. In determining where to sentence within the guideline range, the district court considered evidence that was illegally seized during a 1988 arrest on state drug charges. Defendant appealed.

Although the appellate court affirmed on the facts of the case, it disagreed with four other circuits by holding that "the exclusionary rule bars a sentencing court's reliance on evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction in determining the defendant's sentence under the Sentencing Guidelines."

"This conclusion follows in part from the momentous changes in sentencing wrought by the federal Sentencing Guidelines . . . [which] have dramatically changed the calculus of costs and benefits underlying the exclusionary rule. . . . [S]entencing has to a significant extent replaced trial as the principal forum for establishing the existence of certain criminal conduct. It therefore follows that excluding illegally seized evidence from trial but permitting its use at sentencing will result in a corresponding decrease in the deterrent effect of the exclusionary rule on unconstitutional law-enforcement practices."

However, because defendant's 1988 state drug charges "involved conduct unrelated to that for which Nichols was convicted in this case . . . excluding the evidence from sentencing on the subsequent conviction would not sufficiently fur-

ther the purposes of the exclusionary rule to justify barring its use at sentencing." The court held that, "where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the Sentencing Guidelines, and the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range."

One judge agreed with the result but "prefer[red] not to join in some of the dicta that accompany the court's announcement of this conclusion. Our disposition of this appeal makes it unnecessary to say, for example, whether we agree or disagree with the 'broad rule' that other Courts of Appeals have adopted with respect to the use at sentencing of evidence inadmissible at trial."

U.S. v. Nichols, No. 91-5581 (6th Cir. Nov. 6, 1992) (Jones, J.) (Nelson, J., concurring in part).
See *Outline* at IX.D.4.

Adjustments

Obstruction of Justice

U.S. v. Colletti, No. 91-5405 (3d Cir. Oct. 7, 1992) (Fullam, Sr. Dist. J.) (Remanded: Committing perjury at trial may warrant §3C1.1 enhancement, but "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."). *See also U.S. v. Lawrence*, 972 F.2d 1580, 1581–83 (11th Cir. 1992) (per curiam) (court must make independent finding that defendant willfully lied at trial).
See *Outline* at III.C.5.

Acceptance of Responsibility

U.S. v. Hicks, No. 91-3195 (D.C. Cir. Nov. 3, 1992) (Randolph, J.) (Remanded: Defendant was convicted on one count; the jury could not reach a verdict on a second. At trial, defendant admitted the first offense but denied the second. The district court refused to grant a §3E1.1 reduction, holding that defendant had to accept responsibility for the second offense—as relevant conduct—as well as the offense of conviction. The appellate court, noting the split in the circuits 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." Note, however, that Application Note 1(a) states that "a defendant who falsely denies . . . relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

The court also noted: "Under U.S.S.G. §1B1.11, also effective November 1, 1992, the resentencing will occur under the new version of the Guidelines unless such application would violate the Ex Post Facto Clause." The court cautioned that "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.").
See *Outline* at I.E and III.E.3.

U.S. v. Rodriguez, 975 F.2d 999, 1009 (3d Cir. 1992) (Remanded: In denying acceptance of responsibility reduction, district court erred by not considering reasons why defendants refused to plead guilty to entire indictment and went to trial. The decision to go to trial does not prohibit the reduction, §3E1.1(b) and comment. (n.2), and here the defendants appear to have had specific, valid reasons for refusing to plead—one was acquitted on the count he refused to plead guilty to, the other disagreed with the amount of drugs claimed by the government and won a lower amount on appeal.).
See *Outline* at III.E.4.

Role in Offense

U.S. v. Colletti, No. 91-5405 (3d Cir. Oct. 7, 1992) (Fullam, Sr. Dist. J.) (Remanded: Robbery defendant was not leader of criminal activity involving five or more persons, §3B1.1(a), because the fifth person "was neither 'criminally responsible for the commission of the offense' . . . nor was he used to facilitate the criminal offense—which was already completed" when he became involved. The fifth person was charged with receiving the stolen goods from the robbery, but was not and could not properly have been charged with robbery. He did not know the robbery was to occur, assisted only *after* the offense by briefly hiding the stolen goods, and did not profit from the crime.).
See *Outline* at III.B.2.

Criminal History

Calculation

U.S. v. Woods, No. 92-1016 (7th Cir. Oct. 6, 1992) (Cummings, J.) (Affirmed: District court should have followed Application Note 3 of §4A1.2 and treated prior sentences as "related" under §4A1.2(a)(2) solely because they were consolidated for sentencing. Although *U.S. v. Elmendorf*, 945 F.2d 989, 997–98 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 990 (1992), held that this note need not be strictly followed, and "we still believe that treating crimes as 'related' simply because they were consolidated for trial or sentencing is misguided," the Nov. 1991 additions of §4A1.1(f) and Application Note 6 "show that cases that are consolidated for sentencing are meant to be considered related." Thus, "[l]anguage in *Elmendorf* to the contrary should be limited to cases arising under prior versions of the Sentencing Guidelines." Here, however, "this error was harmless"—although points were subtracted by treating some prior sentences as related, enough points were added under §4A1.1(f) to result in the same criminal history category and sentencing range.).
See *Outline* at IV.A.1.c and X.D.

Offense Conduct

Calculation of Loss

U.S. v. Bailey, 975 F.2d 1028, 1030–31 (4th Cir. 1992) (Remanded: For loss computation in completed fraud, it was improper to include projected profits defrauded investors would have earned on their investments—only the "out-of-pocket funds actually taken" by defendant are included. Use of "probable or intended loss" under §2F1.1, comment. (n.7), is limited to attempt crimes.).
See *Outline* at II.D.2.

Vacated Pending Rehearing En Banc:

U.S. v. Lambert, 963 F.2d 711 (5th Cir. 1992). Please delete the reference to *Lambert* in the *Outline* at VI.A.3.

Guideline Sentencing Update

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VOLUME 5 • NUMBER 6 • DECEMBER 17, 1992

Adjustments

ROLE IN OFFENSE

D.C. Circuit holds that adjustment for mitigating role in relevant conduct cannot be awarded when that conduct was not used to set the offense level. Defendant pled guilty to one count of conspiracy to distribute cocaine. Her offense level was based on only the one kilogram of cocaine in her count of conviction, not the 25 kilograms distributed by the overall conspiracy. Defendant requested a downward adjustment under § 3B1.2, claiming that in the context of the overall conspiracy she was a minor or minimal participant. The district court refused, finding that she was a major participant in the conduct upon which the base offense level was calculated.

The appellant court affirmed. Relevant conduct should be used for role in offense determinations, but only if it is also used to set the base offense level: "Here the larger conspiracy was not taken into account in establishing the base level. To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.... The Guidelines do not require this absurd result." The court stated that the new Application Note 4 (Nov. 1992) to § 3B1.2, and the Introductory Commentary (Nov. 1990) to § 3B1 that it replaced, both support this result. *See* U.S.S.G. App. C (amendment 456).

U.S. v. Olibrices, No. 90-3087 (D.C. Cir. Dec. 1, 1992) (Sentelle, J.).

See *Outline* at III.B.1 and 7.

U.S. v. Cotto, No. 92-1129 (2d Cir. Nov. 10, 1992) (Newman, J.) (Remanded: Under § 3B1.1(b), district court does not have discretion to increase offense level by two, rather than the three specified by guideline, for "manager or supervisor" of criminal activity involving five or more participants. "For some enhancements, the Sentencing Commission has explicitly authorized sentencing judges to select an intermediate degree of increase between specified levels if the facts warrant such an outcome.... No such compromise outcome is permitted for the aggravating role enhancement."). *Cf. U.S. v. Valencia*, 957 F.2d 153, 156 (5th Cir. 1992) (may not give one-point reduction for acceptance of responsibility—must be two points or no reduction) [4 *GSU* #21].

See *Outline* generally at III.B.6.

OBSTRUCTION OF JUSTICE

U.S. v. Lew, No. 92-1144 (2d Cir. Nov. 30, 1992) (Newman, J.) (Remanded: Where the issue was "close," district court should have followed § 3C1.1, comment. (n.1), and considered defendant's allegedly obstructive statements "in a light most favorable to defendant." While awaiting presentment after arrest, defendant made a statement to a potential codefendant that the government claimed was an invitation to fabricate a defense, but defendant claimed was merely a suggestion they say nothing to authorities until they could discuss the charges against them. The appellate court held that "[a]pplication note 1 is a sensible response to the reality that defendants will often make statements susceptible to various interpretations in the anxious moments following apprehension. Before such a statement is used to add a discrete increment of punishment for obstruction of justice, a sentencing judge should be satisfied that the statement is really misconduct deserving of punishment.... Viewed in the light most favorable to the defendant, the statement does not support an obstruction of justice enhancement."). *But cf. U.S. v. Capps*, 952 F.2d 1026, 1029 (8th Cir. 1991) (indicating Note 1 applies only to *false* statements and does not apply to threats against witnesses or conspirators).

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

Determining the Sentence

SUPERVISED RELEASE

U.S. v. Chinske, 978 F.2d 557 (9th Cir. 1992) (Affirmed: Rejected defendant's argument that §§ 5D1.1 and 5D1.2, which require term of supervised release, conflict with 18 U.S.C. § 3583(a), which permits optional term. "U.S.S.G. §§ 5D1.1 and 5D1.2 can be read consistently with 18 U.S.C. § 3583"—those sections "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" that is granted under § 3583(a).). *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), *cert. denied*, 111 S. Ct. 685 (1991).

See *Outline* at V.C and XI.B.

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit affirms downward departure for "extraordinary physical impairment that results in extreme vulnerability" in prison. Defendant, convicted of money laundering offenses, was subject to a guideline range of 46–57 months in prison. The district court departed downward under § 5H1.4, p.s., to impose probation, home confinement, and community service, after concluding that defendant "suffers 'an extraordinary physical impairment'... which leaves him exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries were the Court to impose a sentence of incarceration." The government appealed, disputing the court's factual finding that defendant's condition left him exceptionally vulnerable to attack in prison.

The appellate court affirmed, first agreeing with the principle "that an extraordinary physical impairment that results

in extreme vulnerability is a legitimate basis for departure." The court held that the government failed to present evidence to support its claim that the Bureau of Prisons could adequately protect defendant in prison, and that defendant met his burden of showing departure was justified by introducing "the reports of four doctors and the testimony of one of them; all of them stated that in prison he would be exceedingly vulnerable to victimization and potentially fatal injuries. Although these doctors may not have been familiar with the facilities available to Long in prison, we do not believe the District Court committed clear error by relying upon these statements in concluding that 'the imposition of a term of imprisonment could be the equivalent of a death sentence for Mr. Long.'" *See also U.S. v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (affirmed downward departure based on vulnerability to victimization in prison).

U.S. v. Long, 977 F.2d 1264 (8th Cir. 1992).

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

U.S. v. Williams, No. 91-50434 (9th Cir. Nov. 3, 1992) (per curiam) (Affirmed: Agreed with First Circuit that government agent's perjury before grand jury "is not a basis for downward departure because it does not relate to the 'offense or the offender' and is based solely on a 'perceived need to reprimand the government.'"). *See U.S. v. Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991) (Remanded: "A sentencing departure is not warranted in response to conduct of the government or of an independent third party. Thus it was error for the district court to base its downward departure upon a perceived need to reprimand the government for its conduct in investigating and prosecuting the case.").

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

U.S. v. Mickens, 977 F.2d 69 (2d Cir. 1992) (Remanded: District court may not base departure solely on jury recommendation, but: "Where a jury's request for leniency appears to be a rational response to facts and circumstances placed before it which would themselves lead a court to consider a downward departure, and the district court so finds, the jury's request also may be taken into account." However, the court must find that the factors considered by the jury are appropriate bases for departure.).

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

Offense Conduct

Drug Quantity—Relevant Conduct

U.S. v. Navarro, No. 91-30275 (9th Cir. Nov. 16, 1992) (Wright, J.) (Remanded: Defendant was responsible only for the two grams of heroin he sold, not amounts sold by others after he had ended his participation in the conspiracy. District court must make specific factual findings as to the amount of drugs attributable to defendant as relevant conduct; it may not simply adopt conclusory statements from the presentence report that are unsupported by the facts or the guidelines.).

See *Outline* at II.A.2.

Loss

U.S. v. Santiago, 977 F.2d 517 (10th Cir. 1992) (Remanded: Loss in unsuccessful insurance fraud should have been calculated as the $4,800 insurance company would have paid, even though defendant filed claim for $11,000. Since there was no actual loss, "probable or intended loss" should be used under § 2F1.1, comment. (n.7). Although defendant may have believed car was worth $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.... Although the language of that Guidelines section leaves room for a contrary interpretation, we conclude that a valuation or estimate of loss that exceeds that limit impermissibly ignores economic reality."). *Cf. U.S. v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992) ("offense level may not be increased on the basis of an estimated fraud loss when no actual loss is possible") [5 *GSU* #1].

See *Outline* at II.D.2.

Sentencing Procedure

Plea Bargaining

U.S. v. Lewis, No. 92-10231 (9th Cir. Nov. 2, 1992) (Alarcon, J.) (Affirmed: District court did not exceed its authority or violate defendant's due process rights when, to determine whether defendant qualified for career offender status, it ordered transcripts of three prior convictions to determine whether defendant's guilty pleas in those cases were constitutionally valid. As part of the current plea agreement, the government recommended that defendant not be sentenced as a career offender, but the PSR indicated he should be and it was "entirely proper" for the court to determine for itself whether the prior pleas were constitutional.).

See *Outline* at IX.A.4.

Revocation Of Supervised Release

U.S. v. McGee, No. 92-1553 (7th Cir. Nov. 30, 1992) (Cummings, J.) (Remanded: After revoking defendant's three-year term of supervised release and ordering him to serve two years in prison, district court did not have authority to impose additional five-year term of supervised release: "Once a court revokes a defendant's supervised release and imprisons him under [18 U.S.C. §] 3583(e)(3), no residual term of supervised release survives revocation. Consequently, there is no way for a court to revisit § 3583(e)(2) and create or 'extend' a second term of supervised release."). *Accord U.S. v. Koehler*, 973 F.2d 132, 134–35 (2d Cir. 1992) (remanded).

Contra U.S. v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992) (Affirmed: Court had authority to revoke three-year term of release and sentence defendant to six-month prison term followed by continuation of supervised release to end on the date originally scheduled: "[T]he district court's action is consistent with 18 U.S.C. § 3583(e)(3) which ... permits a sentencing judge to ... require the offender to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision. If a district court has that power, it certainly has the power under that subsection to impose a less drastic sanction, namely, to require an offender to serve part of the remaining supervised release period in prison and the other part under supervised release.").

See *Outline* at VII.B.1.

Certiorari Granted:

U.S. v. Stinson, 943 F.2d 1268 (11th Cir. 1991) (per curiam), *on rehearing*, 957 F.2d 813 (11th Cir. 1992) (per curiam) [4 *GSU* #19], *cert. granted*, 113 S. Ct. 459 (Nov. 9, 1992). Question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under U.S.S.G. § 4B1.1, *see* U.S.S.G. § 4B1.2 comment. (n.2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. § 3742(f)(1)."

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Departures

CRIMINAL HISTORY

Fourth Circuit holds that court may depart by analogy to career offender guideline for defendant who would have been sentenced as career offender but for invalid prior conviction. The presentence report put defendant in criminal history category VI and concluded he had several prior violent felonies that qualified him as a career offender. Defendant challenged the validity of the prior convictions, but the district court ruled that at least two were valid and sentenced him as a career offender under § 4B1.1. As an alternative, the court held that even if one of the required felony convictions were invalid, the same sentence would be imposed because the underlying facts were not disputed and could be used to depart under § 4A1.3, p.s., with the career offender provision as a guide.

The appellate court affirmed, holding that it did not have to decide whether the disputed convictions were valid because the departure to the career offender range was proper. "Once the district court determines that a departure under U.S.S.G. § 4A1.3, p.s. is warranted and that the defendant's prior criminal conduct is of sufficient seriousness to conclude that he should be treated as a career offender, the district court may depart directly to the guideline range applicable to career offenders similar to the defendant.... Thus, if a district court, based on reliable information, determines that a defendant's underlying past criminal conduct demonstrates that the defendant would be sentenced as a career offender but for the fact that one or both of the prior predicate convictions may not be counted [because they are constitutionally invalid], the court may depart directly to the career offender guideline range." *Cf. U.S. v. Hines*, 943 F.2d 348, 354–55 (4th Cir.) (departure to career offender level proper where defendant missed that status only because prior violent felonies were consolidated), *cert. denied*, 112 S. Ct. 613 (1991); *U.S. v. Dorsey*, 888 F.2d 79, 80–81 (11th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 756 (1990).

The court added, as a general matter, that "[a]dditional Criminal History Categories above Category VI may be formulated in order to craft a departure that corresponds to the existing structure of the guidelines." *Accord U.S. v. Streit*, 962 F.2d 894, 905–06 (9th Cir. 1992) [4 *GSU* #24]; *U.S. v. Glas*, 957 F.2d 497, 498–99 (7th Cir. 1992) [4 *GSU* #20]; *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1991) (en banc). A so-called "vertical departure"—moving to higher offense levels within category VI—may also be used and is recommended in the November 1992 revision of § 4A1.3, p.s.

U.S. v. Cash, No. 91-5869 (4th Cir. Dec. 14, 1992) (Wilkins, J.).

See *Outline* at VI.A.1.c, 3, and 4.

MITIGATING CIRCUMSTANCES

U.S. v. Aslakson, No. 92-1891 (8th Cir. Dec. 18, 1992) (per curiam) (Affirmed: An offer, which was refused by the government, to testify against a codefendant in exchange for a substantial assistance motion under § 5K1.1, p.s., cannot warrant departure under § 5K2.0, p.s. on the theory that such conduct is not adequately covered by the acceptance of responsibility reduction in § 3E1.1. Assistance in the prosecution of others is covered under § 5K1.1, not § 3E1.1, and departure cannot be made without motion of the government except in very limited circumstances not present here.).

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

U.S. v. Frazier, No. 91-3585 (7th Cir. Nov. 16, 1992) (Coffey, J.) (Remanded: General finding that defendant suffers from a mental disorder is not sufficient for downward departure under § 5K2.13, p.s. The district court must make specific findings that "defendant's mental condition resulted in a significantly reduced mental capacity at the time of the offense [and] contributed to the commission of her offense.... [S]uch a link cannot be assumed." District court also erred in basing the departure on its opinion that there was "nothing to be gained" by imprisoning defendant, in terms of either punishment or general deterrence: "Departures must 'be based on policies found in the Guidelines themselves rather than in the personal penal philosophy of the sentencing judge.'").

See *Outline* at VI.C.1.b and 4.b.

AGGRAVATING CIRCUMSTANCES

U.S. v. Medina-Gutierrez, No. 92-2094 (5th Cir. Dec. 23, 1992) (Duhé, J.) (Remanded: Plain error to use § 5K2.6, p.s., as a basis for departure in offense of transportation of firearms in interstate commerce. That offense "is, technically, a crime in which weapons are used, and therefore seems to warrant a § 5K2.6 upward departure. Practically speaking, however, this section must refer to crimes that may be committed with or without the use of a weapon, otherwise, every firearms sentence would require upward departure." It was not error, however, to depart upward because of defendant's frequent purchases of weapons: "a criminal defendant who has repeatedly engaged in a criminal activity evidences a dangerousness not apparent in a defendant who has acted illegally only once.").

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

SUBSTANTIAL ASSISTANCE

U.S. v. Easter, No. 91-6103 (10th Cir. Dec. 10, 1992) (Baldock, J.) (Seymour, J., dissenting) (Affirmed: Defendant claimed for the first time on appeal that the government refused to make a § 5K1.1, p.s. motion because he was the only conspirator to request a jury trial. The appellate court rejected his request for a remand and hearing on the government's motives: "Defendant's exercise of his constitutional right to a jury trial would be an improper basis for the government to withhold a motion. Nevertheless, defendant did not raise this argument in the district court," so it could only be reviewed for plain error. But the court, characterizing this as a factual dispute to which "plain error review does not apply," dismissed the appeal: "Defendant's suggestion regarding the government's motive for failing to bring a motion raises the factual issue of, not only the government's motive, but whether the Defendant in fact provided substantial assistance.").

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

Criminal History

Armed Career Criminal

U.S. v. Medina-Gutierrez, No. 92-2094 (5th Cir. Dec. 23, 1992) (Duhé, J.) (Affirmed: Whether prior violent felony convictions were "related" under §4A1.2 is irrelevant to sentencing as armed career criminal under §4B1.4. Defendant argued that three burglary convictions should be treated as one violent felony because they were committed within weeks of one another as part of a common plan and were consolidated for sentencing. However, §4B1.4 applies to defendants subject to enhanced sentence under 18 U.S.C. §924(e), and the appellate court stated that "what matters under §924(e) is whether three violent felonies were committed on different occasions; whether they are . . . 'related cases' under §4A1.2 is irrelevant."). *See also* §4B1.4, comment. (n.1) ("the definition[] of 'violent felony' . . . in 18 U.S.C. §924(e) [is] not identical to the definition[] of 'crime of violence' . . . used in §4B1.1").
[To be placed in new section IV.D in next edition of *Outline*.]

Calculation

U.S. v. Tabaka, No. 91-3882 (3d Cir. Dec. 28, 1992) (Weis, J.) (Remanded: If a prior sentence is suspended, only the portion that was served should be considered in the criminal history calculation. Defendant had received a sentence of a minimum 48 hours and maximum 15 months that was suspended after two days. The appellate court held it was error to consider the maximum sentence (for three criminal history points) rather than the two days actually served (one point). Normally the "sentence of imprisonment" used to calculate criminal history points is the maximum sentence imposed, rather than time actually served. *See* §4A1.2(b)(1) and comment. (n.2). However, §4A1.2(b)(2) specifically states: "If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended.").
See *Outline* at IV.A.2.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Gullickson, No. 92-1398 (8th Cir. Dec. 8, 1992) (Magill, J.) (Remanded: District courts retain discretion under 18 U.S.C. §3584(a) to impose concurrent or consecutive sentences, but they must also follow §5G1.3 unless departure is warranted. Here, §5G1.3(c) (Nov. 1991) called for concurrent sentences, but the district court improperly made the federal sentence consecutive to defendant's unexpired state sentences without "follow[ing] the usual guidelines procedures" to determine whether departure was warranted.).

U.S. v. Parkinson, No. 91-2233 (1st Cir. Dec. 4, 1992) (per curiam) (Affirmed: In determining under §5G1.3(c) the extent to impose sentence consecutively to prior unexpired state sentence, look at "the actual total prison term likely to be served [on state sentence], not the putative terms of imprisonment imposed." Defendant was serving a 10–20 year state term, and for the instant federal offense he received a 240-month sentence, to run consecutively. Defendant argued that this was actually a departure because it would result in a total sentence of 30–40 years, which exceeded the maximum 327 months that "approximate[d] the total punishment that would have been imposed . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time," §5G1.3, comment. (n.3) (1991). However, the appellate court held that good-conduct credit and parole "could potentially result in defendant serving less than seven years of [the state] sentence," for a total sentence of less than 327 months.).

Note that effective Nov. 1, 1992, § 5G1.3(c) was designated a policy statement, but the substance of the guideline is essentially the same.
See *Outline* at V.A.3.

Fines

U.S. v. Fair, No. 92-2098 (5th Cir. Dec. 9, 1992) (Duhé, J.) (Remanded: PSR indicated defendant could not pay fine, and court improperly imposed fine without articulating reasons: "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." Defendant may rely on PSR's conclusion that he cannot pay fine; burden then shifts to government to prove ability to pay. District court also erred in imposing cost of incarceration fine under §5E1.2(i) without first imposing punitive fine under §5E1.2(a).).
See *Outline* at V.E.1 and 2.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Davis, No. 92-3143 (6th Cir. Dec. 16, 1992) (Gilmore, Sr. Dist. J.) (Affirmed: Where defendant was convicted of conspiracy to distribute cocaine, but the unusual circumstances of the case prevented the district court from reaching any reasonable estimate of the quantity of cocaine attributable to defendant, it was proper for the court to use the lowest offense level applicable to cocaine under the Drug Quantity Table.).
See *Outline* at II.B.3.

U.S. v. Reyes, No. 91-6398 (10th Cir. Nov. 17, 1992) (Baldock, J.) (Remanded: District court clearly erred in finding that defendant negotiated to sell additional pound of cocaine, *see* §2D1.1, comment. (n.12) ("the weight under negotiation in an uncompleted distribution shall be used"). The undercover agent testified that he believed that defendant agreed to sell him another pound, but "[n]othing in the recorded conversation indicates an affirmative response by Defendant to supply an additional pound of cocaine. . . . and nothing in the record, other than [the agent's] subjective belief, indicates that Defendant agreed to it."
See *Outline* at II.B.3.

Adjustments

Role in Offense

U.S. v. Katora, No. 91-3505 (3d Cir. Dec. 7, 1992) (Mansmann, J.) (Becker, J., dissenting) (Remanded: Adjustment under §3B1.1(c) could not be applied to equally culpable codefendants who organized only non-culpable persons, not each other or other culpable participants. The fact that defendants "shared responsibility for creating and carrying out the fraud do[es] not indicate that either [defendant] organized the other. Rather, . . . [defendants] were 'organizers' only in the sense that they were 'planners' of the offense. Just as section 3B1.1 cannot enhance the sentence of a solo offender, . . . neither can it enhance the sentences of a duo when they bear equal responsibility for 'organizing' their own commission of a crime." Defendants did organize innocent third parties, but under §3B1.1 "use of non-culpable 'outsiders' [may only be used] to calculate 'extensiveness,' not 'role.' . . . [W]e conclude that the application of sections 3B1.1 and 3B1.2 has two prerequisites: multiple participants and some differentiation in their relative culpabilities.").
See *Outline* at III.B.2, 6, and 7.

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VOLUME 5 • NUMBER 8 • FEBRUARY 4, 1993

Violations of Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Tenth Circuit changes circuit rule, holds that supervised release term may not be reimposed after revocation and incarceration. Defendant's supervised release was revoked for drug possession under 18 U.S.C. § 3583(g), based on a positive urinalysis. The district court sentenced him to 12 months' incarceration to be followed by almost 26 months of additional supervised release. Defendant argued on appeal that a positive test indicates only drug use, not "possession" under § 3583(g), and that a new term of supervised release could not be imposed after revocation of the original term.

The appellate court upheld the revocation based on the positive urinalysis and defendant's admission that he had used marijuana: "There can be no more intimate form of possession than use. We hold that a controlled substance in a person's body is in the possession of that person for purposes of 18 U.S.C. § 3583(g), assuming the required mens rea."

The court reversed the reimposition of supervised release, however. *U.S. v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991) [4 *GSU* #23], ruled that release could be reimposed after revocation. But developments since then, the current panel noted, "warrant this court's serious reconsideration of *Boling*. . . . We have sua sponte presented this issue to all the active judges of the court, . . . and we have now been authorized by those judges to announce that this circuit's prior decision in [*Boling*] is hereby overruled. We have also been authorized to hold, as the law of this circuit governing pending and future cases, that upon breach of a condition of supervised release, the district court may revoke supervised release and order the defendant to serve a term in prison pursuant to 18 U.S.C. § 3583(e)(3), or may extend the defendant's term of supervised release pursuant to 3583(e)(2), but not both. . . . Our holding on this issue compels the conclusion that Rockwell cannot be ordered to serve an additional term of supervised release. Since 3583(g) requires incarceration, the options presented in 3583(e)(2) and (e)(4) are not available to the court, and 3583(e)(3) is available only to the extent of fixing the maximum term of incarceration which may be imposed."

U.S. v. Rockwell, No. 92-6121 (10th Cir. Jan. 29, 1993) (Anderson, J.).

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

U.S. v. Glasener, No. 92-1976 (8th Cir. Dec. 3, 1992) (Gibson, J.) (Affirmed: Defendant on supervised release committed and pled guilty to a new offense that violated the terms of his release. The court revoked his release and imposed a 24-month term of imprisonment. The next day, he received an 88-month sentence for the new offense, which was ordered to run consecutively to the revocation term. The appellate court held that consecutive sentences were proper, and that it did not matter which sentence was imposed first. Application Note 5 of § 7B1.3, p.s. recommends that any sentence imposed after revocation be run consecutively to any revocation sentence. Also, had the order of sentencing hearings been reversed, § 7B1.3(f) would have required consecutive sentences.).

See *Outline* at VII.B.1.

REVOCATION OF PROBATION

U.S. v. Clay, No. 92-5562 (6th Cir. Jan. 6, 1993) (Jones, J.) (Remanded: Under 18 U.S.C. § 3565(a), defendant must be sentenced "to not less than one-third of the original sentence" when probation is revoked for drug possession. "Original sentence" means the maximum term of imprisonment under the Guidelines for the original offense, and a sentence after probation revocation is limited to the original guideline range. Thus, it was error to impose revocation sentence of fifteen months when the guideline maximum was seven months.). *Accord U.S. v. Granderson*, 969 F.2d 980, 983–84 (11th Cir. 1992); *U.S. v. Gordon*, 961 F.2d 426, 430–33 (3d Cir. 1992) [4 *GSU* #21]. *Contra U.S. v. Byrkett*, 961 F.2d 1399, 1400–01 (8th Cir. 1992) (per curiam) ("original-sentence" includes probation, affirmed eight-month prison term where original guideline maximum was six months and sentence was two years' probation) [4 *GSU* #23]; *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) (same, affirmed one-year sentence where original guideline maximum was seven months and sentence was three year's probation) [4 *GSU* #15].

See *Outline* at VII.A.2.

General Application Principles

AMENDMENTS

U.S. v. Warren, No. 91-30464 (9th Cir. Dec. 8, 1992) (Tang, J.) (Affirmed: Defendant, sentenced after the 1991 amendments to the Guidelines, had to be sentenced under the 1989 version of § 2K2.1 because of ex post facto concerns. He argued that the court should use the 1991 version of § 5G1.3, which could produce a shorter total sentence. The district court, however, used the 1989 version of § 5G1.3, reasoning that the 1989 Guidelines should be applied in their entirety. The appellate court agreed: "[W]e think it more appropriate that sentences be determined under one set of Guidelines rather than applying the Guidelines piecemeal. . . . Our decision is also consistent with the approach recently promulgated by the Sentencing Commission for sentences imposed on or after Nov. 1, 1992. *See* U.S.S.G. § 1B1.11(b), p.s. & comment. (n.1) (Nov. 1, 1992) (earlier editions of Guidelines Manual, when applicable, are to be used in their entirety).").

See *Outline* at I.E.

U.S. v. Seligsohn, No. 91-2083 (3d Cir. Dec. 9, 1992) (Weis, J.) (Remanded: For defendants convicted of multiple counts, it was error to apply post-Nov. 1989 version of Guidelines to all counts when ex post facto considerations required that earlier version of Guidelines be used for some counts. The appellate court concluded the government's "so-called 'one-book rule'" would lead to ex post facto problems here, and stated that district courts should determine "which version of the Guidelines is applicable to specific counts.").
See *Outline* at I.E.

Determining the Sentence

Supervised Release

U.S. v. Gullickson, No. 92-2162 (8th Cir. Jan. 5, 1993) (Gibson, J.) (Remanded: 18 U.S.C. § 3624(e) (1988) prohibits imposition of consecutive terms of supervised release, and "dictum" to the contrary in *U.S. v. Saunders*, 957 F.2d 1488, 1494 (8th Cir. 1992) [4 GSU #20], should not be followed: "we believe the statute unambiguously states that terms of supervised release on multiple convictions are to run concurrently."). *Contra U.S. v. Maxwell*, 966 F.2d 545, 550–51 (10th Cir. 1992) (did not discuss 18 U.S.C. § 3624(e)) [5 *GSU* #1].
See *Outline* at V.C.

Fines

U.S. v. White, No. 91-3346 (11th Cir. Jan. 8, 1993) (Kravitch, J.) (Remanded: 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: "18 U.S.C. § 401 employs the disjunctive and authorizes the punishment of a 'fine *or* imprisonment' (emphasis added). The mere existence of the Sentencing Guidelines does not change that clear expression of Congressional intent.").
See *Outline* at V.E.1.

Adjustments

Acceptance of Responsibility

U.S. v. Morrison, No. 92-5033 (6th Cir. Jan. 12, 1993) (Jones, J.) (Remanded: The § 3E1.1 reduction for acceptance of responsibility may not be denied for "criminal activity committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced." The appellate court distinguished cases that upheld denials based on additional criminal conduct, noting that in those cases the criminal activity was somehow related to or was the same type as the offense of conviction, though it noted that two cases indicated denial may be based on any criminal conduct. *See U.S. v. O'Neil*, 936 F.2d 599, 600–01 (1st Cir. 1991); *U.S. v. Watkins*, 911 F.2d 983, 985 (5th Cir. 1990). Referring to Note 1(a) to § 3E1.1, the court concluded that "we consider 'voluntary termination or withdrawal from criminal conduct' to refer to conduct which is related to the underlying offense. Such conduct may be of the same type as the underlying offense, . . . the motivating force behind the underlying offense, . . . related to actions toward government witnesses concerning the underlying offense, . . . or may involve an otherwise strong link to the underlying offense. . . . We are persuaded by the rationale that an individual may be truly repentant for one crime yet commit other unrelated crimes.") (Kennedy, J., dissenting).
See *Outline* at III.E.1.

Multiple Counts

U.S. v. Sneezer, No. 91-10457 (9th Cir. Dec. 30, 1992) (per curiam) (Remanded: Two counts of aggravated sexual assault on the same victim that occurred within a few minutes during the same course of conduct should have been grouped. Generally, under § 3D1.2(b), counts are grouped if they involve the same victim, are connected by a common criminal objective or plan, and involve substantially the same harm. In some instances separate assaults of the same victim should not be grouped, but the appellate court determined that, under the guideline and application notes 3 and 4, "whether to group independent offenses . . . turns on timing," and essentially contemporaneous assaults must be grouped.) (O'Scannlain, J., concurring in judgment).
See *Outline* at III.D.

Sentencing Procedure

U.S. v. LeRoy, No. 92-5086 (10th Cir. Jan. 26, 1993) (Anderson, J.) (Affirmed: District court properly refused to grant defendants' request for discovery of data used by the Sentencing Commission in formulating the Guidelines in order to determine whether defendants were outside the "heartland" of the guidelines applicable to them: "Discovery of Commission files or deliberations relating to promulgation of the guidelines is prohibited. The controlling statute could not be more clear on the point: 'In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. 18 U.S.C. § 3553(b)' . . . . 'Consideration' of the guidelines does not imply investigation into the processes or data from which they emerged. The reasons are obvious. Discovery into the guideline formulation process would be an intrusion into a quasi-legislative rulemaking function delegated by Congress solely to the Commission. 28 U.S.C. §§ 991, 994, 995. And, any conclusion drawn from such discovery would be a usurpation of the Commission's power. Beyond that, the practical problems are too numerous and apparent to warrant discussion. Accordingly, no denial of due process, violation of law, or misapplication of the guidelines resulted from the district court's denial of the discovery.").
See *Outline* generally at IX.E.

Vacated pending rehearing en banc:

U.S. v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (district court may impose higher sentence within guideline range because defendant chose to go to trial instead of pleading guilty) [5 *GSU* #3], *vacated in pertinent part*, Oct. 22, 1992. See *Outline* at I.C.

U.S. v. Roman, 960 F.2d 130 (11th Cir. 1992) (district courts have discretion to allow constitutional challenge to prior conviction) [4 *GSU* #22], *vacated*, 968 F.2d 11 (11th Cir. 1992). See *Outline* at IV.A.3.

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Adjustments

OBSTRUCTION OF JUSTICE

Supreme Court reverses *Dunnigan*, upholds application of § 3C1.1 to perjury by defendant. At defendant's trial for conspiracy to distribute cocaine, several witnesses testified about her drug activities. Defendant testified and denied everything, claiming that she had never possessed or distributed cocaine, but the jury found her guilty. The sentencing court concluded that defendant's denials were untruthful and warranted the § 3C1.1 enhancement for obstruction of justice. The Fourth Circuit reversed, holding that applying § 3C1.1 "for a disbelieved denial of guilt under oath [is] an intolerable burden on the defendant's right to testify in his own behalf." *U.S. v. Dunnigan*, 944 F.2d 178, 183–85 (4th Cir. 1991) [4 *GSU* #10].

The Supreme Court reversed the court of appeals, holding that enhancement for perjury is not unconstitutional. The Court first addressed the findings required before enhancement: "[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury. . . . [A]n accused may give inaccurate testimony due to confusion, mistake or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, 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. . . . When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury."

The Court then held that the Guidelines' requirement of a § 3C1.1 enhancement for perjury "is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf." A defendant's right to testify "does not include a right to commit perjury," and the "concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by our earlier explanation that . . . the trial court must make findings to support all the elements of a perjury violation in the specific case."

U.S. v. Dunnigan, No. 91-1300 (U.S. Feb. 23, 1993) (Kennedy, J.).

See *Outline* at III.C.5.

VICTIM-RELATED ADJUSTMENTS

U.S. v. Morrill, No. 91-8386 (11th Cir. Feb. 16, 1993) (en banc) (per curiam) (Remanded: "We now hold that bank tellers, as a class, are not vulnerable victims within the meaning of section 3A1.1. To the extent that [*U.S. v. Jones*, 899 F.2d 1097 (11th Cir. 1990) [3 *GSU* #8]] holds to the contrary, that case is overruled. . . . This is not to say that bank tellers in individual cases never may be particularly susceptible or otherwise vulnerable victims of a bank robbery. Enhancement is appropriate under section 3A1.1 when a particular teller–victim possesses unique characteristics which make him or her more vulnerable or susceptible to robbery than ordinary bank robbery victims . . . .").

See *Outline* at III.A.1.

MULTIPLE COUNTS

U.S. v. Taylor, No. 91-30418 (9th Cir. Jan. 21, 1993) (Poole, J.) (Remanded: "We join the Tenth Circuit in holding that grouping under section 3D1.2(d) is not appropriate when the guidelines measure harm differently." Thus, for defendant convicted of one count of engaging in an illegal monetary transaction covered by § 2S1.2, which measures harm by "the value of the funds" attributable to the scheme, it was improper to include as relevant conduct amounts from a dismissed wire fraud count, which measures harm under § 2F1.1 as "the loss" attributable to the scheme.). *Accord U.S. v. Johnson*, 971 F.2d 562, 576–76 (10th Cir. 1992) (remanded: improper to add funds obtained from wire fraud scheme as relevant conduct to funds in money-laundering conviction).

See *Outline* at III.D.1.

Criminal History

CALCULATION

First Circuit holds that five bank robberies could be considered related as "part of common scheme or plan." Defendant was sentenced as a career offender on the basis of five prior convictions for five bank robberies committed during a brief period in 1968. Defendant argued that the robberies should be treated as a single felony under the definition of related cases in § 4A1.2(a)(2), comment. (n.3) ("prior sentences are considered related if they resulted from offenses that . . . were part of a single common scheme or plan"), because all five were part of a common plan to rob banks. The district court rejected defendant's argument and his request for an evidentiary hearing.

The appellate court remanded, finding that under the language of the guideline defendant may be correct. "At first blush, it might seem unlikely that the Sentencing Commission intended a defendant to escape career offender status, in the teeth of two prior convictions for different bank robberies at different times and places, simply because those prior robberies were assertedly linked by a further felony, namely, an

overarching conspiracy to rob banks that could literally be called a 'common scheme or plan.'" The court stated that if the Commission did not intend this result, "we might disregard the literal language of the commentary and treat as a single conviction only those convictions so closely related in time and function that separate treatment would disserve the purpose of the career offender provision. Yet a broader perspective suggests that the Commission, in defining related convictions, did mean 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 sentence."

"Once we decide that the 'common scheme or plan' definition is both intentional and valid, [the] language should be given its ordinary meaning. This same language is used in Fed. R. Crim. P. 8 (to determine joinder) and there is no doubt that in that context a conspiracy to rob banks would constitute a common scheme or plan.... We do not, however, think that the district court is required to hold an evidentiary hearing if the court concludes that it would impose the same sentence even without the 'career offender' label. The guideline commentary itself asserts that the rule of thumb here ... is over-inclusive and invites judges to depart upward where the rule of thumb operates to understate criminal history. Accordingly, the requirements for departure are satisfied if the judge supportably concludes that ... five prior bank robberies, united by a conspiracy to rob banks, makes [defendant] deserving of a sentence similar to that he would receive if he were classified as a career offender."

The court noted that the net effect of having a strict rule of thumb with the ability to depart "is to increase the range of discretion of the district judge in these situations, which may be just what the Commission intended. As we have noted, an evidentiary hearing is not automatically required in cases like this one—not because the judge can 'find' no common scheme or plan in the face of a proffer like this one and without a hearing, but rather because the judge may depart rather readily even if such a scheme or plan is assumed."

U.S. v. Elwell, No. 91-1621 (1st Cir. Jan. 20, 1993) (Boudin, J.).

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

Offense Conduct

Drug Quantity

U.S. v. Gilliam, No. 90-5548 (Feb. 12, 1993) (Wilkins, J.) (Widener, J., dissenting) (Remanded: District court erred in automatically attributing to conspiracy defendant the 30 kilograms of cocaine described in the indictment to which he pled guilty. A guilty plea alone is not an admission of responsibility for drug amounts that are attributed generally to a conspiracy. And, "while a plea of guilty to an indictment containing an allegation of the amount of drugs for which a defendant is responsible may, in the absence of a reservation by the defendant of his right to dispute the amount at sentencing, constitute an admission of that quantity for sentencing purposes, Gilliam's indictment did not make any such attribution." Here, defendant admitted only to distributing a much smaller amount and no other evidence was presented to allow the court to make an independent determination of the amounts he should be held responsible for.).

See *Outline* at II.A.3.

Loss

U.S. v. Bartsh, No. 92-1470 (8th Cir. Jan. 13, 1993) (Gibson, Sr. J.) (Affirmed: Agreed with *U.S. v. Curran*, 967 F.2d 5, 6 (1st Cir. 1992), that amount of loss under § 2B1.1 in embezzlement offense includes lost interest.). Note that § 2B1.1 and its Commentary do not mention interest, but Note 7 of § 2F1.1, which refers back to § 2B1.1 to calculate loss, was amended Nov. 1, 1992, to state that loss does not include interest that could have been earned on stolen funds.

See *Outline* at II.D.1.

Departures

Criminal History

U.S. v. Brown, No. 92-50247 (9th Cir. Feb. 10, 1993) (Canby, J.) (Remanded: 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." Although § 5H1.1, p.s. states that age is not ordinarily relevant to departure, age "becomes relevant when it causes a defendant's criminal history score significantly to overstate the seriousness of his criminal record. ... [Therefore], nothing in the guidelines would preclude the district court from departing if it found that, in view of the nature of Brown's prior convictions or Brown's age when he committed one of the predicate offenses, placement in the career offender category significantly exaggerated the seriousness of [his] criminal history.").

See *Outline* at VI.A.2.

Mitigating Circumstances

U.S. v. Brown, No. 92-50247 (9th Cir. Feb. 10, 1993) (Canby, J.) (Remanded: District court incorrectly concluded that it did not have authority to consider downward departure for defendant who alleged "extraordinary abuse" during his childhood and "extraordinary acceptance of responsibility.").

See *Outline* at VI.C.1.b, h, and 4.c.

Aggravating Circumstances

U.S. v. Bartsh, No. 92-1470 (8th Cir. Jan. 13, 1993) (Gibson, Sr. J.) (Affirmed: Although defendant received § 3B1.3 abuse of trust enhancement, court could depart upward because "there is nothing in the Guidelines to indicate that the Sentencing Commission considered an abuse of trust by a United States bankruptcy trustee embezzling funds. This defendant's embezzlement of nearly $1.5 million from an account that he as a federal officer was charged with faithfully managing represents an inordinate abuse of trust that is of a different kind and substantially in excess of the degree which is ordinarily involved in the usual abuse of trust offense.").

See *Outline* at III.B.8.a and VI.B.1.

U.S. v. Gray, 982 F.2d 1020 (6th Cir. 1993) (Remanded: For defendant convicted of selling drug paraphernalia who had also sold large amounts of a cutting agent to a cocaine ring, "the district judge erred when and to the extent that he considered greed and the danger of narcotics to our society as factors justifying [upward] departure .... Greed is obviously the chief motivation for drug-related crimes. For the drafters of the Sentencing Guidelines to have overlooked this is simply not credible. The fact that distribution of narcotics is a danger to our society is precisely why promoting it is a crime.").

See *Outline* at VI.B.2.

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Offense Conduct

DRUG QUANTITY

Second Circuit holds that whether mandatory minimum sentence under 21 U.S.C. § 841(b) applies to conspiracy defendant is determined by "reasonable foreseeability" standard used to determine drug quantity under Guidelines. Defendant was convicted of conspiracy on an indictment that stated the object of the conspiracy was to sell more than five kilograms of cocaine. Evidence indicated that defendant participated in only one transaction of one kilogram right before the conspiracy ended. The district court applied the 10-year mandatory minimum sentence applicable to a conspiracy "involving" five or more kilograms of cocaine, 21 U.S.C. § 841(b)(A). Defendant appealed.

The appellate court remanded, holding that the reasonable foreseeability standard for drug quantity under the Guidelines also applies to conspiracy convictions under 21 U.S.C. § 846 sentenced under § 841(b). The government had argued that because foreseeability is not required for substantive offense mandatory minimums under § 841(b), it should not be required for § 846 conspiracies, especially in light of the 1988 revision of § 846 which directed that conspiracy defendants be sentenced as if they had committed the underlying substantive offense. The appellate court disagreed: "the purpose of § 846 as amended was to synchronize the penalties for conspiracies and their underlying offenses. . . . [T]here is nothing in the legislative history to indicate that Congress intended the revision to expand the accountability of defendants beyond their substantive offenses. . . . If the government's argument were to prevail, § 846 would effectively eviscerate the Guidelines' approach to fixing accountability in drug conspiracies."

"We find that Congress did not intend to overrule the Guidelines in its revision of § 846 and require strict liability in any case where an individual small-time dealer becomes associated with a large-scale conspiracy. The Guidelines . . . require reasonable foreseeability in order to hold a conspirator accountable for the acts of a coconspirator. This is not inconsistent with § 846, which only requires that a conspirator be sentenced to the same penalty applicable to the underlying conduct." *Accord U.S. v. Jones*, 965 F.2d 1507 (8th Cir. 1992).

U.S. v. Martinez, No. 92-1461 (2d Cir. Mar. 8, 1993) (Altimari, J.).

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

Departures

CRIMINAL HISTORY

Third Circuit holds that criminal history departure under § 4A1.3, p.s. is not subject to the "not adequately taken into consideration" requirement of § 5K2.0, p.s. and 18 U.S.C. § 3553(b). At the initial sentencing, the district court departed downward for several reasons, including the belief that career offender status overstated defendant's criminal history, but it did so under § 5K2.0. The appellate court reversed, holding that the cited factors were adequately considered by the Commission and could not support a § 5K2.0 departure. *See U.S. v. Shoupe*, 929 F.2d 116 (3d Cir. 1991). On remand, defendant specified that he sought departure under § 4A1.3 because his career offender status significantly overrepresented the seriousness of his criminal history. The district court denied the motion, concluding that the appellate court opinion precluded departure.

The appellate court again remanded, holding that departure under § 4A1.3 could be considered. "[I]n Guidelines § 4A1.3, the Commission specifically provided district courts with flexibility to adjust the criminal history category calculated through the rigid formulae of § 4A1.1 or § 4B1.1 . . . . Section 4A1.3 is both structurally and in its purpose unlike § 5K2.0 and 18 U.S.C. § 3553(b), which allow district courts to depart from the sentencing range calculated under the Guidelines for mitigating circumstances not adequately considered by the Commission in formulating the Guidelines. . . . We therefore conclude that the statutory authority for the promulgation of § 4A1.3 lies not in 18 U.S.C. § 3553(b), as the government urges, but in the basic provision of the Sentencing Reform Act that gives the Sentencing Commission the authority to promulgate the Guidelines and to take into account, where relevant, the defendant's criminal background. *See* 28 U.S.C. §§ 994(a) & 994(d)(10). . . . We hold that as the plain language of § 4A1.3 provides, a district court considering a § 4A1.3 departure may weigh 'reliable information [that] indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct' . . . , including factors that the Commission may have otherwise considered in promulgating other provisions of the Guidelines."

U.S. v. Shoupe, No. 92-7204 (3d Cir. Mar. 12, 1993) (Becker, J.).

See *Outline* at VI.A.1 and 2.

Second Circuit holds that upward departure may not be based on fact that defendant is awaiting sentencing under the Guidelines on another federal offense. Defendant was convicted on drug charges. The district court departed upward by two criminal history categories (CHC) on the grounds that defendant committed the crime after being released to allow cooperation with the government in another offense and because defendant had not yet been sentenced for a prior federal offense. Although the first departure ground was proper, the appellate court remanded for clarification of the extent of departure and because the second departure ground was improper.

The court distinguished prior cases that "upheld CHC departures for defendants awaiting sentencing on various other crimes. Those cases . . . involved defendants who were to be

sentenced in state court for state offenses. Since state-court sentencing is not governed by the federal Guidelines, we viewed the district court as having discretion to depart on that basis because if the federal court does not depart to take account of the unsentenced state crimes, there is no assurance that the entire range of defendant's pertinent history will be considered in either proceeding." Here, however, defendant would be sentenced for the other federal offense under the Guidelines, and the instant offense would be accounted for there. Thus, "since . . . the overall Guidelines scheme provides for effect to be given to both offenses in specified ways, . . . a departure on this basis for a defendant awaiting sentencing on a federal offense would result in a double counting that was not intended by the policy statement in Guidelines § 4A1.3, and . . . a departure on this basis is impermissible."

U.S. v. Stevens, 985 F.2d 1175 (2d Cir. 1993).

See *Outline* at VI.A.1.f and B.1.

Aggravating Circumstances

Eighth Circuit holds that pregnancy resulting from rape may be proper ground for departure. Defendant was convicted of raping a 15-year-old. She became pregnant with twins—one died in utero and, after complications, hospitalization, and a cesarean, the other was born with a fatal disease and died three weeks later. The government moved for an offense level increase under § 2A3.1(b)(4), arguing that the pregnancy and its consequences constituted a "serious bodily injury." Alternatively, the government argued that upward departure was warranted under these circumstances. Both motions were denied.

The appellate court affirmed the denial of an increase under § 2A3.1(b)(4): "As defined in the guidelines, serious bodily injury easily includes any immediate serious physical trauma resulting from a rape. In contrast, interpreting the language of the guideline definition to include the life altering consequences of a rape-induced pregnancy stretches that language too far."

However, the court determined that pregnancy resulting from rape may be an unusual circumstance that warrants departure and remanded: "We are not aware of any facts that indicate a pregnancy 'commonly' results from a single instance of rape. Nor are we aware of any guideline provision or records that indicate the Commission considered rape-induced pregnancy as a basis for an adjustment or departure. Rather, we are loathe to conclude that when formulating U.S.S.G. § 2A3.1(b)(4), the Commission considered both the trauma of an unwanted rape-induced pregnancy and of an immediate obvious physical injury, but chose to increase punishment only for the physical injury."

U.S. v. Yankton, No. 92-1404 (8th Cir. Mar. 1, 1993) (Hansen, J.).

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

U.S. v. Merritt, No. 91-1637 (2d Cir. Feb. 9, 1993) (Leval, Dist. J.) (Affirmed upward departure based on danger to public health, disruption of a governmental function, and defendant's attempts to keep the proceeds of his crime (nearly $1 million) through continued fraudulent conduct. The district court also factored into the departure defendant's "continuing dishonesty and greed, and his cynical determination to profit from his crime after service of his jail time." The appellate court concluded that the Sentencing Reform Act allows, and the Guidelines do not prohibit, consideration of personal characteristics in unusual cases and that it was appropriate here: "[T]he departure was attributable to conduct and characteristics that went well beyond simple 'failure to pay voluntary restitution' and 'concealment of assets.' It is clear that Merritt's profound corruption and dishonesty, and his elaborate fraudulent manipulation—even after his guilty plea—designed to preserve the huge benefits of his crime after service of jail time, are not" adequately considered under the Guidelines.). *Cf. U.S. v. Bryser*, 954 F.2d 79, 89–90 (2d Cir. 1992) (departure for failure to return stolen money); *U.S. v. Valle*, 929 F.2d 629, 631–32 (11th Cir. 1991) (same) [4#3].

See *Outline* at VI.B.1.

Substantial Assistance

U.S. v. Love, 985 F.2d 732 (3d Cir. 1993) (Affirmed: District court properly held that the § 5K1.1, p.s. requirement for a government motion applies to assistance to state authorities, not just federal: "There is no indication in the language of § 5K1.1 or in the accompanying commentary that the Commission meant to limit 'assistance to authorities' to assistance to federal authorities. The provision is entitled 'Substantial Assistance to Authorities,' and describes the assistance as 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'").

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

Extent of Departure

U.S. v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc) (Affirmed: Resolving inconsistent opinions within the circuit, the en banc court held that to depart under § 4A1.3, p.s., district courts must follow the procedure in that section and "evaluate each successive criminal history category above or below the guideline range for a defendant as it determines the proper extent of departure.").

See *Outline* at VI.D.

Criminal History

Invalid Prior Sentences

U.S. v. Vea-Gonzales, 986 F.2d 321 (9th Cir. 1993) (Remanded: District court erred in not allowing defendant to challenge validity of prior conviction at sentencing hearing. "[T]he Constitution requires that defendants be given the opportunity to collaterally attack prior convictions which will be used against them at sentencing." Even though a 1990 amendment to § 4A1.2, comment. (n.6) indicates consideration of such claims is discretionary, and some circuits have so held, "we have previously held that a defendant is constitutionally entitled to collaterally attack allegedly unconstitutional prior convictions. The Guidelines cannot have changed that.").

See *Outline* at IV.A.3.

Adjustments

Obstruction of Justice

U.S. v. Kirkland, 985 F.2d 535 (11th Cir. 1993) (Remanded: Bank's investigation, conducted by bank employees prior to any law enforcement activity, was not an "official investigation" under § 3C1.1, comment. (n.3(d)). Therefore, district court erred in applying obstruction of justice enhancement to defendant who caused someone else to lie to bank investigators in an attempt to hide embezzlement.).

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

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Offense Conduct

DRUG QUANTITY

Fifth Circuit sets method to calculate offense level when drug and precursor chemical are present in single offense. Defendant pled guilty to possession of amphetamine with intent to distribute. A quantity of phenylacetic acid, a precursor chemical, was included as relevant conduct in the offense level. The PSR converted the amphetamine and phenylacetic acid to marijuana equivalents, using the Drug Equivalency Table in §2D1.1, and added the results for an offense level of 34. Defendant argued that, because his offense occurred after the effective date of § 2D1.11, it was plain error to not use that section for the phenylacetic acid.

The appellate court remanded, agreeing that §2D1.11 should have been considered. However, the Guidelines "do not provide an express method for combining section 2D1.11 precursor chemicals with section 2D1.1 controlled substances or immediate precursors where, as here, the presence of the precursor chemical is merely conduct relevant to possession of a controlled substance." The equivalency tables in §§ 2D1.1 and 2D1.11 convert to different substances and there is "no cross-equivalency table, nor is there any indication elsewhere in the Guidelines as to how quantities of controlled substances and precursor chemical are to be aggregated when relevant conduct is involved."

The court looked to the multiple counts guideline for an appropriate way to combine the amounts. It determined that they should be treated as separate offenses groupable under § 3D1.2(d), which "mentions sections 2D1.1 and 2D1.11 explicitly and allows grouping on the basis of the quantity of the substance or substances involved." That still left the problem of aggregating the different amounts noted above. "The solution that seems most reasonable to us . . . is to convert the phenylacetic acid to marijuana by equating the amounts of each that would give rise to the same offense level" in their respective quantity tables in §§ 2D1.1 and 2D1.11. Using this method, the phenylacetic acid here would have the same offense level as 400–700 kilograms of marijuana under § 2D1.1. The amphetamine converted to 90.72 kilograms of marijuana, using the Drug Equivalency Table in § 2D1.1(c), comment. (n.10). "Giving the defendant the benefit of lenity," the court used 400 kilograms for the phenylacetic acid, for an offense level of 28 for the combined 490.72 kilogram equivalent.

U.S. v. Hoster, No. 92-8223 (5th Cir. April 7, 1993) (Garwood, J.).

See *Outline* generally at II.B.4.b.

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit holds that departure may be permitted for "sentencing entrapment," but was improper in this case. Defendant made seven sales of crack cocaine to an undercover officer. He was convicted on six counts of distribution and one count of possession with intent to distribute. The district court departed pursuant to 18 U.S.C. § 3553(b), finding that the continuation of sales after the fourth transaction constituted "sentencing entrapment" that was not adequately considered by the Sentencing Commission.

The appellate court upheld the principle, but reversed on the facts: "[W]e hold that sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines, but factually was not present in this case . . . . While we are concerned with the government conduct in this case, Barth has 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." The court added that it would "not attempt to determine in the abstract what is permissible and impermissible conduct on the part of government agents. We share 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 from the Sentencing Guidelines." (Reference is to *U.S. v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992).) *Contra U.S. v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992) (rejected sentencing entrapment theory "as a matter of law").

U.S. v. Barth, No. 92-2152 (8th Cir. Apr. 6, 1993) (McMillian, J.).

See *Outline* at VI.C.1.g and 4.a.

D.C. Circuit holds that definition of "non-violent offense" in § 5K2.13, p.s. is not controlled by § 4B1.2 definition of "crime of violence." Defendant robbed a bank by using a threatening note. He was unarmed, did not harm anyone, and shortly thereafter surrendered to police without struggle. His request for downward departure for "significantly reduced mental capacity," § 5K2.13, p.s., was denied by the district court, which ruled "as a matter of law" that use of the threatening note was an act of violence that precluded a § 5K2.13 departure in a "non-violent offense."

The appellate court remanded, holding that the district court should examine the circumstances of the offense to determine whether it was, in fact, non-violent. The court noted that "'non-violent offense' . . . is not defined in section 5K2.13 or anywhere else in the guidelines, nor does section 5K2.13 provide examples of 'non-violent offense[s].' To give content to that term, a number of courts have looked to the definition of 'crime of violence' found in section 4B1.2" for career offenders. *See, e.g., U.S. v. Poff*, 926 F.2d 588, 591–92 (7th Cir. 1991) (en banc); *U.S. v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990); *U.S. v. Borrayo*, 898 F.2d 91, 94 (9th Cir. 1989); *U.S. v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989). Other courts have considered § 5K2.13 without reference to § 4B1.2. *See U.S. v. Philibert*, 947 F.2d 1467, 1471 (11th Cir. 1991); *U.S. v. Spedalieri*, 910 F.2d 707, 711 (10th Cir. 1990).

The court here declined to use the § 4B1.2 definition. First, "[n]othing in the Guidelines themselves or in the Application Notes suggests that section 4B1.2 is meant to control the interpretation and application of section 5K2.13." While "some courts have taken this silence as supporting the decision to rely on section 4B1.2," the court found such reasoning unpersuasive.

Second, "significant policy concerns support the view that section 5K2.13 and section 4B1.2 should be interpreted independently, for the sections address entirely different issues." Section 4B1.2 is designed to identify and maximize sentences for career offenders, and in its purpose and structure "can be read as depriving career offenders of the benefit of the doubt, and assuming the worst." However, "the point of section 5K2.13 is to treat with lenity those individuals whose 'reduced mental capacity' contributed to commission of a crime."

Noting that departure under § 5K2.13 is not allowed if defendant's criminal history indicates "a need for incarceration to protect the public," the court concluded that "the term 'non-violent offense' in section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous, and therefore need not be incapacitated for the period of time the Guidelines would otherwise recommend.... A determination regarding the dangerousness of a defendant, as manifested in the particular details of a single crime . . . , is best reached through a fact-specific investigation. We therefore believe that a District Court, when deciding whether a particular crime qualifies as a 'non-violent offense,' should consider all the facts and circumstances surrounding the commission of the crime," and the sentencing court "is not in any way bound by the definition of 'crime of violence' under section 4B1.2."

U.S. v. Chatman, No. 91-3294 (D.C. Cir. Mar. 16, 1993) (Edwards, J.) (Ginsburg, J., concurring in judgment).

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

Sentencing Procedure

Evidentiary Issues

U.S. v. Mlele, No. 91-3855 (3d Cir. Mar. 22, 1993) (Becker, J.) (Remanded: District court based drug quantity on testimony of addict–informant without adequately determining whether that testimony had the "sufficient indicia of reliability" required by § 6A1.3, p.s.: "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 before basing a sentencing determination on that information."). *See also U.S. v. Simmons*, 964 F.2d 763, 776 (8th Cir. 1992) (remanded quantity determination—testimony by addict–informant that was "marred by memory impairment" resulting from history of addiction lacked "sufficient indicia of reliability"); *U.S. v. Robison*, 904 F.2d 365, 371–72 (6th Cir. 1990) (remanded quantity determination based on estimates by addict–witness with admittedly "hazy" memory).

See *Outline* at II.A.3 and IX.A.3.

U.S. v. Wise, No. 91-3275 (10th Cir. June 11, 1992) (Barrett, Sr. J.) (Remanded: District court erred in refusing to allow defendant to question probation officer about factual basis for conclusions in PSR. Defendant "was entitled, upon request, to be informed by the probation officer 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. Upon receipt of the factual basis or source of such information, Wise is entitled to a reasonable period of time within which to comment upon the reliability of such information in accordance with Rule 32 as construed in *Burns* [*v. U.S.*, 111 S. Ct. 2182, 2185–86 (1991)]."). [Note: Opinion originally unpublished, released for publication March 1993.]

See *Outline* at IX.A.3.

Criminal History

Armed Career Criminal

U.S. v. Maxey, No. 92-10336 (9th Cir. Mar. 23, 1993) (Hall, J.) (Affirmed: In sentencing defendant as an armed career criminal, district court properly refused to use § 4A1.2 to determine whether two prior convictions were "related" and should be counted as one: "We conclude that section 4B1.4 does not incorporate section 4A1.2's definition of 'related' offenses in determining whether a defendant is subject to sentence enhancement under its provisions, and that the Guidelines do not displace section 924(e) and case law interpreting it."). *Accord U.S. v. Medina-Gutierrez*, 980 F.2d 980, 982–83 (5th Cir. 1992) [5 *GSU* #7].

See *Outline* at IV.D.

Probation and Supervised Release

Revocation of Probation

U.S. v. Diaz, No. 92-2158 (10th Cir. Mar. 22, 1993) (Seymour, J.) (Reversed: When probation is revoked under 18 U.S.C. § 3565(a) for drug possession and defendant must be sentenced "to not less than one-third of the original sentence," the term "'original sentence' . . . refers to the term of incarceration available at the time of sentencing," not the length of probation. Therefore, the revocation sentence must be based on 0–6 month guideline range, not three-year probation term.). *Accord U.S. v. Clay*, 982 F.2d 959, 962–63 (6th Cir. 1993) [5 *GSU* #8]; *U.S. v. Granderson*, 969 F.2d 980, 983–84 (11th Cir. 1992); *U.S. v. Gordon*, 961 F.2d 426, 430–33 (3d Cir. 1992) [4 *GSU* #21]. *Contra U.S. v. Byrkett*, 961 F.2d 1399, 1400–01 (8th Cir. 1992) (per curiam) [4 *GSU* #23]; *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) [4 *GSU* #15].

See *Outline* at VII.A.2.

Revocation of Supervised Release

U.S. v. Tatum, No. 92-2232 (11th Cir. Apr. 7, 1993) (per curiam) (Remanded: "We join the majority of circuits that have addressed this issue and hold that upon revocation of a term of supervised release, a district court is without statutory authority to impose both imprisonment and another term of supervised release.").

See *Outline* at VII.B.1.

Adjustments

Vulnerable Victim

U.S. v. Lallemand, No. 92-2178 (7th Cir. Mar. 29, 1993) (Posner, J.) (Affirmed: Vulnerable victim adjustment, § 3A1.1, was properly applied to extortion defendant who specifically targeted married homosexual who engaged in homosexual sex. While susceptibility to the offense is a "typical feature" of extortion, "[b]lackmail victims are not all susceptible to the same degree" and married homosexuals may be considered "a particularly susceptible subgroup of blackmail victims.").

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

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General Application Principles

COMMENTARY

Supreme Court holds that commentary is binding. Defendant was sentenced as a career offender, partly because his instant offense—possession of a firearm by a convicted felon—was held to be a "crime of violence" under § 4B1.2. The appellate court affirmed, holding that such possession "by its nature" is a crime of violence for career offender purposes. *U.S. v. Stinson*, 943 F.2d 1268, 1271–72 (11th Cir. 1991) [4 *GSU* #10]. Shortly after that decision, the commentary to § 4B1.2 was amended to expressly exclude the felon-in-possession offense from the definition of crime of violence. Defendant requested a rehearing, arguing that the amendment should be given retroactive effect. The appellate court denied the request and reaffirmed, holding that the amended commentary is not binding. *U.S. v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992) (per curiam) [4 *GSU* #19].

In a unanimous decision, the Supreme Court vacated and remanded, holding "that 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." The Court cited its decision in *Williams v. U.S.*, 112 S. Ct. 1112, 1119 (1992): "Where . . . 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," and failure to follow such a policy statement is "an incorrect application of the sentencing guidelines" under 18 U.S.C. § 3742(f)(1). Here the Court held that "[o]ur holding in *Williams* dealing with policy statements applies with equal force to the commentary before us." *See also* § 1B1.7 (failure to follow commentary that interprets or explains a guideline "could constitute an incorrect application of the guidelines" subject to reversal).

The Court added that "[i]t does not follow that commentary is binding in all instances. . . . [T]he guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"

Following these principles, the Court concluded that the amendment must be followed: "We recognize that the exclusion of the felon-in-possession offense from the definition of 'crime of violence' may not be compelled by the guideline text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not 'plainly erroneous or inconsistent' with § 4B1.2 . . . . As a result, the commentary is a binding interpretation of the phrase 'crime of violence.' Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies."

The Court did not address whether the amendment should be applied retroactively, finding that the issue was not properly before the Court and should be decided first by the appellate court on remand.

Stinson v. U.S., No. 91-8685 (U.S. May 3, 1993) (Kennedy, J.).

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

Criminal History

CAREER OFFENDER PROVISION

D.C. Circuit holds that the career offender provision does not apply when the instant offense is a conspiracy to commit a controlled substance crime. Defendant pled guilty to a conspiracy charge under 18 U.S.C. § 371, the object of which was possession with intent to distribute PCP. He was sentenced as a career offender under § 4B1.1 and appealed, arguing that the definition of controlled substance offenses in § 4B1.2, comment. (n.1), exceeded the statutory mandate in 28 U.S.C. § 994(h) by including conspiracies to commit such offenses.

The appellate court agreed and remanded. The Sentencing Commission explicitly based the career offender provision on § 994(h), which in relevant part states that a sentence "at or near the maximum term authorized" shall be imposed on a defendant who is convicted of one of several specifically listed drug felonies—each of which is a substantive offense—as well as two prior such drug felonies or violent felonies. The court reasoned that "conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit . . . . Thus, conspiracy to violate the sections specified in § 994(h) cannot be said to be one of the offenses 'described in' those sections."

The court concluded that "the Commission has acted explicitly upon grounds that do not sustain its action. Because we find its stated basis—§ 994(h)—inadequate for Application Note 1's inclusion of conspiracies, Note 1 cannot support Price's sentence as a career offender." Although in this case only the instant offense and § 994(h)(1)(B) were at issue, the court noted that § 994(h)(2)(B), which applies to prior qualifying felonies, "poses the same problem." The court left open

whether the Commission could reach the same result under different authority, such as its broader mandate in § 994(a).

U.S. v. Price, No. 91-3335 (D.C. Cir. Apr. 23, 1993) (Williams, J.).

See *Outline* at IV.B.2.

Departures

Mitigating Circumstances

Ninth Circuit affirms departure for "coercive" government conduct during investigation and for one defendant's medical condition. In the course of investigating illegal weapons sales at "swap meets" in Arizona, an undercover agent made contact with defendants. Defendants initially demurred when the agent tried to get them to sell automatic weapons and silencers, but over the next three months the agent persisted and persuaded them to do so and also to sell several handguns to a convicted felon. After defendants refused a plea agreement and unsuccessfully filed motions to dismiss the indictment for outrageous governmental conduct during the investigation, the government filed a superseding indictment with additional charges against one defendant. Defendant's motion to dismiss that indictment for prosecutorial vindictiveness was denied. At trial, defendants unsuccessfully moved for acquittals based on entrapment, were found guilty on several counts, and filed motions for judgment notwithstanding the verdict.

The district court denied the JNOV motions, but departed from the defendants' 15–21-month ranges to six months of house arrest, sixty months' probation, and 100 hours of community service. The court found departure appropriate because "the conduct of this investigation, although not amounting to entrapment, was sufficiently coercive in nature as to warrant a downward departure under Guideline 5K2.12," p.s. The court also departed, pursuant to §§ 5H1.3, p.s. and 5K2.0, p.s., for one defendant who "suffers from a medical condition, panic disorder with agoraphobia, which is a mitigating factor of a kind not adequately taken into consideration by the Sentencing Commission."

The appellate court affirmed: "We are satisfied that the sentencing court was sufficiently troubled by the defendants' arguments on entrapment, prosecutorial misconduct and vindictive prosecution to the extent that although not satisfied that the indictments should have been dismissed and a judgment NOV entered, it had the authority to reflect its concern in pronouncing sentence. The court stated in advance what it intended to do, and operating precisely within the Sentencing Guidelines, it relied on section 5K2.12, p.s. to support its action .... Agent Murillo did not threaten the defendants, but it was he who initially proposed the illegal activity and persistently contacted Joe Juarez by telephone and in person over several months until the scheme was completed. This sort of aggressive encouragement of wrongdoing, although not amounting to a complete defense, may be used as a basis for departure under section 5K2.12." The court noted that, contrary to the government's argument, "threats of violence are not a prerequisite to application of the guidelines in cases of 'imperfect entrapment.'"

For the one defendant's mental condition, the court concluded "that the district court had authority to grant a downward departure based on sections 5H1.3 and 5K2.0. 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." The court noted that this departure was not based on § 5K2.13, p.s., "which concerns diminished capacity."

U.S. v. Garza-Juarez, No. 92-10187 (9th Cir. Apr. 23, 1993) (Aldisert, Sr. J.).

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

U.S. v. Gaskill, No. 92-5588 (3d Cir. Apr. 16, 1993) (Weis, J.) (Remanded: District court incorrectly held it lacked discretion to depart downward for fraud defendant who was sole caretaker of his seriously mentally ill wife. Section 5H1.6, p.s. precludes departure for family ties and responsibilities under ordinary circumstances, but "[t]he record demonstrates circumstances quite out of the ordinary. The degree of care required for the defendant's wife, the lack of close supervision by any family member other than the defendant, the risk to the wife's well-being, the relatively brief ... imprisonment sentence called for by the guidelines computation, the lack of any end to be served by imprisonment other than punishment, the lack of any threat to the community—indeed, the benefit to it by allowing the defendant to care for his ailing wife—are all factors that warrant departure." The court emphasized that "departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some respects, the rigidity of the guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence.").

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

U.S. v. Miller, No. 92-30083 (9th Cir. Apr. 15, 1993) (Kozinski, J.) (Remanded: The district court departed downward to a sentence of six months' home detention, which defendant completed before this appeal. In remanding for reconsideration of whether any departure was proper, the appellate court held that if the appropriate sentence must include prison time, the district court "may depart downward by up to six months to take into account [defendant's] home detention" because the Sentencing Commission "seems not to have considered the issue of compensating for time erroneously served.").

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

U.S. v. Lewinson, 988 F.2d 1005 (9th Cir. 1993) (Affirmed: Appellate court rejected the government's argument that defendant's reduction in mental capacity was not "sufficiently 'significant' or 'serious' to meet the requirement of § 5K2.13[, p.s. ... T]he government asks us to read into this section a requirement that the 'qualifying mental disease be severe, [and] that it affect the defendant's ability to perceive reality.' However, 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).").

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

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General Application Principles

RELEVANT CONDUCT

Second Circuit holds that Double Jeopardy Clause prohibits punishment for an offense when the same conduct was used to increase defendant's offense level in a prior proceeding. Defendant was convicted on several fraud charges in the District of Connecticut. Other fraudulent conduct that had occurred in Vermont, and for which defendant faced federal charges there, was used as relevant conduct to increase his offense level. After the Connecticut sentencing, defendant moved to have all of the charges in Vermont dismissed on double jeopardy grounds. The Vermont district court held that prosecution was barred only on the counts used by the Connecticut court to increase that offense level. Defendant appealed the order, and the government cross-appealed, arguing that there was no double jeopardy problem at all.

The appellate court affirmed, and followed the three-factor analysis set forth in *U.S. v. Koonce*, 945 F.2d 1145, 1149–54 (10th Cir. 1991) [4 *GSU* #9], in holding that prosecution of conduct already used to set a Guidelines offense level would violate the "multiple punishments prong of the Double Jeopardy Clause." First, the Connecticut sentence "reflects part of McCormick's Vermont conduct. Thus, any further prosecution . . . for this conduct would subject him to the possibility of multiple punishments for the same conduct." Second, "[a]n examination of the Guidelines," and the fraud guideline in particular, indicates that Congress and the Commission did not intend to allow a defendant "to be prosecuted for conduct already used to enhance his or her offense level." Third, "the availability of concurrent sentences does not eliminate this double jeopardy problem" because of the "potential adverse collateral consequences" of further convictions. On the other hand, "those counts of the [Vermont] indictment that did not affect the Connecticut court's Guidelines calculations are not similarly barred from use."

U.S. v. McCormick, No. 92-1470 (2d Cir. Apr. 28, 1993) (Oakes, J.) (Mahoney, J., dissenting from dismissal of Vermont counts).

See *Outline* at I.A.3.

SENTENCING FACTORS

U.S. v. Harris, 990 F.2d 594 (11th Cir. 1993) (Remanded: In light of 28 U.S.C. § 994(k), "it is inappropriate to imprison or extend the term of imprisonment of a federal defendant for the purpose of providing him with rehabilitative treatment." Defendant was serving a state sentence for conduct taken into account in his offense level for the instant federal offense. Under § 5G1.3(b) (1991), his federal sentence should have been concurrent with the state term, but the district court made it consecutive so that the defendant would serve enough time in federal prison to undergo a full drug treatment program.).

See *Outline* at I.C and V.A.3.

AMENDMENTS

U.S. v. Prezioso, 989 F.2d 52 (1st Cir. 1993) (Affirmed: Two criminal history points under § 4A1.1(d) were properly added because defendant committed the instant offense while under a "criminal justice sentence"—an unpaid fine. Before defendant was sentenced, the commentary to § 4A1.1(d) was changed to "clarify" that a sentence to pay a fine was not a "criminal justice sentence." The appellate court held, however, that in light of clear circuit precedent to the contrary this amendment, although labeled as "clarifying," was actually "a change in the meaning of a clear and unambiguous guideline . . . [and] is not entitled to retroactive effect.").

See *Outline* at I.E and IV.A.6.

Adjustments

OBSTRUCTION OF JUSTICE

First Circuit holds that attempted escape from state custody before start of federal investigation may warrant obstruction enhancement. After his arrest by Maine police for a check-kiting scheme, defendant unsuccessfully attempted to escape from the county jail. Shortly thereafter a federal investigation of defendant's activities began and eventually led to federal charges and a plea of guilty to bank fraud and impersonating an IRS agent. Based on the escape attempt, the district court increased his offense level under § 3C1.1 for obstruction of justice. Defendant appealed, claiming that an attempted escape from state authorities before the federal investigation had begun was not a proper basis for the enhancement.

The appellate court affirmed: "The commentary to [§ 3C1.1] makes clear that 'escaping or attempting to escape from custody before trial or sentencing' falls within the definition of obstructive or impeding conduct. . . . The slightly more difficult task is defining when conduct can be said to have occurred 'during the investigation . . . of the instant offense.'" The court concluded that "the guidelines should be read in a common-sense way. Doing so here strongly suggests that the provision may be triggered if, notwithstanding the lack of an ongoing federal investigation, there is a close connection between the obstructive conduct and the offense of conviction. In this case the connection is skin tight: the behavior underlying appellant's arrest by local gendarmes . . . is the very essence of the offense for which the district court sentenced him."

The court also reasoned that the commentary to § 3C1.1 consistently refers to obstructive conduct "without any limitation to federal custody, federal officers, or official federal investigations." In sum, "we hold that 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 the imposition of a section 3C1.1 enhancement." *See also U.S. v. Lato*, 934 F.2d 1080, 1082–83 (9th Cir. 1991)

(affirmed enhancement for obstruction of state investigation prior to federal action) [4 *GSU* #7].

U.S. v. Emery, No. 92-1619 (1st Cir. Apr. 28, 1993) (Selya, J.).

See *Outline* at III.C.4.

Acceptance of Responsibility

U.S. v. Broussard, 987 F.2d 215 (5th Cir. 1993) (Remanded: It was error to deny § 3E1.1 reduction to defendant who refused plea agreement and went to trial in order to contest whether the law applied to his conduct; he did not "den[y] the essential factual elements of guilt," *see* § 3E1.1, comment. (n.2).).

See *Outline* at III.E.4.

Criminal History

Invalid Prior Convictions

Whether Application Note 6 to § 4A1.2 (as amended Nov. 1990) limits challenges to prior convictions at sentencing continues to divide the circuits. Three recent opinions:

U.S. v. Elliott, No. 92-2434 (8th Cir. May 11, 1993) (Loken, J.) (Affirmed: Appellate court rejected challenge to *U.S. v. Hewitt*, 942 F.2d 1270 (8th Cir. 1991), which held that Note 6 requires that any prior conviction not invalidated prior to sentencing must be counted. The court also held "that Application Note 6 as construed in *Hewitt* passes constitutional muster" in limiting collateral attacks.) (Arnold, C.J., dissenting on constitutional issue).

U.S. v. Roman, 989 F.2d 1117 (11th Cir. 1993) (en banc) (per curiam) (Affirming district court, reversing panel opinion that held § 4A1.2 and accompanying commentary gave the district court discretion to review prior convictions, *see* 960 F.2d 130 (11th Cir. 1992) [4 *GSU* #22]. The en banc court held that "the amended text of Note 6 is plain: under § 4A1.2, district courts can exclude only convictions that have already been ruled invalid. Nothing in Note 6, much less the guidelines themselves, authorizes district courts to question state convictions for the first time at sentencing." The court also stated that the Constitution requires such collateral review only when a defendant "sufficiently asserts facts that show that an earlier conviction is 'presumptively void,'" a showing not made in this case.).

U.S. v. Brown, No. 92-7353 (3d Cir. Apr. 30, 1993) (Alito, J.) (Remanded: District court incorrectly ruled it did not have discretion to consider defendant's constitutional challenges to prior convictions. "We hold that under the current version of the Guidelines, a sentencing judge has authority to permit such constitutional challenges.... If the Commission did not intend this interpretation, it can very easily clarify its intent when it next promulgates Guidelines amendments." The court also stated that such challenges should be handled by following the procedures set forth in *U.S. v. Jones*, 977 F.2d 105, 110–11 (4th Cir. 1992).).

See *Outline* at IV.A.3, and summary of *U.S. v. Vea-Gonzales*, 986 F.2d 321 (9th Cir. 1993) in 5 *GSU* #10.

Consolidated or Related Cases

U.S. v. Smith, No. 91-50029 (9th Cir. Apr. 22, 1993) (Wiggins, J.) (Reversed in part: Opinion at 982 F.2d 354 withdrawn and reissued, the appellate court now holding that defendant's two prior assault convictions should be counted as one. Even though the two assaults involved different victims, dates, and locations, and were not part of a common scheme, the court held that they "must be considered related because they were 'consolidated for ... sentencing.' U.S.S.G. § 4A1.2(a)(2) & comment. (n.3).... There is no need for a formal consolidation order for cases to be 'related' under section 4A1.2.... The rule is 'all prosecutions combined for trial or sentencing [count] as a single conviction.' ... Smith's prior convictions were sentenced in the same proceeding by the same judge under the same docket number. This satisfies section 4A1.2.").

See *Outline* at IV.A.1.c, and delete reference to *Smith* in paragraph 3.

Career Offender

U.S. v. Carrillo, No. 90-50704 (9th Cir. Apr. 19, 1993) (Wallace, C.J.) (Affirmed: Defendants were properly sentenced as career offenders even though one of their required prior violent felonies was committed at age 17 and they were committed to the California Youth Authority. Both defendants had been tried as adults and received sentences exceeding one year and one month. Thus, under the definitions in § 4A1.2(d)(1) & comment. (n.7) and § 4B1.2, comment. (n.3), each defendant had received an "adult sentence of imprisonment" for a "prior felony conviction.").

See *Outline* at IV.A.4 and generally at IV.B.2.

Departures

Criminal History

U.S. v. Henderson, No. 92-1019 (9th Cir. May 17, 1993) (Beezer, J.) (Remanded: District court improperly departed upward on ground that defendant's criminal history score inadequately reflected the "extremely violent and serious" nature of his two previous convictions. Citing *U.S. v. Morrison*, 946 F.2d 484, 496 (7th Cir. 1991) [4 *GSU* #10], the appellate court concluded that the "district court did not believe that the Sentencing Commission overlooked anything in awarding criminal history points; the district court believed that the Sentencing Commission did not assign enough points for these particular offenses. That belief may be morally correct. However, the Sentencing Commission chose to award defendants three criminal history points for every conviction leading to a sentence of greater than one year, regardless of the nature of the underlying offense conduct," and thus defendant's prior offenses were "adequately considered.").

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

Sentencing Procedure

Procedural Requirements

U.S. v. Patrick, 988 F.2d 641 (6th Cir. 1993) (Affirmed: District court is not obligated to notify defendant before sentencing hearing that it will disregard presentence report recommendation to allow acceptance of responsibility reduction: "the guidelines clearly put the burden of proof on the defendant to show acceptance of responsibility. The favorable recommendation of the probation department does not alter this, whether or not the government objects.").

See *Outline* at IX.E.

Guideline Sentencing Update

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Departures

MITIGATING CIRCUMSTANCES

First Circuit revises standard of review for departures to give district courts more "leeway" in some situations. Joining two downward departure cases for purposes of appeal, the First Circuit revisited the issues of district court discretion in and appellate review of departures. One defendant was convicted of a drug offense and requested departure based on her circumstances, which included sole care of three young children, dependence on welfare, and no previous criminal record. The district court denied the departure, indicating it felt constrained by the guidelines. The other defendant embezzled from his union and received a departure to probation. The court reasoned that defendant would lose his job and the ability to pay restitution, and that imprisonment served no useful purpose.

The appellate court began by analyzing the four basic kinds of departures set forth in the Guidelines. There are "encouraged" departures, such as those in § 5K that list specific factors that may warrant departure. There are departures that are "discouraged" but not prohibited, as in § 5H where certain factors are listed as "not ordinarily" warranting departure: "Thus, a sentencing court, considering whether or not the presence of these 'discouraged' factors warrants departure, must ask whether the factors themselves are present in unusual kind or degree." There are also "forbidden" departures, prohibited for certain factors even if they make a case "unusual."

Then there are cases that fall outside the "heartland" of typical offense behavior. The Introduction to the Guidelines "makes clear that (with a few exceptions) a case that falls outside the linguistically applicable guideline's 'heartland' is a candidate for departure. It is, by definition, an 'unusual case.' . . . The statute says that the sentencing court considering a departure must ask whether the Sentencing Commission has 'adequately taken into consideration' the aggravating or mitigating circumstance that seems to make a case unusual. But, the Commission itself has explicitly said that (with a few exceptions) it did not 'adequately' take unusual cases 'into consideration.'" Thus, aside from the relatively few "forbidden" factors, "the sentencing court is free to consider, in an unusual case, whether or not the factors that make it unusual (which remove it from the heartland) are present in sufficient kind or degree to warrant a departure. . . . The court retains this freedom to depart whether such departure is encouraged, discouraged, or unconsidered by the Guidelines."

With this in mind, the court expressed concern that *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989), "suggested review that provides no 'leeway' for the district court" because it stated that review of "whether or not" the circumstances "are of a kind or degree" to warrant a departure is "essentially plenary." The court therefore modified the standard of review to distinguish "certain decisions in this category where review should take place without 'leeway,' from others where, despite the technically legal nature of the question, we nonetheless should review with 'full . . . respect for' the sentencing court's 'superior "feel" for the case.' . . . Plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances . . . are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all. . . . Plenary review is also appropriate where the appellate court, in deciding whether the allegedly special circumstances are of a 'kind' that permits departure, will have to perform the 'quintessentially legal' function . . . of interpreting a set of words, those of an individual guideline, in light of their intention or purpose, in order to identify the nature of the guideline's 'heartland' (to see if the allegedly special circumstance falls within it)."

"In many other instances, not anticipated by *Diaz-Villafane*, the district court's decision that circumstances are of a 'kind,' or 'degree,' that warrant departure will not involve a 'quintessentially legal' interpretation of the words of a guideline, but rather will amount to 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. . . . [A]ppellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,' . . . not with the understanding that review is 'plenary.'"

With that, the appellate court remanded both cases. In the first case, most of the circumstances are of the kind for which departure is "discouraged," but not forbidden. The district court should determine whether they are unusual enough to merit departure. It may not be unusual 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 of such circumstances into a case that is not at all ordinary."

In the other case, the court held that "the embezzlement guidelines encompass, within their 'heartland,' embezzlement accompanied by normal restitution needs and practicalities (i.e., the simple facts that restitution is desirable and that a prison term will make restitution harder)." Thus, "ordinary restitution circumstances . . . do not warrant departure." However, "a special need of a victim for restitution, and the surrounding practicalities, might, in an unusual case, justify departure." Here, for example, there was evidence that defendant would not lose his job if imprisoned no more than one year, which would only require a three-month departure, and the district court may consider this fact on remand.

U.S. v. Rivera, No. 92-1749 (1st Cir. June 4, 1993) (Breyer, C.J.).

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

U.S. v. Aguilar, No. 90-10597 (9th Cir. May 12, 1993) (O'Scannlain, J.) (Hall, J., dissenting) (Affirming that downward departure may be based on "the additional punishment" a convicted federal judge "would suffer during the course of potential disbarment and impeachment hearings." Potential removal from life-tenured position, disqualification from future government appointments, and loss of pension rights, distinguish defendant's situation "both qualitatively and quantitatively, from the 'substantial pain and humiliation' suffered by criminal defendants who are 'well-known figures in the worlds of government and finance.' For that reason, we reject the suggestion that the additional punishment Judge Aguilar will suffer is not 'atypical.'" Also, "Judge Aguilar is the first convicted federal judge to be sentenced under the Guidelines. As such, his case does not appear to fall within the heartland of cases for which the Guidelines were designed." Case was remanded, however, for explanation of extent of departure.).
See *Outline* at VI.C.1.h, 3, and 4.

Aggravating Circumstances

U.S. v. McAninch, No. 91-30433 (9th Cir. May 20, 1993) (Fletcher, J.) (Affirmed: Defendant, who pled guilty to mail fraud and mailing threatening communications, "waged a campaign of harassment and intimidation" against people whom he did not know but believed to be interracially married. The district court departed upward, in part because of the racist nature of defendant's offenses. "Because it is not otherwise treated in the guidelines, we . . . agree with the district court that a defendant's racist motivation is a valid ground for departure.").
See *Outline* generally at VI.B.1.

Criminal History

Career Offender Provision

U.S. v. Hayes, No. 91-30432 (9th Cir. June 9, 1993) (Wright, J.) (Affirmed: Defendant was properly sentenced as a career offender because his instant offenses of being a felon in possession of a sawed-off shotgun and possessing an unregistered sawed-off shotgun "otherwise involve conduct that presents a serious potential risk of physical injury to another," § 4B1.2(1)(ii). "We have held that 'being a felon in possession of a firearm is not a crime of violence for purposes of applying the Career Offender guideline.' . . . Those cases, however, did not consider charged conduct involving sawed-off shotguns. . . . [S]uch weapons are inherently dangerous, lack usefulness except for violent and criminal purposes and their possession involves the substantial risk of improper physical force.").
See *Outline* at IV.B.1.b.

U.S. v. Wagner, No. 92-2011 (10th Cir. May 18, 1993) (Brorby, J.) (Remanded: Instant conviction for possessing a listed chemical with intent to manufacture a controlled substance, 21 U.S.C. § 841(d), is not "a controlled substance offense" for career offender purposes. First, even though an "immediate precursor" of methamphetamine—P2P, which is classified as a controlled substance—was seized when defendant was arrested, "the definition of controlled substance for purposes of the career offender section . . . refers to the charged offense" only, not to relevant conduct. Second, § 841(d) "is not, by its plain terms, a federal or state law that prohibits manufacture or possession of a controlled substance," and the Guidelines "specifically distinguish possession of a controlled substance from possession of a listed chemical with the intent to manufacture a controlled substance.").
See *Outline* generally at IV.B.1.a.

Offense Conduct

Calculation of Loss

U.S. v. Watkins, No. 92-5830 (6th Cir. June 1, 1993) (Engel, Sr. J.) (Remanded: District court improperly calculated loss under § 2F1.1 as face value of worthless checks in check-kiting scheme without making specific findings on intended and possible loss. "[T]hree factors must be present for an amount of loss to be relevant under section 2F1.1. First, as application note 7 instructs, the defendant must have intended the loss. Second, it must have been possible for the defendant to cause the loss. Third, 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, the appellate court held that note 7 "must be read in conjunction with section 2X1.1(b)(1), which governs attempts. . . . If the defendant's conduct does not meet [that section's] requirements, that conduct qualifies only as an attempt, and section 2X1.1(b)(1) directs that the offense level be reduced accordingly."). *Cf. U.S. v. Frydenlund*, 990 F.2d 822, 825–26 (5th Cir. 1993) (affirmed: check-kiting would not be treated like fraudulently obtained loans, in which loss is reduced by whatever collateral bank may recover; here, amount of loss was properly calculated as bank's out-of-pocket loss because no repayment had been made at time of sentencing and future payments were speculative).
See *Outline* at II.D.2.a.

Drug Quantity

U.S. v. Wagner, No. 92-2011 (10th Cir. May 18, 1993) (Brorby, J.) (Remanded: Defendant pled guilty to possessing a listed chemical (phenylacetic acid) with intent to manufacture a controlled substance (methamphetamine). The only substance actually seized after arrest was a quantity of P2P, an "immediate precursor" of methamphetamine made from phenylacetic acid. The district court incorrectly set the base offense level by estimating the amount of methamphetamine that could have been produced from the P2P. The Guidelines have a two-step procedure when a listed chemical offense involves an attempt to manufacture a controlled substance. First, apply § 2D1.11 to the amount of phenylacetic acid involved (estimating if no amount was actually seized). Then, following the cross-reference in § 2D1.11(c)(1), use § 2D1.1(c) and comment.(n.10) to convert the P2P into its marijuana equivalent to get an offense level. Use the higher of the two resulting base offense levels.) *Cf. U.S. v. Hoster*, 988 F.2d 1374, 1380–82 (5th Cir. 1993) (discussing interaction of §§ 2D1.1 and 2D1.11 when controlled substance and listed chemical are both present) [5 *GSU* #11].
See *Outline* generally at II.B.4.b.

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Offense Conduct

DRUG QUANTITY

Seventh Circuit holds that Guidelines' foreseeability analysis must be used to determine quantity of drugs attributable to conspiracy defendant for purposes of mandatory sentences. Defendant was convicted of a marijuana distribution conspiracy. The district court held him responsible for the entire amount attributed to the conspiracy—12,500 plants—which resulted in a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A). The evidence indicated that defendant had acted as a broker, and received a commission, for one sale of 700 pounds. He argued on appeal that *U.S. v. Edwards*, 945 F.2d 1387 (7th Cir. 1991), which held that only reasonably foreseeable drug quantities may be attributed to a conspiracy defendant under the Guidelines, should also apply to computing quantity under § 841(b).

The appellate court agreed and remanded. The court found persuasive the "reasoned approach" of the two circuits that have "determined that the foreseeability analysis employed in the Guidelines context is also applicable in the statutory context." *See U.S. v. Martinez*, 987 F.2d 920, 923–26 (2d Cir. 1993) [5 *GSU* #10]; *U.S. v. Jones*, 965 F.2d 1507, 1516–17 (8th Cir. 1992). "Accordingly, we join the other circuits that have confronted the issue in holding that, 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."

The court added that, under *Edwards*, "the scope of the agreement between the defendant and his co-conspirators" is of "particular importance." Also, the district court should make "specific factual findings regarding each defendant's reasonable awareness of the quantity of drugs involved in the conspiracy." *See also U.S. v. Becerra*, No. 92-30115 (9th Cir. July 16, 1993) (Wright, J.) (At note 2: "We reject the government's argument that sentencing under the statutory minimums should differ from the Guidelines.... Accordingly, the government still must show that a particular defendant had some connection with the larger amount on which the sentencing is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty.") (opinion was originally issued May 5, 1993 and printed at 992 F.2d 960).

U.S. v. Young, No. 92-1431 (7th Cir. June 24, 1993) (Ripple, J.).

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

LOSS

U.S. v. Ravoy, No. 92-2661 (8th Cir. June 7, 1993) (Hansen, J.) (Affirmed: In equity skimming scheme that involved defaulting on mortgages, defendants were properly held responsible under § 2F1.1 for the loss caused by another who defaulted on the mortgage of a house purchased from defendants. Before selling that property defendants made no mortgage payments and, as with the other properties in their scheme, never intended to pay that mortgage—"The loss the defendants intended to inflict at the time they skimmed the property was the loss ultimately sustained.").

See *Outline* at II.B.2.b.

Criminal History

INVALID PRIOR CONVICTIONS

U.S. v. Isaacs, No. 92-2129 (1st Cir. June 22, 1993) (Oakes, Sr. J.) (Affirmed: Note 6 to § 4A1.2 "is intended to preclude collateral review of prior convictions," and the Background Commentary "does not provide an independent basis for the review of prior convictions" but is only meant to leave to the sentencing court whether the Constitution requires such a review. On the latter issue, the appellate court held that "the Constitution requires a review of the constitutionality of prior convictions at sentencing only where the prior conviction is 'presumptively void,'" that is, "a constitutional violation can be found on the face of the prior conviction, without further factual investigation.").

U.S. v. Byrd, No. 92-5623 (4th Cir. June 15, 1993) (Wilkins, J.) (Affirmed: "Application Note Six provides no independent authority for a district court to refuse to count a prior conviction that has not previously been ruled constitutionally invalid.... [T]he Background Commentary does not change the meaning of Application Note Six; it merely recognizes that the Guidelines cannot take away a right to attack the validity of a prior conviction at sentencing that is afforded by the Constitution or a statute.... Thus, the Guidelines provide that prior convictions that have not previously been ruled constitutionally invalid must be counted under § 4A1.2 unless the Constitution or federal statute requires that the district court entertain a challenge to the conviction.").

See *Outline* at IV.A.3 and cases in 5 *GSU* #13.

CONSOLIDATED OR RELATED CASES

U.S. v. McComber, No. 92-3298 (8th Cir. June 28, 1993) (per curiam) (Affirmed: District court did not err in treating prior sentences as unrelated under § 4A1.2(a)(2) and Note 3. Defendant's five prior sentences "were imposed at a single March 17, 1992, sentencing proceeding. However, the sentences 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 numbers and no order of consolidation was entered.").

See *Outline* at IV.A.1.c.

Adjustments

Acceptance of Responsibility

Four circuits have recently held that the 1992 amendment to § 3E1.1, that allows an additional one-point reduction for acceptance of responsibility in some instances, should not be applied retroactively. *See U.S. v. Avila*, No. 93-1063 (10th Cir. June 28, 1993) (per curiam); *U.S. v. Dowty*, No. 93-1634 (8th Cir. June 25, 1993) (per curiam); *Desouza v. U.S.*, No. 92-2444 (1st Cir. June 14, 1993) (per curiam); *U.S. v. Cacedo*, 990 F.2d 707, 710 (2d Cir. 1993).

See *Outline* generally at I.E, III.E.4.

General Application Principles

Relevant Conduct

U.S. v. Evbuomwan, 992 F.2d 70 (5th Cir. 1993) (Remanded: Error to attribute fraud loss caused by third party without a specific finding that such activity was within the scope of agreement with defendant. Even if defendant knew of the activity, "the mere knowledge that criminal activity is taking place is not enough for sentence enhancement under § 1B1.3. The rule does not hold accountable any person who reasonably suspects that criminal activity is taking place, regardless of their own involvement. To [be] accountable for the crime of a third person, 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. . . . The appropriate application of § 1B1.3 requires giving temporal primacy to the determination of whether a defendant has agreed to jointly undertake a criminal activity. If the defendant has not joined the criminal activity, it does not matter that he could have foreseen the criminal act. The reasonably foreseeable standard applies only after it is shown that a jointly undertaken activity has taken place."). *See also U.S. v. Garrido*, No. 92-2925 (8th Cir. June 3, 1993) (Magill, J.) ("Simple knowledge" that coconspirator possessed other drugs is not sufficient—may attribute those drugs to defendant only if coconspirator's possession was in furtherance of conspiracy and reasonably foreseeable); *U.S. v. Ismond*, 993 F.2d 1498 (11th Cir. 1993) (district court must make "individualized findings concerning the scope of criminal activity undertaken by a particular defendant").

See *Outline* at I.A and II.D.4.

Amendments

U.S. v. Fagan, No. 88-5439 (9th Cir. June 25, 1993) (Canby, J.) (Appellate court remanded sentences, noted that defendant should then be resentenced under the current Guidelines even though he was originally sentenced in 1990: "It is well-settled that, when sentencing a defendant, the district court must apply the version of the Sentencing Guidelines in effect on the date of sentencing. . . . [U]pon remand for resentencing, . . . absent an ex post facto problem, the district court must apply the version of the Sentencing Guidelines in effect on the date of resentencing."). *Accord 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); *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).

See *Outline* at I.E.

Departures

Criminal History

U.S. v. Ruffin, No. 92-1335 (7th Cir. June 29, 1993) (Easterbrook, J.) (Remanded: It was error to fix the extent of upward departure by reference to the career offender guideline instead of following the criminal history departure procedure in § 4A1.3, p.s. Defendant did not have the required two prior felony convictions as defined in § 4B1.2, and "[n]othing in the career offender guideline, or any of the commentary concerning departures, invites a judge to apply these penalties to defendants who have not been 'convicted.' . . . 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.").

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

Aggravating Circumstances

U.S. v. Hicks, No. 92-50127 (9th Cir. June 28, 1993) (O'Scannlain, J.) (Affirmed in part: Proper to depart upward under § 5K2.12, p.s., for "terroristic nature of" and "potential for great destruction" from defendant's activities. Defendant carried out a series of "terroristic" attacks on the Internal Revenue Service over four years. Among other things, he planted car bombs at and launched mortar attacks against IRS buildings. The applicable offense guideline, § 2K1.4, does not account for such activity. And while that guideline "contemplates the possibility that the conduct underlying the offense may have put people at risk of bodily harm or even death, there is nothing to indicate that [it accounts for] the degree of risk that the district court found was present here"—had the bombs and mortars worked properly, many people would probably have been killed and injured. However, the sentence must be remanded because the district court did not provide a sufficient explanation for the extent of the departure.).

See *Outline* at VI.B.1.

Determining the Sentence

Supervised Release

U.S. v. Ravoy, No. 92-2662 (8th Cir. June 7, 1993) (Hansen, J.) (Remanded: Sentencing court could not impose a term of "inactive supervised release"—"strictly for the purposes of administering and monitoring the repayment of [defendant's] restitution obligations"—that, combined with the "active" terms of release, exceeded the maximum statutory term of supervised release. This had the effect of imposing consecutive terms of release, which are prohibited by *U.S. v. Gullickson*, 982 F.2d 1231, 1235–36 (8th Cir. 1993) (supervised release terms must be concurrent) [5 *GSU* #8].).

See *Outline* at V.C.

Certiorari Granted:

U.S. v. Granderson, 969 F.2d 980 (11th Cir. 1992), *cert. granted*, 113 S. Ct. — (June 28, 1993) (No. 92-1662). Issue: Does "original sentence" in 18 U.S.C. § 3565(a)—which mandates a sentence of "not less than one-third of the original sentence" when probation is revoked for drug possession—refer to the term of probation originally imposed or to term of imprisonment originally available under the Guidelines?

See *Outline* at VII.A.2 and cases in 5 *GSU* #11.

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VOLUME 6 • NUMBER 1 • AUGUST 9, 1993

General Application Principles

POLICY STATEMENTS

Seventh Circuit holds that district courts "must follow policy statements unless they contradict a statute or the Guidelines." Defendant's five-year term of supervised release was revoked for drug possession. Under 18 U.S.C. § 3583(g), he was subject to a prison term of not less than 20 months. Under the Guidelines he was subject to a 12–18 month term, or 20 months in light of the mandatory term under § 3583(g). *See* §§ 7B1.3, 7B1.4(a) & (b)(2), p.s. The government argued that the Chapter Seven policy statements were merely advisory, not binding. The district court agreed and sentenced defendant to 36 months.

The appellate court remanded: "Both parties agree that the correct interpretation of this policy statement leads to the conclusion that the district court must sentence Lewis to 20 months imprisonment—no more and no less. . . . While we may have been previously inclined to accept the proposition that policy statements are merely advisory, . . . this view has been explicitly rejected by . . . *Stinson v. U.S.*, 113 S.Ct. 1913 (1993). In reaching its holding that sentencing guideline commentary is binding, unless contrary to statute or the Guidelines themselves, the Court [stated]: 'The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.' *Id.* at 1917." Therefore, "we are compelled to hold that the district court erred by not sentencing Lewis to 20 months imprisonment, absent a departure. . . . U.S.S.G. sec. 7B1.4(b)(2) does not conflict with any statute or the Guidelines themselves. Consequently, Lewis must be resentenced."

U.S. v. Lewis, No. 92-2586 (7th Cir. July 8, 1993) (Kanne, J.).

Note: This appears to be the first circuit to hold that the Chapter Seven policy statements must be followed. Most of the circuits had held, prior to *Stinson*, that Chapter Seven must be considered but is not binding. See *Outline* generally at VII.

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Mergerson, No. 92-1179 (5th Cir. July 12, 1993) (King, J.) (Remanded: For defendant convicted of conspiracy to distribute heroin, it was error to use amounts he negotiated to sell to find him responsible for over one kilogram of heroin and thus subject to the statutory minimum term under 21 U.S.C. § 841(b)(1)(A)(i). Although negotiated amounts are used under the Guidelines, see § 2D1.1, comment. (n.12), "§ 841(b)(1)(A)(i) requires that drug quantities actually be possessed with the intent to distribute—rather than merely being negotiated—[and] the district court's findings for purposes of guidelines sentencing are in large part inapplicable to the court's separate findings pursuant to § 841(b)(1)(A)(i)." Therefore, "the district court had to find . . . that Mergerson actually possessed or conspired . . . to actually possess over a kilogram of heroin during the conspiracy . . . . Mere proof of the amounts 'negotiated' with the undercover agents . . . would not count toward the quantity of heroin applicable to the conspiracy count.").

See *Outline* at II.A.3 and B.4.a.

Departures

SUBSTANTIAL ASSISTANCE

Third Circuit holds government may not deny § 5K1.1 motion to penalize defendant for exercising right to trial. The government offered to move for a substantial assistance departure if defendant pled guilty to mail fraud and money laundering charges. Defendant refused to plead to money laundering because he believed the statute did not apply to his conduct. The government responded by "withdraw[ing] the proposed § 5K1.1 plea agreement offer based on [defendant's] refusal to plead," and added that it also had "serious reservations" about defendant's truthfulness, which could also preclude a § 5K1.1 motion. Defendant was convicted on all counts and no § 5K1.1 motion was made. Defendant claimed the district court could depart under *Wade v. U.S.*, 112 S.Ct. 1840 (1992), because the government had an unconstitutional motive for denying the motion—to penalize him for going to trial. He also claimed that his assistance was equal to or greater than that of two defendants who pled guilty and received departures. The district court denied defendant's request, stating that *Wade* did not prohibit the government's action.

The appellate court remanded: "The Court in *Wade* stated that a district court may grant relief to a defendant if the prosecutor has 'an unconstitutional motive' for withholding a § 5K1.1 motion. . . . [I]t is an elementary violation of due process for a prosecutor to engage in conduct detrimental to a criminal defendant for the vindictive purpose of penalizing the defendant for exercising his constitutional right to a trial."

On remand, defendant can attempt to prove prosecutorial vindictiveness. He is not entitled to a presumption of vindictiveness, however, "because the government has proffered legitimate reasons . . . for its refusal to file a 5K1.1 motion," namely, that defendant's assistance was not, in fact, substantial. Thus, defendant "must prove actual vindictiveness in order to prevail. . . . [H]e must show that the prosecutor withheld a 5K1.1 motion solely to penalize him for exercising his right to trial," and this requires showing "that the government's stated justifications . . . are pretextual."

U.S. v. Paramo, No. 92-1861 (3d Cir. July 7, 1993) (Cowen, J.).

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

Fifth Circuit remands refusal to file § 5K1.1 motion because "significant ambiguities" in the plea agreement require a determination of the intent of the parties. Defendant entered into a plea agreement with the government. At defendant's rearraignment, the government told the district

court "that it is implicit although not spelled out in the agreement that if Mr. Hernandez should provide substantial assistance to the Government, . . . that the Government may make a motion for downward departure at sentencing." Defendant provided information, but the government claimed the assistance was insubstantial and did not file a motion. Defendant claimed that he provided the government with all the information it requested, but the government did not follow up on it and did not give him an opportunity to provide more assistance. Defendant was sentenced to the statutory minimum after refusing the chance to withdraw his plea.

The appellate court remanded, holding that the district court must determine whether the government's conduct was consistent with the parties' reasonable understanding of the plea agreement, which in this case involves "the parties' interpretation of what might constitute substantial assistance." Here, "it is unclear from the record what more Hernandez could have provided—or, more to the point, what more the government could possibly have contemplated that he would provide—in order to earn a motion for downward departure." The Fifth Circuit has held that when a defendant accepted a plea agreement in reliance on government representations "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 obliged to move for a downward departure." *See U.S. v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991) [4 *GSU* #5].

As to whether the government's use of "may" instead of "shall" move for departure gave it greater discretion, the court stated: "We find it difficult if not impossible to believe that any defendant who hopes to receive a [§ 5K1.1 motion] would knowingly enter into a plea agreement in which the government retains unfettered discretion to make or not to make that motion, even if the defendant should indisputably provide substantial assistance. On remand . . . , the government should not be heard to make the legalistic argument that merely by using the word 'may' the government is free to exercise the prosecutor's discretion whether to make the motion . . . . Frankly, we are incredulous that any defendant would consciously make such an obviously bad deal absent some extremely compelling need to plea rather than stand trial."

U.S. v. Hernandez, No. 92-7485 (5th Cir. July 7, 1993) (Weiner, J.).

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

U.S. v. Dixon, No. 92-5780 (4th Cir. July 2, 1993) (Hall, J.) (Remanded: The government breached the plea agreement by not making a § 5K1.1 motion. The agreement stated that if defendant's "cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person," the government would make the motion. The government "repeatedly conceded" defendant had, in fact, substantially assisted an investigation, but wanted to withhold the motion until defendant assisted in a future trial. Noting that the agreement provided for assistance in the investigation *or* prosecution of another, the appellate court held that "the government has no right to insist on assistance in both investigation and prosecution . . . . Dixon's providing substantial assistance in the investigation of another person has already triggered the government's duty under the plea agreement . . . . Dixon is entitled to specific performance.").

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

U.S. v. Beckett, No. 92-5091 (5th Cir. July 7, 1993) (DeMoss, J.) (Remanded: Although the government specified it was moving under § 5K1.1 only and not for a departure from the statutory minimum under 18 U.S.C. § 3553(e), the district court had discretion to depart below the statutory minimum. "[O]nce the motion is filed, the judge has the authority to make a downward departure from any or all counts, without regard to any statutorily mandated minimum sentence. We see nothing in these provisions that causes us to believe that Congress intended to permit the government to limit the scope of the court's sentencing authority by choosing to package its substantial assistance representation in a 5K1.1 motion rather than a 3553(e) motion.").

See *Outline* at VI.F.3.

Adjustments

Acceptance of Responsibility

U.S. v. Clemons, No. 92-6285 (6th Cir. July 19, 1993) (Milburn, J.) (Affirmed: Adopting the reasoning of *U.S. v. Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992), the appellate court held that "conditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege against self-incrimination does not penalize the defendant for assertion of his right against self incrimination in violation of the Fifth Amendment." Thus, it was proper to deny the § 3E1.1 reduction to a defendant who accepted responsibility for the offense of conviction but refused to admit to related conduct. The court noted, however, that the 1992 amendments to § 3E1.1 and Application Note 1(a), which did not apply to defendant, "'would appear to preclude the Fifth Amendment issue from arising in the future . . . .' *U.S. v. Hicks*, 978 F.2d 722, 726 (D.C. Cir. 1992)."). *See also U.S. v. March*, No. 92-3343 (10th Cir. July 9, 1993) (Logan, J.) (Affirmed: § 3E1.1 reduction properly denied to defendant who followed advice of counsel and refused to discuss circumstances of offense with probation officer preparing presentence report, claiming he might incriminate himself and destroy basis for appeal.). *But see U.S. v. LaPierre*, No. 92-10321 (9th Cir. July 12, 1993) (Norris, J.) (Remanded: District court may not deny § 3E1.1 reduction because defendant claimed privilege against self-incrimination and refused to discuss facts with probation officer and planned to appeal—exercise of constitutional rights may not be weighed against defendant.).

See *Outline* at III.E.2 and 3.

Role in the Offense

U.S. v. Webster, No. 90-50699 (9th Cir. June 11, 1993) (per curiam) (Remanded: District court should consider whether defendant qualifies for minor participant adjustment—based on all relevant conduct—for his role as a courier. However, downward departure may not be considered under *U.S. v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992), which held that departure for a drug courier may be appropriate if the courier was the only "participant" in the offense of conviction. The Nov. 1990 amendment to § 3B's Introductory Commentary, which states that relevant conduct should be used for role in offense adjustments, effectively overturned the reasoning of *Valdez-Gonzalez*, which focused on the fact that the earlier version of § 3B1.2 did not adequately account for a defendant's role in relevant conduct.).

See *Outline* at III.B.5.

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Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Fourth Circuit holds Guidelines' reasonable foreseeability analysis should be used to determine drug quantities for mandatory minimum sentences under 21 U.S.C. § 841(b). Two defendants in a large drug conspiracy were subject to ten-year minimum terms if they were held responsible for the full amount of drugs distributed by the conspiracy. 21 U.S.C. §§ 846 and 841(b). However, under the Guidelines' reasonable foreseeability analysis a smaller quantity of drugs would be attributed to them and their sentences would be significantly lower. The district court sentenced them to the mandatory term using the full amount from the conspiracy, but also imposed alternative sentences under the Guidelines.

The appellate court held that it was improper to automatically use the full amount of drugs from the conspiracy for purposes of the mandatory minimum. The court looked to the statutes and legislative history to "conclude that the most reasonable interpretation of the relevant statutory provisions requires a sentencing court to assess the quantity of narcotics attributable to each coconspirator by relying on the principles set forth in *Pinkerton* [*v. U.S.*, 328 U.S. 640 (1946)]." To hold a defendant liable for acts of other conspirators under *Pinkerton*, "the act must be 'done in furtherance of the conspiracy' and 'be reasonably foreseen as a necessary or natural consequence of the' conspiracy."

The relevant conduct section of the Guidelines "incorporates the concept of reasonable foreseeability as described in *Pinkerton*" and should be used to "determine the application of § 841(b) for a defendant who has been convicted of § 846." The court held that "in order to apply § 841(b) properly, a district court must first apply the principles of *Pinkerton* as set forth in the relevant conduct section of the Sentencing Guidelines, U.S.S.G. § 1B1.3, to determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement. If that amount satisfies the quantity indicated in § 841(b), the district court must impose the mandatory minimum sentence absent a higher sentencing range resulting from application of the Sentencing Guidelines. If the quantity is less than that set forth in § 841(b), the statutory mandatory minimum sentencing provision would not apply."

The court held that the alternative sentences imposed under the Guidelines in this case were proper, and remanded for amendment of the judgments.

U.S. v. Irvin, No. 91-5454 (4th Cir. Aug. 23, 1993) (Wilkins, J.).

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

CALCULATING WEIGHT OF DRUGS

U.S. v. Johnson, No. 91-1621 (7th Cir. July 29, 1993) (Lay, Sr. J.) (Remanded: For defendant convicted of possession with intent to distribute cocaine, it was error to include the weight of waste water in which a small amount of cocaine base was mixed. "The waste water does not serve as a dilutant, cutting agent or carrier medium for the cocaine base. It does not 'facilitate the distribution' . . . of the cocaine in that cocaine is not dependent on the water for ingestion, and unlike a dilutant or cutting agent, the waste water does not in any way increase the amount of drug available at the retail level. The liquid, with just a trace of cocaine base, is merely a by-product of the manufacturing process with no use or market value. . . . To read the statute or *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] as requiring inclusion of the weight of all mixtures, whether or not they are useable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent.").

See *Outline* at II.B.1.

General Application Principles

SENTENCING FACTORS

D.C. Circuit holds en banc that, after granting a reduction for acceptance of responsibility, the sentencing court may consider defendant's decision to go to trial when picking the sentence within the guideline range. Defendant was convicted at trial on a drug charge. The district court granted a § 3E1.1 reduction, but expressed reservations about giving defendant the full benefit of the two-point reduction in light of his going to trial when "he, in effect, had no defense," and later made a "rather meager" acknowledgment of responsibility. The court stated that, if defendant had pled guilty before trial, it would "have sentenced him at the very bottom of the Guidelines," but because "the case did go to trial, I am going to add an additional six months to the guideline sentence that I intend to impose," and sentenced defendant to 127 months instead of 121. The original appellate panel affirmed, rejecting defendant's claim that he was punished for exercising his Sixth Amendment right to trial. *U.S. v. Jones*, 973 F.2d 928 (D.C. Cir. 1992) [5 *GSU* #3].

The en banc court affirmed, "although on narrower grounds. . . . [I]t is clear . . . that the district judge could not properly be described as enhancing defendant's punishment. Instead, in considering appellant's decision to admit guilt only after conviction, the judge merely viewed the appellant's timing as pertinent to the scope of the benefit he should receive. The judge decided he should give appellant less of a benefit than he would have allowed an otherwise identical defendant who showed greater acceptance of responsibility by acknowledging his guilt at an earlier stage."

The court added that, looking at the pre-adjustment guideline range as a "baseline sentence," "the sentencing judge appears simply to have given the defendant four-fifths of the possible credit for acceptance of responsibility (24 out of 30 possible months), explaining that if Jones had shown greater evidence of contrition (in this instance by pleading guilty), the judge would have made a greater adjustment." It was "legally relevant (and constitutionally unobjectionable)" for the district judge to conclude that, "within the 121–151 month range

the judge was bound to work within, Jones's limited remorse deserved only a 24-month reduction."

U.S. v. Jones, No. 91-3025 (D.C. Cir. July 2, 1993) (en banc) (Williams, J.) (three judges dissenting).
See *Outline* at I.C and III.E.4.

Relevant Conduct

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Remanded: It was error to attribute to defendant all drugs distributed by the conspiracy on the basis that defendant "certainly could have reasonably foreseen" such amounts: "foreseeability is only one of the limitations on the ability of the court to charge one participant in a conspiracy with the conduct of the other participants. . . . Another limitation on the court's ability to charge a defendant with the conduct of others is that the conduct must be in furtherance of the execution of the 'jointly undertaken criminal activity.'" Thus, the district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake.").
See *Outline* at I.A.1 and II.A.2.

Departures

Mitigating Circumstances

U.S. v. Restrepo, No. 92-1631 (2d Cir. July 26, 1993) (Kearse, J.) (Remanded: Although consideration of alienage is not prohibited by the Guidelines, it was improper to depart downward for defendant who faced deportation and other collateral consequences due to his status as a permanent resident alien. Consideration of "national origin" is prohibited by § 5H1.10, p.s., but national origin "is not synonymous with 'alienage,' i.e., simply not being a citizen of the country in which one is present. . . . Thus, the prohibition against consideration of national origin does not constitute a prohibition against consideration of alienage. . . . [T]o the extent that alienage is a characteristic shared by a large number of persons subject to the Guidelines, it is a characteristic that, for sentencing purposes, is not 'ordinarily relevant.' It remains, however, a characteristic that may be considered if a sentencing court finds that its effect is beyond the ordinary" in nature or degree. In this case, however, "none of the bases relied on by the district court, i.e., (1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of sentence, and (3) the effect of deportation as banishment from the U.S. and separation from family, justified the departure."). *Cf. U.S. v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990) ("possibility of deportation is not a proper ground for departure"); *U.S. v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990) (reversed upward departure based on fact that anticipated deportation after release precluded imposition of fine or supervised release).
See *Outline* generally at VI.C.4.b.

U.S. v. Ziegler, No. 92-3242 (10th Cir. July 23, 1993) (Brorby, J.) (Remanded: District court improperly departed downward for defendant's post-offense drug rehabilitation. "[W]e hold drug rehabilitation is taken into account for sentencing purposes under U.S.S.G. 3E1.1 (1991) and, therefore, rehabilitation is generally an improper basis for departure." Even in extraordinary or unusual cases rehabilitation is not a proper basis for departure: "Although [§ 5H1.4, p.s.] explicitly refers to drug dependence, not drug rehabilitation, we interpret this section as encompassing both phenomena because drug rehabilitation necessarily presupposes drug dependence. . . . A departure based upon drug rehabilitation rewards drug dependency because only a defendant with a drug abuse problem is eligible for the departure. For this reason, we hold the Guidelines do not contemplate drug rehabilitation as a grounds for departure even in rare circumstances.").
See *Outline* at VI.C.2.a.

U.S. v. Gaither, No. 92-3222 (10th Cir. July 23, 1993) (Brorby, J.) (Reversed, in light of *Ziegler*, departure based on post-offense drug rehabilitation, but remanded for further findings on defendant's claim that departure was also based on his "exceptional acceptance of responsibility." Such a departure is proper only 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.").
See *Outline* at VI.C.4.c.

U.S. v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (Affirmed: "Applying the modified standard of review for such cases recently announced in *U.S. v. Rivera*," 994 F.2d 942 (1st Cir. 1993), the district court properly departed downward—from the 24–30 month range to probation with six months' home confinement—for defendant's unusual family circumstances. Defendant had been living with a divorced woman and her two children since 1989, and had developed a special relationship with the woman's son that had helped ameliorate the son's serious psychological and behavioral problems. Evidence that the son "would risk regression and harm if defendant were incarcerated amply supports the district court's determination that Sclamo's relationship to James is sufficiently extraordinary to sustain a downward departure.").
See *Outline* at VI.C.1.a.

Determining the Sentence

Fines

U.S. v. Turner, No. 93-1148 (7th Cir. July 14, 1993) (Easterbrook, J.) (Remanded: The required cost-of-imprisonment fine, § 5E1.2(i), is authorized by statute. Case is remanded, however, because the district court imposed the fine after finding that defendant was unable to pay a punitive fine under § 5E1.2(a) and (c). Although the appellate court declined to hold that a cost-of-imprisonment fine may never be imposed unless a punitive fine is imposed first, it concluded that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under sec. 5E1.2(i).").
See *Outline* at V.E.2.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Sosa, 997 F.2d 1130 (5th Cir. 1993) (Affirmed: In sentencing defendant for revocation of probation for drug possession to "not less than one-third of the original sentence," 18 U.S.C. § 3565(a), "original sentence" refers to the length of probation and is not limited to the maximum original guideline sentence.).

Three courts have now held that "original sentence" refers to probation; four have held it is limited to the original guideline sentence. The Supreme Court granted certiorari in one of the latter cases. *See U.S. v. Granderson*, 113 S. Ct. 3033 (1993).
See *Outline* at VII.A.2.

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Criminal History

INVALID PRIOR CONVICTIONS

Sixth Circuit holds en banc that "a narrow window of challenge to prior convictions is available" to defendants sentenced under the Guidelines. Defendant challenged the validity of two prior state convictions for violent felonies that would have placed him in the career offender category. The district court held that the convictions were invalid under state law and defendant should not be sentenced as a career offender. The original appellate panel held that the validity of the convictions had to be determined not under state law but under federal constitutional standards, and remanded after finding that federal standards were not violated. That opinion was withdrawn for rehearing en banc "to decide whether a defendant may challenge at sentencing a prior state court conviction not previously ruled invalid which would result in a longer sentence if included within the Sentencing Guidelines calculus."

The majority of the en banc court held that "under certain limited circumstances it is within a sentencing court's discretion to entertain a challenge to the inclusion of a prior state conviction in a criminal history score. . . . [T]he defendant must first comply with the procedural requirements for objecting to the conviction's inclusion in the criminal history score. The defendant also must state specifically the grounds claimed for the prior conviction's constitutional invalidity in his initial objection and 'the anticipated means by which proof of invalidity will be attempted—whether by documentary evidence, including state court records, testimonial evidence, or combination—with an estimate of the process and the time needed to obtain the required evidence.' . . . An example of a challenge that a court should entertain would be a challenge to a previously unchallenged felony conviction where the defendant was not represented by counsel, counsel was not validly waived, and court records or transcripts are available that document the facts."

"In addition to the types of proof that will be offered, the court also should consider whether the defendant has available an alternative method for attacking the prior conviction either through state post-conviction remedies or federal habeas relief. While this factor should not be dispositive of whether a sentencing court should entertain such a challenge, the availability of an alternative method should play a significant role in the court's decision." The court stated that its holding is similar to the Fourth Circuit's approach that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) [5 *GSU* #15].

As to defendant's challenge, the en banc court held that the district court erred in finding that the prior convictions were invalid under state law: "When the inclusion of a prior state conviction in the criminal history score is challenged, the validity of that conviction must be determined solely as a matter of federal law." Holding that the convictions were valid under federal law, the court reversed and remanded.

Twelve of the fourteen members of the en banc court joined in the result. Six joined the opinion on the issue of what circumstances a district court must consider before allowing a challenge to prior convictions; one judge concurred but would allow district courts more discretion. Five judges would further limit such challenges. The two judges who dissented from the result would allow challenges to prior convictions as a matter of right, as in *U.S. v. Vea-Gonzalez*, 999 F.2d 1326 (9th Cir. 1993) (superseding 986 F.2d 321 [5 *GSU* #10]).

U.S. v. McGlocklin, No. 91-6121 (6th Cir. Sept. 17, 1993) (en banc) (Guy, J.) (dissenting opinions noted above).

See *Outline* at IV.A.3.

Sentencing Procedure

Eleventh Circuit holds that defendants may waive right to appeal Guidelines sentences, but the waiver must be specifically addressed in the plea colloquy. Defendant appealed his sentence. The government argued the appeal should be denied because defendant's plea agreement included a waiver of his "right to appeal or contest . . . his sentence on any ground," unless the sentence was in violation of law.

The appellate court held that, under most circumstances, "a defendant's knowing and voluntary waiver of the right to appeal his sentence will be enforced." However, "for a waiver to be effective it must be knowing and voluntary [and] . . . in most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court must have specifically discussed the sentence appeal waiver with the defendant during the Rule 11 hearing." To enforce a waiver, either the district court must have "specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy" or it must be "manifestly clear from the record that the defendant otherwise understood the full significance of the waiver."

Here, the court held the district court "did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances. . . . Nor does . . . the record [show] that Bushert otherwise understood the full significance of his sentence appeal waiver." The court concluded 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." The appellate court found defendant's claims of sentencing error had no merit and affirmed his sentence.

U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993).

Evidentiary Issues

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Affirmed: Cocaine excluded at trial because it was seized during an unconstitutional search was properly used to calculate defendants' offense levels. Evidence illegally seized for the purpose of sentence enhancement would be excludable, but there was "no indication in the record that this evidence was obtained to enhance defendants' sentences." The court distinguished as dicta the conclusion in *U.S. v. Nichols*, 979 F.2d 402, 410–11 (6th Cir. 1992), that unlawfully seized evidence should not be used in setting the base offense level.) (Keith, J., dissented on this issue). See *Outline* at IX.D.4.

Adjustments

Use of Special Skill

U.S. v. Mainard, No. 92-10298 (9th Cir. Sept. 20, 1993) (Fernandez, J.) (Remanded: Enhancement under § 3B1.3 for use of special skill was improperly given for defendant's "sophistication in methamphetamine manufacturing" and "ability to pass his expertise along to others." There was "no evidence that Mainard was a trained chemist or pharmacist . . . who abused his skills to produce drugs." "Although the methamphetamine laboratory might have been sophisticated, nothing indicates that Mainard used any 'pre-existing, legitimate skill not possessed by the general public,'" and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under § 3B1.3.). *Accord U.S. v. Young*, 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant learned how to manufacture PCP—which by definition requires special skill—insufficient for § 3B1.1).

Compare U.S. v. Spencer, No. 93-1041 (2d Cir. Aug. 25, 1993) (Altimari, J.) (Remanded for recalculation of drug amount, but affirmed special skill enhancement for defendant convicted of methamphetamine offenses. Although "special skill" "usually requir[es] substantial education, training, or licensing," § 3B1.3, comment. (n.2), and defendant was self-taught, he "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. . . . [He] experimented often as an amateur chemist . . . , built an extremely sophisticated home chemistry laboratory . . . , used his chemical acumen professionally . . . to conduct a joint project [with a chemist] to develop a sophisticated medical testing device," and had taken college courses.). *Accord U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor had acquired requisite "special skill" through experience).

See also U.S. v. Muzingo, 999 F.2d 361 (8th Cir. 1993) (Affirmed: Defendant used "special skill" to break into safe-deposit boxes He made keys to the boxes, "a skill that he acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys." There was also evidence he had technical drawings and a "little gadget" he used to determine the profile of the keys that he required.). See *Outline* at III.B.9.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Truss, No. 92-2171 (6th Cir. Sept. 8, 1993) (Suhrheinrich, J.) ("[W]e find the majority's position persuasive and join [most circuits] in holding that, while an additional term of supervised release may be in the best interests of an orderly administration of justice, no additional term of supervised release is permitted by § 3583(e)(3)."). *Accord U.S. v. Tatum*, 998 F.2d 893 (11th Cir. 1993) (per curiam) (Remanded: "We join the majority of circuits that have addressed this issue and hold that upon revocation of a term of supervised release, a district court is without statutory authority to impose both imprisonment and another term of supervised release."). See *Outline* at VII.B.1.

Offense Conduct

More than Minimal Planning

U.S. v. Wong, No. 92-5570 (3d Cir. July 30, 1993) (Mansmann, J.) (Affirmed: When appropriate, both enhancement for more than minimal planning and adjustment for role in offense may be given: "The upward adjustments mandated respectively by §§ 2B1.1(b)(5) and 3B1.1(c) operate independently of each other . . . . [W]e hold that where a defendant is not only a participant in a sophisticated criminal scheme, but is also one of the more culpable individuals in that scheme, the two enhancements may be applied in tandem.").

Contra U.S. v. Chichy, No. 92-3481 (6th Cir. Aug. 6, 1993) (Contie, Sr. J.) (Remanded: It is "impermissible double counting" to impose both enhancements. The appellate court held it was bound by *U.S. v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992), which held that separate enhancements under § 2F1.1(b)(2) and § 3B1.1(a) were improper. "We believe the same reasoning applies to subsection (c) of § 3B1.1. . . . Although it is possible for a defendant to receive an enhancement under § 2F1.1(b)(2) for more than minimal planning without being an organizer, leader, manager, or supervisor under § 3B1.1(c), the converse is not true. A defendant cannot receive an enhancement for role in the offense under § 3B1.1(c) unless he has engaged in more than minimal planning."). See *Outline* at II.E and III.B.6.

Calculating the Weight of Drugs

U.S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993) (Remanded: *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), a drug importation case, applies to conspiracy to manufacture and possess cases. Thus, for defendants convicted of conspiracy to manufacture and possess methamphetamine, it was error to include amounts of discarded "sludge" that contained less than one percent methamphetamine and "were not only unusable, but also toxic." Courts may, however, use "the approximation approach" in § 2D1.1, comment. (n.12), if the amount of drugs seized does not reflect the scale of the offense and the evidence supports that method.).

Compare U.S. v. Nguyen, No. 92-8032 (10th Cir. Apr. 13, 1993) (Saffels, Sr. Dist. J.) (Affirmed: District court properly used entire weight of "a 10.3 gram 'eight-ball' comprised of small pieces of yellowish cocaine base mixed with white sodium bicarbonate powder." Defendant argued that crack cocaine is not usually combined with sodium bicarbonate powder, but the appellate court stated: "This is not an absurd case, but one in which the sodium bicarbonate could have remained after the distillation into the final cocaine base form. In addition, the defendant purchased the drug in this form and sold it in this form.") (previously unpublished table opinion, 991 F.2d 806, to be published in full). See *Outline* at II.B.1.

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VOLUME 6 • NUMBER 4 • OCTOBER 14, 1993

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Second Circuit vacates mandatory minimum sentence that was based on inclusion of relevant conduct that was not part of the offense of conviction. Defendant was arrested in November 1991 and charged with possession of a firearm in connection with a drug trafficking offense and possession of cocaine with intent to sell. In February 1992, defendant was arrested again and charged with conspiracy to possess with intent to distribute and conspiracy to distribute cocaine. Pursuant to a plea agreement, he was convicted of the November weapons charge and the February charges; the November drug charge was dropped. In sentencing defendant on the February drug charges, which involved .431 grams of cocaine base, the district court included the 12.86 grams of cocaine base involved in the November transaction and sentenced defendant to the mandatory minimum five-year sentence for a conspiracy involving more than five grams of cocaine base, 21 U.S.C. §§ 841(b)(1) and 846.

The appellate court remanded, holding that the November drug amount could be included as relevant conduct in computing the guideline sentence, if appropriate, but could not be counted toward the mandatory minimum. "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. Thus, the district court erred in concluding that it should include the cocaine from the November episode not only as related conduct relevant to the base offense level for the February episode, but also in determining whether the mandatory minimum for the February offense applied. . . . [Section 841(b)(1)] indicates that the minimum applies to the quantity involved in the charged, and proven, violation of § 841(a). In this case, Darmand's violation of § 841(a) was found to involve only .431 grams. Consequently, the mandatory minimum should not have been imposed."

U.S. v. Darmand, No. 93-1009 (2d Cir. Sept. 8, 1993) (Oakes, J.).

See *Outline* at II.A.3.

DRUG QUANTITY—RELEVANT CONDUCT

U.S. v. Adams, 1 F.3d 1566 (11th Cir. 1993) (Remanded: In determining what drug amounts were reasonably foreseeable to conspiracy defendant who had participated in only one abortive flight to pick up marijuana, it was error to attribute to him "a hypothetical second load that [he] never attempted to transport." While it may sometimes be appropriate to hold a defendant liable for other flights, "[a] sentencing court may not speculate on the extent of a defendant's involvement in a conspiracy; instead, such a finding must be supported by a preponderance of the evidence. . . . 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."). See *Outline* at II.A.1.

Criminal History

CONSOLIDATED OR RELATED CASES

Seventh Circuit holds that there must have been a formal consolidation order or other judicial determination for prior convictions to be "consolidated for sentencing." The district court sentenced defendant as a career offender after finding that two of defendant's prior convictions for bank robbery—which had been charged in the same indictment—were related, but that a third, separately indicted robbery was not. Defendant argued that the convictions had been "consolidated for sentencing," § 4A1.2, comment. (n.3). "Both indictments were returned by the same grand jury at the same time. The cases, which had separate docket numbers, were assigned to the same judge and identical bonds were set. The charges proceeded together through arraignment, motions, motion hearing, plea agreement, plea hearing, sentence hearing, and subsequent sentence modification. All three offenses . . . were the subject of Russell's plea agreement. Russell received 15-year concurrent sentences for each of the three offenses, in separate orders, but one order referring to the separate cases by number modified the sentences to ten years on each count." The district judge determined that the separate offenses, indictments, minute sheets, judgments, and convictions "do not suggest consolidation." Also, there was no formal consolidation order, and the two robberies in the first indictment were committed by defendant alone while the third was by defendant and his brother.

The appellate court affirmed, noting initially that Application Note 3 is binding and thus consolidated sentences must be treated as related, but that "the commentary does not answer the question of when sentences should be deemed to have been 'consolidated' for sentencing." The court concluded that "the purpose of the guideline would best be implemented by 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. . . . In other words, there must be a judicial determination by the sentencing judge that the cases are to be consolidated, treated as one, for sentencing purposes. 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."

In this case, although there were "many characteristics of a consolidated sentencing," the district court "did not err in treating the two separate indictments as 'unrelated.'" The appellate court found that "there was no showing that there

was a request in the plea agreement that the cases be consolidated for sentencing purposes. The cases were continually treated as separate except for the various court proceedings being held at the same time before the same judge. . . . There is nothing in the record to indicate that the district court considered or made a determination that the cases were so related that they should be consolidated for sentencing purposes because one overall sentence would be appropriate for the three crimes, or that, except for the concurrent provision, the sentence for one conviction was somehow affected by the conduct under the other charge. At each hearing the two indictments were treated as separate cases, and there is nothing to show that the sentence for any charge would have been different if the cases had been heard on different days before different judges at entirely separate sentencing hearings."

U.S. v. Russell, 2 F.3d 200 (7th Cir. 1993).

See *Outline* at IV.A.1.c.

Career Offender Provision

U.S. v. Hayes, No. 91-30432 (9th Cir. Oct. 8, 1993) (Order amending original opinion at 994 F.2d 714, to remove holding that the offense of felon in possession of a sawed-off shotgun is a crime of violence: "Because we hold that possession of an unregistered sawed-off shotgun is a crime of violence, we need not decide whether being a felon in possession of a sawed-off shotgun is a crime of violence." Defendant's status as career offender is reaffirmed.).

Note to readers: This affects the entries for *Hayes* in 5 *GSU* #14 and *Outline* at IV.B.1.b.

General Application Principles

Relevant Conduct

U.S. v. Carrozza, No. 92-1798 (1st Cir. Sept. 16, 1993) (Campbell, Sr. J.) (Remanded: In sentencing RICO defendant, district court erred in "conclud[ing] that relevant conduct in a RICO case was, as a matter of law, limited to the specific predicate acts charged against the defendant . . . and conduct relating to the charged predicates. . . . We hold that relevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs." Also, "the term 'underlying racketeering activity' in §2E1.1(a)(2) means simply any act, whether or not charged against the defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. § 1961(1) and is otherwise relevant conduct under § 1B1.3." However, the statutory maximum sentence, which for RICO can be increased depending on the seriousness of the underlying racketeering activity, "must be determined by the conduct alleged within the four corners of the indictment," and uncharged relevant conduct affects only where defendant is sentenced within the statutory range.).

See *Outline* generally at I.A.4.

Departures

Mitigating Circumstances

U.S. v. Benish, No. 92-3311 (3d Cir. Sept. 16, 1993) (Sloviter, C.J.) (Affirmed: "The exclusive focus [in § 2D1.1] on the number of marijuana plants leads us to conclude that the Commission considered and rejected any other factors. Thus, we see no basis on which a district court could conclude that the age or sex of particular marijuana plants are factors that have not 'adequately' been considered by the Commission. . . . We see nothing atypical or unusual in the fact that the particular plants here were male, old, and possibly weak."). *Cf. U.S. v. Upthegrove*, 974 F.2d 55, 56 (7th Cir. 1992) (poor quality of marijuana is not ground for downward departure).

See *Outline* at II.B.2 and VI.C.4.b.

U.S. v. Hadaway, 998 F.2d 917 (11th Cir. 1993) (Remanded: Defendant, who pled guilty to possession of an unregistered sawed-off shotgun, claimed the district court erred by refusing to consider a downward departure on the grounds that his conduct was "outside the heartland" of such cases, did not cause the harm the law was intended to prevent (he averred that he acquired the gun on a whim, meant to keep it as a curiosity or for parts, and did not even know if it worked), and the rural community in which he lives considers the sentence to be excessive. The appellate court remanded because "it is clear that the district court had the authority to depart downward if it were persuaded that Hadaway's case truly was 'atypical . . . where conduct significantly differs from the norm,' U.S.S.G. Ch. 1, Pt. A, n.4(b), or that Hadaway's conduct threatened lesser harms, U.S.S.G. § 5K2.11," p.s. However, departure cannot be based on the community's view of the crime: "[W]e join the First and Fifth Circuits in holding that departures based on 'community standards' are not permitted." *See U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990) (rejecting upward departure for community standards); *U.S. v. Aguilar-Pena*, 887 F.2d 347 (1st Cir. 1989) (same).).

See *Outline* at VI.B.2 and VI.C.4.b.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Levi, 2 F.3d 842 (8th Cir. 1993) (Affirmed: Ex Post Facto Clause is not violated by application of amended revocation policy statements, § 7B1 (Nov. 1990), to defendant who committed the underlying offense before the amendments but violated his supervised release afterwards: "This court has found that the sentencing court is required only to 'consider' Chapter 7 policy statements. . . . Being merely advisory, a Chapter 7 policy statement is not a law within the meaning of the Ex Post Facto Clause. . . . Consequently, the fact that the district court considered a Chapter 7 policy statement that had been amended subsequent to Levi's initial sentencing does not implicate the Ex Post Facto Clause."). *See also U.S. v. Schram*, No. 92-30023 (9th Cir. July 22, 1993) (Farris, J.) (Affirmed: District court correctly applied Nov. 1990 version of § 7B1 even though defendant's underlying offense occurred before then: "Sections 7B1.3 and 7B1.4 were amended before Schram violated the terms of his supervised release. They were not applied 'retroactively' because they were not applied to conduct completed prior to their enactment."). *Cf. U.S. v. Bermudez*, 974 F.2d 12, 13–14 (2d Cir. 1992) (per curiam) (consider Chapter 7 policy statements after revocation of supervised release even though defendant was originally sentenced before effective date of Guidelines).

See *Outline* generally at VII.

Certiorari Granted:

U.S. v. Nichols, 979 F.2d 402 (6th Cir. 1992), *cert. granted*, No. 92-8556 (Sept. 28, 1993). Issue: Whether a prior uncounseled misdemeanor conviction can be used in calculating defendant's criminal history score.

See *Outline* at IV.A.5.

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VOLUME 6 • NUMBER 5 • NOVEMBER 2, 1993

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Ninth Circuit holds that, for mandatory minimum sentences, conspiracy drug amounts should be determined under Guidelines' reasonable foreseeability analysis, regardless of amounts specified in the indictment. Defendants were convicted of conspiracy to distribute cocaine and heroin. The conspiracy count specified that at least one kilogram of heroin and five kilograms of cocaine were involved in the conspiracy, and the sentencing court ruled that it was not free to determine whether defendants were responsible for smaller amounts for purposes of the statutory minimum under 21 U.S.C. § 841(b)(1)(A).

The appellate court held this was error and remanded for one defendant (the error was held harmless for the other defendant). The mandatory sentence under "§ 841(a) does not alter the court's responsibility to assess a defendant's 'individual . . . level of responsibility' for the amount of drugs involved in an offense by determining, in accord with the Guidelines, the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty."

"The sentencing court's responsibility to determine the quantity of drugs attributable to a defendant is not altered by the fact that the amount involved in a drug conspiracy is specified in the indictment. Quantity is not an element of a conspiracy offense. . . . The drug amount attributable to a defendant for purposes of sentencing is not established merely by looking to the amount of drugs involved in the conspiracy as a whole, '[u]nder the Guidelines each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.' . . . [I]t is not relevant for sentencing purposes whether or not an indictment specifies the amount alleged in the conspiracy."

U.S. v. Castaneda, No. 92-30077 (9th Cir. Oct. 5, 1993) (Nelson, J.).

See *Outline* at II.A.2 and 3 and summary of *Irvin* in 6*GSU*#2.

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Palacios-Molina, No. 92-2887 (5th Cir. Oct. 27, 1993) (Johnson, J.) (Remanded: Weight of liquid that cocaine was dissolved in for transport should not be included. "The cocaine in the present case was not a usable substance while it was mixed with the liquid in the bottles. Only after the liquid was distilled out would it be ready for either the wholesale or retail market. . . . Thus, as this liquid was not part of a marketable mixture, it is not implicated under the market-oriented analysis in *Chapman [v. U.S.*, 111 S. Ct. 1919 (1991)] and should not have been considered part of a mixture . . . under § 2D1.1. . . . For sentencing purposes, the method of transporting the drugs is unimportant. Rather, it is the amount of that commodity trafficked that counts.").

U.S. v. Killion, No. 92-3130 (10th Cir. Oct. 13, 1993) (Alley, Dist. J.) (Affirmed: Holding that *Chapman v. U.S.*, 111 S. Ct. 1919 (1991), did not change circuit precedent for determining weight of amphetamine precursor mixture: "we today again hold that so long as a mixture or substance contains a detectable amount of a controlled substance, its entire weight, including waste by-products of the drug manufacturing process, may be properly included in the calculation of a defendant's base offense level under § 2D1.1."). *Accord U.S. v. Innie*, No. 92-50239 (9th Cir. Oct. 5, 1993) (O'Scannlain, J.) (for methamphetamine).

See *Outline* at II.B.1, summaries of *Newsome* and *Nguyen* in 6*GSU*#3, *Johnson* in 6*GSU*#2, and list of amendments below.

LOSS

U.S. v. Lowder, No. 92-6378 (10th Cir. Sept. 17, 1993) (Kelly, J.) (Affirmed: It was proper to include in the loss calculation the interest that could have been earned on fraudulently obtained funds where defendant had guaranteed investors a 12% rate of return. Section 2F1.1, comment. (n.7), states that loss does not include "interest the victim could have earned on such funds had the loss not occurred," which the appellate court interpreted "as disallowing 'opportunity cost' interest, or the time-value of money stolen from victims. Here, however, Defendant defrauded his victims by promising them a guaranteed interest rate of 12%. He induced their investment by essentially contracting for a specific rate of return. He also sent out account summaries, showing the interest accrued on their investment. This is analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss. *See U.S. v. Jones*, 933 F.2d 353 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers).").

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

Departures

CRIMINAL HISTORY

U.S. v. Carr, No. 92-3767 (6th Cir. Sept. 28, 1993) (Ryan, J.) (Remanded: Extent of upward departure for defendant whose criminal history category was VI should not have been calculated by using hypothetical category IX based on 20 criminal history points. Although this methodology was previously accepted, the Nov. 1992 amendment to § 4A1.3, p.s., "disapprove[d] of this method . . . . Thus, instead of hypothesizing a criminal history range more than VI, the Guidelines require a sentencing court to look to the other axis and consider available ranges from higher offense levels." Here, defendant's "offense level would have to be increased from 18 to 21" to receive the sentence imposed. If the district court resentences defendant to the same sentence using offense level 21, "it must demonstrate why it found the sentence imposed by each intervening level to be too lenient.").

See *Outline* at VI.A.4.

U.S. v. Carrillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (Remanded: Departure above criminal history category VI for defendant with 19 criminal history points was improper because his "criminal history is simply not serious enough to justify a departure." Under § 4A1.3, p.s., "a court should not depart unless the defendant's record is 'significantly more serious' than that of other defendants in the same criminal history category.... However, defendants in category VI are by definition the most intractable of all offenders. The record does not reflect that Carillo, among all those in that criminal history category, has a criminal record so serious, so egregious, that a departure is warranted.... The sheer number of a defendant's criminal history points is not, so to speak, the point. A sentencing court must look, rather, to the defendant's overall record.... We emphasize, as does the Sentencing Commission, that a departure from category VI is warranted only in the highly exceptional case.").
See *Outline* at VI.A and A.4.

Aggravating Circumstances

U.S. v. Schweitzer, No. 92-5713 (3d Cir. Sept. 16, 1993) (Stapleton, J.) (Remanded: For defendant convicted of conspiring to bribe a public official to secure confidential information from the Social Security Administration, it was error for the district court to base an upward departure partly on defendant having given multiple media interviews "as well as telling about what he had done and, on the Oprah Winfrey Show, how much money he got out of it, and bragging or predicting that he would get probation." There were other factors that warranted departure, such as defendant's "corruption of a government function" and the "loss of public confidence," see § 2C1.1, comment. (n.5), but "it was inappropriate for the district court . . . to take into account Schweitzer's media efforts to call attention to the alleged ease of acquiring confidential information held by the government," "a situation that is unquestionably a matter of public concern.").
See *Outline* generally at VI.B.2.

Determining the Sentence

Fines

U.S. v. Norman, 3 F.3d 368 (11th Cir. 1993) (per curiam) (Remanded: "Section 5E1.2(i)'s plain language imposing costs of imprisonment and supervision as an additional fine amount supports the holding of the courts in *Labat*, *Corral*, and *Fair* that such additional fine may not be imposed unless a [punitive] fine pursuant to § 5E1.2(a) is also imposed."). *Contra U.S. v. Favorito*, No. 92-50465 (9th Cir. Sept. 28, 1993) (Brunetti, J.) (Affirmed: Adopting *U.S. v. Turner*, 998 F.2d 534, 538 (7th Cir. 1993) [6 *GSU* #2]: "The district court did not err in imposing a fine of costs of imprisonment without imposing a separate punitive fine.").
See *Outline* at V.E.2.

Adjustments

Abuse of Position of Trust

U.S. v. Lamb, No. 92-2846 (7th Cir. Aug. 27, 1993) (Coffey, J.) (Remanded: It was error to refuse to give § 3B1.3 adjustment for abuse of trust to defendant letter carrier who pled guilty to embezzlement of U.S. mail. "Based on the facts in the case before us, we conclude that a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust."). *See also* U.S.S.G. § 3B1.3, comment. (n.1) (Nov. 1993) ("because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail").
See *Outline* at III.B.8.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Alese, No. 93-1198 (2d Cir. Sept. 28, 1993) (per curiam) (Remanded: "We think the most reasonable interpretation of [18 U.S.C.] § 3565(a) is that a person found to have committed a narcotics-related violation of probation is to be sentenced to a prison term that is at least one-third the length of the maximum prison term to which she could originally have been sentenced." Thus, defendant whose original guideline range was 2–8 months should be resentenced "to a prison term of not less than 2 2/3 months and not more than eight months.").
See *Outline* at VII.A.2 and summary of *Sosa* in 6 *GSU* #2.

Rehearing En Banc Granted:

U.S. v. Aguilar, 994 F.2d 609 (9th Cir. 1993) [5 *GSU* #14].
See *Outline* at VI.C.1.e and h, 4.a.

Note to readers: Because the next *Guideline Sentencing: An Outline of Appellate Case Law* will not be issued until February 1994, we include here a list of *Outline* sections that will be significantly affected by some of the Nov. 1993 Guidelines amendments. This list is designed solely to alert readers to these changes, not to explain them, and does not include all of the new amendments.

Outline Section - Amendment

II.B.1 - The definition of "mixture or substance" in § 2D1.1, comment. (n.1), was revised. Also, a new method for determining the weight of LSD is set forth in § 2D1.1(c)(n.*) and comment. (n.18). Note that these amendments are retroactive under § 1B1.10, p.s.

II.B.3 - A new definition of "cocaine base" is provided in § 2D1.1(c)(n.*).

II.D.1 - § 2B1.1, comment. (n.2), now states that loss does not include interest that could have been earned on stolen funds.

II.E and III.B.6 - § 1B1.1, comment. (n.4), now directs that adjustments from different guideline sections are to be applied cumulatively, absent instruction to the contrary.

III.B.6 - § 3B1.1, comment. (n.2), was added to clarify that the aggravating role adjustment only applies to one who controls other participants, but that an upward departure may be warranted for one who controls only property, assets, or activities.

III.B.8.a - The definition of an abuse of position of trust in § 3B1.3, comment. (n.1), was reformulated.

IV.A.3 - § 4A1.2, comment. (n.6), was amended to clarify that the guideline and commentary are not meant to enlarge a defendant's right to collaterally attack a prior conviction.

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Offense Conduct

CALCULATING WEIGHT OF DRUGS

Tenth Circuit affirms converting powdered cocaine into cocaine base for sentencing where facts showed that object of the conspiracy was to convert powder to crack. Defendant was convicted of eleven drug-related counts, including conspiracy to distribute cocaine base, distribution of cocaine, and manufacture of cocaine base. The presentence report stated that defendant had distributed both cocaine powder and cocaine base. In determining what amounts and kinds of cocaine to attribute to defendant for sentencing, the probation officer concluded that the intent of the conspirators was to distribute the cocaine as cocaine base, and recommended converting the amount of powdered cocaine involved to cocaine base. The sentencing court agreed, finding that the conspirators routinely converted powder cocaine to crack and provided "cooking" instructions for coconspirators when necessary. The court sentenced defendant based on the quantity of cocaine base—after the conversion—ultimately distributed, and defendant appealed.

The appellate court affirmed: "According to U.S.S.G. 2D1.4 (1991) [now consolidated into § 2D1.1], '[i]f a defendant is convicted of a conspiracy or an attempt to commit an offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.' The district court made the factual determination that the cocaine powder involved in the conspiracy was routinely converted to crack. The eventual conversion was foreseeable to, if not directed by, Mr. Angulo-Lopez. Under the Guidelines, 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. . . . The record supports the district court's findings that Mr. Angulo-Lopez intended the powdered cocaine to be converted into crack."

See also 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) (for defendant convicted of conspiracy to distribute cocaine, evidence supported finding that defendant sold crack, not cocaine powder, and it was proper to convert seized powder cocaine and currency into crack cocaine for sentencing).

U.S. v. Angulo-Lopez, No. 92-6370 (10th Cir. Oct. 26, 1993) (Brorby, J.).

See *Outline* at II.B.3.

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Watch, No. 91-8671 (5th Cir. Nov. 5, 1993) (Barbour, Chief Dist. J.) (Vacating defendant's conviction, remanding for repleading: District court violated Fed.R.Crim. P. 11 by not informing defendant that, although his indictment purposely omitted alleging drug quantity in order to avoid the mandatory minimum sentences under 21 U.S.C. § 841(b), he could still be subject to a mandatory term after the Guidelines' calculation of quantity. "Because statutory minimum sentences are incorporated in the quantity-based Guidelines, the government is prevented from avoiding application of the statutory minimum sentences prescribed in § 841(b)(1)(A) and (B) by simply failing to include a quantity allegation in an indictment or information in hopes of having the less severe penalty range of § 841(b)(1)(C) applied by default. The failure to include a quantity allegation in an indictment or information has no effect whatsoever on the determination of the appropriate sentence under the Guidelines."

"At the time of Watch's guilty plea, he was not guaranteed application of the sentence range provided for in § 841(b)(1)(C), as represented by the government and accepted by the district court, because the quantity of drugs involved in the offense had yet to be determined. While the district court was not required to calculate and explain the applicable sentence under the Guidelines before accepting Watch's guilty plea . . . , we find that the district court was required to inform Watch of any possible statutorily required minimum sentences he might face as a result of application of the quantity-based Guidelines. . . . The practical consequence of this determination is that a prudent district judge hearing a plea from a defendant charged under an indictment or information alleging a § 841(a) violation but containing no quantity allegation may simply walk a defendant through the statutory minimum sentences prescribed in § 841(b), explaining that a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged.").

See *Outline* at II.A.3 and IX.A.2.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit affirms sentence below statutory minimum in absence of substantial assistance motion as remedy for government's breach of plea agreement. Defendant pled guilty to a drug count under an agreement with the government. In exchange for defendant's cooperation in providing information and testifying against his cousin, the government agreed to inform the district court of his cooperation and "to recommend to the sentencing court that defendant be sentenced to the minimum period of incarceration required by the Sentencing Guidelines." Defendant's guideline range was 41–51 months, but he was sentenced to the applicable five-year mandatory minimum after the government refused to move under 18 U.S.C. § 3553(e) for a lower sentence. Defendant did not appeal, but later moved under 28 U.S.C.

§ 2255 to vacate his conviction or correct his sentence. The district court found that the government had breached the plea agreement by not making a § 3553(e) motion and that its continued refusal to recommend departure was in bad faith. The court changed defendant's sentence to 41 months, which it concluded was the sentence called for by the plea agreement.

The appellate court affirmed. The issue here was "what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty.... As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" The term "minimum period of incarceration required by the Sentencing Guidelines" was ambiguous because it could be taken to mean the computed guideline range or, as the government argued, the mandatory minimum term, which under § 5G1.1(b) becomes "the guideline sentence."

The appellate court was also persuaded by the fact that, to accept the government's position, it would have to conclude that defendant agreed to cooperate in exchange for no benefit. At the time of the agreement all the sentencing factors were known, and "the parties should have been aware that De la Fuente's guideline sentencing range of 41–51 months would lie entirely below the statutory minimum of 60 months. By providing for a sentencing recommendation in this circumstance, the parties must surely have envisioned a sentence below the statutory minimum. Otherwise, the provision would have served no purpose.... We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. Even if we believed that the government in fact acted in such an unfair manner in this case, we would decline to acknowledge and reward such conduct in light of the high standard of fair dealing we expect from prosecutors."

U.S. v. De la Fuente, No. 92-10719 (9th Cir. Oct. 27, 1993) (Reinhardt, J.).

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

Determining the Sentence

Supervised Release

U.S. v. Chukwura, No. 92-8737 (11th Cir. Nov. 1, 1993) (Hatchett, J.) (Affirmed: As a condition of supervised release, the district court had authority to order deportation of foreign national who was already subject to deportation. 18 U.S.C. § 3583(d) "plainly states that if a defendant is subject to deportation, a court may order a defendant deported 'as a condition of supervised release.' The statute then provides that if the court decides to order the defendant's deportation, it then 'may order' the defendant delivered to a 'duly authorized immigration official' for deportation.... The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." The appellate court also held that defendant was not denied a deportation hearing: "The Sentencing Guidelines specifically require sentencing courts to address many of the factors that arise at regular INS deportation hearings. While we do not require district courts, contemplating whether to order a defendant deported, to conduct an INS type hearing, we are confident that in this case the sentencing hearing met those requirements.").

See *Outline* at V.C.

General Application Principles

Relevant Conduct

U.S. v. Wishnefsky, No. 93-3009 (D.C. Cir. Oct. 29, 1993) (Ginsburg, J.) (Affirmed: Criminal conduct that occurred outside five-year statute of limitations may be considered as relevant conduct under the Guidelines. District court properly included amounts embezzled from 1980–1986 as "part of the same course of conduct or common scheme or plan" in calculating loss caused by defendant convicted of embezzlement during 1987–1990.).

See *Outline* at I.A.4 and II.D.4.

U.S. v. Sykes, No. 92-2984 (7th Cir. Oct. 22, 1993) (Rovner, J.) (Remanded: Following test for "similarity, regularity, and temporal proximity," it was error to include as relevant conduct fourth fraud count that was dismissed as part of the plea agreement. Without more, general similarity of defendant's attempts to obtain money or credit by using false name and social security number does not comprise "same course of conduct or common scheme or plan" under § 1B1.3(a)(2). Here, defendant's acts, four frauds in a 32-month period, were "not sufficiently repetitive to enable us to call her conduct 'regular'"; the conduct in the fourth count occurred 14 months after the third; and "the acts charged in count IV differ in significant respects from the earlier conduct.").

See *Outline* at I.A.2.

Adjustments

Multiple Counts

U.S. v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (Affirmed: It was proper to group defendant's three mail fraud counts separately from two counts of money laundering (for depositing in a bank the insurance proceeds that were received as a result of the same frauds). The fraud and money laundering counts could not be grouped together under § 3D1.2(a) or (b) because they involved distinct acts and different victims. Defendant contended that all counts should be grouped under § 3D1.2(c) because the knowledge that the money laundered funds were derived from mail fraud "embodies conduct that is treated as a specific offense characteristic" in the money laundering guideline. The appellate court held, however, that "[t]he 'conduct' embodied in the mail fraud counts is the various acts constituting the frauds, coupled with the requisite intent to deceive; the 'specific offense characteristic,' in U.S.S.G. § 2S1.2(b)(1)(B), is knowledge that the funds being laundered are the proceeds of a mail fraud. It happens that Lombardi's knowledge of the funds' source derives from the fact that he committed the frauds, but that does not make the fraudulent acts the same thing as knowledge of them." To hold otherwise would allow a defendant to "get exactly the same total offense level whether the defendant committed the mail fraud or merely knew that someone else had committed it.").

See *Outline* at III.D.1.

Acceptance of Responsibility

U.S. v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993) (per curiam) (Affirmed: Nov. 1992 amendment to U.S.S.G. § 3E1.1(b) providing for possible three-point reduction is not retroactive.).

See *Outline* at III.E.4.

Guideline Sentencing Update

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Probation and Supervised Release

REVOCATION OF SUPERVISED RELEASE

Ninth Circuit holds that mandatory minimum penalty in 18 U.S.C. § 3583(g)—revocation of supervised release for drug possession—may not be required when underlying offense was committed before effective date of that section. Defendant committed his offenses in April and May of 1988; he pled guilty and was sentenced in 1990. On Dec. 31, 1988, the supervised release statute was amended to provide that release must be revoked for possession of a controlled substance and the defendant sentenced "to serve in prison not less than one-third of the term of supervised release." 18 U.S.C. § 3583(g). Defendant began serving his supervised release term in Dec. 1990, had it revoked in Aug. 1992 for drug possession, and was sentenced under § 3583(g) to 12 months, one-third of his term of supervised release. The district court ruled that even though defendant's original offenses occurred before § 3553(g) became effective, the conduct that caused the revocation occurred thereafter and the ex post facto clause was not violated by imposing sentence after revocation under § 3553(g).

The appellate court reversed. "We find virtually dispositive the strong line of cases that decides this precise issue in connection with revocation of parole.... These cases hold that the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date under a statute that was adopted after the violator committed the underlying offense but before he violated the terms of his parole. For purposes of an ex post facto analysis, there is absolutely no difference between parole and supervised release.... In both cases, the question is at what time the prisoner is to be released from prison. A delay in that date constitutes the same punishment whether it is imposed following a parole violation or a violation of supervised release." *Accord U.S. v. Parriett*, 974 F.2d 523, 526–27 (4th Cir. 1992).

U.S. v. Paskow, No. 92-50616 (9th Cir. Nov. 26, 1993) (Reinhardt, J.).

See *Outline* at VII.B.2.

U.S. v. O'Neil, No. 93-1325 (1st Cir. Dec. 15, 1993) (Selya, J.) (Remanded: "We hold that the [supervised release revocation] provision (SRR), 18 U.S.C. § 3583(e)(3), permits a district court, upon revocation of a term of supervised release, to impose a prison sentence or a sentence combining incarceration with a further term of supervised release, so long as (1) the incarcerative portion of the sentence does not exceed the time limit specified in the SRR provision itself, and (2) the combined length of the new prison sentence cum supervision term does not exceed the duration of the original term of supervised release." The district court here exceeded these limits by imposing a two-year prison term plus a new three-year term of supervised release after revoking defendant's original three-year term of release.

In remanding for recalculation of a new revocation sentence, the court added in a footnote that "we today join six other circuits in recognizing [Sentencing Guidelines] Chapter 7 policy statements as advisory rather than mandatory.... On remand, the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing." The court reasoned that "although a policy statement ordinarily 'is an authoritative guide to the meaning of the applicable guideline,' *Williams v. U.S.*, 112 S. Ct. 1112, 1119 (1992), the policy statements of Chapter 7 are unaccompanied by guidelines, and are prefaced by a special discussion making manifest their tentative nature."). *But see U.S. v. Lewis*, 998 F.2d 497, 499 (7th Cir. 1993) (Chapter 7 policy statements are binding unless they contradict statute or guidelines) [6 *GSU* #1]. *Cf. U.S. v. Levi*, 2 F.3d 842, 845 (8th Cir. 1993) (finding, in context of ex post facto issue, that Chapter 7 is "a different breed" of policy statement and not binding law) [6 *GSU* #4].

See *Outline* at VII and VII.B.1, summaries of *Truss* and *Tatum* in 6 *GSU* #3.

Departures

CRIMINAL HISTORY

U.S. v. Clark, 8 F.3d 839 (D.C. Cir. 1993) (Remanded: District court departed downward to a sentence within the range that would have applied absent defendant's career offender status. Of the three grounds for departure, one was invalid and two were valid but required further findings. It was improper to depart based on the "unique status of the District of Columbia," wherein the U.S. Attorney controls whether prosecution is brought in local or federal court and defendant likely would have received a much lighter sentence in the local court. This is an exercise of prosecutorial discretion and "is not a mitigating factor within the meaning of 18 U.S.C. § 3553(b)."

Departure because career offender status overrepresents the seriousness of defendant's criminal history may be appropriate, but further findings are required here. Departure on the basis of defendant's lack of guidance as a youth and exposure to domestic violence may also warrant departure. Although the Nov. 1992 amendment to § 5H1.12, p.s., prohibits departure for lack of youthful guidance "and other similar factors," defendant's offense preceded the amendment and its application to his disadvantage would violate the ex post facto clause. *Accord U.S. v. Johns*, 5 F.3d 1267, 1269–72 (9th Cir. 1993). The appellate court cautioned, however, that "there must be

some plausible causal nexus between the lack of guidance and exposure to domestic violence and the offense for which the defendant is being sentenced."

The court further noted that the district court may "consider whether a nexus exists between the circumstances of Clark's childhood and his prior criminal offenses, for purposes of determining whether the seriousness of his criminal record is overrepresented under § 4A1.3." Additionally, "the district court may want to contemplate whether Clark's childhood exposure to domestic violence is sufficiently extraordinary to be weighed under U.S.S.G. § 5H1.3."

Finally, the court held that if the district court properly finds that career offender status overrepresents the seriousness of defendant's criminal history, it may depart to "the criminal history category and offense level that would have been applicable absent the career offender increases." *See also Reyes, infra.*).

See *Outline* at VI.A.2, VI.C.1.b and h.

U.S. v. Reyes, 8 F.3d 1379 (9th Cir. 1993) (Brunetti, J., dissenting) (Remanded: District court had authority to depart downward for career offender based on the overrepresentation of defendant's criminal history and offense compared to most career offenders. "His conduct was not at all of the magnitude of seriousness of most career offenders.... Convicted for selling .14 grams of cocaine, he was subject to the same base offense level and sentencing range as if he had sold almost 4000 times that much. 21 U.S.C. § 841(b)(1)(C). Under the career offender guideline a defendant convicted for a fraction of one gram of cocaine is accorded the harshest punishment due an offender trafficking in up to 500 grams. 21 U.S.C. § 841(b)(1)(C)."

The appellate court stressed, however, that the departure was not based on the small quantity of drugs per se: "Instead of emphasizing the absolute quantities of drugs involved, [the sentencing judge] cast the issue of quantity in comparative terms. Reyes' criminal history was 'comparatively minor.' His offenses were 'minor' as compared to others (not small on some absolute scale).... Quantity serves merely as the means to compare the similar treatment of defendants whose offenses differ by exceptional orders of magnitude.... While... the Commission did take into account varying penalties linked to different drug quantities..., we conclude that the sentencing ranges resulting in exceptional discrepancies were not adequately considered."

However, the district court did not adequately explain the extent of departure, which was down to the range that would have applied absent career offender status. The appellate court stated that such a departure may be appropriate, but the reasons must be articulated.).

See *Outline* at VI.A.2.

Substantial Assistance

U.S. v. Baker, 4 F.3d 622 (8th Cir. 1993) (Remanded: Defendant pled guilty to a drug charge and agreed to assist the government by providing information about others' drug trafficking. Although she provided some information, the government did not file a § 5K1.1, p.s. motion. The district court departed anyway under § 5K2.0, finding as a mitigating circumstance that "defendant was required to inform the Government of circumstances involving a close relative," which exposed her to family problems and "made it most difficult for the defendant to believe that she had not fulfilled her obligations .... The Court finds that, subjectively, the defendant had fulfilled her obligations and was therefore entitled to the 5K1.1."

The appellate court held this was an invalid departure. "The repercussions Baker experienced are mild forms of" the "injury" or "danger or risk of injury" listed as a consideration in § 5K1.1(a)(4), p.s., and "thus were considered by the Sentencing Commission." Defendant's "subjective belief that she had complied with the terms of the cooperation agreement is relevant only to the question of whether she did comply, which is merely a factor a district court should consider when determining the extent of a departure under § 5K1.1, *see* U.S.S.G. § 5K1.1(a)(1)-(3), p.s." The court also held that cooperation with the prosecution "simply cannot be sufficiently extraordinary to warrant a departure under § 5K2.0." The court reasoned that because there are no limits on the extent of a departure under § 5K1.1, "a district court may depart all the way down to a sentence of no imprisonment under § 5K1.1 so long as that departure is 'reasonable' in light of the defendant's assistance. The availability of an unlimited departure proves that § 5K1.1, if it recognizes a defendant's assistance at all, cannot recognize it inadequately.").

See *Outline* at VI.C.1.i, VI.F.1.b.i.

Adjustments

Acceptance of Responsibility

U.S. v. Gonzalez, 6 F.3d 1415 (9th Cir. 1993) (Reversed: District court erred in denying § 3E1.1 reduction because it did not believe defendant's reason for committing the crime. "Under § 3E1.1, Gonzalez was required to recognize and affirmatively accept personal responsibility for his criminal conduct. The record shows he did.... Neither § 3E1.1 nor any cases we have found state or otherwise indicate that a defendant's reason or motivation for committing a crime is an appropriate factor to consider in determining whether to grant the adjustment. Even if it were established that Gonzalez at some point in the proceedings lied about why he committed the crimes, this lack of candor ... should play no part in the district court's § 3E1.1 determination.").

See *Outline* generally at III.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Ballard, 6 F.3d 1502 (11th Cir. 1993) (Affirmed: District court had authority to order that sentence for federal offense—committed by defendant while he was in state jail awaiting trial on state charge—would be consecutive to whatever state sentence defendant received, would not begin until after defendant's release from state custody, and would not be reduced by any time served on the state charge. Although the statute and Guidelines "do not address Ballard's exact situation," see 18 U.S.C. § 3584(a), U.S.S.G. § 5G1.3(a) and (c), they do not preclude the district court's action and, in fact, "evince a preference for consecutive sentences when imprisonment terms are imposed at different times.").

See *Outline* at V.A.2.

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Offense Conduct

Second and Sixth Circuits split on whether drug quantity must be found by the jury or sentencing court when quantity determines whether a conviction for possession of crack is a felony or misdemeanor. Both defendants were acquitted of possession with intent to distribute crack cocaine but convicted of the lesser included offense of simple possession of crack cocaine—a misdemeanor for amounts under five grams if defendant has no prior drug convictions but a felony with a five-year minimum sentence for more than five grams. *See* 21 U.S.C. § 844(a). Neither jury verdict specified the amount of crack that defendants were guilty of possessing. Each district court found there was more than five grams involved and sentenced defendants under the Guidelines. Both defendants appealed, claiming that quantity is an element of the offense and must be found by the jury.

The Second Circuit rejected that claim, holding "that quantity is not an element of simple possession because § 844(a) prohibits the possession of any amount of a controlled substance, including crack. . . . The task of determining how much drugs Monk was carrying falls to the sentencing judge. He, therefore, had to find that Monk possessed more than 5 grams of crack in order to treat the crime as a felony." The appellate court noted that "it is beyond cavil" that more than five grams was involved, since defendant essentially admitted to possessing 340 grams, claiming only that he had no intent to distribute. In addition, the indictment specifically alleged possession of 50 grams and the jury returned a special verdict form of guilty "as charged in the indictment."

U.S. v. Monk, No. 93-1349 (2d Cir. Jan. 24, 1994) (McLaughlin, J.).

The Sixth Circuit, however, concluded that "the amount possessed constitutes an element of the offense." It would be "an impermissible usurpation of the historic role of the jury" to allow a defendant to "be convicted of a felony, as opposed to a misdemeanor, on the strength of a sentencing judge's factual finding on the amount of crack cocaine possessed by the defendant. . . . The felony of which Mr. Sharp was convicted . . . was 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." *Accord U.S. v. Puryear*, 940 F.2d 602, 604 (10th Cir. 1991) ("We conclude that drug quantity constitutes an essential element of simple possession under section 844(a). . . . 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").

U.S. v. Sharp, No. 93-5117 (6th Cir. Dec. 28, 1993) (Nelson, J.).

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

Adjustments

ACCEPTANCE OF RESPONSIBILITY

Fifth Circuit holds that where defendant met three-part test for additional one-level reduction under § 3E1.1(b), district court had no discretion to deny that reduction because defendant had also obstructed justice. Defendant lied about his prior criminal record in his presentence interview, and was assessed a two-point enhancement for obstruction of justice under § 3C1.1. Despite that, the district court awarded the two-point reduction for acceptance of responsibility. Because of the obstruction, however, the court refused the extra one-point reduction under § 3E1.1(b), which defendant otherwise qualified for because of his timely plea and cooperation.

The appellate court devised a three-step test to determine whether a defendant qualifies for the § 3E1.1(b) reduction. The first two steps, which were not in dispute here, are that a defendant qualifies for the two-point reduction under § 3E1.1(a) and has an offense level of 16 or greater before that reduction. The third step is met by "(1) timely providing complete information to the government concerning his own involvement in the offense, or (2) timely notifying authorities of his intention to enter into a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *See* § 3E1.1(b). The issue here was whether defendant satisfied (2).

Based on the language of § 3E1.1(b) and accompanying Application Note 6, the court concluded "that the timeliness required . . . applies specifically to the governmental efficiency to be realized 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, without taking the defendant's trial into consideration. Of equal importance in the instant case is that which the timeliness of step (b)(2) does not implicate: time efficiency for any other governmental function, including without limitation the length of time required for the probation office to conduct its presentence investigation, and the 'point in time' at which the defendant is turned over to the Bureau of Prisons to begin serving his sentence."

Therefore, it was error to deny the extra deduction because defendant's obstruction may have delayed the presentence report and the beginning of his incarceration: "[A]s long as obstruction does not cause the prosecution to prepare for trial or prevent the court (as distinguished from the probation office) from managing its calendar efficiently, obstruction of justice is not an element to be considered. . . . [A] defendant who has satisfied all three elements of subsection(b)'s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction."

U.S. v. Tello, 9 F.3d 1119 (5th Cir. 1993).

In another case, the Fifth Circuit used "the *Tello* test" to reverse a denial of a § 3E1.1(b) reduction. The district court granted a two-level reduction but denied the additional reduction, apparently because it mistakenly thought defendant's offense level was not 16 or higher. The appellate court determined that defendant's offense level "indisputably was above 16" and concluded that defendant also met the third step of the *Tello* test: "Mills clearly took the step defined in subsection (b)(2) when . . . less than a month after his arraignment and only six weeks after he was charged . . . he notified authorities of his intention to enter a plea of guilty. . . . Having thus satisfied all three prongs, Mills was entitled—as a matter of right—to the third 1-level reduction in his offense level. . . . [T]he court was without any sentencing discretion whatsoever to deny Mills the third 1-level decrease." Because "the sentencing court left no doubt that, as far as it was concerned, Mills should be incarcerated for the maximum term permitted under the applicable Guidelines range," instead of remanding the appellate court chose to "reverse the term of incarceration imposed by the district court, modify that term to one of 30 months—the maximum within the correct sentencing range—and affirm Mills' sentence as thus modified."

U.S. v. Mills, 9 F.3d 1132 (5th Cir. 1993).

See *Outline* generally at III.E and X.D.

Departures

Mitigating Circumstances

U.S. v. Newby, No. 92-5711 (3d Cir. Nov. 30, 1993) (Cowen, J.) (Affirmed: The district court properly refused to consider downward departure for inmate-defendants who, in addition to the penalty for their instant offenses, would lose good time credits as an administrative penalty for the same conduct. "Loss of good time credits is not a factor that relates to the defendants' guilt for their conduct; the defendants' being sanctioned administratively does not show that they were morally less culpable of the charged crime. . . . [P]rison disciplinary sanctions through loss of good time credit do not constitute a proper basis for a downward departure." The appellate court refused to follow *U.S. v. Whitehorse*, 909 F.2d 316, 320 (8th Cir. 1990) ("District Court did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case").

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

U.S. v. Crook, 9 F.3d 1422 (9th Cir. 1993) (Remanded: Defendant pled guilty to manufacturing 751 marijuana plants. The district court departed downward two offense levels on the grounds that defendant had grown the marijuana for his personal use and the Guidelines did not take into account that a defendant could lose his home—which was not acquired with proceeds from drug sales—through civil forfeiture. (Note: On this issue the court cited *U.S. v. Shirk*, 981 F.2d 1382 (3d Cir. 1992), as support, but that case has been vacated. See last item.) The appellate court held that "the Guidelines do not allow for departure on account of civil forfeiture." Also, the district court clearly erred in finding that the marijuana was for defendant's personal use. Even using a conservative estimate, it was five times more than defendant could use at his admitted rate of smoking—"we are convinced by the size of Crook's marijuana crop that he must have been manufacturing marijuana, at least in part, for sale or distribution.").

See *Outline* at VI.C.1.i and 4.b.

U.S. v. One Star, 9 F.3d 60 (8th Cir. 1993) (Affirmed: Downward departure to five years' probation for defendant convicted of being a felon in possession of a firearm was properly based on combination of factors and "the unusual mitigating circumstances of life on an Indian reservation noted . . . in *U.S. v. Big Crow*, 898 F.2d 1326, 1331–32 (8th Cir. 1990)." Defendant did not appear to present a danger to the community, especially with a no-alcohol condition of probation. He had strong family ties and responsibilities—including the sole support of nine family members—and a good employment record. Defendant also "submitted a resolution by the Rosebud Sioux Tribe and numerous letters from tribal officers and others praising his work record and contributions to the community and urging that he not be incarcerated." The appellate court also rejected the government's contention "that the degree of departure was unreasonable because it requires a reduction from offense level twenty to offense level eight to make One Star eligible for a sentence of probation. . . . The maximum prison term for a violation of § 922(g)(1) is ten years. *See* 18 U.S.C. § 924(a)(2). Therefore, the district court had statutory authority to sentence One Star to probation. *See* 18 U.S.C. §§ 3559(a), 3561(a). That being so, and its findings being legally sufficient to warrant a departure, the court's decision to impose probation 'is quintessentially a judgment call.' . . . Though the district court's decision to depart and the extent of its departure no doubt approach the outer limits of its sentencing discretion under the Guidelines, we conclude that One Star's sentence was a reasonable exercise of that discretion.").

See *Outline* at VI.C.1.a and e, 3, and D.

Criminal History

Career Offender Provision

U.S. v. Calverley, No. 92-1175 (5th Cir. Dec. 29, 1993) (Garza, J.) (Affirmed: Defendant, convicted of possession of a listed chemical with intent to manufacture a controlled substance under 21 U.S.C. § 841(d)(1), was properly sentenced as a career offender. "[W]e hold that a sentencing court, in determining whether an offense is a controlled substance offense under § 4B1.2(2), 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. . . . [P]ossession 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 U.S.S.G. § 4B1.2." The court refused to follow *U.S. v. Wagner*, 994 F.2d 1467, 1474–75 (10th Cir. 1993) [5 *GSU* #14], which held that § 841(d) is not a controlled substance offense under § 4B1.2(2) and should not be treated as an attempt to manufacture a controlled substance.).

See *Outline* at IV.B.2.

Certiorari Granted and Judgment Vacated:

U.S. v. Shirk, 981 F.2d 1382 (3d Cir. 1992), certiorari granted and judgment vacated by *Shirk v. U.S.*, No. 92-1841 (U.S. Jan. 18, 1994), for rehearing in light of *Ratzlaf v. U.S.*, No. 92-1196 (U.S. Jan. 11, 1994). Please delete reference to *Shirk* in *Outline* at VI.C.4.b.

Guideline Sentencing Update

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VOLUME 6 • NUMBER 9 • FEBRUARY 14, 1994

Offense Conduct

DRUG QUANTITY—RELEVANT CONDUCT

Ninth Circuit holds that drugs held solely for personal use should not be used to set offense level for possession with intent to distribute. Defendant pled guilty to possession of cocaine with intent to distribute. He admitted to possessing 80–90 grams, but claimed most of the cocaine was for his personal use and only the 5–6 grams he intended to distribute should be used in sentencing. The district court appeared to agree that personal use amounts should not be used, but determined those amounts could not be distinguished and used the full amount.

The appellate court remanded: "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. Accordingly, we hold that in calculating the base offense level for possession with intent to distribute, the district court must make a factual finding as to the quantity of drugs possessed for distribution and cannot include any amount possessed strictly for personal use."

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993).

See *Outline* at II.A.1.

U.S. v. Roederer, 11 F.3d 973 (10th Cir. 1993) (Affirmed: Following interpretation of "same course of conduct" set out in *U.S. v. Perdomo*, 927 F.2d 111 (2d Cir. 1991), court agreed that defendant's cocaine sales in conspiracy that ended in 1987 were relevant conduct for instant offense of cocaine distribution in May 1992: "We hold that the evidence, when viewed in its entirety, establishes that Roederer was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. Roederer's conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate.").

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

DRUG QUANTITY—OTHER ISSUES

U.S. v. Tavano, No. 93-1492 (1st Cir. Dec. 29, 1993) (Selya, J.) (Remanded: District court erred when it "formulated a per se rule" that evidence presented at trial controls and refused to consider defendant's evidence regarding drug quantity that differed from the testimony at trial. The appellate court held that "both Fed. R. Crim. P. 32(c)(3)(D) and U.S.S.G. § 6A1.3 require a sentencing court independently to consider proffered information that is relevant to . . . the sentencing determination.").

See *Outline* at II.A.3, IX.D.3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Crowell, 9 F.3d 1452 (9th Cir. 1993) (Affirmed: "[W]e join the other Circuit Courts . . . which have held that the weight of the dilaudid tablet, rather than the weight of the hydromorphone, is the proper measure of drug quantity. . . . We find that use of the gross weight of the tablet is entirely consistent with" *Chapman v. U.S.*, 111 S. Ct. 1919 (1991).). *Accord U.S. v. Young*, 992 F.2d 207, 209–10 (8th Cir. 1993).

See *Outline* at II.B.1.

U.S. v. Coohey, 11 F.3d 97 (8th Cir. 1993) (Remanded: Defendant was sentenced for an LSD offense before, but his appeal came after, the Nov. 1993 amendment to § 2D1.1(c) (providing new method to determine weight of LSD). He challenged the old method of including the carrier medium and also challenged the new method, claiming it was arbitrary and violated the Sentencing Commission's statutory grant of authority. The appellate court reaffirmed prior precedent that upheld use of the carrier medium and also upheld the new method. The case was remanded, however, for the district court to consider whether it should retroactively apply the new method pursuant to § 1B1.10(a).).

See *Outline* at II.B.1.

Adjustments

VULNERABLE VICTIM

Sixth Circuit holds that relevant conduct should not be used for § 3A1.1 adjustment. Defendant was convicted of conspiracy to defraud the IRS by filing false tax returns and claiming fraudulent tax refunds. He convinced several people to assist him, and the government claimed that some of these people were "particularly vulnerable in some way" and that defendant "prey[ed] on their vulnerabilities in recruiting them to his scheme." The district court agreed and imposed § 3A1.1's two-level enhancement.

The appellate court remanded, holding "that the language of section 3A1.1 requires that individuals targeted by a defendant be victims of the conduct underlying the offense of conviction." Here, the victim of the offense of conviction was the government, and while some of the others "may have been 'victimized' by Wright in the sense that he may have taken advantage of them, we do not believe they were victims of the offense."

In addition, because "section 3A1.1 applies only in cases where there is a victim of the offense of conviction, we further hold that 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, No. 93-3055 (6th Cir. Dec. 14, 1993) (Kennedy, J.).

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

OBSTRUCTION OF JUSTICE

U.S. v. Haddad, 10 F.3d 1252 (7th Cir. 1993) (Reversed: It was error to give § 3C1.1 enhancement for allegedly threatening prosecutor and attempting to influence witness. "Neither the factual findings made nor the actual record below support an 'obstruction' enhancement" for attempting to influence the witness. As to the alleged threat, § 3C1.1 "must be interpreted and determined on the basis of the language in

[§] 1B1.3(a)(1)," which holds a defendant responsible for conduct "that occurred . . . in the course of attempting to avoid detection or responsibility for that offense." Thus, it would have to be shown "that the acts of the defendant alleged to obstruct or impede justice were done 'willfully' and with the specific intent 'to avoid responsibility' for the offense for which he was being tried. . . . [E]ven if there was a threat (as to which the record is unclear) it is obvious that such acts were not committed 'in the course of attempting to avoid responsibility for the offense of conviction.'").
See *Outline* at III.C.4.

U.S. v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (Affirmed: Defendant's plea agreement required him to cooperate with government investigators and testify truthfully at a coconspirator's trial. The district court held that defendant gave false testimony that merited a § 3C1.1 enhancement. The appellate court affirmed, holding that "violation of a plea bargain warrants a sentence enhancement for obstruction of justice." *See also U.S. v. Duke*, 935 F.2d 161, 162 (8th Cir. 1991) (enhancement warranted where defendant did not provide truthful information as required by plea agreement). The court also agreed with the Tenth Circuit that § 3C1.1 "applies when 'a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant.' *U.S. v. Bernaugh*, 969 F.2d 858, 861 (10th Cir. 1992).").
See *Outline* at III.C.2 and 4.

Departures

Mitigating Circumstances

U.S. v. Cantu, No. 92-30211 (9th Cir. Dec. 27, 1993) (Reinhardt, J.) (Canby, J., concurring in part) (Remanded: District court erred in holding that Vietnam veteran suffering from post-traumatic stress disorder did not have "significantly reduced mental capacity" for purposes of § 5K2.13, p.s. "'Reduced mental capacity' . . . comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments. . . . Therefore, a defendant suffering from post-traumatic stress disorder, an emotional illness, is eligible for such a departure if his ailment distorted his reasoning and interfered with his ability to make considered decisions." The fact that defendant also had an alcohol problem did not disqualify him for departure. Under § 5K2.13, defendants "are disqualified only if their voluntary alcohol or drug use caused their reduced mental capacity. . . . If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure."

The court also joined other circuits that held "the disorder need be only a contributing cause, not a but-for cause or a sole cause, of the offense. . . . [Section 5K2.13] requires only that the district court find some degree, not a particular degree of causation. . . . [T]he degree to which the impairment contributed to the commission of the offense constitutes the degree to which the defendant's punishment should be reduced."

The court added: "Resolution of disputed facts concerning mental impairment requires more than simply a neutral process. The court's inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as § 5K2.13 implicitly recommends.' *U.S. v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993). Lenity is appropriate because the purpose of § 5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed to the commission of a crime.").
See *Outline* at VI.C.1.b.

U.S. v. White Buffalo, 10 F.3d 575 (8th Cir. 1993) (Affirmed: "Lesser harms" departure under § 5K2.11, p.s., was appropriate for defendant convicted of unlawful possession of an unregistered firearm (a .22 single-shot rifle with shortened barrel). Defendant lived in a remote area of an Indian reservation and used the gun solely to shoot animals that preyed on his chickens. He had been steadily employed for a few years and had no prior arrests or convictions. The appellate court affirmed the conclusion that defendant's actions "were not the kind of misconduct and danger sought to be prevented by the gun statute," and rejected the government's contention that § 5K2.11 should not be applied to possession of shortened unregistered weapons. *Cf. U.S. v. Hadaway*, 998 F.2d 917, 919–20 (11th Cir. 1993) (district court may consider § 5K2.11 departure for defendant convicted of possessing unregistered sawed-off shotgun) [6*GSU* #4].

The district court erred, however, in finding that departure was also justified under § 5K2.0 for the kind of personal and community factors upheld in *U.S. v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990). The facts were simply "not sufficiently unusual" to support departure. However, "§ 5K2.11 provided a legally sufficient justification for departure in this case," and "the district court reasonably exercised its discretion in imposing probation" after departing from offense level 15 to 8. *Cf. U.S. v. One Star*, 9 F.3d 60, 62 (8th Cir. 1993) (upholding departure to probation from 33–41-month range) [6*GSU* #8].).
See *Outline* at VI.C.1.a, generally at VI.C.4, and X.A.2.

General Application Principles

Stipulation to Additional Offenses

U.S. v. Saldana, No. 93-10050 (9th Cir. Dec. 20, 1993) (Nelson, J.) (Remanded: Defendant pled guilty to three drug counts; twelve food stamp counts were dismissed, but the stipulation of facts in the plea agreement provided evidence of the food stamp offenses. The district court held that it had discretion whether or not to consider the food stamp counts under § 1B1.2(c) and declined to do so. The appellate court held this was error: "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."). *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.").
To be included in *Outline* at I.B.

Criminal History

Other Sentences or Convictions

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993) (Remanded: State deferred sentence that had no supervisory component, and was treated by the district court as a suspended sentence, did not warrant two criminal history points under § 4A1.1(d). "[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)."). *Cf. U.S. v. McCrary*, 887 F.2d 485, 489 (4th Cir. 1989) (because § 4A1.2 requires actual imprisonment to count as "sentence of imprisonment," improper to count suspended sentence with no imprisonment).
See *Outline* at IV.A.5.

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Departures

MITIGATING CIRCUMSTANCES

U.S. v. Tsosie, No. 93-2145 (10th Cir. Jan. 14, 1994) (Godbold, Sr. J.) (Remanded: Downward departure is permissible for voluntary manslaughter defendant where the victim was having an affair with defendant's wife and died after a fight with defendant. First, the district court properly found, under the totality of the circumstances, that defendant's behavior was an aberration—he had "a long history of continuous employment with the Navajo Tribe, . . . a reputation for being economically supportive of his family, [and he] has not been engaged in any prior criminal activity." Second, the victim's conduct "contributed significantly to provoking Tsosie's offense behavior," having "consisted not merely of having an affair with Tsosie's wife but also of being in a vehicle with Tsosie's wife the day after she took her children away and gave a false excuse about her whereabouts. . . . Further, in the ensuing fight, [the victim] took off his belt and hit Tsosie on the nose with it and actively participated in the affray" that led to his death. Thus, it was proper to consider under § 5K2.10(a) that "the victim was of a greater physical size and strength than the defendant," and the facts distinguish this case from *U.S. v. Desormeaux*, 952 F.2d 182 (8th Cir. 1991), and *U.S. v. Shortt*, 919 F.2d 1325 (8th Cir. 1990). Finally, when defendant saw the victim was seriously injured he went for help, then returned and tried to stop the bleeding. "Rendering aid to a victim is a factor that is not considered by the Guidelines." Remand is required, however, because the district court did not adequately explain the departure from the 41–51-month range to a four-month term in a halfway house.).
See *Outline* at VI.C.1.c and g, 3, and 4.a.

U.S. v. Marcello, 13 F.3d 752 (3d Cir. 1994) (Affirmed: Defendant convicted of structuring bank deposits in order to evade reporting requirements was not eligible for downward departure based on aberrant behavior. "Aberrant behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender. . . . The district court correctly applied this standard and found that some pre-planning was required to deposit $9,000.00 each day over a one-week period of time.").
See *Outline* at VI.C.1.c.

AGGRAVATING CIRCUMSTANCES

U.S. v. Torres-Lopez, 13 F.3d 1308 (9th Cir. 1994) (Remanded: Upward departure for high-speed car chase while transporting illegal aliens was improper. 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." Also, defendant did not treat the alien passengers in a dangerous or inhumane manner so as to warrant departure under § 2L1.1, comment. (n.8). "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.").
See *Outline* at VI.B.1.b and j.

Offense Conduct

OTHER DEFENDANTS' DRUG QUANTITIES

U.S. v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (Remanded: "We hold today that relevant conduct as defined in § 1B1.3(a)(1)(B) is prospective only, and consequently relevant conduct under § 1B1.3(a)(1)(B) cannot include conduct occurring before the defendant joins a conspiracy." It was therefore improper to count drug quantities trafficked by the conspiracy before defendant joined it. On remand the district court must determine: "1) when Carreon joined the conspiracy . . . , 2) what drug quantities were within the scope of Carreon's conspiratorial agreement . . . , and 3) of these drug quantities, which were reasonably foreseeable—prospectively only—by Carreon." Defendant's knowledge of the conspiracy's prior conduct may be used, but only as "evidence of what Carreon agreed to and what he reasonably foresaw when he joined the conspiracy.").
See *Outline* at II.A.2.

POSSESSION OF WEAPON BY DRUG DEFENDANT

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: It was error to give drug defendant § 2D1.1(d)(1) enhancement for rifles found in his home. Defendant presented "unrefuted testimony that these rifles were for hunting and were unconnected with the marijuana. . . . The District Court failed to consider that the defendant was charged with a marijuana manufacturing operation. There are no allegations that Zimmer was actively selling the substance from his home. We do not have a situation in which 'drug dealing' was occurring on the premises, during which a weapon might be utilized. None of the weapons were found anywhere near the marijuana." Further, one rifle was disassembled and inoperable, supporting defendant's claim that he was repairing it for a friend, and there was no ammunition in the house for an unloaded second rifle, supporting defendant's assertion that the rifle did not belong to him. "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.' U.S.S.G. § 2D1.1, comment.(n.3).").
See *Outline* at II.C.1 and 3.

DRUG QUANTITY

U.S. v. Zimmer, 14 F.3d 286 (6th Cir. 1994) (Remanded: In determining relevant conduct, the district court could not assume defendant produced a certain number of plants in the past based only on defendant's admission that he had grown

marijuana before. "The court's determination that the defendant grew an additional 200 plants is not supported anywhere in the record. The District Court may not 'create' a quantity when there is absolutely no evidence to support that amount. An estimate can suffice, but 'a preponderance of the evidence must support the estimate.' . . . The information and equipment seized in the case clearly demonstrates that the 'sophisticated' indoor growing operation was but a few months old. Thus, the size of defendant's operation at the time of arrest cannot be manipulated to infer a certain amount of past 'success' (25 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.' The relevant conduct enhancement is therefore reversed and the District Court is directed to resentence defendant based on the actual amount of marijuana seized.").
See *Outline* at II.B.4.d and generally at II.A.1.

Adjustments

Official Victim

U.S. v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994) (Affirmed: Enhancement under § 3A1.2(b) for assault on law enforcement officer by a coconspirator was properly given to defendant convicted of drug offenses. Although Application Note 1 to § 3A1.2 indicates there must be a specified "victim" of the offense of conviction, Note 1 should not be applied to subsection (b) because it conflicts with the guideline and accompanying Note 5, both of which were added later.). *Accord U.S. v. Powell*, 6 F.3d 611, 613–14 (9th Cir. 1993) (same, for defendant who assaulted officer during unlawful possession of weapon offense). *See also U.S. v. Gonzales*, 996 F.2d 88, 93 (5th Cir. 1993) (affirmed enhancement where codefendant shot officer).
See *Outline* at I.F and III.A.2.

Obstruction of Justice

U.S. v. Cotts, 14 F.3d 300 (7th Cir. 1994) (Affirmed: Section 3C1.1 enhancement was properly given to defendant who planned to murder a nonexistent informant that undercover agents had blamed for the failure of a drug deal. "The obstruction enhancement is applicable not just to defendants who have actually obstructed justice but also to those who have attempted to do so, . . . and the district court explicitly based [defendant's] enhancement on his attempt, not his success, in obstructing justice. 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.").
See *Outline* at III.C.1.

U.S. v. Washington, 12 F.3d 1128 (D.C. Cir. 1994) (Affirmed: Section 3C1.2 enhancement was properly given to defendant who led police on a car chase in an urban area. "In his attempt to escape the police, [defendant] drove in a fast and reckless manner through a series of neighborhood alleys and ended up flipping his car. It was not clearly erroneous for the district court to find that this behavior constituted reckless endangerment during flight.").
See *Outline* at III.C.3.

Violation of Probation

Revocation for Drug Possession

U.S. v. Penn, No. 93-5190 (4th Cir. Feb. 17, 1994) (Ervin, C.J.) (Remanded: Defendant's probation was revoked for drug possession under 18 U.S.C. § 3565(a), subjecting him to imprisonment for "not less than one-third of the original sentence." The district court construed "original sentence" to mean defendant's three-year probation term rather than his 6–12-month guideline range, and sentenced him to 12 months. The appellate court remanded, holding "that the most reasonable interpretation of § 3565(a) is that a person found to have committed a narcotics related violation is to be resentenced to a term of incarceration that is at least one-third but does not exceed the maximum prison term to which the person could have been sentenced" under the Guidelines. Therefore, although defendant could still be sentenced to 12 months, the minimum term required is only 4 months.).
See *Outline* at VII.A.2, summary of *Alese* in 6 *GSU* #5.

Revocation of Probation

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994) (Affirmed: Defendant, originally subject to 33–41-month guideline range but given a five-year term of probation after departure, was properly sentenced after revocation to 33 months instead of the 3–9 months called for by § 7B1.4, p.s. "[T]he policy statements of Chapter 7 are not binding, [although] Forrester is correct in arguing that the sentencing court must consider them. . . . Here, the district court considered Chapter 7. In footnote 1 of its order revoking probation it stated that 'even if [it] sentenced Defendant under Chapter 7, the court would not be bound by the 3–9 month range suggested by Defendant. Commentary note 4 to § 7B1.4 provides that, "[w]here the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance) . . . , an upward departure may be warranted."' Having considered the policy statements of Chapter 7, the court was free to reject the suggested sentence range of 3 to 9 months.").
See *Outline* at VII.

Criminal History

Invalid Prior Convictions

U.S. v. Isaacs, No. 92-2068 (1st Cir. Jan. 25, 1994) (Oakes, Sr. J.) (Remanded: The Guidelines, in § 4A1.2, comment. (n.6 & backg'd) (Nov. 1990), do not provide a sentencing court with independent authority to review the validity of a prior conviction. The Constitution may require such review, but "only where the prior conviction is 'presumptively void.' . . . [A] prior conviction is 'presumptively void' if a constitutional violation can be found on the face of the prior conviction, without further factual investigation. . . . Under limited circumstances, however, a conviction may be 'presumptively void' even if a constitutional violation cannot be found on the face of the prior conviction. . . . Where an offender challenges the validity of a prior conviction on 'structural' grounds"—such as deprivation of certain trial rights or judicial bias—"a district court should entertain the challenge whether or not the error appears on the face of the prior conviction." Here, defendant's challenge should not have been heard because there was no facial invalidity and he did not allege a "structural error" in the prior conviction.) (replacing opinion originally issued June 22, 1993, and reported in 5 *GSU* #15).
See *Outline* at IV.A.3, summary of *McGlocklin* in 6 *GSU* #3.

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Violation of Probation

REVOCATION FOR DRUG POSSESSION

Supreme Court resolves circuit split, holds that the minimum sentence after revocation of probation for drug possession is one-third of the original guideline maximum. Defendant was originally subject to a guideline range of 0–6 months' imprisonment, and was sentenced to a 60-month term of probation. He violated probation by possessing cocaine and was subject to 18 U.S.C. § 3565(a), which states that for "possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence defendant to not less than one-third of the original sentence." The district court interpreted "original sentence" to mean one-third of the probation term, and sentenced defendant to prison for 20 months. The appellate court reversed, holding that "one-third of the original sentence" should be read to mean the maximum sentence available under the original guideline range; thus, defendant should have been sentenced to "not less than" 2 months, with a maximum sentence of 6 months. *See U.S. v. Granderson*, 969 F.2d 980 (11th Cir. 1992). [See *Outline* at VII.A.2 for other circuit holdings.]

The Supreme Court affirmed the appellate court. "According the statute a sensible construction, we recognize, in common with all courts that have grappled with the 'original sentence' conundrum, that Congress prescribed imprisonment as the *type* of punishment for drug-possessing probationers. As to the *duration* of that punishment, we rest on the principle that "'the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended.'" . . . The minimum revocation sentence, we hold, is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum."

Two justices concurred in the judgment only, and two justices dissented.

U.S. v. Granderson, No. 92-1662 (U.S. Mar. 22, 1994) (Ginsburg, J.).

Outline at VII.A.2.

Violation of Supervised Release

SENTENCING

U.S. v. Anderson, 15 F.3d 278 (2d Cir. 1994) (Affirmed: After revocation of supervised release, defendant was subject to a statutory maximum of 24 months' imprisonment and a range of 6–12 months under Guidelines Chapter 7. The district court sentenced her to 17 months, stating that it departed from the Guidelines because defendant needed "intensive substance abuse and psychological treatment in a structured environment." The appellate court 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 sentencing after revocation of supervised release under 18 U.S.C. § 3583(e). "In determining the length of a period of supervised release, . . . a district court may consider such factors as the medical and correctional needs of the offender. . . . Because [of that], 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." (Kearse, J., dissented.)

The court also "declined to extend *Williams [v. U.S.*, 112 S. Ct. 1112 (1992),] to Chapter 7 policy statements," and reaffirmed its pre-*Williams* holding that "Chapter 7 policy statements are advisory, rather than binding. . . . Accordingly, the district court need not 'make the explicit, detailed findings required when it departs from a binding guideline,' . . . [and] we will affirm the district court's sentence provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable." The court found those conditions were met and affirmed the sentence.).

Outline at VII and VII.B.1.

Criminal History

OTHER SENTENCES OR CONVICTIONS

U.S. v. Thomas, No. 92-2112 (8th Cir. Mar. 10, 1994) (en banc) (Hansen, J.) (four judges dissenting) (Affirmed: District court may consider constitutionally valid but uncounseled prior misdemeanor conviction in determining Guidelines sentence. Under *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), "one cannot be sent to jail because of a prior uncounseled misdemeanor conviction, either upon the initial conviction or because of the conviction's later use in a subsequent sentencing, but if the subsequent sentence to imprisonment is already required as a consequence of the subsequent crime, the prior conviction may be used as a factor to determine its length.").

Outline at IV.A.5.

CAREER OFFENDER PROVISION

U.S. v. Heim, 15 F.3d 830 (9th Cir. 1994) (Affirmed: Disagreeing with *U.S. v. Price*, 990 F.2d 1367 (D.C. Cir. 1993) [5 *GSU* #12], and holding that "the Sentencing Commission did not exceed its statutory authority in including conspiracy within the meaning of 'controlled substance offense' in §§ 4B1.1 and 4B1.2.").

Outline at IV.B.2.

U.S. v. Baker, 16 F.3d 854 (8th Cir. 1994) (Remanded: District court erred in holding that defendant's 21 U.S.C. § 856 conviction for managing or controlling a "crack house" was a "controlled substance offense" for career offender purposes under § 4B1.2(2). Although managing a residence for the purpose of *distributing* a controlled substance would

qualify, managing a residence for the purpose of *using* drugs does not, and the jury's verdict was ambiguous—"it does not clarify whether Baker was convicted of a possession § 856 offense or a distribution § 856 offense. When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range.").
Outline at IV.B.2.

Challenges to Prior Convictions

U.S. v. Mitchell, No. 92-3903 (7th Cir. Feb. 23, 1994) (Flaum, J.) (Affirmed: "[W]e agree with the result reached by the First, Fourth, Sixth, Eighth, and Eleventh Circuits, and hold that a defendant may not collaterally attack his prior state conviction at sentencing unless that conviction is presumptively void, . . . that is a conviction lacking constitutionally guaranteed procedures plainly detectable from a facial examination of the record." The court also determined that, although it and other circuits had found that early versions of Application Note 6 to § 4A1.2 indicated such challenges should be allowed, amendments to the commentary in Nov. 1990 and later have made it clear that the Sentencing Commission did not intend to enlarge a defendant's right to collaterally attack a prior conviction "beyond any right otherwise recognized by law.").
Outline at IV.A.3.

Departures

Criminal History

U.S. v. Fletcher, 15 F.3d 553 (6th Cir. 1994) (Affirmed: Downward departure for career offender—to his offense level before career offender designation and criminal history category V instead of VI—was appropriate. "Fletcher argued that his case was ripe for a downward departure because of his extraordinary family responsibilities, the age of the convictions on his record (1976 and 1985), the time intervening between the convictions, and his attempts to deal with his drug and alcohol problems. Moreover, Fletcher specifically requested the court to compare him 'to other defendants who would typically be career offender material.' Fletcher also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court held "that these circumstances present a satisfactory basis for a downward departure. Fletcher's unrelated past convictions, . . . the type of convictions, his attempts to deal with his alcohol problems, . . . the age of the convictions, and Fletcher's responsibilities to his parents are circumstances that indicate that the seriousness of Fletcher's record and his likelihood of recidivism were over-stated by an offense level of 32 and a criminal history category of VI. . . . While we note that 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.").
Outline at VI.A.2.

Mitigating Circumstances

U.S. v. Monk, 15 F.3d 25 (2d Cir. 1994) (Remanded: Defendant, convicted of simple possession of crack but acquitted of possession with intent to distribute, was sentenced to 135 months. The district court concluded that it had no power to depart, although it wanted to because "the interests of justice require it, given the rather harsh result on the facts of this case" due to the inclusion of relevant conduct in setting the offense level. The appellate court concluded that "the sentencing judge failed to appreciate his authority to depart under [18 U.S.C.] § 3553(b). *See U.S. v. Concepcion*, 983 F.2d 369, 385–89 (2d Cir. 1992) (where relevant conduct guideline would require extraordinary increase in sentence by reason of conduct for which defendant was acquitted by jury, district court has power to depart downward) . . . . We repeat that when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered.").
Outline generally at VI.C.4.

U.S. v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (Remanded: District court could not grant downward departure "because of its concern that incarceration of the appellee would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community. We hold that this departure is inconsistent with U.S.S.G. § 5H1.2, which provides that departures based on a defendant's 'vocational skills' are generally not permitted." The court added that "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.").
Outline at VI.C.1.e.

Determining the Sentence

Supervised Release

U.S. v. Porat, No. 93-1095 (3d Cir. Mar. 3, 1994) (Roth, J.) (Remanded: Home detention was available as a condition of supervised release under § 5C1.1(d) and (e)(3), but the district court could not allow it 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. To do so, the probation office must closely monitor his actions. In order that the probation office effectively perform its responsibilities, we believe that Porat must serve his home detention in the United States. 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.").
Outline generally at V.C.

Note to readers:

The latest revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, which supersedes the August 1993 issue, has been printed and is being mailed to all recipients of *Guideline Sentencing Update*. Please note the following changes that should be made to your copy:

VII.F.1.b.ii - *U.S. v. Hernandez*, 996 F.2d 62 (5th Cir. 1993), was modified March 7, 1994, to be reprinted at 17 F.3d 78. Please delete the sentence and quote that immediately precedes the citation on p. 87 of the *Outline*. The holding of the case did not change. Also, the citation for *Hernandez* in VI.F.1.a on p. 85 should be changed to 17 F.3d 78.

IX.D.4 - At p. 100, *U.S. v. Tincher*, 8 F.3d 350 (8th Cir. 1993), was withdrawn and replaced by an unpublished per curiam opinion listed at 14 F.3d 603.

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VOLUME 6 • NUMBER 12 • MAY 12, 1994

Determining the Sentence

FINES

Third Circuit holds that a fine—including a departure to a larger fine—may be based on potential future earnings from sale of rights to story of the crime, but the value of those rights must be supported by evidence. Defendants, husband and wife, kidnapped a business executive to hold for ransom. Although the victim died within four days from a wound suffered during the kidnapping, defendants continued their attempts to receive ransom for six weeks, during which time the case generated extensive media coverage. The husband pled guilty to seven felony counts, the wife to two, and both were given lengthy prison terms. They were also subject to fines up to $250,000 under § 5E1.2(c); however, the district court departed and imposed the maximum fines allowed under 18 U.S.C. § 3571—$250,000 for each felony conviction—equaling $1.75 million for the husband and $500,000 for the wife. Both defendants had received offers for the rights to their stories, and the court determined that their potential gains required a departure to "ensure both the disgorgement of any gain from the offense . . . and an adequate punitive fine." *See* U.S.S.G. § 5E1.2, comment. (n.4).

The appellate court remanded because there was no evidence that defendants' rights were worth those amounts, but approved the use of future story rights as a basis for fines and, in an appropriate case, for upward departure. "Future earning capacity is obviously an appropriate factor to consider. . . . At least in cases such as this, when it is a near certainty that the literary and other media rights to the story of a crime are marketable, possible future sales of those rights may be considered when determining whether a defendant is able to pay a fine. . . . [W]e are convinced that, given the facts and circumstances surrounding this highly publicized crime, the district court was realistic in finding that [defendants] might become able to pay a fine in the future."

However, "while it is entirely proper in cases such as this for district courts to look to potential sales of literary and other media rights as a source of future income . . ., the value of those rights must be supported by more than hypothesis or speculation to justify departures from the applicable Guidelines fine range. This is especially so where Congress has chosen to permit only the government to initiate a petition for modification of a fine if circumstances change so that a defendant is truly unable to pay it." The evidence that the husband had the potential ability to pay a $1.75 million fine did not meet the clear and convincing standard of proof the appellate court held was required for a sevenfold departure from the maximum Guidelines fine. *See U.S. v. Kikumura*, 918 F.2d 1084, 1100–02 (3d Cir. 1990) (extreme departures must meet clear and convincing standard). The court also held that, even under the preponderance standard, the facts did not support the finding that the wife could pay a larger fine. *Cf. U.S. v. Wilder*, 15 F.3d 1292, 1300–01 (5th Cir. 1994) (affirming upward departure to $4 million fine because defendant gained at least $2 million and caused losses exceeding $5 million).

U.S. v. Seale, No. 92-5686 (3d Cir. Apr. 7, 1994) (Lewis, J.).

Outline at V.E.1, VI.B.1.a and h, and IX.B.

U.S. v. Robinson, No. 92-10196 (9th Cir. Apr. 4, 1994) (Brunetti, J.) (Remanded: District court must determine defendant's ability to pay fine at the time of sentencing and cannot impose community service as an alternative sanction should defendant prove unable to pay fine after release from prison. "The Guidelines do not state explicitly that the district court must make the [ability to pay] determination at the time of sentencing, but they strongly imply such a requirement. . . . [T]he structure of § 5E1.2 indicates that the district court, before imposing any fine, must determine whether the defendant has established [the] inability" to pay. As to the community service, 18 U.S.C. § 3572(e) states that "the court may not impose an alternative sentence to be carried out if the fine is not paid." The appellate court also noted that, under Guidelines § 5E1.2(f), an alternative sanction such as community service "must be imposed 'in lieu of all or a portion of [a] fine'; community service cannot be imposed as a fallback punishment to be served if the defendant cannot later pay the fine.").

Outline at V.E.1.

CONSECUTIVE OR CONCURRENT SENTENCES

U.S. v. Kiefer, No. 93-2247 (8th Cir. Apr. 1, 1994) (Loken, J.) (Remanded: Defendant was convicted on a federal firearms charge and, under § 5G1.3(b) and comment. (n.2), was to receive a sentence that was concurrent to his state sentence on related charges, with credit for the 14 ½ months served on the state sentence. However, he was also subject to a mandatory minimum fifteen-year sentence under 18 U.S.C. § 924(e), and the district court determined that it could not make the sentences completely concurrent by giving full credit for time served because that would effectively put the federal sentence below the mandatory minimum. The appellate court remanded, holding that "§ 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.").

Outline generally at V.A.3.

Sentencing Procedure

EVIDENTIARY ISSUES

U.S. v. Beler, No. 92-3970 (7th Cir. Mar. 31, 1994) (Rovner, J.) (Remanded: Agreeing with *U.S. v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993), that "section 6A1.3(a)'s reliability standard must be rigorously applied" to evidence used in

sentencing. Here, a witness made contradictory statements regarding cocaine amounts that were not in the offenses of conviction. The district court included as relevant conduct amounts from one of the witness's higher estimates, but did not "directly address the contradiction and explain why it credit[ed] one statement rather than the other. . . . Before the court relies on the higher estimate, it must provide some explanation for its failure to credit the inconsistent statement. . . . [Defendant] simply has too much at stake for us to be satisfied with a conclusory factual finding based on potentially unreliable evidence." The appellate court also agreed with other circuits that have held that addict-witness testimony should be closely scrutinized: "[T]he district court should have subjected any information provided by [that witness] to special scrutiny in light of his dual status as a cocaine addict and government informant.").
Outline at IX.D.1.

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

U.S. v. Portin, No. 93-10397 (9th Cir. Apr. 1, 1994) (per curiam) (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 the Rule 11(e)(1)(C) plea agreement. 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." Here, the original fines were properly imposed, and neither defendants nor the government challenged them on appeal.).
Outline at IX.F.

Adjustments

Obstruction of Justice

U.S. v. Fredette, 15 F.3d 272 (2d Cir. 1994) (Affirmed: Defendants, convicted of witness retaliation offenses and sentenced under the "Obstruction of Justice" guideline, § 2J1.2, were properly given § 3C1.1 enhancements for additional attempt to obstruct justice. "We conclude that Application Note 6 (to § 3C1.1) 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.").
Outline at III.C.4.

Violation of Supervised Release

Sentencing

U.S. v. Sparks, No. 93-3677 (6th Cir. Mar. 22, 1994) (Guy, J.) (Remanded: District court erred in concluding that, under § 7B1.3(f), revocation sentence *must* be consecutive to state sentences imposed earlier for the conduct that caused revocation. Appellate court reaffirmed its holding before *Stinson v. U.S.*, 113 S. Ct. 1913 (1993), that "the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing" in Chapter 7.).
Outline at VII and VII.B.1.

U.S. v. Malesic, 18 F.3d 205 (3d Cir. 1994) (Remanded: Supervised release may not be reimposed after revocation and imprisonment. Thus it was error to revoke defendant's three-year term of release and sentence him to eighteen months' imprisonment to be followed by a three-year term of supervised release.).
Outline at VII.B.1.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Vincent, No. 93-1910 (6th Cir. Mar. 31, 1994) (Milburn, J.) (Affirmed: Because evidence showed that the stalks and seeds of marijuana plants contain "a detectable amount of the controlled substance," § 2D1.1(c)(n.*), "the stalks and seeds need not be separated before the controlled substance can be used. Accordingly, the stalks and seeds are to be used in calculating the weight of a controlled substance.").
Outline at II.B.2.

U.S. v. Tucker, No. 93-2806 (7th Cir. Mar. 23, 1994) (Wood, J.) (Affirmed: District court correctly used 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. It was undisputed that the 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.).
Outline at II.B.1.

More Than Minimal Planning

U.S. v. Bridges, No. 93-3175 (10th Cir. Mar. 17, 1994) (McKay, J.) (Remanded: Defendant participated in two burglaries and pled guilty to theft of government property from the second burglary. The district court enhanced the sentence for more than minimal planning under § 2B1.1(b)(5), solely on the ground that defendant's conduct "involv[ed] repeated acts over a period of time," § 1B1.1, comment. (n. 1(f)). The appellate court remanded, finding that the examples given in Note 1(f) "demonstrate that the Guidelines equate 'repeated' with 'several,'" meaning "more than two." Thus, when a district court "bases the two-point increase solely on the 'repeated acts' language of the Guidelines, there must have been more than two instances of the behavior in question.").
Outline at II.E.

Departures

Substantial Assistance

U.S. v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994) (Remanded: In reducing defendant's sentence under Fed. R. Crim. P. 35(b) for substantial assistance, the district court erred in considering defendant's "status as a first time offender, his lack of knowledge of the conspiracy until just prior to arrest, his relative culpability, and his prison behavior. . . . 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.").
Outline at VI.F.4.

Changes to previously reported cases:

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994), *withdrawn* and revised opinion filed Mar. 25, 1994. Holding is essentially the same as reported in 6 *GSU* #10.

U.S. v. Calverley, 11 F.3d 505 (5th Cir. 1993), *reh'g en banc granted* Feb. 18, 1994. See 6 *GSU* #8 and *Outline* at IV.B.2.

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Criminal History

CHALLENGES TO PRIOR CONVICTIONS

Supreme Court holds that defendant has no right to challenge prior conviction used to enhance sentence under 18 U.S.C. § 924(e) unless right to counsel was denied. Defendant was convicted of possession of a firearm by a felon and subject to a mandatory minimum sentence of fifteen years under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because he had three prior state convictions for violent felonies. He challenged two of the convictions, claiming ineffective assistance of counsel and that his guilty pleas were not knowing and voluntary. The district court held there was no statutory right to challenge the prior convictions and no constitutional right to challenge except for complete denial of counsel. The Fourth Circuit affirmed, adding that constitutional challenges may be allowed "when prejudice can be presumed from the alleged violation," but not, as here, when the violation "necessarily entails a fact-intensive inquiry." *U.S. v. Custis*, 988 F.2d 1355, 1363–64 (4th Cir. 1993).

The Supreme Court also affirmed, finding first that nothing in § 924(e) authorizes collateral attacks. "The statute focuses on the fact of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." The Court also held that the Constitution requires that challenges be allowed only for a complete denial of counsel, not for claims such as defendant's. "Ease of administration" and an "interest in promoting the finality of judgments" were also cited by the Court. The Court recognized, however, "that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. . . . If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences."

U.S. v. Custis, No. 93-5209 (U.S. May 23, 1994) (Rehnquist, C.J.) (three justices dissenting).

Note: Although this case concerns § 924(e) rather than the Guidelines use of prior convictions, some circuits have not distinguished between the two. *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 . . . § 924(e)"); *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) (holding 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 Guidelines cases inapposite because "Guideline provision arises in a different legal context and uses language critically different from" § 924(e)). This decision will also affect application of the Guidelines Armed Career Criminal provision, § 4B1.4, which applies to defendants "subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)."

Outline at IV.A.3.

JUVENILE CONVICTIONS AND SENTENCES

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Affirmed: District court properly held that prior conviction under Youth Corrections Act was not "expunged" for Guidelines purposes. The conviction had been "set aside" under the YCA, but "the 'set aside' provision should not be interpreted to be an expungement under § 4A1.2(j) in calculating a defendant's criminal history category. The Commentary to § 4A1.2(j) explains that convictions which are set aside for 'reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction,' are not expunged for purposes of this Guideline and can be included in Criminal History Category determinations. Because the YCA conviction here was set aside for 'reasons unrelated to innocence or errors of law,' it was properly utilized in the criminal history calculation."). *See also 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). *Contra U.S. v. Kammerdiener*, 945 F.2d 300, 301 (9th Cir. 1991) (conviction "set aside" under YCA was "expunged" under § 4A1.2(j)). *Cf. U.S. v. Doe*, 980 F.2d 876, 881–82 (3d Cir. 1992) (reversing denial of motion for expungement, holding "set aside" in YCA means "a complete expungement").

Outline at IV.A.4.

Sentencing Procedure

PLEA BARGAINING—DISMISSED COUNTS

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Remanded: "Counts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure. . . . To allow consideration of dismissed counts in an upward departure eviscerates the plea bargain. Such consideration allows the prosecutor to drop charges against a defendant in return for a guilty plea and then turn around and seek a sentence enhancement against that defendant for the very same charges in the sentencing hearing. . . . We adopt the reasoning outlined by the Ninth Circuit that a sentencing court should not be allowed to violate the bargain worked out between the defendant and the government. . . . Consideration of dismissed counts as relevant conduct is explicitly allowed by the Guidelines. However, the bar to considering dismissed counts in making upward departures remains an important limitation in the modified real-offense sentencing approach of our current sentencing program. Allowing consideration of dismissed offenses would bring us much closer to the type of pure real-offense sentencing system explicitly rejected by the Guidelines.") (Davis, J., dissenting).

Outline at VI.B.2.b and IX.A.1.

Departures

Mitigating Circumstances

Third Circuit approves departure based on defendant's anguish at involving his son in fraud offense. Defendant tried to solve his company's cash-flow problems through false progress reports to receive accelerated payments from the government, and later did not return unearned payments that had resulted from mistaken double billing. In the first instance he had his son prepare reports to aid the scheme, apparently without the son's knowledge of the fraud. Defendant's efforts notwithstanding, the company eventually went bankrupt and the frauds were discovered. Defendant pled guilty to conspiracy to defraud the government, his son to aiding and abetting a false statement. The district court departed downward one level for defendant (allowing home confinement and probation instead of imprisonment), finding that the amount of loss calculated under § 2F1.1 overstated defendant's criminality and that the Guidelines did not account for the effect on defendant of having unintentionally caused his son to be convicted of a crime.

The appellate court remanded because the district court clearly erred by not imposing a more than minimal planning enhancement and failed to adequately explain the departure, but affirmed the grounds of the departure. While the government did suffer a large loss, the loss overstated defendant's criminality because defendant intended not to steal money but rather to expedite payments that would have eventually been due the company. And, without the takeover of his company and subsequent bankruptcy, "it is quite possible that the loss to the United States would have been far less."

"The other reason for the district court's departure was the mental anguish Monaco felt seeing his son, otherwise a law-abiding citizen with an excellent future, convicted of a crime because of his father's fraudulent scheme . . . [and thereby] stigmatized, not for deliberately committing a criminal act, but for dutifully and unquestioningly honoring his father's request. . . . In at least some cases, such as the district court found here, a defendant who unwittingly makes a criminal of his child might suffer greater moral anguish and remorse than is typical. . . . [W]e think the Sentencing Commission did not consider this issue when it promulgated the Guidelines.

"Moreover, we do not believe that by promulgating U.S.S.G. § 5H1.6, the Sentencing Commission foreclosed the possibility of a downward departure in this extraordinary situation. That section specifically states that family ties and responsibilities are 'not ordinarily relevant' for departure purposes. 'Not ordinarily relevant' is not synonymous with 'never relevant' or 'not relevant.' . . . In the unusual facts and circumstances of this extraordinary case, . . . it is entirely probable that Monaco never intended to criminalize his son and was deeply and legitimately shocked and remorseful when it happened. This is not something that is likely to occur frequently, and when it does, the interests of justice weigh more heavily against overpunishing the defendant than they do in favor of rigidly enforcing the Guidelines without regard for legitimate penological bases of sentencing." The court also noted that "the defendant is a productive, non-violent offender and a small downward departure would eliminate the need for incarceration entirely."

U.S. v. Monaco, No. 93-5261 (3d Cir. May 10, 1994) (Nygaard, J.).

Outline at VI.C.1.a and 4.a, VI.B.1.k.

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: For defendant who otherwise did not qualify for substantial assistance departure under § 5K1.1, it was error to depart downward under § 5K2.13 on the basis that his diminished capacity rendered him incapable of providing substantial assistance to the government. "[T]he Guidelines consider diminished capacity, but limit its relevance to the effect on the defendant's commission of the offense. Guidelines § 5K2.13 does not authorize consideration of the effect of a defendant's diminished capacity on his ability to provide substantial assistance." The case was remanded "for a determination whether Munoz-Realpe's mental incapacity contributed to the commission of his offense" sufficiently to warrant departure under § 5K2.13.).

Outline at VI.C.1.b, generally at VI.F.1.b.i

U.S. v. O'Brien, 18 F.3d 301 (5th Cir. 1994) (Remanded: Defendant's post-conviction community service, including musical performances and benefit shows, did not justify a downward departure. Defendant's activities reflect skills he developed as a professional musician, and educational and vocational skills and employment record do not support departure under §§ 5H1.2, 5H1.5, p.s.).

Outline generally at VI.C.4.b.

Substantial Assistance

U.S. v. Gerber, No. 93-5057 (10th May 9, 1994) (Ebel, J.) (Affirmed: It was not a violation of the Ex Post Facto Clause to apply 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.").

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

Offense Conduct

Calculating Weight of Drugs

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: 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. The Nov. 1993 amendment to § 2D1.1(c) (n.*) states: "'Cocaine base,' for the purposes of this guideline, means 'crack.'" Thus, the appellate court held, "forms of cocaine base other than crack are treated as cocaine hydrochloride." The court also held that it would use the new Guidelines definition in determining whether to apply a mandatory minimum sentence 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." *But cf. U.S. v. Palacio*, 4 F.3d 150, 154 (2d Cir. 1993) (recognizing narrower definition of cocaine base for Guidelines, but stating amendment would not affect broader definition used for mandatory minimum sentences under 21 U.S.C. § 841(b)).).

Outline at II.B.3.

Guideline Sentencing Update

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VOLUME 6 • NUMBER 14 • JUNE 29, 1994

Criminal History

OTHER SENTENCES OR CONVICTIONS

Supreme Court affirms use of prior uncounseled misdemeanor convictions in criminal history score. Defendant challenged the addition of one criminal history point for a prior state misdemeanor conviction—driving under the influence—for which he was fined $250 but not incarcerated. He was not represented by counsel and claimed that use of an uncounseled misdemeanor conviction to increase his guideline sentence violated his Sixth Amendment rights as construed in *Baldasar v. Illinois*, 446 U.S. 222 (1980). The appellate court affirmed, concluding that *Baldasar* limits the use of a prior uncounseled misdemeanor conviction only when it would convert a later misdemeanor into a felony, and thus its use in the criminal history score was proper. *See U.S. v. Nichols*, 979 F.2d 402, 415–18 (6th Cir. 1992).

The Supreme Court affirmed while overruling *Baldasar*. "[A]n uncounseled conviction valid under *Scott [v. Illinois*, 440 U.S. 367 (1979),] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. . . . Today we adhere to *Scott v. Illinois, supra,* and overrule *Baldasar*. Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."

Nichols v. U.S., 114 S. Ct. 1921 (1994) (three justices dissented).

Outline at IV.A.5.

CAREER OFFENDER PROVISION

Circuits continue to split on whether career offender guideline covers drug conspiracies. Two circuits recently agreed with *U.S. v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), that § 4B1.1 does not apply to drug conspiracy defendants despite the inclusion of conspiracy as a predicate offense in § 4B1.2, comment. (n.1). The Sentencing Commission "mistakenly interpreted [28 U.S.C. §] 994(h) to include convictions for drug conspiracies. . . . Because the Commission promulgated section 4B1.1 under the authority of 28 U.S.C. § 994(h), it is invalid to the extent that its scope exceeds the reach of that section of the statute. The guideline should not have been applied to the [drug conspiracy] defendants herein." *U.S. v. Bellazerius*, No. 93-3157 (5th Cir. June 17, 1994) (Politz, C.J.) (remanded). *See also U.S. v. Mendoza-Figueroa*, No. 93-2867 (8th Cir. June 27, 1994) (Gibson, Sr. J.) (remanded: "There is no indication that the Commission intended to rely on its discretionary authority under section 994(a) to extend the section 994(h) mandate. Rather, it is evident that the Commission simply exceeded the language of section 994(h)."") (Bartlett, Dist. J., dissented).

Conversely, three circuits recently disagreed with *Price* and agreed with *U.S. v. Heim*, 15 F.3d 830 (9th Cir. 1994), that the Commission had the authority to include conspiracy pursuant to its general authority under 28 U.S.C. § 994(a). *See U.S. v. Damerville*, No. 93-3235 (7th Cir. June 14, 1994) (Pell, J.) (affirmed: "Commission properly exercised its authority in including conspiracy to violate [21 U.S.C.] § 841 among the [controlled substance] offenses that qualify a defendant for career offender status"); *U.S. v. Hightower*, No. 93-5117 (3d Cir. May 31, 1994) (Nygaard, J.) (affirmed: "Reference in the commentary to § 994(h) as a specific source of authority does not preclude the authority of § 994(a). . . . [T]he commentary's expansion of the definition of a controlled substance offense to include inchoate offenses is not 'inconsistent with, or a plainly erroneous reading of' section 4B1.2(2) . . . [and] it does not 'violate[ ] the Constitution or a federal statute'"); *U.S. v. Allen*, No. 92-1225 (10th Cir. May 5, 1994) (Seymour, J.) (affirmed: "Commission could rely on the broader language of section 994(a) . . . to include conspiracy-related offenses in the career offender guideline").

See *Outline* at IV.B.2 and summary of *Heim* in 6 *GSU* #11.

ARMED CAREER CRIMINAL

U.S. v. Oliver, 20 F.3d 415 (11th Cir. 1994) (Remanded: "[P]ossession of a firearm by a convicted felon does not constitute a 'violent felony' within the meaning of [18 U.S.C.] § 924(e), and thus cannot be considered a predicate prior conviction for purposes of sentence enhancement under § 4B1.4." Although, as § 4B1.4, comment. (n.1) states, the definition of "violent felony" in § 924(e) is "not identical to the definition of 'crime of violence'" in § 4B1.1, "we conclude that the two expressions are not conceptually distinguishable for purposes of the narrow question raised in this appeal." Under § 4B1.2, comment. (n.2), "crime of violence" does not include possession of a firearm by a felon, and "[i]t is reasonable to suggest that 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.").

Outline at IV.D.

Offense Conduct

MANDATORY MINIMUM SENTENCES

U.S. v. Rodriguez-Sanchez, No. 93-50198 (9th Cir. May 3, 1994) (Reed, Sr. Dist. J.) (Remanded: In determining drug amounts for mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) for defendant convicted of possessing methamphetamine with intent to distribute, § 841(a)(1), district

court may not include amounts possessed for personal use, only the amount defendant intended to distribute. In *U.S. v. Kipp*, 10 F.3d 1463, 1465–66 (9th Cir. 1993), the court held that, under the Guidelines, "[d]rugs 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." The court here stated that, "[a]lthough the specific holding of *Kipp* is not technically binding upon us, the principle behind that decision guides our decision. We are dealing with the same crime, possession with intent to distribute. The legislative intent behind the mandatory minimum sentencing provisions of § 841(b) are not necessarily identical with those behind the Sentencing Guidelines but they are similar. . . . [Section] 841(a)(1) does not criminalize mere possession of drugs, only possession with intent to distribute. . . . Other statutes deal with the crime of possession. . . . Thus, the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession.").

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

Departures

Substantial Assistance

U.S. v. Martin, No. 93-6477 (4th Cir. May 25, 1994) (Hamilton, J.) (Remanded: "[I]f at the time of sentencing, the government deems the defendant's assistance substantial, the government cannot defer its decision to make a U.S.S.G. § 5K1.1 motion on the ground that it will make a Fed. R. Crim. P. 35(b) motion after sentencing. Instead, the government at that time must determine—yes or no—whether it will make a U.S.S.G. § 5K1.1 motion. If the government defers making a U.S.S.G. § 5K1.1 motion on the premise that it will make a [Rule] 35(b) motion after sentencing, the sentence that follows deprives a defendant of due process, and is therefore 'in violation of law.'" *Accord U.S. v. Drown*, 942 F.2d 55, 58–60 (1st Cir. 1991). The remedy for such a violation is normally a remand to give the government "the opportunity to consider afresh the substantiality of the defendant's assistance at the time of sentencing." Here, however, during the sentencing hearing the government agreed defendant had rendered substantial assistance and effectively promised to make a substantial assistance motion "within the next year," which was "tantamount to and the equivalent of a modification of the plea agreement." On remand, then, defendant "is entitled to specific performance of the government's promise to reward him for his presentence substantial assistance." Note that the government did make a Rule 35(b) motion within a year, but the district court ruled that under the terms of Rule 35(b) it had no power to grant the motion because defendant did not actually provide any *post*-sentencing assistance.).

Outline at VII.F.1.b.ii, 3, and 4.

Criminal History

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: Extent of upward departure for defendant in criminal history category VI was proper. The court departed from defendant's offense level 12 and 23 criminal history points, a guideline range of 30–37 months, "by adding one offense level for each criminal history point above the thirteen points required to reach category VI, and assessing four additional levels for [other] reasons." The appellate court found that the reasons for departure "are adequate and the extent of departure is reasonable and not an abuse of discretion.").

Outline at VI.A.4.

Mitigating Circumstances

U.S. v. Pacheco-Osuna, No. 93-50199 (9th Cir. May 2, 1994) (Remanded: It was error to depart downward for immigration defendant because his arrest might have been invalid. Although defendant did not challenge his arrest, the district court found "he may have been stopped because he was Mexican looking, rather than [for] good cause." The appellate court held that whether defendant's arrest was illegal was "a factor entirely unrelated to [his] crime (entry after deportation) or to his criminal history . . . . Even if the stop . . . had not been proper, that was not related to his culpability or to the severity of his offense. Sentencing is not designed to punish, deter or educate errant government officials.").

Outline at VI.C.4.b.

U.S. v. Haversat, 22 F.3d 790 (8th Cir. 1994) (Remanded: Downward departure for antitrust defendant was proper for "truly exceptional family circumstances." Defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening," his presence was crucial to her treatment, and there was testimony that even a short separation could threaten her health. *Accord U.S. v. Gaskill*, 991 F.2d 82, 84–86 (3d Cir. 1993). However, the court abused its discretion by departing five levels and declining to impose any kind of confinement or even probation, imposing only a fine. The court should "craft a sentence that imposes some form of confinement to meet the expressed goal of § 2R1.1 and that still takes into consideration [defendant's] need to be available to render care to his wife," such as intermittent confinement or home detention.).

Outline at VI.C.1.a.

General Application Principles

Relevant Conduct—Other Issues

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: "Appellant argues that the district court erred in including a stolen U.S. Treasury check . . . as relevant conduct under § 1B1.3(a)(1)(A) and (B) . . . . Appellant argues that because the check is the basis of a pending state prosecution against him, it should not be included as relevant conduct in the current federal proceeding. We disagree. . . . The Second Circuit has considered the issue . . . and has ruled that information from a pending state prosecution on a related offense may be used as relevant conduct. *U.S. v. Caceda*, 990 F.2d 707, 709 (2d Cir. 1993). We agree.").

Outline at I.A.4.

Adjustments

Acceptance of Responsibility

U.S. v. Colussi, 22 F.3d 218 (9th Cir. 1994) (Remanded: Agreeing with *U.S. v. Tello*, 9 F.3d 1119 (5th Cir. 1993), that if a defendant meets the test for the extra one-level reduction under § 3E1.1(b), it must be granted: "The language mandates a one point reduction where the requirements of § 3E1.1(b) are met." Here, defendant satisfied the first two parts of the test, but the district court apparently "believed it had discretion whether to consider th[e] third step. This was error.").

Outline at III.E.5.

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VOLUME 6 • NUMBER 15 • JULY 20, 1994

Offense Conduct

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Boot, No. 93-2317 (1st Cir. June 7, 1994) (Cyr, J.) (Affirmed: Nov. 1993 amendment to § 2D1.1(c) that changed method of calculating weight of LSD controls for guideline calculations, but for mandatory minimum sentences the calculation is still controlled by the holding in *Chapman v. U.S.,* 500 U.S. 453, 468 (1991), that the weight of the carrier medium is included. Therefore, defendant resentenced under § 1B1.10(a) could not have his sentence reduced below the applicable five-year mandatory minimum, based on the weight of the LSD plus the carrier medium, even though his guideline range was reduced from 121–151 months to 27–33 months.). *Cf. U.S. v. Mueller,* No. 93-1481 (10th Cir. June 22, 1994) (Moore, J.) (Affirmed: Defendant, originally sentenced to five-year mandatory minimum that was later reduced to 39 months after Fed. R. Crim. P. 35(b) departure, was not entitled to resentencing under amended LSD calculation in § 2D1.1(c). Under § 1B1.10(b), the district court "should consider the sentence that it would have originally imposed had the guidelines, *as amended,* been in effect at that time." Here, even though amended § 2D1.1(c) would result in a range of 18–24 months, defendant was still subject to five-year minimum term, and the "subsequent reduction upon the government's Rule 35 motion, which occurred at a later date, has no concomitant retrospective applicability.").
Outline at II.A.3 and II.B.1.

U.S. v. Telman, No. 93-3324 (10th Cir. June 30, 1994) (Baldock, J.) (Affirmed: Defendant pled guilty to an LSD offense and, following a § 5K1.1 motion by the government, had his offense level reduced from 29 to 15 and was sentenced below the five-year statutory minimum to 18 months. Following § 1B1.10(a), he later sought resentencing under the Nov. 1993 amendment on calculating weight of LSD in § 2D1.1(c), claiming that his offense level would be 15 following the amended guideline, that the district court would have departed downward from level 15 instead of ending there, and that his sentence would therefore be lower. The district court denied the motion and was affirmed. "[I]t is apparent from the language of 1B1.10(a)—*i.e.,* 'may consider'—that a reduction is not mandatory but is instead committed to the sound discretion of the trial court. . . . [T]he district court considered a number of [the factors in 18 U.S.C. § 3582(c)], including Defendant's post-amendment guideline range, and decided that due to Defendant's personal and offense characteristics, Defendant did not merit a sentence reduction. After reviewing the record, we cannot say the district court abused its discretion.").
Outline at I.E and II.B.1.

Adjustments

ACCEPTANCE OF RESPONSIBILITY (§ 3E1.1(b))

U.S. v. Kimple, No. 92-10735 (9th Cir. June 24, 1994) (Nelson, J.) (Remanded: It was error to deny reduction under § 3E1.1(b)(2) on the grounds that over a year passed before defendant's guilty plea and he filed a pretrial motion to suppress evidence. "Because constitutionally protected conduct should not be considered against the defendant for purposes of an acceptance of responsibility reduction, . . . a defendant's exercise of those rights at the pretrial stage should not in and of itself preclude a reduction for timely acceptance. . . . If the Government establishes that it prepared for trial in conjunction with responding to pretrial motions, denial of the reduction may be justified. However, where the record reflects only the Government's efforts in responding to such motions, as [here], then the trial court may not deny the additional reduction for timely acceptance simply because a defendant vigorously defended a motion to suppress or simply because a given length of time has elapsed prior to the defendant noticing his intent to plead guilty. . . . [W]e do not consider the length of time that has passed in isolation," and here, in what the trial court called a complex case, there were several 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. Stoops, No. 93-10244 (9th Cir. June 1, 1994) (Beezer, J.) (Remanded: Defendant's multiple confessions on day of robbery and leading police to evidence qualified him for the extra reduction under § 3E1.1(b)(1), despite the government's claim that these actions did not "assist[] authorities in the investigation or prosecution" of his offense because the information was readily available to police. "[S]ubsection (b) does not require that the defendant timely provide information that 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. . . . Multiple consistent confessions on the day of arrest ordinarily serve such a purpose."

"The government also argues that Stoops does not qualify for . . . § 3E1.1(b) because Stoops challenged the admissibility of his confessions in pretrial motions to suppress[, reasoning] that a confession does not qualify a defendant for the reduction unless its admissibility goes unchallenged. This theory conflates subsections (b)(1) and (b)(2). These subsections are separated by the connective 'or,' not 'and.' A defendant qualifies under subsection (b)(1) if he timely provides complete information, whether or not he moves to suppress or timely notifies the government of his intent to plead guilty.

. . . Although the motions may have delayed his notice of intent to plead guilty, they could not have delayed his confessions, which had already occurred.").

U.S. v. McConaghy, 23 F.3d 351 (11th Cir. 1994) (per curiam) (Remanded: "Section 3E1.1(b)(2) is not facially unconstitutional." However, 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, not simply whether the government had already engaged in trial preparation: "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.").
Outline at III.E.5.

Departures

Mitigating Circumstances

U.S. v. Minicone, No. 93-1594 (2d Cir. June 8, 1994) (Miner, C.J.) (Remanded: "[W]e hold that 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.).
Outline at VI.C.3.

Criminal History

U.S. v. Rodriguez-Martinez, No. 91-10220 (9th Cir. June 1, 1994) (O'Scannlain, J.) (Remanded: In departing upward to 136 months for defendant subject to 120-month statutory minimum, the district court did not indicate how it calculated the departure above defendant's guideline range of 63–78 months and then above the mandatory minimum. The "existence of a mandatory minimum sentence does not alter the manner in which a district court determines the appropriate extent of a departure: a court must determine a defendant's offense level and appropriate criminal history category, including departures from the recommended criminal history category, just as it would in an ordinary case. If the resulting sentencing range is under the statutory minimum, the district court must give the mandatory minimum sentence; if the sentencing range includes the statutory minimum, the district court may impose a sentence above the mandatory minimum."). *But cf. U.S. v. Carpenter*, 963 F.2d 736, 745–46 (5th Cir. 1992) (affirming as reasonable under the circumstances departure to 230 months where district court used 180-month mandatory minimum sentence as starting point for departure calculation, rather than guideline range of 33–41 months).
Outline at VI.A.3.a.

U.S. v. Thomas, No. 93-5514 (6th Cir. May 23, 1994) (Merritt, C.J.) (Affirmed: Upward departure based on "inordinately high criminal history score of 43" was proper. "Thomas's score of 43, one of the highest we could find in reported cases, is clearly sufficiently unusual to warrant departure from the guidelines." The extent of departure was also proper even though the district court did not "consider and reject each of the six intermediate gridblocks between the original guideline range . . . and the range in which the actual sentence fell . . . ," as defendant argued it must do for departures above CHC VI. "Neither the Guidelines nor the law of this circuit require the district court to provide a mechanistic recitation of its rejection of the intervening, lower guideline ranges. Section 4A1.3 . . . indicates quite clearly that the court should continue to consider ranges 'until it finds' an appropriate sentence for the defendant before it, but nothing in § 4A1.3 calls for a more detailed, gridblock-by-gridblock approach advocated by the defendant. . . . The approach required of the sentencing court when departing beyond Criminal History Category VI, as we see it, is to consider carefully all of the facts and circumstances surrounding the case which affect the departure, and from them determine an appropriate sentence for the particular defendant.").
Outline at VI.A.4.

Determining the Sentence

Restitution

U.S. v. Meacham, No. 93-1692 (6th Cir. June 15, 1993) (Martin, J.) (Remanded: The Victim Witness and Protection Act "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. . . . While the Act provides that a 'court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement,' 18 U.S.C. § 3663(a)(3), this Court has held that the repayment of the cost of investigation is not 'restitution' within the meaning of the Act." *See 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 holding that restitution imposed as a condition of supervised release is still subject to VWPA)). *But cf. U.S. v. Daddato*, 996 F.2d 903, 904–06 (7th Cir. 1993) (affirming "a condition in the nature of restitution on a sentence of supervised release" that defendant repay government's cost of purchasing drugs from defendant, including drugs from charges that were dismissed or never charged, reasoning that this payment is valid under supervised release statute's "catch-all provision," 18 U.S.C. § 3583(d), and not subject to VWPA).
Outline at V.D.2.

Violation of Supervised Release

Revocation for Drug Possession

U.S. v. Meeks, No. 93-1708 (2d Cir. June 2, 1994) (Kearse, J.) (Remanded: Defendant whose supervised release was revoked for drug possession should not have been sentenced under the mandatory provision of 18 U.S.C. § 3583(g) when his original offense occurred before that section's effective date (Dec. 31, 1988): "[A]ny provision for punishment for a violation of supervised release is an increased punishment for the underlying offense. Thus, where the underlying offense was committed prior to the effective date of § 3583(g), application of that section violates the Ex Post Facto Clause.").
Outline at VII.B.2.

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General Application Principles

RELEVANT CONDUCT—DOUBLE JEOPARDY

Fifth Circuit holds defendant may be tried for offense that was used as relevant conduct in prior sentencing. Defendant was part of a conspiracy that attempted to import 591 kilograms of cocaine in Aug. 1990. He was not arrested then, but was arrested later for the conspiracy's Feb. 1991 possession of 375 pounds of marijuana with intent to distribute. When defendant was sentenced for the marijuana offense the cocaine was included as relevant conduct, increasing his guideline range from 63–78 months to 292–365 months, but he was sentenced to 144 months after a § 5K1.1 departure. Defendant was then indicted for the cocaine offense, but the district court dismissed the indictment, holding that punishment for that offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment. *See also U.S. v. Koonce*, 945 F.2d 1145, 1149–54 (10th Cir. 1991) (double jeopardy violated by punishing same conduct that was previously included as relevant conduct); *U.S. v. McCormick*, 992 F.2d 437, 439–41 (2d Cir. 1993) (following *Koonce*, affirmed dismissal of charges).

The appellate court remanded, finding that Congress had authorized multiple punishments through the Guidelines. Section 5G1.3(b) (added after the *Koonce* decision), requires concurrent sentences when a prior offense has "been fully taken into account in the determination of the offense level for the instant offense," and thus "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him again for all relevant conduct. . . . [W]e are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding." The court held there is "no basis for distinguishing the situation described by § 5G1.3(b)"—in which an earlier offense is fully taken into account in sentencing for the instant offense—from the reverse situation presented here.

The court also rejected defendant's claim that, because the § 5K1.1 motion from the first case will not apply to the second, it is unfair to allow the government to seek what will actually be a longer (although concurrent) sentence than if both offenses had been tried together and sentenced under § 3D1.2(d). *See* § 1B1.1(d) & (i) (indicating § 5K departures are considered after offenses have been grouped). If defendant is convicted, the court noted, "the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses," and he may be subject to a concurrent sentence of 292–365 months, depending on adjustments.

U.S. v. Wittie, 25 F.3d 250 (5th Cir. 1994). *See also U.S. v. Cruce*, 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: not a double jeopardy violation 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; Kansas and Texas conspiracies are separate offenses, and "we hold that Congress has not (in the Sentencing Guidelines) evinced the clear intent necessary to preclude punishment for a separate and distinct offense, even though the underlying conduct has been used previously to enhance another sentence. . . . [I]t chose only to *limit* punishments in the second proceeding [through § 5G1.3(b)]—not to preclude that proceeding and the consequent punishment altogether").
Outline at I.A.4.

Offense Conduct

LOSS

U.S. v. Goodchild, 25 F.3d 55 (1st Cir. 1994) (Affirmed: Inclusion of late fees and finance charges in credit card fraud loss is not prohibited by § 2F1.1, comment. (n.7). "We hold that in a case involving the fraudulent use of unauthorized credit cards, finance charges and late fees do not come within the meaning of the Commentary phrase 'interest the victim could have earned on such funds had the offense not occurred.' This phrase, we think, refers to opportunity cost interest. In a credit card case there is an agreement between the company and the cardholder to the effect that when payments are made late, or not at all, the cardholder is subject to late fees and finance charges. This is part of the price of using credit cards. The credit card company has a right to expect that such fees and charges will be paid. This is not 'interest that the victim could have earned on such funds had the offense not occurred.'"). *See also U.S. v. Henderson*, 19 F.3d 917, 928–29 (5th Cir. 1994) (Interest on fraudulently obtained loans was properly included: "Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction." Note 7 "sweeps too broadly and, if applied in this case would be inconsistent with the purpose of § 2F1.1."). *Outline* at II.D.

ESTIMATING DRUG QUANTITY

U.S. v. Hendrickson, No. 92-1386 (2d Cir. June 13, 1994) (Sotomayor, Dist. J.) (Remanded: Where defendant produced only 77 grams of heroin over a two-year period, his initial expression of intent to import 50–60 kilograms of heroin was not sufficient to show he intended and was able to produce that amount. Under former § 2D1.4, comment. (n.1), "where the

Government asserts that a defendant negotiated to produce a contested amount, we hold that the 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. . . . [W]e do not, at least in a conspiracy case, require sentencing courts to exclude from consideration only those drug amounts which the defendant neither intended to produce nor was reasonably capable of producing. Instead, we shift the sentencing guideline § 2D1.4 analysis back to its proper focus—the 'object of the conspiracy.' In other words, courts must consider the amount of drugs the conspirators agreed to produce. . . . [D]efendant's ability, which includes that of his coconspirators, to produce specific amounts of narcotics, is highly relevant in determining whether the conspirators agreed to produce these amounts." The court added that this analysis would apply to § 2D1.1, comment. (n.12).) (Winter, J., dissented.).
Outline at II.B.4.a.

U.S. v. Pion, 25 F.3d 18 (1st Cir. 1994) (Affirmed: 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 § 2D1.1, comment. (n.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." Also, defendant's "inability to produce the additional three kilograms was no impediment to its imposition of the ten-year minimum sentence mandated by statute. . . . Absent a statutory alternative, . . . we think 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)."). *But cf. 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.").
Outline at II.B.4.a.

Determining the Sentence

Restitution

U.S. v. Gibbens, 25 F.3d 28 (1st Cir. 1994) (Remanded: It was error to order restitution to cover loss to government involved in defendant's illegal purchase of food stamps from undercover agent at one quarter their face value. Although the government can be a "victim" under the Victim and Witness Protection Act, its application in this situation is unclear and "nothing in the legislative history of either the organic Act or it amendments indicates that losses incurred in government sting operations should be subject to recoupment under the VWPA." Thus the appellate court invoked the rule of lenity to hold that "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.").
See *Outline* at V.D.2 and summary of *Meacham* in 6 *GSU* #15.

Adjustments

Obstruction—Reckless Endangerment

U.S. v. Young, No. 93-50186 (9th Cir. June 7, 1994) (Hug, J.) (Remanded: Reckless endangerment enhancements for defendants who did not drive during high-speed chase were improper without specific findings that, pursuant to § 3C1.2, comment. (n.5), defendants "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the driver's reckless conduct. "[T]he government must establish that the defendants did more than just willfully participate in the getaway chase. It must prove that each defendant was responsible for or brought about the driver's conduct in some way. 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. . . . Thus, enhancement under section 3C1.2 requires the district court to engage in a fact-specific inquiry.").
Outline at III.C.3.

Role in the Offense

U.S. v. Smaw, 22 F.3d 330 (D.C. Cir. 1994) (Remanded: A "GS-7 time and attendance clerk" did not occupy a position of trust within the meaning of § 3B1.3's amended commentary. Although defendant 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," as is now required under Application Note 1. Although defendant was sentenced before Nov. 1, 1993, the amended Note should be applied because it is clarifying, rather than substantive.).
Outline at III.B.8.a.

Criminal History

Consolidated or Related Cases

U.S. v. Hallman, 23 F.3d 821 (3d Cir. 1994) (Remanded: Defendant's prior sentence for forgery should not have been counted in the criminal history score for the instant conviction for possession of stolen mail because the two offenses were related as "part of a single common scheme or plan," § 4A1.2(a)(2), comment. (n.3). "[A]ll of the stolen mail . . . was in the form of checks or credit cards and [the check in the prior forgery offense] was from a sequence of blank checks found within the stolen mail. Therefore, it is reasonable to infer that the mail was stolen to find checks or other instruments that could be converted to use through forgery." Noting that "intent of the defendant is a crucial part of the analysis," the court distinguished *U.S. v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992), because there the defendant had no prior intent to forge a money order he obtained in the robbery of a supermarket.).
Outline at IV.A.1.b.

Sentencing Procedure

Unlawfully Seized Evidence

U.S. v. Kim, 25 F.3d 1426 (9th Cir. 1994) (Affirmed: Drugs seized during an illegal search may be included as relevant conduct where the search was not carried out for the purpose of increasing defendant's offense level. The appellate court left open the question whether suppression "would be necessary and proper" if evidence was illegally obtained for the purpose of increasing a defendant's guideline sentence.).
Outline at IX.D.4.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Departures

CRIMINAL HISTORY

U.S. v. Hines, No. 92-30441 (9th Cir. June 20, 1994) (Trott, J.) (Remanded: It was proper to depart upward under §§ 5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state"—evidenced by serious and repeated threats of future violence—and the resulting "significant likelihood that he will commit additional serious crimes." The case is distinguishable from *U.S. v. Doering*, 909 F.2d 392 (9th Cir. 1990), because the court did not base the departure on defendant's need for psychiatric treatment but on the "extraordinary danger to the community" he represented. And, because it was an extraordinary circumstance under § 5K2.0, the prohibition in § 5H1.3 did not preclude departure. However, although the district court may depart by offense levels since the departure was based on both §§ 5K2.0 and 4A1.3, it must explain why it chose three levels instead of one or two.).
Outline generally at VI.A.3.a and VI.B.1.i.

MITIGATING CIRCUMSTANCES

U.S. v. Walker, No. 93-50621 (9th Cir. June 21, 1994) (Farris, J.) (Affirmed: Agreeing with reasoning of *U.S. v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (Guidelines do not authorize downward departure on basis of suicidal tendencies), and holding that "post-arrest emotional trauma, or, what [defendant] refers to as 'self-inflicted punishment,' does not constitute a valid basis for departure.").
Outline at VI.C.1.b and i.

U.S. v. Amor, 24 F.3d 432 (2d Cir. 1994) (Affirmed: Downward departure for duress, § 5K2.12, was permissible for defendant convicted of three counts related to an illegal weapon and one count of retaliating against a witness. Defendant obtained the weapon after damage to his car and threats related to a labor dispute. The retaliation count arose from his repeated threats against a coworker who had informed police that defendant had the illegal weapon. The retaliation count had the highest offense level and thus controlled the guideline range under § 3D1.2's grouping rules. The government argued "(a) that 'offense' as used in § 5K2.12 should be interpreted as referring only to the offense that controlled a defendant's offense level for his entire group of offenses, (b) that Amor's controlling offense was the retaliation offense, and (c) that such duress as existed related only to the firearm offenses, not to the retaliation offense," thus making departure improper. The appellate court held that this was "too narrow a view of what it means for an offense to be committed 'because of' duress for the purposes of § 5K2.12.... The evidence was sufficient to support the finding that Amor had received a clear threat of physical injury and substantial property damage from the unlawful actions of unidentified parties.... [T]he relationship between the gun acquisition and the threats was close enough that it was fair for the court to conclude that there was a causal nexus between the original duress and the eventual threats of retaliation.").
Outline at VI.C.1.g.

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Valentine, 21 F.3d 395 (11th Cir. 1994) (Remanded: Basing upward departure on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns v. U.S.*, 111 S. Ct. 2182 (1991). "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." Notice is required "to warn the defendant to marshal facts by which he may contest the evidence that ostensibly supports the proposed upward departure." Here, for example, the departure was "premised on several unsupported factual assumptions" that defendant was unaware of until the sentencing hearing. "If Valentine had been given notice that the district court was contemplating a departure on these 'facts,' he would have had notice and opportunity to argue against the court's mistaken factual conclusions; without such notice, this opportunity was lost.").
Outline at VI.G.

Offense Conduct

DRUG QUANTITY

U.S. v. de Velasquez, No. 93-1674 (2d Cir. June 22, 1994) (McLaughlin, J.) (Affirmed: For defendant who imported heroin by carrying it internally, it was proper to also include heroin hidden in her shoes that she claimed she did not know was there. "[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."). See also *U.S. v. Imariagbe*, 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; and, while "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," that is not the case here); U.S.S.G. § 1B1.3, comment. (n.2) ("defendant is accountable for all quantities of contraband with which he was directly involved," and reasonable foreseeability "does not apply to conduct that the defendant personally undertakes").
Outline at II.A.1.

CALCULATING WEIGHT OF DRUGS—MARIJUANA

U.S. v. Stevens, 25 F.3d 318 (6th Cir. 1994) (Remanded: It was error to calculate marijuana distributer's offense level by using the number of plants his supplier grew rather than the weight of the marijuana distributed. The "equivalency provision" in § 2D1.1(c) at n.*, which treats each plant as the equivalent of one kilogram of marijuana when more than

one hundred plants are involved, 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.").
Outline at II.B.2.

More Than Minimal Planning

U.S. v. Kim, 23 F.3d 513 (D.C. Cir. 1994) (Affirmed: Section 2B1.1(b)(5) 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." *Accord U.S. v. Bridges*, –F.3d–(10th Cir. Mar. 17, 1994) ("repeated" means "more than two") [6 *GSU* #16]; *U.S. v. Maciaga*, 965 F.2d 404, 407 (7th Cir. 1992) (dicta indicating same). However, the enhancement was proper here because defendant twice obtained falsely notarized documentation, which may be considered as "significant affirmative steps . . . taken to conceal" his false bank loan applications.).
Outline at II.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Quinones, 26 F.3d 213 (1st Cir. 1994) (Remanded: "[W]e hold that a sentencing court possesses the power to impose either concurrent or consecutive sentences in a multiple-count case. We also hold, however, that . . . a sentencing court's decision to abjure the standard concurrent sentence paradigm should be classified as, and must therefore meet the requirements of, a departure. It follows that a district court only possesses the power to deviate from the concurrent sentencing regime prescribed by section 5G1.2 if, and to the extent that, circumstances exist that warrant a departure.").
Outline at V.A.1.

Fines

U.S. v. Gomez, 24 F.3d 924 (7th Cir. 1994) (Affirmed: Although defendants "appeared to be penniless at the time of sentencing," fines could be imposed based on defendants' likely future wages in prison. Bureau of Prisons regulations "permit prisoners to keep half of their wages no matter what their obligations; the other half, however, is available for alimony, civil debts—and fines. 28 C.F.R. sec. 545.11(a)(3). Neither the text of the regulations nor any of defendants' arguments suggests that funds available to pay civil debts should be unavailable to pay criminal debts."). *Accord U.S. v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994) (indigent defendant "can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program").
Outline at V.E.1.

Adjustments

Obstruction of Justice

U.S. v. Johns, No. 92-1775 (2d Cir. June 13, 1994) (Jacobs, J.) (Remanded: During his presentence interview defendant denied involvement in any drug transactions other than those charged in his indictment. The district court held the denials were false and imposed a § 3C1.1 enhancement. "The government contends that these are not simply denials of guilt, but affirmative statements of materially false information. We conclude, however, that they do constitute 'denials of guilt' and therefore may not be deemed obstruction of justice . . . . There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. It is indisputable that [Application] Note 1 limits retribution for denials of guilt that are false; therefore, there can be no moral dimension to the matter of how that false denial may be framed. . . . Within the context of § 3C1.1, every denial of guilt will be materially false. Note 1 removes this sort of false statement from the ambit of the Guidelines provision. . . . The language of Note 1 is clear—absent 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.") (Altimari, J., dissented).
Outline at III.C.2.c and 5.

U.S. v. Vegas, No. 93-1375 (2d Cir. June 13, 1994) (Leval, J.) (Affirmed: Where jury apparently rejected defendant's "innocent explanation" by finding him guilty, the government argued that *U.S. v. Dunnigan*, 113 S.Ct. 1111 (1993), required the district court to make a finding as to whether defendant committed perjury and thereby merited a § 3C1.1 enhancement. The appellate court disagreed: "*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. On the contrary, that opinion clearly states that when the court wishes to impose the enhancement over the defendant's objection, the 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, under the perjury definition we have set out.' . . . *Dunnigan* does not suggest that the court make findings to support its decision against the enhancement.").
Outline at III.C.2.a and 5.

U.S. v. Woods, 24 F.3d 514 (3d Cir. 1994) (Remanded: Because § 3C1.1 "applies only when the defendant has made efforts to obstruct the investigation, prosecution, or sentencing of the offense of conviction," it 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. There was evidence defendant participated in that robbery, but he was not indicted for it and pled guilty to two other robberies. 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." The court added: "The result we reach is regrettable . . . [b]ut we are bound by the language of § 3C1.1 and its application notes.").
Outline at III.C.4.

Role in the Offense

U.S. v. Okoli, 20 F.3d 615 (5th Cir. 1994) (Affirmed: Nov. 1993 amendment clarifies that defendant need not personally lead five or more participants to receive § 3B1.1(a) enhancement; leading at least one of the five is sufficient. *See* § 3B1.1, comment. (n.2) ("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.").
Outline at III.B.2.c.

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