SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SIXTH CIRCUIT

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CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction[1]

United States v. Duerson, 25 F.3d 376 (6th Cir. 1994). The district court refused to depart downward where the defendant's crime, robbing a UPS dispatcher and armored courier, was a product of extensive planning, finding it was not a "spontaneous and seemingly thoughtless act." The courts of appeals do not agree over the definition of "single act of aberrant behavior." *See* USSG Ch. 1, Pt. A, Intro. 4(d). The Ninth Circuit defines "single act" broadly, *see United States v. Takai*, 941 F.2d 738 (9th Cir. 1991) (finding that a bribery scheme by members of an immigrant community constituted a single act of aberrant behavior because it was not for profit and one of the members acted "irrational"). The Fourth and Seventh Circuits define "single act" narrowly, finding that any defendant who plans an offense over a period of time or any defendant who commits the offense behavior more than once has not committed a "single act of aberrant behavior." *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991). The circuit court declined to address the "single act" issue, but upheld the district court's decision.

Part B General Application Principles

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002). Defendants were convicted and sentenced for using a telephone to facilitate a narcotics conspiracy. On appeal defendant-Carpenter argued that the district court erred when it held him responsible for the conspiracy's total distribution of fifteen kilograms of cocaine pursuant to the relevant conduct provision of USSG §1B1.3. The Sixth Circuit discussed Application Note 2 to §1B1.3 which sets out a two-pronged test that must be satisfied before a defendant is held accountable for the conduct of others: (1) the conduct must be in furtherance of the jointly undertaken criminal activity; and (2) the conduct must be reasonably foreseeable in connection with that criminal activity. The court then noted that the Second Circuit had stated that "in order to hold a defendant accountable for the acts of others, a district court must make two particularized findings: (1) that the acts were within the scope of the defendant's agreement; and (2) that they were foreseeable to the defendant." *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). In order to determine the scope of the defendant's agreement, "the district court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." *Studley*, 47 F.3d at 574. The Sixth Circuit followed the Second Circuit's interpretation of

[1] "Aberrant behavior" was amended Nov. 1, 2000, and was moved to §5K2020 (*see* Appendix C, Amendment 603).

§1B1.3 and held that this section required that the district court make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy. In the instant case, the court found that the district court made particularized findings with respect to the foreseeability prong. However, the record was void of any indication that the district court specifically addressed the first prong of *Studley* - whether the acts fo the co-conspirators were within the scope of defendant-Carpenter's agreement. Accordingly, the court vacated defendant-Carpenter's sentence because the district court had failed to make particularized findings with respect to the scope of defendant-Carpenter's agreement.

United States v. Meacham, 27 F.3d 214 (6th Cir. 1994), *cert. denied*, 519 U.S. 1017 (1996). The district court erred in attributing to the defendants all of the narcotics distributed through the conspiracy, without making individualized findings of the amount of drugs attributable to each defendant. The district court failed to make individualized findings concerning the scope of the conspiracy, the duration of the conspiracy, and the nature of each defendant's participation in it. The case was remanded for resentencing. *See also United States v. Peairs*, 2001 WL 549437 (6th Cir. May 24, 2001), finding that district court did not focus enough on defendant's individual involvement (unpublished).

United States v. Partington, 21 F.3d 714 (6th Cir. 1994). The circuit court affirmed an enhancement under USSG §2K2.1(a)(5) for the possession of a non-operational sawed-off rifle defendant used for parts in sentencing a defendant convicted of illegal firearm sales. The circuit court held that it was not necessary for the defendant to have actually attempted to sell the firearm nor to have kept it in operating condition for it to be considered as relevant conduct in sentencing him for illegal firearms dealings. The circuit court compared illegal firearm transactions to illegal drug transactions, stating that it was sufficient that the firearm was located where the defendant conducted some of his illegal firearms transactions and that it could have easily been made operable. *See United States v. Chalkias*, 971 F.2d 1206, 1216 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992).

United States v. Pierce, 17 F.3d 146 (6th Cir. 1994). The district court correctly considered the defendant's tax evasion activity that exceeded the statute of limitations. The Sixth Circuit concluded that "conduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct."

United States v. Ukomadu, 236 F.3d 333 (6th Cir. 2001). The defendant was convicted of possession of heroin with intent to distribute. The defendant objected to the drug quantity determination of 293.3 grams of heroin that was the basis for his sentence because, before the package of heroin was in defendant's possession, the customs officials had removed most of the heroin from the package, leaving behind approximately 6 grams in the package eventually possessed by the defendant. On appeal, the defendant argued that his resulting base offense level should be based on the six grams he actually possessed when the package was delivered, not the entire 293.3 grams. The Sixth Circuit disagreed and found that the defendant was personally involved as a participant who was the intended

recipient of the package and who indeed took delivery of the package intended to contain 293.3 grams of heroin. The court held that because the defendant met the requirements of USSG §1B1.3, Application Note 2, he was responsible for the entire 293.3 grams of heroin because it was "within the scope of the criminal activity he jointly undertook." *See also United States v. Swiney*, 203 F.3d 397, 406 (6th Cir. 2000) (held that the *Pinkerton*[2] principles, as articulated in the relevant conduct guideline, USSG §1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841(b)(1)(C)).

Acquitted Conduct

See United States v. Partington, 21 F.3d 714 (6th Cir. 1994), §2K2.1, p. 15.

§1B1.10 Retroactivity of Amended Guideline Range (Policy Statement)

United States v. Dullen, 15 F.3d 68 (6th Cir. 1994). The defendant was not eligible for retroactive application of an amendment to USSG §3E1.1, enacted only ten weeks after his sentence was imposed, which would have permitted an additional reduction in his offense level had it been in effect when he was sentenced. The circuit court held that this amendment may not be applied retroactively because it was not listed in USSG §1B1.10(d), which specifically identifies those amendments which were intended to be applied retroactively. *See United States v. Desouza*, 995 F.2d 323, 324 (1st Cir. 1993); *see also United States v. Dowty*, 996 F.2d 937 (8th Cir. 1993).

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

See United States v. Cseplo, 42 F.3d 360, 361 (6th Cir. 1994), §2T1.1, p. 17.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.2 Second Degree Murder

United States v. Milton, 27 F.3d 203 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). Although the district court should have specifically considered the elements of second degree murder when it used the cross-reference from USSG §2K2.1(c)(1), the sentence was affirmed because the appellate court, based on *de novo* review of the record, concluded that the defendant acted with "malice aforethought."

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[2] *Pinkerton v. United States*, 328 U.S. 640 (1946) (held that a co-conspirator may be vicariously liable for the substantive offense committed by a co-conspirator if the act is done "in furtherance of the conspiracy" and is "reasonably foreseen as a necessary or natural consequence of the unlawful agreement").

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Weekley, 130 F.3d 747 (6th Cir. 1997). The district court did not err in applying USSG §2A3.1(b)(1)–the use of force with a dangerous weapon enhancement–when the defendant brandished a razor while molesting a young boy.

§2A6.1 Threatening or Harassing Communications

United States v. Newell, 309 F.3d 396 (6th Cir. 2002). Defendant was convicted for transmitting threatening interstate communications in violation of 18 U.S.C. § 875(c). The district court applied a six-level enhancement to defendant's sentence pursuant to USSG §2A6.1(b)(1). On appeal, defendant argued that none of the factors relied on by the district court, viewed either alone or collectively, demonstrated a substantial and direct connection to his offense. The Sixth Circuit noted that the pivotal inquiry in determining the appropriateness of a §2A1.6(b)(1) enhancement is whether the defendant intended to carry out the threat, and the likelihood that he would actually do so. Consequently, essential to the determination of whether to apply the six-point enhancement was a finding that a nexus existed between the defendant's conduct and the threats that form the basis of the indictment. The court held that defendant's purchase and possession of a .32 caliber handgun in close temporal proximity to the making of the threats constituted conduct that sufficiently supported a six-level enhancement under §2A6.1(b)(1).

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States[3]

§2B1.2 Receiving, Transporting, Transferring, Transmitting or Possessing Stolen Property (Deleted by consolidation with §2B1.1, effective November 1, 1993)

United States v. Warshawsky, 20 F.3d 204 (6th Cir. 1994). In considering a question of first impression in the circuit, the circuit court addressed the interpretation of "in the business of receiving and selling stolen property," USSG §2B1.2(b)(4)(A), and endorsed the tests set forth in *United States v. Esquival*, 919 F.2d 957, 959 (5th Cir. 1990), and *United States v. Braslawsky*, 913 F.2d 466,

[3]Effective January 25, 2003, the Commission, in response to a congressional directive in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, made several modifications to §2B1.1 pertaining to serious fraud offenses involving a substantial number of victims and their solvency or financial security, destruction of evidence, and officers and directors of publicly traded companies who commit fraud offenses. *See* USSG App. C, Amendment 647. Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, Amendment 617.

468 (7th Cir. 1990). Sentencing courts should examine "the defendant's operation to determine: (1) if stolen property was bought and sold, and (2) if stolen property transactions encouraged others to commit property crimes."

§2B3.1 Robbery

United States v. Moerman, 233 F.3d 379 (6th Cir. 2000). The defendant pled guilty to three counts of armed bank robbery. In each of the robberies the defendant's actions or statements did not directly threaten the tellers or the customers with the use of the firearm if they did not comply with the defendant's demands. On appeal, the defendant argued that the six-level enhancement for "otherwise using" the firearm under USSG §2B3.1 did not apply to his case because he only "brandished" the firearm and therefore should have received only a five-level enhancement on each of the two counts. The Sixth Circuit agreed. In one bank robbery, the defendant pointed the firearm in a threatening manner. In another bank robbery the defendant moved a customer aside with the barrel of the firearm without an accompanying threatening statement. The court held that the conduct of the defendant did not go beyond brandishing the weapon and reversed and remanded the case to recalculate the sentence using the five-level increase for brandishing the weapon.

United States v. Smith, 320 F.3d 647 (6th Cir. 2003). Defendants were convicted and sentenced for conspiracy to commit bank robbery and bank extortions. On appeal, one of the defendants claimed that the district court violated his due process rights when it applied a four-level increase to his base sentence pursuant to USSG §2B3.1(b)(4)(A) for abduction of the bank managers and a two-level increase under USSG §3A1.3[4] for physical restraint of a victim. More specifically, defendant argued that the district court engaged in impermissible "double counting" by penalizing him twice for restraining the bank managers and their families. The Sixth Circuit stated that in most circumstances where a victim is abducted, the limiting provision of §3A1.3 prevented the sentencing court from applying enhancements under both §§2B3.1(b)(4)(A) and 3A1.3 since restraint often occurred as part of an abduction. However, given the unique circumstances of the instant case, the court was not convinced that applying both enhancements resulted in impermissible double-counting. Nor did the court believe that the limiting provision of §3A1.3 contemplated a situation where different victims were both restrained and abducted. The court noted that defendant effectively abducted the bank manager when he forced her to drive to the bank; the other members of the bank manager's family were restrained at a different location. Therefore, in applying both enhancements, the district court penalized separate acts of violence directed toward different individuals rather than the same aspect of defendant's conduct. Accordingly, the district court's sentence was affirmed.

United States v. Winbush, 296 F.3d 442 (6th Cir. 2002). Defendant pled guilty to robbing two banks. During each robbery, defendant presented a note to the teller which read, "This is a hold up I have a gun." Defendant did not exhibit a gun or make any oral statements during either bank

[4]Throughout the opinion, the Sixth Circuit mistakenly referred to USSG §3A1.2 instead of §3A1.3. The correct section was inserted into the summary of this opinion.

robbery. At the sentencing, the district court enhanced defendant's sentence by two-levels under USSG §2B3.1(b)(2)(F) finding the statement quoted constituted a threat of death. On appeal defendant argued that merely advising the victim that one is armed, unaccompanied by any words, actions, or gestures of a threatening nature was insufficient to establish a "threat of death." Joining the Third and Seventh Circuit, the Sixth Circuit held that a robber's note saying "I have a gun" constituted a threat of death under §2B3.1(b)(2)(F) warranting a two-level enhancement. *See United States v. Figueroa,* 105 F.3d 874, 880 (3d Cir. 1997); *United States v. Carbaugh,* 141 F.3d 791 (7th Cir.), *cert. denied,* 525 U.S. 977 (1998).

§2B5.1 Offenses Involving Counterfeit Bearer Obligations on the United States

United States v. Hover, 293 F.3d 930 (6th Cir. 2002). Defendant argued that the district court improperly increased the offense level base on the assertion that part of the offense was committed outside the United States. In support of his argument, defendant maintained that evidence offered at trial and sentencing was insufficient to establish that he had knowledge of the origin of the counterfeit currency. The Sixth Circuit noted that the plain language of USSG §2B5.1(b)(5) did not require defendant to possess express knowledge of any acts occurring outside the United States. Instead this section provided for a two-level enhancement based solely on the fact that "any part" of the act occurred outside the country. There was no basis for a knowledge requirement to be read into §2B5.1(b)(5). The court held that defendant's argument was without merit and affirmed the district court.

Part D Offenses Involving Drugs

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

United States v. Cochran, 14 F.3d 1128 (6th Cir. 1994). The defendant was convicted for conspiracy to possess methamphetamine, with intent to distribute. He appealed the two-level increase added to his sentence pursuant to USSG §2D1.1(b) for possession of a weapon during a drug offense. The defendant claimed that because he believed his co-conspirator was a "small time" drug dealer who was not known to carry a gun, it was not reasonably foreseeable to the defendant that his co-conspirator would have a gun with him during the drug buy. The circuit court reversed the firearms enhancement. Possession of a gun by one co-conspirator is attributable to another co-conspirator if such possession was reasonably foreseeable. *See United States v. Williams*, 894 F.2d 208, 211-212 (6th Cir. 1990). The test of reasonable foreseeability is an objective one. *See United States v. Chalkias*, 971 F.2d 1206 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992). However, constructive possession can not be established by "mere presence on the scene plus association with illegal possessors." *See United States v. Birmley*, 529 F.2d 103, 107 (6th Cir. 1976). At a minimum, there must be "objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his co-conspirator would be armed." In this case there was no such evidence.

United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993). Each defendant in a drug conspiracy is responsible, for purposes of determining whether any statutory mandatory minimum penalty applies, only for the drug amount which was reasonably foreseeable to him within the scope of his agreement. Stated another way, each drug conspiracy defendant is not automatically responsible for all drugs moved by the conspiracy in which he was involved.

United States v. Layne, 324 F.3d 464 (6th Cir. 2003). Defendants were convicted of conspiracy to manufacture methamphetamine with the intent to distribute the same. On appeal, defendants, without citation to case law, challenged the constitutionality of USSG §2D1.1(b)(6)(A) under the Fifth Amendment's Due Process Clause and the Eighth Amendment. More specifically, defendants argued that §2D1.1(b)(6)(A) created disparate sentencing results by increasing the offense level of a less culpable defendant many more levels than it increased the offense level of a defendant involved in a more serious offense, without considering evidence of mitigating circumstances. The Sixth Circuit noted that the disparate impact of a sentencing factor would violate the Due Process Clause only where the applicable statute appeared to have been tailored to permit the finding of that particular factor "to be a tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). In other words, the disparate sentencing impact resulting from the district court's finding that the subject laboratory created a substantial risk of harm to human life would violate due process only if §2D1.1(b)(6)(A) permitted this finding to decidedly overshadow the underlying offense. Defendants were each sentenced to serve eighty-seven months in prison. These penalties were well below the applicable 20-year statutory maximum. The court noted that although this suggested that §2D1.1(b)(6)(A) did not violate the Due Process Clause, the Supreme Court had acknowledged that there was a "divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *United States v. Watts*, 519 U.S. 148, 156 (1997). The Sixth Circuit noted that defendants' argument that the district court had applied the wrong standard because it assessed whether there was evidence of a substantial risk of harm to human life by a preponderance of the evidence, rather than by clear and convincing evidence, was without merit because the district court had applied the higher standard. Defendant Layne then argued that §2D1.1(b)(6)(A) violated the Eighth Amendment's prohibition against cruel and unusual punishment to the extent that its application resulted in disproportionate sentences. The court noted again that defendant Layne's sentence was well below the 20-year statutory maximum. The court stated that only an extreme disparity between crime and sentence offended the Eighth Amendment. *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). Therefore, the court looked to whether a sentence was "extreme" and "grossly disproportionate" to assess whether the Eighth Amendment had been violated. *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000). The court noted that defendant-Layne's sentence could not be said to be either "extreme" or "grossly disproportionate" to the crime that she committed. However, defendant Layne complained of the lack of proportionality–not between the crime she committed and the punishment she received, but between herself and others convicted of the same crime. Defendant Layne claimed the Eighth Amendment was violated when one person received only a three-level increase in their sentence as a result of §2D1.1(b)(6)(A) but others received a nine-level increase as a result of the application of the same provision. The court noted that the Supreme Court had concluded

that comparative proportionality was not mandated by the Constitution. *Pulley v. Harris,* 465 U.S. 37, 43-45 (1984). Accordingly, the court was not persuaded that defendant Layne's sentence ran afoul of the Eighth Amendment merely because it was disproportionate to the sentences received by others who committed the same or similar crimes. Consequently, the district court was affirmed.

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000). Each defendant is accountable for all quantities of drugs with which he is directly involved and, in the case of jointly undertaken criminal activity (conspiracies), all reasonably foreseeable drug quantities within the scope of his agreement.

United States v. Peters, 15 F.3d 540 (6th Cir.), *cert. denied,* 513 U.S. 883 (1994). The defendants were convicted of conspiracy to possess crack cocaine with intent to distribute and possession with intent to distribute crack cocaine. The district court imposed a sentence under USSG §2D1 but found that a two-level increase for the possession of a firearm in connection with the drug offense was not warranted. The United States appealed, contending that the pistol found at the scene of the arrest warranted the increase. The circuit court upheld the sentence, finding that the district court's findings were reasonable in light of the "due deference" that must be given to a lower court's factual findings.

United States v. Powers, 194 F.3d 700 (6th Cir. 1999). When a defendant in an LSD case is entitled to be sentenced under the "safety valve" established by 18 U.S.C. § 3553(f), statutory directions as to how the amount of the LSD should be determined do not control. Rather, in such cases, the LSD is to be weighed under the formula expressed in Amendment 488 to the federal sentencing guidelines. The guideline method is used because qualifications as a "safety valve" defendant removes that defendant from the scope of statutory (mandatory minimum) penalties.

United States v. Sonagere, 30 F.3d 51 (6th Cir.), *cert. denied*, 513 U.S. 1009 (1994). The defendant asserted that the provisions of USSG §2D1.1 are unconstitutional. Under that section, the district court held the defendant responsible for the manufacture of 219 kilograms of marihuana. On appeal, the defendant argued that USSG §2D1.1(c) is "irrational" and violated his right to substantive due process. The Sixth Circuit disagreed. In a brief opinion on the sentencing issue, the Sixth Circuit stated that it had "expressly rejected" the precise argument made by the defendant in *United States v. Holmes*, 961 F.2d 599, 601-03 (6th Cir.), *cert. denied*, 506 U.S. 881 (1992).

United States v. Stevens, 25 F.3d 318 (6th Cir. 1994). The district court erred in calculating the amount of marijuana for which the defendant was responsible. The sentencing judge based the calculation on the number of marijuana plants the defendant's supplier grew, instead of on the weight of the marijuana the two conspired to possess. The circuit court joined the Second and Eleventh Circuits in holding that the marijuana equivalency provision applies only to plants that have not been harvested; offense levels for dry leaf marijuana are to be determined "based upon the actual weight of the [drug] and not based upon the number of plants from which the marijuana was derived." *See United States v. Blume,* 967 F.2d 45 (2d Cir. 1992); *United States v. Osburn*, 955 F.2d 1500 (11th Cir.), *cert. denied*, 506 U.S. 878 (1992); *but see United States v. Haynes*, 969 F.2d 569 (7th Cir. 1992) (the

equivalency provision applies to dry leaf marijuana when it is known how many plants were used to make the marijuana). The circuit court determined that its decision was consistent with earlier versions of the guidelines which calculated offense levels for harvested marijuana based on weight, not on the number of plants which yielded that amount of marijuana. Its decision is consistent also with section 6479 of the Anti-Drug Abuse Act of 1988 in which Congress, when drafting the mandatory minimum provisions, distinguished between marijuana plants and dry leaf marijuana.

United States v. Vincent, 20 F.3d 229 (6th Cir. 1994), *habeas corpus granted*, 1996 WL 495575 (W.D. Mich. Jul. 3, 1996) (No. 96-CV-50). The district court did not err by failing to exclude the weight of the marijuana stalks and seeds in calculating the weight of the marijuana. Section 2D1.1 provides that "mixture or substance" does not include portions of a drug mixture that have to be separated from the controlled substance before the controlled substance can be used. The stalks and seeds of a marijuana plant contain amounts of a controlled substance and need not be separated before the controlled substance can be used. However, the district court erred in concluding that the defendant's conviction for possession of a firearm by an unlawful user of a controlled substance was not an underlying offense to defendant's unlawful use or carrying of a firearm during and in relation to a drug trafficking offense. In order to avoid double counting, USSG §2K2.4 requires that the district court not apply any specific offense characteristic for firearm discharge, use, or possession with respect to the defendant's sentence when a sentence is imposed in conjunction with a sentence for the underlying offense. This case is distinguishable from *United States v. Sanders*, 982 F.2d 4 (1st. Cir. 1992), *cert. denied*, 508 U.S. 963 (1993), which considered violations of 18 U.S.C. §§ 922(g) and 924(c), where "there was no double counting under USSG §2K2.4 because the defendant's base offense level was not increased by a specific offense characteristic. In this case, however the district court increased the defendant's base offense level by specific offense characteristics."

United States v. Ward, 190 F.3d 483 (6th Cir. 1999). Even drug quantities involved in an acquitted count can be counted for sentencing purposes when the defendant's involvement with the drugs is proven by a preponderance of the evidence.

Part F Offenses Involving Fraud or Deceit[5]

§2F1.1 Fraud and Deceit[6]

United States v. Flowers, 55 F.3d 218 (6th Cir.), *cert. denied*, 516 U.S. 901 (1995). In its first published opinion addressing the issue, the appellate court held that the amount of loss in a check kiting case is determined at the time the crime "was detected, rather than at sentencing, and that defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by

[5]Guideline 2F1.1 was deleted by consolidation with guideline 2B1.1 effective Nov. 1, 2001 (*see* Appendix C, Amendment 617).

[6]Effective November 1, 2001, the Commission deleted §2F1.1 (Offenses Involving Fraud and Deceit) by consolidation with §2B1.1. *See* USSG, App. C, Amendment 617.

subsequently making voluntary restitution." The fact that the check kiters made restitution to the bank prior to sentencing cannot alter the "fact of loss." The sentences were affirmed.

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

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

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. The defendant was convicted of falsifying bank records and misapplying bank funds, 18 U.S.C. §§ 656 and 1005, based on fraudulent loans made to third parties for the benefit of himself. The defendant asserts that the loss calculation was incorrect because the bank's loss was subsequently reduced when a third party paid the balance due on two of

the loans. The circuit court stated that amount of loss is typically determined at the time the crime is discovered rather than at sentencing. The circuit court noted, however, that loss does not include amounts recoverable by "foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies . . . ." The circuit court found that the subsequent repayment was not an immediate repayment as it was made over a year after the fraud was unearthed. The circuit court held that although this repayment reduced the amount of the bank's final loss, the "loss" at the time the crime was discovered is not lowered because, at that time, the bank did not have an expectation of "immediate recovery" from the actual debtor or by legal means. Lastly, while a reduction in the amount of loss is appropriate for amounts that a bank has or may expect to recover from assets originally pledged as collateral, the loans in question were not secured. Consequently, the circuit court held that the calculation of amount of loss was correct in this case.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[7]

United States v. Gawthrop, 310 F.3d 405 (6th Cir. 2002). Defendant was convicted on one count of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2). On appeal defendant argued that the district court erred in applying a five-level enhancement under USSG §2G2.2(b)(4) because his 1988 conviction for sexually abusing his daughter was too attenuated from the 1999 sexual abuse of his granddaughter to form a "pattern of activity" under §2G2.2(b)(4). More specifically, defendant claimed that there must be a sufficient temporal nexus between instances of abuse or exploitation to establish a pattern of such activity. In other words, the issue on appeal was whether the eleven-year span between these two events precluded each from being considered as a part of a pattern of such activity. The Sixth Circuit noted that the fact that defendant's 1988 conviction could not be considered as part of his criminal history under §4A1.2 was of no consequence. Nothing in §2G2.2(b)(4) required a temporal nexus between any instances of sexual abuse or exploitation. Defendant had displayed a repugnant proclivity for abusing females in his family. The abuse of his daughter and granddaughter–even though the events occurred eleven years apart–clearly constituted a "pattern of activity involving the sexual exploitation of a minor" sufficient to justify the district court's adjustment to his offense level.

[7]Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, provided enhancements to the sentencing guidelines for sexual conduct with a minor. *See* USSG App. C, Amendment 649.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice[8]

United States v. Kimble, 305 F.3d 480 (6th Cir. 2002). The issue on appeal was whether the district court properly applied the guidelines §2X3.1 (Accessory After the Fact) cross-reference provision in §2J1.2(c)(1), where defendant pleaded guilty to obstructing justice under 18 U.S.C. § 401 by refusing to testify at a criminal trial. The Sixth Circuit noted that when sentencing a defendant under §2J1.2 the district court was required to calculate the base offense level for the offense of conviction under both the "obstruction of justice" guideline, §2J1.2, and the "accessory after the fact" guideline, §2X3.1, and apply the greater of the two sentences. *See United States v. Shabazz*, 263 F.3d 603, 608 (6th Cir. 2001). It was not necessary for the government to prove facts sufficient to establish a defendant's guilt as an "accessory after the fact" in order to impose a sentence under §2X3.1; the section merely served as a tool to calculate the base offense level for particularly serious obstruction offenses. *See United States v. Russell*, 234 F.3d 404, 410 (8th Cir. 2000); *United States v. Brenson*, 104 F.3d 1267, 1285 (11th Cir. 1997). Defendant's claim that he was not actually an accessory after the fact to the homicide at issue was not relevant, as it did not matter whether the defendant was actually guilty of the crime referenced in §2X3.1 in order for the higher sentence recommendation to be imposed; application of the §2X3.1 cross-reference provision was mandatory. The district court's sentence was affirmed.

United States v. Levy, 250 F.3d 1015 (6th Cir.), *cert. denied*, 534 U.S. 941 (2001). The defendant pled guilty to solicitation to commit a crime of violence in violation of 18 U.S.C. § 373, retaliating against a witness, in violation of 18 U.S.C. § 1513, and being an accessory after the fact under 18 U.S.C. § 3. On appeal the defendant argued that the eight-level increase under USSG §2J1.2(b)(1) for the specific offense characteristic of causing physical injury to the witness constituted improper double counting as it was the conduct for which he was convicted and was considered in formulating his base offense level. He further argued that upward departures under USSG §§5K2.2 (Physical Injury) and 5K2.8 (Extreme Conduct) amounted to double counting because those provisions punished conduct taken into account in USSG §2J1.2(b)(1), and the conduct overlapped. The Sixth Circuit disagreed. The language of the statute, 18 U.S.C. § 1513, criminalizes retaliation against a witness that involves actual or *threatened* bodily injury. Because the base offense level applied to convictions under section 1513, regardless of whether bodily injury occurred, double counting did not occur because the eight-level increase under USSG §2J1.2(b)(1) did not take into account conduct that was already taken into account in setting the base offense level. Upward departures for use of a weapon, bodily injury, or significant property damage were encouraged under USSG §2J1.2(b)(1), Application Note 4. As a result, the departures would not be considered double counting. Section 2J1.2(b)(1) was applied because the offense caused physical injury, but USSG §5K2.2 directs the

[8] Effective January 25, 2003, the Commission, in response to a congressional directive contained in sections 805 and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, increased the base offense level and added a two-level enhancement to ensure deterrence and punishment of obstruction of justice offenses generally, especially in cases involving destruction or fabrication of documents or other physical evidence. *See* USSG, App. C, Amendment 647.

court to consider the "extent of the injury." No double-counting existed between USSG §§2J1.2(b)(1), 5K2.2, and 5K2.8 because §5K2.2 focused solely on the extent of the physical injury, and §5K2.8 focused on the depravity of the defendant's conduct.

United States v. Roche, 321 F.3d 607 (6th Cir. 2003). Defendant was convicted of bank robbery in an earlier proceeding and submitted three documents to support his request for a downward departure. The trial court imposed a lighter sentence, based in part upon the documents, and the documents were later shown to be false. Because of the false documents, defendant was charged with obstruction of justice, and the district court imposed an enhanced sentence for that conviction. Defendant argued that the false documents he submitted to the court for consideration in the sentencing procedure did not obstruct the investigation of the bank robbery case because "the case was for all intents and purposes ended." The court of appeals stated that § 2J1.2(c) encompasses both the investigation and prosecution of a case. It found that the sentencing stage of defendant's bank robbery conviction continued to entail the prosecution of the offense. Accordingly, it affirmed the application of the enhancement under §2J1.2(c).

§2J1.7 Commission of Offense While on Release

United States v. Lanier, 201 F.3d 842 (6th Cir. 2000). The defendant, formerly a sole state Chancery Court judge, was convicted of deprivation of rights under the color of law, in violation of 18 U.S.C. § 242, for sexually assaulting several women in his judicial chambers. During en banc proceedings, the defendant was released on his own recognizance and his conviction was set aside for lack of any notice to the public that the governing statute included simple or sexual assault crimes within its coverage. On appeal, the U.S. Supreme Court vacated the en banc judgment and remanded the case to the Sixth Circuit at which point the court entered an order requiring the defendant to surrender to the U.S. Marshal of the Western District of Tennessee. After the defendant failed to appear on the date ordered, he was charged with failure to appear in violation of 18 U.S.C. § 3146. At sentencing, the district court applied the sentencing enhancement to the defendant's offenses pursuant to 18 U.S.C. § 3147 and a three-level increase to the defendant's offense level under USSG §2J1.7 for committing the offense while on release. On appeal, the defendant argued that the district court erred by applying these enhancements because the three-level enhancement set forth in these sections should not apply when the offense of conviction is failure to appear, an offense that is necessarily committed while on release. The Sixth Circuit disagreed. Citing *United States v. Benson*, 134 F.3d 787, 788-89 (6th Cir.), *cert denied*, 525 U.S. 932 (1998), the court concluded that "section 3147 clearly and unambiguously mandates that the courts impose additional consecutive sentences on persons convicted of crimes they commit while released . . . . " The enhancement of the defendant's sentence was affirmed and was not considered as constituting impermissible multiple punishments for the same crime.

Part K Offenses Involving Public Safety

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

United States v. Boumelhem, 339 F.3d 414 (6th Cir. 2003). Defendant was convicted of five violations of, and one count of conspiracy to violate 18 U.S.C. § 922(g) which prohibits the possession or shipment of firearms or ammunition by a person who has previously been convicted of a crime punishable by imprisonment for over one year. Defendant was at the same time convicted of one count of conspiracy to violate 18 U.S.C. § 922(e), which prohibits the delivery of firearms and ammunition to a common carrier for shipment in foreign commerce without written notice to the carrier in violation of 18 U.S.C. § 922(e). The district court assessed a four-point enhancement against defendant under USSG §2K2.1(b)(5) based on his possession of a firearm in connection with another felony offense - the conspiracy to deliver to any common carrier for shipment a firearm or ammunition without written notice to the carrier that such firearm or ammunition was being shipped. On appeal, relying on Application Note 18 of §2K2.1(b)(5), defendant objected to the enhancement of his sentence arguing that the conspiracy to ship or transport firearms and ammunition in foreign commerce was a "firearms trafficking offense" as that phrase was used in the application note. The Sixth Circuit agreed with defendant's argument. The court noted that conspiring to deliver firearms or ammunition for shipment to a common carrier in a manner that would violate 18 U.S.C. § 922(e) would clearly implicate an offense for firearms-related "commercial activity." There was no indication in the record that this was a situation, like that suggested in the application note, where firearms were possessed to facilitate the transport of other firearms, and even in that situation, the guidelines did not provide for enhancement under §2K2.1(b)(5). Defendant's sentence was vacated and the case was remanded to the district court for resentencing.

United States v. Cobb, 250 F.3d 346 (6th Cir.), *cert. denied*, 534 U.S. 925 (2001). The defendant pled guilty to disposing of a firearm to a convicted felon in violation of 18 U.S.C. § 922(d). Defendant had smuggled a pistol to her boyfriend while he was in jail with the belief that the weapon would be used to kill the person who had raped the defendant's mother. The defendant's boyfriend ended up using the pistol to shoot and kill a deputy while attempting to escape from custody. At sentencing, the district court applied the cross-reference under USSG §2K2.1(c)(1) which cross-references to USSG §2A1.1, the first degree murder guideline, and sentenced the defendant under USSG §2A1.1. On appeal, the defendant argued that USSG §2K2.1(b)(5) should have been applied instead because she did not have the "knowledge or intent" that the deputy would be killed but only had "reason to believe" that the firearm would be used in connection with another felony offense. The Sixth Circuit disagreed and affirmed the application of the cross-reference to USSG §2A1.1, under USSG §2K2.1(c)(1)(B), and found that if the defendant had the requisite state of mind with respect to that general offense and death resulted, then USSG §2K2.1(c)(1)(B) was applicable.

See United States v. Dalecke, 29 F.3d 1044, 1047 (6th Cir. 1994), §5K2.0, p. 25.

See United States v. Milton, 27 F.3d 203 (6th Cir. 1994), *cert. denied,* 513 U.S. 1085 (1995), §2A1.2, p. 3.

United States v. Mise, 240 F.3d 527 (6th Cir. 2001). The defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal the defendant argued that the district court erred in applying a four-level enhancement for possession or transfer with knowledge, intent, or reason to believe that the pipe bomb would be used or possessed in connection with another felony under USSG §2K2.1(b)(5). The Sixth Circuit affirmed the four-level enhancement and found that defendant knew of the plan to use the pipe bomb to injure another person and also testified himself that "a pipe bomb was a destructive device used to hurt people."

United States v. Partington, 21 F.3d 714 (6th Cir. 1994). The circuit court affirmed an enhancement under USSG §2K2.1(a)(5) for the possession of a non-operational sawed-off rifle defendant used for parts in sentencing a defendant convicted of illegal firearm sales. The circuit court held that it was not necessary for the defendant to have actually attempted to sell the firearm nor to have kept it in operating condition for it to be considered as relevant conduct in sentencing him for illegal firearms dealings. The circuit court compared illegal firearm transactions to illegal drug transactions, stating that it was sufficient that the firearm was located where the defendant conducted some of his illegal firearms transactions and that it could have easily been made operable. *See United States v. Chalkias*, 971 F.2d 1206, 1216 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992).

United States v. Raleigh, 278 F.3d 563 (6th Cir. 2002). Defendant pled guilty to violation of 18 U.S.C. § 922(g), felon in possession of a firearm, and violation of 18 U.S.C. § 922(j), possession of a stolen firearm. On appeal, defendant challenged the district court's application of the two-level stolen firearm enhancement to his base offense level under USSG §2K2.1(b)(4) as an impermissible "double-counting." Defendant argued that he not only was convicted for possession of a stolen firearm, in violation of § 922(j), but that the guideline also called for a two-level increase if the firearm in question was stolen, or had an altered or obliterated serial number. The Sixth Circuit noted that defendant's argument was foreclosed by the plain language of Application Note 12 to §2K2.1. In other words, the district court determined defendant's base offense level under subsection (a)(4), not (a)(7), and because the language of the application note required conviction under section 922(j) and a base level determination under subsection (a)(7), the exception contained in application note 12 did not apply to defendant's offense. The court also noted that in *United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000), it had discussed the effect of §2K2.1 and Application Note 12 and held that the Application Note 12 exception to the §2K2.1(b)(4) enhancement did not apply to a defendant who was convicted as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and whose base offense level was determined under §2K2.1(b)(4). *See also United States v. Brown*, 169 F.3d 89 (1st Cir. 1999); *United States v. Turnipseed,* 159 F.3d 383 (9th Cir. 1998). Accordingly, the district court did not err in determining a two-level enhancement; defendant's sentence was affirmed.

United States v. Wheeler, 330 F.3d 407 (6th Cir. 2003). Defendant pleaded guilty to being a felon in possession of a firearm. On appeal, he argued that the sentence imposed by the district court should be vacated because it resulted in "double counting." Defendant contended that the district court improperly used the same conduct–namely, his possession of firearms–first as the basis for sentencing him under §2K2.1, second as an enhancement to his base offense level under §2K2.1(a)(2), third as the basis for two criminal history points under §4A1.1(d), and finally as the basis for three additional criminal history points under §4A1.1(a). The court of appeals found no impermissible double counting. It stated that while violations of section 922(g)(1) are sentenced under §2K2.1, an enhancement under subsection 2K2.1(a)(2) focuses on defendant's history of drug offenses, a different aspect of defendant's conduct than gun possession. Similarly, it noted, §4A1.1(d) focuses not on gun possession alone, but on the fact that defendant violated section 922(g)(1) while under another criminal justice sentence. Finally, it concluded that the prior drug convictions for which defendant received criminal history points under §4A1.1 obviously included conduct other than gun possession. The court stated that although some of these points are based on the same drug convictions as defendant's enhancement under §2K2.1(a)(2), the guidelines expressly provide that "prior felony conviction(s) resulting in an increased base offense level under subsections . . . (a)(2) . . . are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A." USSG. §2K2.1, comment. (n.15). Each of the guidelines applied by the district court either emphasized different aspects of defendant's conduct than gun possession alone or involves double-counting expressly authorized by the Sentencing Commission.

Part P Offenses Involving Prisons and Corrections Facilities

§2P1.2 Providing or Possessing Contraband in Prison

United States v. Gregory, 315 F.3d 637 (6th Cir. 2003). Defendants appealed their convictions and sentences arising out of the transfer of contraband from defendant Lockhart to defendant Gregory while he was in prison. A number of issues were raised on appeal, one of them being the application of the cross-reference in USSG §2P1.2(c)(1). Defendant Lockhart argued that her actions constituted a transfer but not a distribution because the government presented no evidence as to what defendant Gregory intended to do with the drugs. The Sixth Circuit held that for the purposes of this section a transfer constituted distribution. It was irrelevant what purpose defendant Gregory may have had for the drugs. Defendant Lockhart did not simply possess the contraband but distributed it to defendant Gregory. Defendant Lockhart's sentence was affirmed.

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

United States v. Rutana, 18 F.3d 363 (6th Cir. 1994). The district court erred in declining to increase the defendant's offense level for the disruption of a public utility. The circuit court disagreed

with the district court's determination that the defendant merely "impact[ed]," but did not disrupt, a public utility when he knowingly participated in discharging pollutants into a public sewer system. The circuit court, noting that "the expenditure of substantial sums of money" was not required to prove that a disruption of a public utility occurred, held that the defendant's discharges constituted a "disruption" and not an "impact" because they caused the waste water treatment plant responsible for treating the contaminated sewer line to violate its clean water permit.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). The district court did not err in calculating "tax loss" by aggregating a corporate tax loss of 34 percent of the unreported corporate income (corporate tax rate) and an individual tax loss of 28 percent of unreported individual income (individual tax rate), where the defendant was convicted of willfully failing to report income on his wholly owned corporation's federal income tax return and of willfully attempting to evade individual income taxes by preparing and signing a return that failed to report the receipt of sums skimmed from the corporation. The defendant argued that the district court should followed the method endorsed by the Seventh Circuit in *United States v. Harvey*, 996 F.2d 919 (7th Cir. 1993), by reducing his unreported individual income by the amount of additional tax that his corporation would presumably have paid if its return had been accurate. The circuit court rejected this argument, reasoning that the method used by the district court met the guidelines' accuracy requirements. Moreover, the approach used in Harvey was not appropriate in this case because Harvey assumes that the defendant committed "a single crime, [that] causes both corporate and personal income to be understated," and because it assumes that the funds diverted to the defendant's personal use constitute a "disguised dividend," the size of which would have been reduced by the amount of the corporate tax if the "dividend" had been paid openly. The circuit court found that neither of these assumptions applied to the defendant's case, concluding that there was no justification for proceeding as if only one crime had been committed.

Part X Other Offenses

§2X1.1 Conspiracies, Attempts, Solicitations

United States v. DeSantis, 237 F.3d 607 (6th Cir. 2001). The district court erred in granting a three-level reduction for an attempted bankruptcy fraud, pursuant to USSG §2X1.1(b)(1). The defendant pled guilty to crimes arising out of a scheme to execute and conceal a bankruptcy fraud. The defendant filed a petition for bankruptcy that had failed to disclose almost one million dollars in assets. The trustee discovered the fraud, and no actual loss resulted. The district court granted the defendant a three-level reduction under USSG §2X1.1(b)(1) for an attempted offense, and the government appealed. The appellate court reversed, concluding that because the defendant's bankruptcy fraud was completed upon the filing of the petition, the act was completed. The appellate court rejected the district court's reliance on *United States v. Watkins*, 994 F.2d 1192 (6th Cir. 1992). The appellate

court noted that whether a USSG §2X1.1 reduction for mere attempts applies is controlled by whether "the defendant completed all acts the defendant believed necessary for successful completion of the substantive offense . . ." USSG §2X1.1(b)(1). The substantive offense was the fraud itself, not the deprivation of a particular sum. Once the defendant filed the petition, the substantive offense was completed.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Curly, 167 F.3d 316 (6th Cir. 1999). The district court did not err in applying the vulnerable victim enhancement. The defendant contended that the government had failed to show that he targeted older victims due to their vulnerability. The circuit court found that the targeting requirement was no longer required and that the defendant's claim that he did not know the victim's vulnerability was suspect. The enhancement applies if the defendant knew or should have known that the victim's unusually vulnerable.

§3A1.2 Official Victim

United States v. Hudspeth, 208 F.3d 537 (6th Cir.), *cert. denied*, 531 U.S. 884 (2000). The defendant was convicted of threatening a state prosecutor by mailing threatening communications in violation of 18 U.S.C. § 876. On appeal, the defendant claimed that the three-level enhancement added to the defendant's sentence pursuant to USSG §3A1.2(a) should not have been applied because the term "government officer or employee" refers only to federal employees, not to state or local employees such as the state prosecutor in this case. The defendant further argued that 18 U.S.C. § 1114, to which USSG §3A1.2(a) referred prior to amendment in 1992, criminalized only the killing of these officers "on account of the performance of their official duties," and not because of their "official position," and was amended to expand protection only to federal employees from retaliatory conduct similarly conduct similarly based on status, not to expand protection to state and local employees. The Sixth Circuit disagreed and held that criminal sentences may be enhanced pursuant to USSG §3A1.2(a) if the underlying conduct was motivated by the victim's status as a state or local government employee.

§3A1.3 Restraint of Victim

See United States v. Smith, 320 F.3d 647 (6th Cir. 2003), §2B3.1, p. 5.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Anthony, 280 F.3d 694 (6th Cir. 2002). The appellate court held that a four-level enhancement under §3B1.1 was improper because the requisite number of participants were not involved, and improper factors were used in determining that the criminal activity was extensive. Defendant engaged in a scheme to remove the federally required child-proof safety mechanisms from disposable cigarette lighters which his company sold, and orchestrated an effort to conceal his conduct from a federal investigator. Defendant contended that the sentence enhancement was not warranted, since his criminal activity did not involve five or more participants and was not otherwise extensive. First the court found that the participants in defendant's criminal activity included only those who knowingly assisted in misleading the investigator, rather than those who participated only in the non-criminal removal of the safety mechanisms. Next the court addressed what factors a sentencing court may consider in determining whether an activity was "otherwise extensive" under the guideline, an issue, it noted, that has caused a split in the circuit courts. The court stated that it agrees with the Second Circuit's test that the "otherwise extensive" language in §3B1.1(a) is not a license to engage in a sweeping analysis of the offense for any factor that might possibly support a finding of extensiveness, but authorizes a four-level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants. *See United States v. Carrozzella*, 105 F.3d 796, 803 (2d Cir. 1997). It went on to say that the purpose of the *Carrozzella* test is to enable a court to identify an individual whose contribution was so essential to the criminal objective that he should be counted as a "participant" under § 3B1.1(a) irrespective of his true criminal intent. To this end, *Carrozzella* announced a three-factor test that examines: (i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; and (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme. *Carrozzella*, 105 F.3d at 804. Based on this numerosity test the court of appeals concluded that the district court's finding that the scheme was "extensive" rested upon a consideration of impermissible factors. It noted that while it does not disagree that the cover-up scheme was multi-faceted or even "extensive" as that word is commonly understood, §3B1.1 is not so much about extensiveness in a colloquial sense as about the size of the organization in terms of the persons involved that a defendant organized or led. Thus, it remanded the case to the district court.

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997). The district court erred in applying a two-level enhancement to the defendant's sentence under USSG §3B1.1(c) for being an organizer, leader, manager, or supervisor of a criminal activity. The defendant argued that she did not exert control over the other participants in the criminal enterprise. Prior to November 1, 1993, the enhancement was warranted under USSG §3B1.1(c), where the government was able to establish, by a preponderance of the evidence, that the defendant exercised a managerial, leadership, organizational or supervisory role in a criminal enterprise and four or less individuals were involved. The guideline did not require that these other participants be subordinate to the defendant, just that the activity involved five or more people. Application Note 2 was added to clarify confusion amongst circuit courts as to the operation of the guideline. Prior to the amendment, some circuits had concluded that a defendant's control over the property and assets warranted a USSG §3B1.1 enhancement. *United States v. Chambers*, 985 F.2d 1263 (4th Cir.), *cert. denied*, 510 U.S. 834 (1993). Other circuits only applied

the enhancement where the defendant exercised full control over at least one participant. *United States v. Fuentes*, 954 F.2d 151 (3d Cir.), *cert. denied*, 504 U.S. 977 (1992). Under the amended provision, the method by which the defendant's sentence was increased depended on whether the defendant exercised control over an individual or over a piece of tangible property. If the defendant exercised control over a person, then a sentence enhancement was required. As an issue of first impression in the Sixth Circuit, the appellate court looked to several other examples in which the defendant, by virtue of the timing of the defendant's sentence, was entitled to the clarification set out in Application Note 2. These cases did not support the government's contention that a defendant's control over a scheme, rather than over a participant in a scheme, requires enhancement of a sentence under USSG §3B1.1. In the instant case, the defendant's sentence was imposed subsequent to the effective date of the Application Note 2. Accordingly, the amended commentary clarifying the method to be used to increase a sentence when a defendant exercises control over a participant applies to her sentence. The appellate court concluded that the defendant did not engage in such a leadership role and, therefore, the enhancement was unwarranted.

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

§3B1.2 Mitigating Role

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002). Defendants were convicted and sentenced for use of a telephone to facilitate a narcotics conspiracy. On appeal, defendant Campbell argued that the district court erred when it refused to grant him a downward adjustment pursuant to the mitigating role under USSG §3B1.2. The Sixth Circuit noted that a defendant may be a minimal or minor participant in relation to the scope of the conspiracy as a whole, but he is not entitled to a mitigating role reduction if he is held accountable only for the quantities of drugs attributable to him. *See United States v. Walton*, 908 F.2d 1289, 1303 (6th Cir.), *cert. denied*, 498 U.S. 990 (1990); *United States v. Welch*, 97 F.3d 142, 152 (6th Cir. 1996). In the instant case, the district court held defendant Campbell accountable for at least 100, but less than 200 grams of cocaine, which was the

amount of drugs that defendant Campbell actually purchased and distributed or used. The full amount of cocaine involved in the conspiracy was fifteen kilograms. Because the district court held defendant Campbell accountable only for the quantity of drugs attributable to him, the district court correctly denied defendant Campbell's request for a downward adjustment pursuant to §3B1.2.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Brogan, 238 F.3d 780 (6th Cir. 2001). The defendant pled guilty to bank fraud in violation of 18 U.S.C. § 1344. The defendant was the assistant treasurer of a Michigan corporation from which he misappropriated, through means of a fraudulent wire transfer, the sum of $7.9 million. The defendant's sentence was enhanced for his abuse of position of trust based on three factors: 1) the job description of the defendant's position found in the pre-sentence report; 2) the willingness of his superior to believe his explanation of the wire transfer; and 3) the sheer size of the theft. On appeal, the defendant argued that the two-level adjustment for abuse of trust was not applicable because his former job did not qualify as a "position of trust." The Sixth Circuit agreed, and found that the enhancement under USSG §3B1.3 was meant to discourage violations of the kind of trust shown to fiduciaries and public officials. The misplaced reliance and lack of supervision the corporation showed the defendant was not this sort of institutionalized and necessary trust relationship. The court concluded that the defendant did not have a position of trust, and therefore he could not abuse the position. The defendant's sentence was reversed and remanded for resentencing. *See also United States v. Tribble*, 206 F.3d 634, 637 (6th Cir. 2000) (held that a postal window clerk did not hold a position of trust because the position did not require the type of trust in the discretion of a fiduciary or manager as the application notes indicated was required under USSG §3B1.3).

United States v. Gilliam, 315 F.3d 614 (6th Cir. 2003). The court of appeals held that the district court did not err in enhancing defendant's sentence for abuse of a position of trust under §3B1.3. Defendant argued that he did not abuse the public trust because he was employed by a government contractor and not the government. The court noted that the defendant worked as a drug counselor for an employer that was under contract with the United States Probation Office to provide counseling services to individuals placed under probation supervision. In this capacity, the court concluded that he occupied a position which implied that he served an essentially public function involving considerable responsibility with respect to both the government and society at large. The court stated that a "position of trust" arises almost as if by implication "when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other's presumed better judgment some control over their affairs." *United States v. Brogan*, 238 F.3d 780, 783 (6th Cir. 2001) (quoting *United States v. Ragland*, 72 F.3d 500, 503 (6th Cir. 1996)). As a probation counselor contracted by the United States Probation Office, the court found that the defendant was without question employed in a position of considerable trust, which he abused by attempting to engage in illicit drug transactions with a client. Accordingly, it found that the enhancement was properly applied in this case.

United States v. Godman, 223 F.3d 320 (6th Cir. 2000). The defendant pled guilty to counterfeiting Federal Reserve notes in violation of 18 U.S.C. § 471. The defendant had no formal computer training and only used an off-the-shelf software program which he learned in less than a week. At sentencing, the district court applied a two-level enhancement under USSG §3B1.3 for use of a special skill by the defendant based on his use of computer skills. On appeal, the defendant challenged the application of the enhancement under USSG §3B1.3 and argued that his skills of making the bills were not special skills for the purpose of applying USSG §3B1.3. The Sixth Circuit agreed, citing Application Note 3 in the Commentary of USSG §3B1.3 which provides that "special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing such as pilots, doctors, lawyers, and demolition experts. The court held that the defendant's computer skills could not reasonably be equated to the skills possessed by the professionals listed in Application Note 3. The defendant's sentence was vacated and remanded for re-sentencing.

United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002). Defendant was convicted and sentenced for one count of embezzling bank funds, and five counts of making false entries in bank records with the intent to defraud. On appeal, defendant challenged the district court's decision to increase her offense level under USSG §3B1.3 for abuse of a position of trust or use of a special skill. Defendant argued that the adjustment should not apply to those who hold the position of a vault teller. The Sixth Circuit noted that it had established that the level of discretion rather then the amount of supervision was the definitive factor in determining whether a defendant held and abused a position of trust. Whether §3B1.3 applied to a vault teller was a matter of first impression for the court. In deciding this issue, the court was guided by the commentary's distinction between an ordinary bank teller and a bank executive. The court stated that clearly a vault teller fell somewhere in the middle of the spectrum; defendant's level of discretion was greater than that of a regular teller but considerably less than that of a bank president. In applying the abuse of a position of trust enhancement to defendant's sentence, the district court adopted the government's list of findings concerning the extent of defendant's responsibilities. The controlling question, however, was whether defendant's level of discretion was that of a fiduciary. Although defendant appeared to have been under light or no supervision, she was not authorized to exercise substantial professional or managerial discretion in her position. Defendant did take advantage of her seniority to other Bank employees to control the daily cash count and to handle the food stamps. However she was not in a trust relationship with the bank such that she could administer its property or otherwise act in its best interest. Defendant abused her clerical position and the bank's apparent trust in her to embezzle cash from the bank, but she did not hold a position of trust. Accordingly, the enhancement under §3B1.3 was inapplicable and the sentence was vacated and remanded for resentencing.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Brown, 237 F.3d 625 (6th Cir.), *cert. denied*, 532 U.S. 1030 (2001). The defendant was convicted of producing and possessing child pornography. Prior to the defendant's arrest, he had threatened to stab a child whom he had repeatedly molested. On appeal, the defendant argued that the threats to the child did not warrant application of the enhancement under USSG §3C1.1 because at the time he made the threats, the investigation had not focused on him so he could not have been *willfully* obstructing the investigation until after his arrest. The Sixth Circuit disagreed and joined the Fifth and Eighth Circuits in holding that the obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the "correct belief" that an investigation is "probably underway." *United States v. Lister*, 53 F.3d 66, 71 (5th Cir. 1995); *United States v. Oppendahl*, 998 F.2d 584, 586 (8th Cir. 1993). The court found that the defendant's chat room comment, "God, I hope he don't have any of my privates on there," was sufficient evidence to make it clear that he knew prior to his arrest that he was under investigation and concluded that application of the level enhancement under USSG §3C1.1 was proper.

United States v. Hover, 293 F.3d 930 (6th Cir. 2002). Defendant was indicted for conspiracy to commit an offense against the United States by causing counterfeit currency to be brought into the country and possessing, uttering, publishing, and passing the same in violation of 18 U.S.C. § 472. Defendant was initially tried on September 7, 1999. On September 10, 1999, near the end of the proceedings, the district court judge declared a mistrial with regards to defendant based on ineffective assistance provided by defense counsel. Defendant was tried for a second time on the same charges and was sentenced to 36 months. On appeal defendant argued that district court erroneously increased his offense level based on his perjury in the first trial. Defendant did not argue that he did not perjure himself in the first trial. Instead, defendant asserted that his perjury should not be considered in his sentencing because the first proceeding culminated in a mistrial declared on account of ineffective assistance of counsel. The Sixth Circuit noted that the district court held that defense counsel did not put words into defendant's mouth, and defendant should not be able to place blame on counsel in defendant's first trial; defendant's perjured testimony was volitional, and therefore it could not be excused based on ineffective assistance. The Sixth Circuit noted that the ultimate question was whether defendant's first and second trials were part of the same "prosecution" for purposes of USSG §3C1.1. Relying on the Ninth Circuit's opinion in *United States v. Stout*, 936 F.2d 433 (9th Cir. 1991), the court held that defendant's perjury in the first trial (the mistrial) could be considered for purposes of applying §3C1.1. In support of this conclusion, the court reasoned that the same conduct was at issue in both the first trial and the second trial–defendant was retried on the very same charges–therefore it formed part of the same prosecution under the guidelines. The district court's sentence was affirmed.

United States v. Lawrence, 308 F.3d 623 (6th Cir. 2002). Defendant was charged with various drug trafficking offenses, money laundering, and forfeiture. On appeal, defendant argued that his sentence enhancement for obstruction of justice based on his perjury was improper. The Sixth Circuit noted that it had set forth its own requirements for sentence enhancement in compliance with the Supreme Court's decision in *United States v. Dunnigan*, 507 U.S. 87 (1992). For a district court to enhance a defendant's sentence under USSG §3C1.1, the court must: 1) identify those particular

portions of defendant's testimony that it considers to be perjurious; and 2) either make a specific finding for each element of perjury or, at least, make a finding that encompasses all of the factual predicates for a finding a perjury. The court indicated that the second requirement was held by the Supreme Court to be necessary under §3C1.1. *See United States v. Sassanelli,* 118 F.3d 495, 501 (6th Cir. 1997). However, the first requirement was a rule of the Sixth Circuit's own creation to assist in its review of sentence enhancements under §3C1.1; the court has never insisted on a rigid adherence to its terms. The court noted that it will not be enough for a sentencing court to recognize conflicting testimony and to resolve, in its own mind, which witness is credible; nor will it be sufficient for a sentencing judge to broadly consider everything defendant said at trial to be perjurious; the sentencing court must be specific. In the instant case, the district court stated that it did not believe defendant's testimony at trial, nor did the jury. The district court stated: "Well, I presided at trial. I heard all of the testimony. There is no way that Danny Young was on his own, and I believe you were the person that was directing that... In regard to obstruction of justice, I heard your testimony, and there was very little that I believed. I don't think there was very much the jury believed taking their verdict in the case." The district court made no indication which portions of defendant's testimony were perjurious nor did the court apply any of the elements of perjury to the testimony. Accordingly, the district court's finding was insufficient under the Sixth Circuit's requirements for sentence enhancement under §3C1.1. Accordingly, the court vacated defendant's sentence with respect to the two-level enhancement under §3C1.1, and remanded for resentencing.

United States v. Mise, 240 F. 3d 527 (6th Cir. 2001). The defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal, the defendant argued that the district court failed to make proper findings of fact to support its findings that he committed perjury in his trial testimony. The Sixth Circuit affirmed the two-level enhancement for obstruction of justice under USSG §3C1.1. Citing *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) and *United States v. Sassanelli*, 118 F.3d 495, 501 (6th Cir. 1997), the court required the district court to fulfill two requirements for applying the adjustment for obstruction of justice under USSG §3C1.1 to a defendant committing perjury: "first, it must identify those particular portions of the defendant's testimony that it considers to be perjurious, and second, it must 'either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury'." In this case the district judge both identified the conflict between the tape-recorded comments in which the defendant admitted making the bomb and the trial testimony where he denied making the bomb and made specific findings for each element of perjury meeting its burden under *Dunnigan* and *Sassanelli*.

United States v. Perry, 30 F.3d 708 (6th Cir. 1994). The district court erred in enhancing the defendant's sentence for obstruction of justice pursuant to USSG §3C1.1. The defendant defied the district court's order to appear clean shaven at his jury trial for bank robbery. As a result, the teller was unable to identify the defendant as the bank robber. The district court relied on this conduct to justify a six-month term for contempt and an enhancement for obstruction of justice. The circuit court concluded that this amounted to impermissible double-counting because the same conduct formed the basis for both the contempt sentence and the obstruction of justice enhancement. The district court

could have avoided double-counting by following Application Note 6, which prescribes the proper method of calculating a sentence when the defendant is convicted both of the obstruction offense (here, the contempt) and the underlying conduct.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[9]

United States v. Green, 305 F.3d 422 (6th Cir. 2002). On January 19, 1990, defendant was charged with several others in a 37-count indictment in a multi-count drug conspiracy and tax evasion conspiracy/criminal enterprise. On August 24, 1990, defendant failed to appear for sentencing. On appeal defendant argued that his offenses should not have been grouped together because grouping was not consistent with the failure to appear statute. First the Sixth Circuit noted that in addition to the statutory language of 18 U.S.C. § 3146(b), there were three relevant guidelines provisions with respect to grouping: §§3D1.1, 2J1.6 and 3D1.2. The court then noted that grouping a failure to appear with the underlying offense was the subject of a circuit split. Several circuits have concluded that grouping the failure to appear offense with the underlying offense for sentencing is appropriate based on the guidelines and the commentary. *See United States v. Gigley*, 213 F.3d 503 (10th Cir. 2000); *United States v. Kirkham*, 195 F.3d 126, 130-32 (2d Cir. 1999); *United States v. Jernigan*, 60 F.3d 562, 564 (9th Cir. 1995); *United States v. Pardo*, 25 F.3d 1187, 1193-94 (3d Cir. 1994); *United States v. Lechuga*, 975 F.2d 397, 401 (7th Cir. 1992); *United States v. Magluta*, 203 F.3d 1304, 1305 (11th Cir. 2000). However, the Eighth and the Fifth Circuits, on the other hand, have found that the sentencing guidelines were in conflict with the statutory language of § 3146(b)(2) regarding the imposition of a consecutive sentence and have therefore refused to group the failure to appear offense with the underlying offense for sentencing. *See United States v. Crow Dog*, 149 F.3d 847, 849 (8th Cir. 1998); *United States v. Packer*, 70 F.3d 357, 360 (5th Cir. 1995). The Sixth Circuit sided with the majority of the circuits; the sentencing guidelines, §§3D1.1, 2J1.6, and 3D1.2, clearly called for grouping a failure to appear with the underlying offense and did not violate the consecutive sentence requirement under 18 U.S.C. § 3146(b)(2). The district court was affirmed in part and reversed in part on other grounds; the case was remanded for resentencing.

§3D1.4 Determining the Combined Offense Level

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

[9]Effective January 25, 2003, the Commission, in response to a congressional directive contained in the Bipartisan Campaign Reform Act of 2002, included §2C1.8 offenses among those listed under §3D1.2(d) in which the offense level is determined largely on the basis of the total amount of harm or loss of some other measure of aggregate harm. *See* USSG, App. C, Amendment 648.

appellate court further noted that the lower court's departure was unreasonable because it was at odds with the guidelines' fundamental principle of producing declining marginal punishments.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[10]

United States v. Castillo-Garcia, 205 F.3d 887 (6th Cir. 2000). The defendant pled guilty to re-entering the United States after deportation. At sentencing, the defendant's request for an acceptance of responsibility reduction was rejected because of his history of illegal re-entries and because of the lack of remorse he showed to the probation officer when he said he would re-enter the country again after deportation. On appeal, the defendant argued that his efforts to accept responsibility were not outweighed by the fact that he had re-entered the country illegally on previous occasions. The Sixth Circuit disagreed. The court found that it was particularly appropriate to refuse a downward adjustment for acceptance of responsibility when a defendant is a repeat offender of the same statute and that a defendant's lack of remorse was a valid consideration under USSG §3E1.1.

United States v. Jeter, 191 F.3d 637 (6th Cir. 1999). The district court did not err by refusing to find that the defendant accepted responsibility when the defendant committed pre-indictment misconduct. The defendant pleaded guilty and cooperated with the government, but following his June 1996 state charge arrest for loan fraud conduct (and prior to his November 1997 federal indictment), the defendant engaged in additional fraudulent conduct; accordingly, the district court could properly find the defendant did not qualify for the reduction. (J. Kennedy dissented.)

United States v. Roper, 135 F.3d 430 (6th Cir.), *cert. denied*, 524 U.S. 920 (1998). The district court did not err in denying the defendant an acceptance of responsibility reduction when the defendant fabricated an entrapment defense.

United States v. Smith, 245 F.3d 538 (6th Cir. 2001). The defendant pled guilty to possession with intent to distribute crack cocaine and cocaine. At sentencing, the district court determined that defendant's untimely acceptance of responsibility only qualified him for a two-point reduction under USSG §3E1.1(a), and not a three-point reduction under USSG §3E1.1(b). On appeal, the defendant argued that the district court erred in not granting him the additional one level for acceptance of responsibility under USSG §3E1.1(b). The court held that the defendant's delay until the eve of the trial to enter a guilty plea compelled the government to prepare its entire case for trial. The court affirmed the two-level reduction for acceptance of responsibility and affirmed the defendant's sentence.

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[10]Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

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

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Penn, 282 F.3d 879 (6th Cir. 2002). The district court found that defendant was eligible for a reduced sentence pursuant to the "safety valve" provision of USSG §5C1.2. On appeal, the government argued that defendant was not eligible for a reduced sentence under the "safety valve" provision because he has more than one criminal history point as calculated under §4A1.1. More specifically, the government argued that the district court erred in its conclusion that by granting a downward departure pursuant to §4A1.3, the district court was authorized to reduce the defendant's criminal history points and thereby make him eligible for sentencing under the "safety valve." The Sixth Circuit noted that the commentary to §5C1.2 is unambiguous, and clearly limits a district court's authority to apply the "safety valve" provision to cases where a defendant has not more than one criminal history point as calculated under §4A1.1, regardless of whether the district court determined that a downward departure in defendant's sentence is warranted under by §4A1.3. In the instant case, the district court's determination that defendant was entitled to a downward departure under §4A1.3 had no effect on defendant's criminal history score as calculated under §4A1.1. Section 4A1.3 did not authorize the district court to add or subtract individual criminal history points from a defendant's record; instead, it merely allowed the district court to impose a sentence outside the range prescribed by the guidelines for a defendant's particular offense level and criminal history category. In other words, §4A1.3 allows a district court to sentence a defendant with reference to the guideline range applicable to a defendant with another criminal history category, not to change the defendant's actual criminal history category. Accordingly, the district court's sentence was vacated and the case remanded for resentencing.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Carter, 283 F.3d 755 (6th Cir.), *cert. denied*, 537 U.S. 874 (2002). Defendant pleaded guilt to receipt of child pornography. On appeal, defendant argued that his three prior state court drug convictions should have been treated as one offense for the purpose of calculating criminal history points under § 4A1.2. The court of appeals disagreed. It stated that under §4A1.2 crimes were part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. It further noted that if the offenses were not jointly planned in the inception, or if the commission of one offense entailed the commission of another, under § 4A1.2(a)(2), the offenses are unrelated and should be counted separately. The court found no evidence that the defendant jointly planned all three drug sales. Nor did it find that the commission of the first drug transaction would in any way entail the commission of the following drug sales. For these reasons, it affirmed the sentence of the district court. However, it noted that had the defendant been convicted in federal court on the same charges which form the basis for his three prior convictions, he would have been most likely charged in a single indictment, convicted of only a single count, and sentenced on the quantity of drugs in all three sales. He would thereafter have had only a single prior drug conviction rather than the three attributable to the state drug convictions. Based on this observation and the lack of consistency and uniformity in the application of this provision among the circuit courts, it urged the Sentencing Commission to review §4A1.2 .

United States v. Harris, 237 F.3d 585 (6th Cir. 2001). The defendant was convicted of the manufacture, attempt to manufacture, and possession with intent to distribute more than 100 grams of methamphetamine. The defendant had two 14-year-old prior concurrent three-year state sentences on which he was paroled after 18 days. At sentencing the district court assessed six criminal history points for the defendant's priors as directed under USSG §4A1.1(a) and (b), instructing the court to add three points for each prior sentence of imprisonment exceeding one year and one month, and two points for each "prior sentence" totaling 60 days to 13 months. The defendant objected to the criminal history points assessed, arguing that he only served 18 days for those sentences. His objection was overruled. On appeal, the defendant argued that only one criminal history point should have been assigned under USSG §4A1.2(c) and that, according to §4A1.2(b)(2), criminal history points should not have been assigned to him for the two prior state convictions because his release on parole after serving 18 days acted as a "suspension" of those sentences. The Sixth Circuit disagreed. Citing *Doyle v. Hampton*, 207 Tenn. 399, 340 S.W.2d 891,893 (Tenn. 1960)[11] the court concluded that Tennessee state law treated the defendant's release after 18 days in 1984 as a correctional parole, not a court-mandated suspended sentence, and held that the district court did not err in increasing the defendant's base offense level by six points based on his prior state convictions.

§4A1.3 Adequacy of Criminal History Category

[11] *Doyle* at 893. ("parole . . . is nothing more than a conditional suspension of sentence . . . [and the sentence of the prisoner] does not expire because of the parole[ ] nor during the pendency of the parole[, and] during this time [the prisoner] is still in the custody of the penal authorities of the State and subject to the provisions upon which [he or she] has been paroled.")

United States v. Barber, 200 F.3d 908 (6th Cir. 2000). The district court did not abuse its discretion in departing upward from Criminal History Category IV to Criminal History Category VI. There was ample support in the record to justify the district court's conclusion that, pursuant to USSG §4A1.3, the defendant's criminal past and likelihood of recidivism were not adequately represented by his otherwise applicable guideline range.

United States v. Schultz, 14 F.3d 1093 (6th Cir. 1994). The district court erred in departing from defendant's criminal history category of III to the career offender category of VI based on two prior convictions that were too old to be counted. The Sixth Circuit held that the two prior convictions could be considered as a basis for an upward departure pursuant to USSG §4A1.3, but, if counted, would only have resulted in defendant being assigned to Criminal History Category IV. The district court erred in departing to Criminal History Category VI by stating that the defendant would have been a career offender if those two prior convictions had been counted, without articulating why categories IV and V were insufficient.

United States v. Thomas, 24 F.3d 829 (6th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court's upward departure was appropriate in light of the defendant's criminal history score of 43, and his high likelihood of recidivism. Furthermore, the district court is not required to provide a mechanistic recitation of its rejection of the intervening offense level guideline ranges when departing beyond Criminal History Category VI; the court must only "use the offense level ranges as a reference, and depart from them no further than is required to reach a gridblock that contains a reasonable sentence for the defendant." The presentence report stated that an upward departure might be at issue because of the defendant's high criminal history, therefore the defendant was given adequate notice.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Champion, 248 F.3d 502 (6th Cir. 2001). The defendant argued that his violation of 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for the purpose of a visual depiction was not a crime of violence because it did not have as an element, the use, attempted use, or threatened use of physical force against the person of another. The court found that Congress itself had "undertaken the fact-finding necessary to conclude that a violation of section 2251(a), by its very nature, presents a serious potential risk of physical injury" and held that the district court properly concluded that the defendant's section 2251(a) conviction was a crime of violence.

United States v. Walker, 181 F.3d 774 (6th Cir.), *cert. denied*, 528 U.S. (1999). the district court did not err in finding that the defendant's prior state court conviction for solicitation to commit aggravated robbery was a "crime of violence" and, therefore, the defendant was properly sentenced as a career offender.

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999). The Court of Appeals held that the burglary of a building which is not a dwelling is not a crime of violence as defined in USSG USSG §4B1.2(a)(2) but that under certain circumstances maybe a crime of violence under the subsection's "otherwise" language. On remand the court could consider the burglary charge to decide whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another."

United States v. Wood, 209 F.3d 847 (6th Cir.), *cert. denied*, 530 U.S. 1283 (2000). The defendant pled guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). The presentence report (PSR) recommended that a "career offender enhancement" under USSG §4B1.1 be applied after determining that the defendant had two prior convictions for crimes of violence–a 1978 breaking and entering and a 1993 robbery in the third degree. At sentencing the district court adopted the PSR's recommendation and sentenced the defendant as a career offender. On appeal the defendant argued that the prior conviction for robbery in the third degree was not a crime of violence because it did not meet the criteria set forth in USSG §4B1.2(a) which required an element of force or threatened use of force. He further argued that the state statute governing this offense proscribed conduct which did not necessarily have to involve violence, threatened or actual, "against the person of another" as required by USSG §4B1.2. The Sixth Circuit disagreed. Applying the criteria set forth in *United States v. Wilson*, 168 F.3d 916, 927[12] the court held that Alabama's robbery in the third degree was a "crime of violence" because robbery was an enumerated offense and because the statutory definition for the offense has as an element the use, attempted use, or threatened use of physical force against the person of another. The defendant's status as a career offender was affirmed.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

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

[12] *Wilson* at 927. (interpreted USSG §4B1.2 and its commentary as authorizing three ways in which a prior conviction could be considered a "crime of violence": 1) if the conviction is for a crime that is among those specifically enumerated in the guidelines; 2) if it is for a crime that, although not specifically enumerated, has as an element of the offense the use, attempted use, or threatened use of physical force; or 3) if, although neither specifically enumerated nor involving physical force as an element of the offense, the crime involved conduct posing a serious potential risk of physical injury to another.

providing information and, therefore, did not satisfy the fifth criterion. The circuit court held that the defendant bears the burden of proof to establish compliance, by a preponderance of the evidence, as the burden is allocated to the party seeking a departure. *United States v. Rodriguez*, 896 F.2d 1031, 1032 (6th Cir. 1990); *United States v. Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989), *cert. denied*, 507 U.S. 990 (1993). After conducting a fact-specific analysis, the district court concluded that the defendant did not meet the burden to show compliance with the fifth criterion. The circuit court stated that the applicability of a USSG §3E1.1 reduction does not, by itself, establish a USSG §5C1.2 reduction because the "requirement of USSG §5C1.2 that a defendant provide `all information he has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan' is greater than the requirement for an acceptance of responsibility reduction under USSG §3E1.1." *See United States v. Wrenn*, 66 F.3d 1, 3 (1st Cir. 1995); *United States v. Ivester*, 75 F.3d 182, 185 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996). The district court concluded that the defendant did not meet this standard, as he did not provide a "completely forthright account" of his involvement in the offense and the information he provided regarding conduct that was "part of the same course of conduct or of a common scheme or plan" was even less complete. The findings were not clearly erroneous.

United States v. Bazel, 80 F.3d 1140 (6th Cir.), *cert. denied*, 519 U.S. 882 (1996). The defendant raised an issue of his eligibility for application of the "safety valve" provisions of 18 U.S.C. § 3553(f) and USSG §5C1.2. The appellate court, using a *de novo* standard of review because the issue was "the proper construction of the sentencing guidelines, and not their application," affirmed the district court's decision that the defendant did not meet the criteria set forth in 18 U.S.C. § 3553(f)(4) and USSG §5C1.2(4). Under these provisions, the defendant must "not [be] an organizer, leader, manager, or supervisor of others in the offense, as determined under the Sentencing Guidelines and not [be] engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." After finding that the defendant was an "organizer, leader, manager, or supervisor," the district court held that the defendant was not eligible for the "safety valve." The defendant argued, based on the presence of the conjunctive "and" within the criterion, that the government must prove that the defendant was not an "organizer, leader, manager, or supervisor" and also that he was not engaged in a CCE. The defendant contended that a denial of the safety valve based on the presence of one of the two requirements would be tantamount to replacing the "and" with an "or." The circuit court rejected this argument, concluding that the statute's criteria are "phrased in terms of what the defendant must show was not true of him," rather than what the government was required to prove was true of the defendant. The circuit court also concluded that proper grammatical structure and the legislative history of section 3553(f) supports the district court's conclusion. With respect to legislative history, the court noted that section 3553(f) was intended to grant sentence reductions for individuals deemed merely to be drug "mules," rather than individuals with leadership roles in the offense. Under 21 U.S.C. § 848(c)(2)(A), an individual engaged in a CCE is defined, in part, as an "organizer . . . supervisor or any other [kind] of manage[r]." Consequently, the circuit court concluded that to read two separate requirements into the statute would render the "organizer, leader, manager, or supervisor" requirement redundant, because this requirement is included in the CCE definition. The district court's construction of the guidelines was correct.

United States v. Burnette, 170 F.3d 567 (6th Cir.), *cert. denied*, 528 U.S. 908 (1999). The district court did not err in applying separate consecutive section 924(c) convictions which occurred during a kidnapping and robbery. The defendant kidnapped a bank manager at her home and the next morning robbed the bank. The Sixth Circuit affirmed the imposition of the 5-year sentence for the first conviction and consecutive 20-year sentence for the second.

United States v. Clark, 110 F.3d 15 (6th Cir. 1997). The district court erred in holding that the defendant could not have his sentence modified to a term less than the mandatory minimum. The Sixth Circuit ruled that the safety valve provision, 18 U.S.C. § 3553(f), is applicable to cases pending on appeal, even if, as in this case, the safety valve provision was not in effect at the time of the original sentencing. In reaching this conclusion, the circuit court looked to the purpose statement of section 3553(f) which suggests that in order to further the statutes remedial intent, it should apply to cases pending on appeal when the statute was enacted. The court then noted that when a sentence is modified under 18 U.S.C. § 3582(c)(2), the court must consider the factors set forth in section 3553(a). These factors are consistent with application of the safety valve. Since an ex post facto violation would not occur by applying the safety valve upon modification—as the defendant would not be disadvantaged in such a case—the safety valve has been applied on remand for resentencing. *See United States v. Flanagan*, 80 F.3d 143, 144-45 (5th Cir.), *cert. denied* 116 S. Ct. 907 (1996); *United States v. Polanco*, 53 F.3d 893, 898-99 (8th Cir. 1995), *cert. denied*, 518 U.S. 1021 (1996). Both 18 U.S.C. §§ 3553(a) and 3582(b)(2)-(3) indicate that if a sentence can be appealed and modified pursuant to 3742, it is not final. Likewise, section 3582(b)(1) is not final if it can be modified via section 3582(c). In either scenario, the defendant's sentence could be lowered below the statutory minimum and, thus, the safety valve is relevant. Therefore, the court held that the safety valve may be considered in pending sentencing cases and on remand before the district court on under section 3742 or 3582(c), the sentencing guidelines or other standards calling for the modification of sentences, and the case was remanded to the district court to determine if safety valve relief should be granted.

United States v. Maduka, 104 F.3d 891 (6th Cir. 1997). The appellate court affirmed the district court's interpretation of §5C1.2 criteria and its refusal to allow the defendant to rely on the guideline to avoid the statutory minimum sentence. The defendant argued that the court should have imposed a sentence below the statutory minimum because he qualified for relief pursuant to §5C1.2. The circuit court disagreed, and held that the defendant had not provided accurate and complete information to the government concerning the offenses charged in the indictment and, therefore, §5C1.2 was inapplicable. Every court which has considered the issue has held that §5C1.2 requires a defendant to provide full disclosure regarding the immediate chain of distribution, regardless of whether the conviction was for a substantive drug offense or for conspiracy.

See United States v. Penn, 282 F.3d 879 (6th Cir. 2002), §4A1.1., p. 27.

United States v. Pratt, 87 F.3d 811 (6th Cir. 1996). The district court did not err in applying the "safety valve" provision and in recognizing its discretion to depart downward when circumstances

warranted a departure. The defendant was arrested with 4 kilos of cocaine in her luggage and pleaded guilty to possession with intent to distribute cocaine. She was subsequently sentenced to the applicable sentencing range within the discretion of the court for a mitigating role in the offense and acceptance of responsibility. The defendant argued on appeal that the district court did not recognize its discretion to sentence her to as little as 24 months based on the language in section 3553(f). The circuit court however held that this language alone does not provide a departure from the sentencing guidelines and affirmed the sentence imposed by the district court.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

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

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

compensation for the loss. The circuit court remanded the case to the district court "to determine by a preponderance of the evidence the commission [the defendant] would have earned."

§5E1.2 Fines for Individual Defendants

United States v. Breeding, 109 F.3d 308 (6th Cir. 1997). The district court did not err in assessing a fine to cover the costs of imprisonment and supervised release pursuant to USSG §5E1.2. The defendant asserted that §5E1.2(i) is invalid because the Sentencing Commission exceeded the scope of its authority in directing district courts to assess fines for costs of incarceration. The Sixth Circuit had refused to decide this issue on its merits in the past because the prior defendants had waived any rights to appeal the issue by failing to raise the issue before the district court. The appellate court agreed with the defendant that the issue was not waived in her case, because she was never put on notice that a fine for the costs of imprisonment would be imposed until the court imposed judgment. In addressing the defendant's claim on the merits, the appellate court held that the Sentencing Commission did not exceed its authority in assessing the fines. The defendant relied upon the decision of the Third Circuit that §5E1.2(i) is invalid because the Sentencing Reform Act did not specifically refer to recouping the costs of imprisonment as a goal of sentencing. In rejecting the Third Circuit's reasoning, the Sixth Circuit joined the majority of the circuit courts of appeals in holding that the Sentencing Commission acted within its authority. *See United States v. Hagmann*, 950 F.2d 175 (5th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992); *United States v. Turner*, 998 F.2d 534, 536-38 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Leonard*, 37 F.3d 32, 39-40 (2d Cir. 1994); *United States v. May*, 52 F.3d 885, 890-92 (10th Cir. 1995); *United States v. Zakhor*, 58 F.3d 464, 465-68 (9th Cir. 1995); *United States v. Price*, 65 F.3d 903, 908-09 (11th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). The Sentencing Reform Act required the Sentencing Commission to create sentencing policies that consider "the deterrent effect a particular sentence may have on the commission of the offense by others." The court relied on the Seventh Circuit's rationale in *Turner* that the guidelines call for longer sentences as the harm caused by the offense rises; longer sentences are more costly; thus, the costs of confinement rises with the seriousness of the offense, and a fine based on these costs reflects the seriousness of the offense. "Moreover, higher fines are more potent deterrents to crime. Section 5E1.2(i) increases the fine, and therefore, increases deterrence."

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000). In an appropriate case, a district court may depart downward on the basis of a “discouraged” departure factor or, more frequently, on the basis of simultaneously present, multiple “discouraged” departure factors. However, there must be credible evidence of the existence and extent of the factors relied upon by the district court.

§5H1.4 Physical Condition

United States v. Thomas, 49 F.3d 253 (6th Cir. 1995). The district court did not err in refusing to grant the defendant a downward departure because he was HIV positive, although he had not yet developed AIDS. The defendant argued that a downward departure was warranted because

the guidelines had not taken into account recently available statistics showing the decreased life expectancy and increased cost of caring for people who are HIV positive. The circuit court agreed that these statistics were not available when the guidelines were written, but reasoned that the Commission had already considered the impact of the guidelines on persons who are HIV positive in its creation of USSG §5H1.4. The circuit court, citing a Virginia district court's rationale concerning the relationship between §5H1.4 and a defendant with AIDS, concluded that the defendant would be entitled to a departure "if his HIV has progressed into advanced AIDS, and then only if his health was such that it could be termed as an `extraordinary physical impairment.'" *United States v. DePew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990), *aff'd* on other grounds, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). The defendant was still in "relatively good health," and thus was not entitled to a departure.

See United States v. Tocco, 200 F.3d 401 (6th Cir. 2000), §5H1,1.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[13]

See United States v. Tocco, 200 F.3d 401 (6th Cir. 2000), §5H1.1.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Truman, 304 F.3d 586 (6th Cir. 2002). In the instant case, the district court held that USSG §5K1.1 applied and that absent a motion from the government to depart, the district court lacked the discretion to do so. On appeal, defendant argued that §5K1.1 was not the exclusive provision for dealing with all cooperation, but rather the court may consider a defendant's cooperation not contemplated by §5K1.1 under the grant of discretion to sentencing judges embodied in §5K2.0. Relying on *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), defendant argued that his cooperation was directed to state and local authorities and thus was outside the scope and limitation of §5K1.1. The Sixth Circuit noted that there was a split among the circuits as to whether the substantial assistance mentioned in §5K1.1 was limited to federal authorities. *Compare United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998); *with United States v. Love*, 985 F.2d 732 (3d Cir. 1993). However the court noted that it did not need to decide this issue nor weigh in on the circuit division in order to resolve this appeal. The court stated that, by its terms, §5K1.1 applied only to substantial assistance in connection with the investigation and prosecution of another individual who has committed a crime. Where the substantial assistance was directed other than toward the prosecution of another person, the limitation of §5K1.1–the requirement of a government motion as a triggering mechanism did not apply. The court noted that other courts had recognized this distinction and had observed that when the defendant's cooperation did not involve investigation or prosecuting another person, the government's power to limit the court's exercise of discretion to depart downward did not apply. *See e.g. United States v.*

[13]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement to add a second paragraph. *See* USSG, App. C, Amendment 649.

Khan, 920 F.2d 1100 (2d Cir. 1990). Accordingly the court held that when a defendant moved for a downward departure on the basis of cooperation or assistance to government authorities which did not involve the investigation or prosecution of another person, §5K1.1 did not apply and the sentencing court was not precluded from considering the defendant's arguments solely because the government had not made a motion to depart. Consequently the district court erroneously concluded that it lacked discretion to consider the defendant's asserted grounds for a downward departure absent a motion from the government; the sentence was vacated and the case was remanded.

§5K2.0 Grounds for Departure (Policy Statement)[14]

United States v. Griffith, 17 F.3d 865 (6th Cir.), *cert. denied*, 513 U.S. 850 (1994). The district court properly refused to depart downward. The defendant argued that his effort to cure his gambling addiction was a factor that warranted a downward departure. The Sixth Circuit concluded that the defendant's claim was not cognizable because he failed to establish either that his sentence was the result of an incorrect application or that the district court failed to recognize its discretion to depart.

§5K2.2 Physical Injury (Policy Statement)

United States v. Baker, 339 F.3d 400 (6th Cir. 2003). Defendants were convicted for interstate robbery and attendant firearms offenses. At the sentencing hearing, the district court provided for a five-level upward departure to account for both the gravity of the injury inflicted upon a security guard, under USSG §5K2.2, and the heinous nature of the defendants' conduct pursuant to USSG §5K2.8. On appeal defendants argued that the five-level upward departure under §5K2.2 double-counts conduct already accounted for by the six-level enhancement under §2B3.1(b)(3)(C). The Sixth Circuit noted that noted that under §5K2.0 a physical injury does not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, a court may depart from the guidelines, if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive. In the instant case, the Sixth Circuit noted that no such extreme or unusual circumstances existed here, and therefore the five-level upward departure could not be sustained under §5K2.2. However, this upward departure was ultimately affirmed by the court under §5K2.8 because the district court did not abuse its discretion in finding that defendants' conduct was sufficiently heinous to depart upward.

[14]Effective April 30, 2003, the Commission, in response to a congressional directive under the Child Protect Act, Pub. L. 108-21, added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. The appellate standard of review also has been amended effective April 30, 2003, by the PROTECT Act, 18 U.S.C. § 3472(e). *See* USSG App. C, Amendment 649.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). The district court erred in departing upward based on extreme psychological injury. USSG §5K2.3. The defendants were convicted of armed bank robbery and challenged the district court's decision to depart upward. The circuit court vacated the defendants' sentences. Although the victims did suffer fear and anxiety, and two of the victims were temporarily transferred to another branch, the psychological injuries sustained did not satisfy USSG §5K2.3's requirement that the impairment be so substantial that it is of extended or continuous duration and manifested by physical or psychological symptoms. *See United States v. Lucas*, 889 F.2d 697 (6th Cir. 1989).

§5K2.6 Weapons and Dangerous Instrumentalities (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). The district court erred in departing upward based on the use of a weapon or dangerous instrumentality. USSG §5K2.6. The defendants were convicted of armed bank robbery. They argued that the upward departure amounted to double-counting because USSG §2B3.1(b)(2)(A) already took into account their use of firearms. The circuit court agreed. The factors relied upon by the district court, that one of the gun shots narrowly missed one of the victims and that the defendants fired two separate shotgun blasts, did not occur "to a degree substantially in excess of that which ordinarily" occurs during a bank robbery.

§5K2.8 Extreme Conduct (Policy Statement)

See United States v. Baker, 339 F.3d 400 (6th Cir. 2003), §5K2.2, p. ?.

§5K2.13 Diminished Capacity (Policy Statement)[15]

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hayes, 171 F.3d 389 (6th Cir. 1999). The district court plainly erred by relying at sentencing on letters from victims which were not disclosed to the defendant. During sentencing, the court stated that it had received letters from people who were present during the defendant's bank robbery and that the court took them very seriously. The defendant and his attorney were unaware of the letters, as they were not disclosed in the presentence report. The appellate court held that Rule 32 required that the letters be disclosed and remanded for resentencing.

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[15]Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, added language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

United States v. Johnson, 529 U.S. 53 (2000). The Supreme Court, in a unanimous decision, held that under 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." Therefore, the length of supervised release is not reduced by excess time served in prison. The defendant had two of his convictions declared invalid, pursuant to *Bailey v. United States*, 516 U.S. 137 (1995), and had served 24 months extra prison time. The defendant was released from prison, but a three-year term of supervised release was yet to be served on the remaining convictions. The defendant filed a motion to reduce his supervised release term by the amount of extra prison time he served. The district court denied the relief, explaining that supervised release commenced upon respondent's actual release from incarceration, not before. The Sixth Circuit reversed and held that his supervised release term commenced not on the day he left prison, but when his lawful term of imprisonment expired. The Supreme Court, in its decision to reverse the Sixth Circuit, resolved a circuit split over whether the excess prison time should be credited to the supervised release term. *Compare United States v. Blake*, 88 F.3d 824 (9th Cir. 1996) (supervised release commences on date defendants should have been released, not dates of actual release) with *United States v. Jeanes*, 150 F.3d 483 (5th Cir. 1998) (supervised release cannot run during any period of imprisonment); *United States v. Joseph*, 109 F.3d 34 (1st Cir. 1997) (same); *United States v. Douglas*, 88 F.3d 533 (8th Cir. 1996)(same). The Supreme Court examined the text of section 3624(e) which states: "[t]he term of supervised release commences on the day the person is released from imprisonment." The court concluded that the ordinary commonsense meaning of release is to be freed from confinement. The court found additional support in 18 U.S.C. § 3583(a) which authorizes the imposition of a "term of supervised release after imprisonment." Furthermore, the objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life.

This decision resolved a split in the circuits, holding that post-revocation penalties relate to the original offense, and under the *Ex Post Facto* Clause, a law "burdening private interests" cannot be applied to a defendant whose original offense occurred before the effective date of the statute. *Compare United States v. Johnson*, 181 F.3d 105 (6th Cir. 1999) (unpublished); *United States v. Sandoval*, 69 F.3d 531 (1st Cir.)(unpublished), *cert. denied*, 519 U.S. 821 (1996); *United States v. St. John*, 92 F.3d 761 (8th Cir. 1996) (no *ex post facto* violation in applying § 3583(h) to a defendant whose offense occurred before date statute enacted) *with United States v. Dozier*, 119 F.3d 239 (3d Cir. 1997); *United States v. Lominac*, 144 F.3d 308 (4th Cir. 1998); *United States v. Eske*, 189 F.3d 536 (7th Cir. 1999), *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997); and *United States v. Meeks*, 25 F.3d 1117 (2d Cir. 1994) (because revocation penalties punish the original offense, retroactive application of section 3583(h) violates *Ex Post Facto* Clause). Absent a clear indication by Congress that a statute applies retroactively, a statute takes effect the day it is enacted.

In the case below, the Sixth Circuit held that application of section 3583(h)(explicitly authorizing reimposition of supervised release upon revocation of supervised release) did not violate the *Ex Post Facto* Clause even though the defendant's original offense occurred in 1993, a year before the statute was enacted. The lower court held that revocation penalties punish a defendant for the

conduct leading to the revocation, not the original offense. Thus, because the statute was enacted before the defendant violated his supervised release, there was no *ex post facto* violation. *United States v. Johnson*, 181 F.3d 105 (6th Cir. 1999). The government disavowed the position taken by the lower court of appeal, and "wisely so" opined the Supreme Court "in view of the serious constitutional questions that would be raised by construing revocation and re-imprisonment as punishment for the violation of the conditions of supervised release." *Johnson*, 529 U.S. at 699.

In addition to making the determination that *ex post facto* analysis for revocation conduct relates to the date of the original offense, the Supreme Court found that no *ex post facto* analysis was necessary in the defendant's case because Congress gave no indication that section 3583(h) applied retroactively. The statute could not be applied to the defendant because it did not become effective until after the defendant committed the original offense. Nevertheless, the version of section 3583(e)(3) in effect at the time of the original offense authorized a court to reimpose a term of supervised release upon revocation. Congress's unconventional use of the term "revoke" rather than "terminate" would not preclude additional supervised release, and this reading is consistent with congressional sentencing policy.

The Supreme Court's finding that the pre-Crime Bill version of section 3583(e)(3) authorizes supervised release as part of a revocation sentence resolved another split in the Circuits. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held that § 3583(e)(3) did not authorize a court to impose an additional term of supervised release following revocation and imprisonment. The First and Eighth Circuits held that section 3583(e)(3) did grant a court such authority. *See Johnson*, 529 U.S. at 699 (n. 2) (2000) (citing cases).

United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994). The circuit court held that Chapter Seven policy statements "are not binding on the district court, but must be considered by it in rendering a sentence for a violation of supervised release." The circuit court remanded the case, holding that the district court erred in concluding that it lacked discretion to impose anything other than a consecutive sentence for defendant's violation of supervised release. *See United States v. Cohen*, 965 F.2d 58 (6th Cir. 1992). The court joined six other circuits which recognize Chapter Seven policy statements as advisory only.

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release

United States v. Coatoam, 245 F.3d 553 (6th Cir.), *cert. denied*, 534 U.S. 924 (2001). The appellate court held that a court must revoke probation for refusing a drug test if it is a term of probation. The defendant violated the terms of his probation by failing to attend drug testing, counseling, or mental health aftercare. The district court revoked his probation, stating that it had no discretion in its decision. The defendant appealed, arguing that the plain language of 18 U.S.C. § 3565(b)(3) did not apply to him. Section 3565(b)(3) requires mandatory revocation if a defendant refuses to comply with drug testing as imposed by section 3563(a)(4). Section 3563(a)(4) used to require a defendant to submit to drug testing as a mandatory condition of probation, that section was renumbered and is now found at section 3565(a)(5). The new section 3563(a)(4) imposes a

mandatory condition of probation on defendants convicted of crimes of domestic violence, and requires offender rehabilitation counseling. Thus, the defendant contended that section 3565(b)(3) did not apply to him because he was not convicted of a crime of domestic violence. The appellate court rejected this argument, concluding that Congress made a simple drafting error when it designated the mandatory condition for domestic violence at section 3565(a)(4), rather than (a)(5). The correct reading of section 3565(b)(3) is that the statute requires revocation of probation for failure to submit to drug testing when a defendant is required, as a condition of probation, to submit to drug testing.

United States v. Lowenstein, 108 F.3d 80 (6th Cir. 1997). The district court did not err in modifying and subsequently revoking the defendant's supervised release. The defendant argued that the district court could not modify the terms of his release without first finding that he had violated one of the terms set forth in the release order. In addition, the defendant argued that the evidence did not support either the violation finding upon which the modification was based or the violation finding upon which the revocation was based. The appellate court disagreed, and held that the defendant's reliance on USSG §7B1.3(a)(2) was misplaced. The court reasoned that the guideline did not provide that a violation was a necessary prerequisite for a modification of supervised release. Further, the provisions of the guideline demonstrate that a court can modify the conditions of a defendant's supervised release regardless of whether the defendant violated his existing condition. As to the defendant's second allegation, the court reasoned that a sentencing court may revoke a term of supervised release and incarcerate a defendant when the "court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release. In the instant case, the harassing phone calls made to an attorney in the Oakland County Probate Court and the unauthorized travel out of state were sufficient evidence of release violations.

United States v. Throneburg, 87 F.3d 851 (6th Cir.), *cert. denied*, 519 U.S. 975 (1996). The sentencing court did not err in holding the supervised release revocation hearing two years after the issuance of the violation warrant or in imposing the resulting sentence consecutive to a state sentence being served for another crime. With respect to the timing of the revocation hearing, the court noted that the violation warrant issued well within the three year term of supervised release and the hearing was held two years into the three-year period. The court rejected defendant's argument that his rights were prejudiced by this delay based on the assumption that if the federal court held the hearing and imposed the 24-month sentence earlier, the state Department of Corrections would have likely paroled the defendant to the federal sentence. The court adhered to the ruling of previous courts that delay violates due process only when it impairs the defendant's ability to contest the validity of the revocation. In this case, defendant admitted to violating the conditions of his supervised release and failed to provide support for his assertion that delay constitutes a due process violation. The court also rejected defendant's argument that his sentence upon revocation should be served concurrently with his state sentence. Although USSG §7B1.3 contains a policy statement directing the sentencing court to impose revocation sentences consecutively to other terms of imprisonment, the court recognized its discretion in this matter and provided an explanation as to the reason for imposing consecutive rather than concurrent sentences.

United States v. Twitty, 44 F.3d 410 (6th Cir. 1995). The district court erred in revoking the defendant's probation pursuant to 18 U.S.C. § 3565 based on conduct which occurred before the defendant was sentenced to probation. The district court had ruled that revocation of the defendant's probation was warranted because she was under an appearance bond at the time of her pre-probationary conduct which specified that she not commit any violation of federal, state or local law while released on bond. The district court held that this condition gave the defendant "fair notice" to remain crime free. The circuit court, while acknowledging that § 3565(a) grants courts authority to revoke probation for pre-probationary conduct, concluded that such revocation can occur only after the defendant has fair notice of the terms of probation that could result in revocation. *But see United States v. James*, 848 F.2d 160 (11th Cir. 1988). Thus, a defendant's probation may be revoked for conduct which occurs prior to the actual commencement of the probationary sentence, but not for conduct, such as the defendant's, which occurs prior to the date on which the defendant was sentenced to probation.

§7B1.4 Term of Imprisonment

United States v. Hudson, 207 F.3d 852 (6th Cir.), *cert. denied*, 531 U.S. 890 (2000). The defendant appealed his revocation sentence of nine months arguing that the district court erred in sentencing him to a term of incarceration in excess of the range applicable on the original charge. He reasoned that because the sentencing range for the underlying offense was 0-6 months, the district court could not impose a sentence greater than six months for violation of probation despite the policy statement in §7B1.4(a) which provides for a sentencing range of 3-9 months. However, the Sixth Circuit disagreed and held that 18 U.S.C. § 3565(a)(2) in no way restricts the sentencing court to the imposition of a sentence no greater than that originally applicable to the defendant but rather directs the court to *consider* the relevant policy statements issued by the Sentencing Commission.

APPLICABLE GUIDELINES/EX POST FACTO

United States v. Pierce, 17 F.3d 146 (6th Cir. 1994). The district court did not err in including preguidelines conduct as relevant conduct to determine the defendant's tax loss. The Sixth Circuit held that using preguidelines conduct to enhance the defendant's base offense level did not violate the ex post facto clause. *See United States v. Ykema*, 887 F.2d 697, 700 (6th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3582

United States v. Lively, 20 F.3d 193 (6th Cir. 1994). The defendant pleaded guilty to mail fraud for defrauding mail order companies of over $30,000 worth of merchandise. She challenged the district court's decision to impose six months of imprisonment rather than home confinement. In a case of first impression, the Sixth Circuit held that, in the creation of its sentencing table, the Sentencing

Commission adequately considered the various competing policy aims of providing a definite prospect of imprisonment for economic crimes like fraud and a congressional mandate that:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation . . .

18 U.S.C. § 3582(a). Because the defendant's sentencing range was 6-12 months, placing her in Zone B, the district court did not err in imposing a sentence of 6 months imprisonment even though the court could have sentenced the defendant to various less restrictive alternatives.

18 U.S.C. § 3583

United States v. Hancox, 49 F.3d 223 (6th Cir. 1995). The district court erred in denying the government's motion for revocation of the defendant's supervised release. The defendant admitted that she had used drugs on numerous occasions while on supervised release. The district court elected not to revoke, because she had been admitted into an in-patient drug treatment program and had been making progress since her arrest. On appeal, the appellate court agreed with the government that 18 U.S.C. § 3583(d) mandates the termination of supervised release upon evidence that the defendant possessed a controlled substance. The appellate court noted that "use" constitutes "possession" for purposes of the statute, joining the First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. *See United States v. McAfee*, 998 F.2d 835 (10th Cir. 1993); *United States v. Dow*, 990 F.2d 22 (1st Cir. 1993); *United States v. Rockwell*, 984 F.2d 1112 (10th Cir.), *cert. denied*, 508 U.S. 966 (1993); *United States v. Courtney*, 979 F.2d 45 (5th Cir. 1992); *United States v. Baclaan*, 948 F.2d 628 (9th Cir. 1991); *United States v. Blackston*, 940 F.2d 877 (3d Cir.), *cert denied*, 502 U.S. 992 (1991); *United States v. Oliver*, 931 F.2d 463 (8th Cir. 1991); and *United States v. Dillard*, 910 F.2d 461 (7th Cir. 1990). The sentence was vacated and the case was remanded for resentencing. "Pursuant to 18 U.S.C. § 3583, the district court was required to revoke Hancox's supervised release and to sentence her to 20 months in prison. Twenty months is one-third of her supervised release term of five years. The district court had no discretion to disregard the mandate of the statute."

18 U.S.C. § 3583(e)(1)

United States v. Spinelle, 41 F.3d 1056 (6th Cir. 1994). In addressing an issue of first impression, the appellate court held that "a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. § 3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a)." The appellate court reasoned that sentencing and post-sentence modification are "two separate chronological phases," and seen as such, "the statute mandating a specific sentence of supervised release [in this case, three years] and the statute authorizing the termination of a prior imposed sentence are quite consistent." Thus, the defendant, sentenced to a

mandatory three-year term of supervised release under the provisions of the Anti-Drug Abuse Act of 1986, at 21 U.S.C. § 841(b)(1)(C) was properly sentenced, and the district court properly exercised its discretion pursuant to 18 U.S.C. § 3583(e)(1) to terminate the supervised release after the completion of one year.

18 U.S.C. § 3742

United States v. Lavoie, 19 F.3d 1102 (6th Cir. 1994). In an issue of first impression, the Sixth Circuit held that pursuant to 18 U.S.C. § 3742(a), which makes an incorrect application of the guidelines appealable, a guidelines sentence is appealable "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."

POST-*APPRENDI* (*APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000))

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000). The defendant was convicted of a RICO conspiracy in violation of 18 U.S.C. § 1962(d). On appeal, the defendant argued that in the context of a RICO conspiracy, the district court violated the *Apprendi* rule by applying the preponderance of the evidence standard in determining the underlying offenses and by not submitting the issue to the jury. The court found that the defendant faced a maximum sentence of 20 years on the RICO conspiracy counts, disregarding the murder conspiracy. The court held that because the district court did not sentence defendant to a term of more than 20 years on the RICO counts, even considering the murder conspiracy, *Apprendi* was not triggered.

United States v. Darwich, 337 F.3d 645 (6th Cir. 2003). Defendant was convicted of conspiracy to distribute marijuana. On appeal, defendant argued that the district court improperly concluded that the drug quantity necessary to sentence him to 88 months in prison pursuant to 21 U.S.C. § 841(b)(1)(C), USSG §2D1.1(a)(3), and USSG §2D1.1(c)(7) was proved beyond a reasonable doubt. The question for the Sixth Circuit was whether a district court's use of hearsay testimony to establish drug quantity beyond a reasonable doubt violated *Apprendi*. First the Sixth Circuit noted that it had consistently held that hearsay was permissible at a sentencing hearing so long as it had some minimum indicia of reliability. However though the court recognized the traditional acceptance of hearsay testimony at sentencing, it stated that drug quantity was considered an element of the offense and not a sentencing factor when such quantity altered the statutory maximum sentence the defendant could receive. The court held that the normal rules of evidence should apply when *Apprendi* required the district court to find the drug quantity beyond a reasonable doubt, and therefore it was not permissible to use hearsay evidence to reach the 50-kilogram quantity needed to sentence defendant under §841(b)(1)(C). Accordingly, the district court's acceptance of hearsay testimony to reach the necessary 50 kilograms beyond a reasonable doubt was erroneous. Without establishing that defendant was responsible for at least 50 kilograms of marijuana beyond a reasonable doubt, the district court could not sentence defendant under § 841(b)(1)(C), and instead had to sentence him under section 841(b)(1)(D). Consequently, defendant's sentence of 88 months was improper because

it subjected him to a sentence in excess of the statutory maximum in violation of his constitutional right to have each element of the offense proved beyond a reasonable doubt.

United States v. Leachman, 309 F.3d 377 (6th Cir. 2002). Defendant pled guilty to four counts arising out of a home marijuana-growing operation in violation of 21 U.S.C. §§ 841 and 846. On appeal, defendant argued that his sentence was unconstitutional under *Apprendi* because his mandatory minimum sentencing range was determined by an amount of drugs not proved to a jury beyond a reasonable doubt. The Sixth Circuit noted that in *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court held that anything increasing the statutory minimum was a sentencing factor, not an element, and therefore, allowing the judge to determine whether the firearm was brandished by a preponderance of the evidence did not violate the defendant's constitutional rights. The court then noted that although *Harris* involved a defendant sentenced under 18 U.S.C. § 924, there was no logical reason why its rule did not likewise govern convictions under 21 U.S.C. § 841. Accordingly, *Flowal, Ramirez, Strayhorn* and all other cases before the Sixth Circuit in which it was held that *Apprendi* applied to mandatory minimum sentences were overruled to the extent they conflict with *Harris* and this opinion. *See, e.g., United States v. Humphrey*, 287 F.3d 422 (6th Cir. 2002); *Gibson v. United States*, 271 F.3d 247 (6th Cir. 2001); *United States v. Garcia*, 268 F.3d 407 (6th Cir. 2001). The district court's sentence was affirmed.