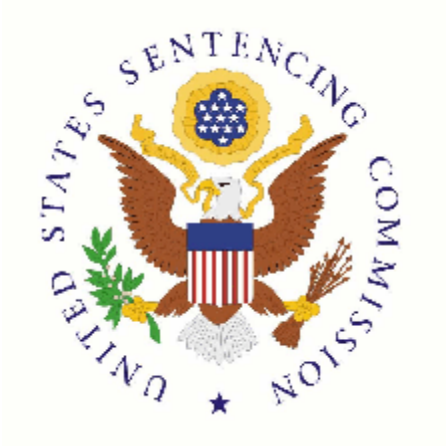
SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FIRST CIRCUIT



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Office of General Counsel
U.S. Sentencing Commission

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First Circuit
Case Law Highlights

§1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)–*U.S. v. Colon-Solis*, 354 F.3d 101 (1st Cir. 2004) (held that sentencing court was required to make a specific finding, supportable by a preponderance of the evidence, ascribing the triggering drug amount to defendant, when imposing a mandatory minimum sentence), p. 2; ***U.S. v. Maxwell*, 351 F.3d 35 (1st Cir. 2003)** (the court did not err in sentencing Maxwell based upon both the one count of wire fraud and the losses from the 1999 investors–the latter constituted "relevant conduct" for sentencing purposes), p.3; ***U.S. v. Santos*, 357 F.3d 136 (1st Cir. 2004)** (defendant could be held responsible for more than 3.5 kilograms of cocaine), p. 4.

§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)–*U.S. v. Beaudoin*, 362 F.3d 60 (1st Cir. 2004) (the district court did not commit clear error in applying the sentencing enhancement for possession of a dangerous weapon based on the defendant, a convicted felon, possessing a circular saw), p. 12.

§2F1.1 (Fraud and Deceit)–*U.S. v. Maldonado-Montalvo*, 356 F.3d 65 (1st Cir. 2003) (purported independent wrongful conduct of truck drivers, whether or not they were defendants' coconspirators, could not constitute a legitimate ground for a "multiple causation" departure; evidence did not support "multiple causation" departure on basis that the milk supplied by defendants did not adversely affect any consumer's health), p. 18; ***U.S. v. Thurston*, 358 F.3d 51 (1st Cir. 2004)** (intended loss figure of more than $5 million was sufficiently supported by evidence), p. 18.

§3B1.2 (Mitigating Role)–***U.S. v. Santos*, 357 F.3d 136 (1st Cir. 2004)** (court found that the defendant was entitled only to downward sentencing adjustment for playing minor, as opposed to minimal, role in offense was not clearly erroneous), p. 4.

§3C1.1.1 (Obstructing or Impeding the Administration of Justice)–*U.S. v. Fournier*, 361 F.3d 42 (1st Cir. 2004) (defendant had the specific intent to obstruct justice, warranting a sentence enhancement on such basis; and the district court did not err in refusing to grant sentence reduction for acceptance of responsibility), p. 35.

§4A1.2 (Definitions and Instructions for Computing Criminal History)–*U.S. v. Caldwell*, 358 F.3d 138 (1st Cir. 2004) (held that any error in district court's calculation of defendant's criminal history was harmless), p. 42.

§5D1.2 (Term of Supervised Release)–*U.S. v. Riggs*, 347 F.3d 17 (1st Cir. 2003) (government did not breach plea agreement; five-year term of supervised release was not upward departure), p. 54.

§5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment)–*U.S. v. Caldwell*, 358 F.3d 138 (1st Cir. 2004) (held that the district court had discretion to determine whether the federal sentence would run concurrently or consecutively to three undischarged state sentences; the sentence had to be imposed consecutively to the undischarged state sentence that was imposed upon revocation of probation), p. 42.

§5H1.3 (Mental and Emotional Conditions)–*United States v. Maldonado-Montalvo*, 356 F.3d 65 (1st Cir. 2003) (court abused its discretion in relying upon defendant's depression as a ground for its downward departure), p. 18.

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CHAPTER ONE: *Introduction and General Application Principles*

Part A Authority

§1A1.1 Authority

See United States v. Thurston, 358 F.3d 51 (1st Cir. 2004), §2F1.1, p. 18.

Part B General Application Principles

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

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court's inclusion of enhancements in the calculus of the defendant's offense level under USSG §1B1.3 was not erroneous. The defendant argued that the state court had accounted already for the conduct upon which the enhancements were based. However, USSG §1B1.3 requires that courts consider all relevant conduct when calculating the offense level, including conduct upon which a previous sentence was based. Furthermore, the First Circuit had previously ruled that the sentencing guidelines had contemplated "multiple prosecutions for different offenses based on the same conduct" and permitted enhancements based on conduct underlying previous convictions. *United States v. Hughes*, 211 F.3d 676, 690 (1st Cir. 2000). The court affirmed this part of the sentence, ruling that, pursuant to USSG §1B1.3, the district court was required to include the enhancements when calculating the offense level.

United States v. Batista, 239 F.3d 16 (1st Cir. 2001), *cert. denied*, 534 U.S. 850 (2001). The district court did not err when it included in the sentencing calculus the drug quantities written in the ledger defendant was reviewing at the time of his arrest. Having been convicted of conspiracy and possession with intent to distribute cocaine, the defendant argued that the only drug quantity relevant to sentencing was that for which he was convicted. Section 1B1.3 mandates that the judge include all quantities that are "part of the same course of conduct or common scheme or plan as the offense of conviction." USSG §1B1.3(a)(2). A "common scheme or plan" includes offenses "substantially connected to each other by at least one common factor." USSG §1B1.3, comment. (n.9). Affirming the decision, the court found that the totality of the record demonstrated that the transactions described in the ledger and the offense of conviction shared a "common scheme or plan." Not only was the defendant holding the ledger in his lap when the police arrived, but the district court determined that the defendant was a member of the conspiracy for which he was convicted during the times the transactions in the ledger were executed, establishing the "common factor" required under the guideline.

United States v. Brandon, 17 F.3d 409 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994). The defendants were convicted of bank fraud and conspiracy to commit bank fraud. They appealed the district court's determination of loss, claiming that the district court improperly assigned to each of them the entire amount of loss without regard to their individual degrees of participation in the conspiracy. The circuit court affirmed, holding that, under USSG §1B1.3, it is possible for a defendant to join, and thus foresee and be held accountable for, the operation of the entire conspiracy.

United States v. Colon-Solis, 354 F.3d 101 (1st Cir. 2004). This was a case of first impression. The defendant pled guilty to a drug conspiracy offense but asserted that the quantity of drugs attributable to the conspiracy was improperly attributed to the defendant for purposes of imposing a mandatory minimum sentence. The defendant's principal argument was that the district court erred in imposing a ten-year mandatory minimum sentence under 18 U.S.C. § 841(b)(1)(A), without making a specific finding that he–rather than the charged conspiracy–was accountable for a particular quantity of drugs. On appeal, the court examined whether a defendant is automatically subject to a mandatory minimum, without a particularized finding that the drug amounts were attributable to, or foreseeable by, him, if the defendant admitted that the drug quantity involved was sufficient to trigger the mandatory minimum. The appellate court agreed, holding that the mandatory minimum sentence based on drug quantity could not be automatically imposed based solely on the quantity attributable to the conspiracy, and such mandatory minimum sentence required an individualized finding as to drug amounts attributable to, or foreseeable by, the defendant. The defendant was one of several codefendants who simultaneously changed their pleas. The prosecutor stated only that the appellant had served as a runner "on occasions" and had assisted in the packaging and processing of narcotics and delivery of the narcotics to drug points. The prosecutor did not allude in any way to specific drug weights. The sentencing court applied a *per se* rule, automatically attributing to the appellant the full amount of the drugs charged in the indictment and attributed to the conspiracy as a whole. The First Circuit held that this was error. The court further held that when a district court determines drug quantity for the purpose of sentencing a defendant convicted of participating in a drug trafficking conspiracy, the court is required to make an individualized finding as to drug amounts attributable to, or foreseeable by, that defendant. In the absence of such an individualized finding, the drug quantity attributable to the conspiracy as a whole cannot automatically be shifted to the defendant.

United States v. Cyr, 337 F.3d 96 (1st Cir. 2003). The defendant challenged the sentencing court's description of his prior state convictions for distribution of heroin as "unrelated" to his prior state convictions for distribution of Xanax, even though the arrests took place on the same day. He argued that the court should have grouped the offenses for criminal history purposes. The court of appeals explained that under the guidelines, the glue that binds prior sentences together under Application Note 3 may be different from the substantive similarities that render prior conduct "relevant" to an instant offense. In this case, the defendant's July Xanax and heroin sentences are related because (1) the offenses occurred on the same occasion, and (2) the cases were consolidated for trial. The court held that, despite the fact that the offenses were related, it was not improper for the district court to conclude that only the prior heroin offenses were relevant to the instant heroin conspiracy, while the prior Xanax

offenses were not. Accordingly, the court found no error in the district court's assignment of three criminal history points for defendant's prior Xanax sentences.

United States v. LaCroix, 28 F.3d 223 (1st Cir. 1994). The district court did not err in including as relevant conduct the acts of the defendant's co-conspirators when determining the amount of loss under USSG §2F1.1. The defendant was convicted of conspiracy to defraud a federally insured financial institution in violation of 18 U.S.C. § 371. He argued that the district court misinterpreted the "accomplice attribution test" because it based its foreseeability finding on the defendant's "awareness" of his co-conspirator's activities. The circuit court concluded that awareness is germane to the foreseeability prong of the "accomplice attribution test" when that awareness is a knowledge of the nature and extent of the conspiracy in which the defendant is involved. The time from which the sentencing judge should determine foreseeability is the time of the defendant's agreement.

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1998). The district court erred by failing to make particularized findings of the quantity of drugs used to determine the defendant's base offense level under §2D1.1. The defendant was convicted of a drug conspiracy under 21 U.S.C. §§ 841(a)(1) and 846. Although the evidence at trial showed that the defendant's role in the conspiracy was substantial, neither the district court nor the presentence report referred to any evidence to support assigning the defendant a base offense level of 38. The case was remanded for the court to make particularized findings on what quantity of drugs were attributable to the defendant.

United States v. Maxwell, 351 F.3d 35 (1st Cir. 2003). The district court did not err in counting conduct not included in the offense of conviction as relevant conduct when sentencing the defendant. The defendant pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, receiving 18 months' imprisonment, three years supervised release and a $30,000 fine. The defendant was involved in a Ponzi scheme involving two sets of investors, one set recruited in October 1998, and the second in May 1999. The defendant appealed the sentence, claiming the district court erred in attributing the losses of the May 1999 investors to her as relevant conduct under USSG §1B1.3, claiming there was an insufficient temporal relationship between the 1999 investors and the limited offense of conviction for a wire transfer in June 2000. The court was not persuaded. For all acts and omissions attributable as relevant conduct under §1B1.3, the government must show they "were part of the same course of conduct or common scheme or plan as the offense of conviction." The June 2000 wire transfer related to defendant's efforts to help the ringleader payback the May 1999 investors. The district court correctly concluded the wire transfer offense of conviction was in furtherance of the larger scheme. The one-year lag between defrauding the May 1999 investors and the June 2000 wire transfer does not undermine the court's conclusion, because the guidelines expressly state that "where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity" makes up for it. §1B1.3 comment. (n.9(B)). The defendant knew the ringleader used a false name to deceive the investors and hide his financial arrangement with the defendant when making the June 2000 wire transfer. All of the defendant's conduct was part of the continuing efforts of the defendant to help defraud the investors.

United States v. Nieves, 322 F.3d 51 (1st Cir.), *cert. denied*, 538 U.S. 1049 (2003). The defendant pled guilty to conspiracy to distribute crack cocaine and distribution of crack and cocaine hydrochloride. On appeal, the defendant challenged the district court's determination to hold her accountable for the sale of an additional 1.63 grams of crack on December 7, 1999, during a drug conspiracy. With the additional quantity, the defendant would be subject to a mandatory minimum. The defendant alleged that she had successfully withdrawn from the conspiracy prior to that date after she told the cooperation witness that she stopped using drugs and would no longer acquire drugs for the cooperation witness because of her pregnancy. The circuit court held that the district court did not err and found the defendant had not truly disavowed the purposes of the conspiracy because she later agreed to help the cooperation witness contact her codefendant to procure drugs.

United States v. Santos, 357 F.3d 136 (1st Cir. 2004). The defendant pled guilty to conspiring and attempting to possess in excess of five kilograms of cocaine, and the sentencing court–which expressly found that there was a sound factual basis for the plea–was entitled to accept that concession at face value and to draw reasonable inferences from it. The court found that the record provided adequate support for a finding that the appellant reasonably could have foreseen that the amount of cocaine involved in the deal would exceed 3.5 kilograms. The defendant argued that his equivocal answer of "I guess," when asked if he was at the garage to pick up the 35 kilograms of cocaine, his absence during the pre-sale negotiations, his method of compensation based on a flat fee instead of a share of the anticipated profits, and his inability to open the vehicle's "hide," indicated how far removed he was a minimal participant. The Court of Appeals found that the sentencing court carefully appraised the defendant's involvement, considering his presence during a discussion with co-conspirators, the size of the down payment, and the amount of cocaine displayed on the table when the defendant first entered the garage for a scheduled pick up of the drug quantity. The appellate court determined that he properly should be classified as a minor, not a minimal, participant and affirmed the district court's conclusion.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder[1]

[1]Pending congressional approval, the Commission, effective November 1, 2004, will revise Commentary in §2A1.1(First Degree Murder) to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, pursuant to 18 U.S.C. § 3553(e); delete outdated language.

§2A1.2 Second Degree Murder[2]

§2A1.3 Voluntary Manslaughter[3]

§2A1.4 Involuntary Manslaughter[4]

§2A1.5 Conspiracy or Solicitation to Commit Murder[5]

§2A2.1 Assault with Intent to Commit Murder; Attempted Murder[6]

§2A2.2 Aggravated Assault[7]

United States v. Zaragoza-Fernandez, 217 F.3d 31 (1st Cir. 2000). The district court properly applied the aggravated assault guideline, §2A2.2, in a case in which the defendant argued that there was no showing that he intended to cause the law enforcement officer serious bodily injury. The First Circuit held that the evidence showed that the defendant saw the law enforcement officer in front of his car, had reason to appreciate he was an officer, continued to drive at him, and was prepared to strike him with his car to effectuate his escape. The circuit court concluded that the defendant committed an aggravated assault on the officer.

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[2]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level for §2A1.2 (Second Degree Murder) to address proportionality concerns.

[3]Pending congressional approval, the Commission, effective November 1, 2004, will Increase base offense level for §2A1.3 (Voluntary Manslaughter) to address proportionality concerns.

[4]Pending congressional approval, the Commission, effective November 1, 2004, will add a third alternative base offense level for reckless involuntary manslaughter offense that involved the reckless operation of a means of transportation to address concerns that vehicular manslaughter involving alcohol or drugs be sentenced at a higher offense level.

[5]Pending congressional approval, the Commission, effective November 1, 2004, will increase base offense level for §2A1.5 (Conspiracy or Solicitation to Commit Murder) to address proportionality concerns.

[6]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level for §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the object is to commit first degree murder to address proportionality concerns.

[7]Pending congressional approval, the Commission, effective November 1, 2004, will add an enhancement to §2A2.2 (Aggravated Assault) if the defendant was convicted under 18 U.S.C. §111(b) or §115; decrease the base offense level by one level; and increases by one level each of the specific offense characteristics for degrees of bodily injury.

§2A2.3 Minor Assault[8]

§2A2.4 Obstructing or Impeding Officers[9]

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Sexual Abuse[10]

§2A3.2 Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts[11]

§2A3.3 Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts[12]

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact[13]

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[14]

United States v. Lorenzo-Hernandez, 279 F.3d 19 (1st Cir.), *cert. denied*, 537 U.S. 877 (2002). The district court properly applied the one-level enhancement under USSG §2A4.1(b)(4)(B)

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[8]Pending congressional approval, the Commission, effective November 1, 2004, will amend §2A2.3 (Minor Assault) by increasing by one level each of the alternative base offense levels; adds a two-level enhancement if the victim sustained bodily injury; adds a cross-reference to §2A2.2 (Aggravated Assault).

[9]Pending congressional approval, the Commission, effective November 1, 2004, will amend §2A2.4 (Obstructing or Impeding Officers) by increasing the base offense level and by adding an enhancement if the victim sustained bodily injury to maintain proportionality.

[10]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Sexual Abuse) in response to the PROTECT Act, to reflect the seriousness of the offenses.

[11]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level of 24 under §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), in response to the PROTECT Act, to account for the new mandatory minimum of five years for offenses under 18 U.S.C. §§ 2422 and 2423(a); and increase the offense levels for specific offense characteristics under §2A3.2, for custody, care, or supervisory control of the victim by the defendant and for misrepresentation or undue influence by the defendant.

[12]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level in response to the PROTECT Act, Pub. L. 108-21, to "amend the guidelines to ensure that the guidelines adequately reflect the seriousness of the offenses."

[13]Pending congressional approval, the Commission, effective November 1, 2004, will increase offense levels in response to the PROTECT Act, Pub. L. 108-21, with a separate base offense level applying to conduct described in 18 U.S.C. § 2241(a) or (b) (Aggravated Sexual Abuse), and to conduct described in 18 U.S.C. § 2242 (Sexual Abuse), and level 12 applying to all other cases.

[14]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level for §2A4.1 (Kidnaping, Abduction, Unlawful Restraint) from level 24 to base offense level 32, effective May 30, 2003, in response to the PROTECT Act, Public Law 108-21.

for not releasing the kidnapping victim within seven days. The defendant challenged application of the one-level enhancement in USSG §2A4.1(b)(4)(B), arguing that even though the kidnapping victim had not been released before seven days had elapsed, he had only been a member of the conspiracy for five days and that therefore the enhancement should not apply to him. The First Circuit held that even if the defendant's claim to have only joined conspiracy at a later date was valid (and there was a suggestion that the district court did not think it was), the enhancement would still apply. The court noted that the enhancement is driven by the release date of the victim, not the length of time of the defendant's involvement.

§2A6.1 Threatening or Harassing Communications

United States v. Freeman, 176 F.3d 575 (1st Cir. 1999). The district court did not err in denying the defendant a four-level reduction under USSG §2A6.1(b)(2), which applies "if the offense involved a single instance evidencing little or no deliberation." The defendant pled guilty to transmitting a threatening communication in interstate commerce under 18 U.S.C. § 875. The facts indicate that the defendant made a total of eight and at least two threatening phone calls to a hotline dedicated to locating missing children. The defendant's calls consisted of various statements about abducting, torturing, and sexually assaulting his stepdaughter. He continued to "update" the hotline operator. A defendant's communication is a threat if the defendant "should have reasonably foreseen that the statement uttered would be taken as a threat by those to whom it is made." *Id*. at 578 (quoting *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (internal quotation omitted). The district court did not err in concluding that eight phone calls in two days were more than a "single instance." Finally, the court did not err in finding that the defendant's conduct amounted to more than "little or no deliberation." The defendant looked up the number, spoke to the operator, remembered the contents of previous calls, and made up new ways to describe the torture.

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[15]

United States v. Carrington, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 520 U.S. 1150 (1997). The circuit court affirmed the district court's calculation of loss under §2B1.1 based on the market value of the items the defendant obtained. The defendant argued that the district court erred in

[15]Pending congressional approval, the Commission, effective November 1, 2004, will reference the new offense, 18 U.S.C. § 1037 (Fraud and Related Activity in Connection with Electronic Mail) to §2B1.1 (Theft, Fraud, or Property Destruction) in Appendix A; add an enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through "improper means;"define "improper means;" and provide instruction in the Commentary to apply the "mass marketing" enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

its calculation of loss by relying on the values assigned by the presentence report instead of using the actual amount of money that the defendant obtained in the sale and the fair wholesale value of the vehicles he bought. Under USSG §2B1.1, comment. (n.2), a product's fair market value is ordinarily the appropriate value of the victim's loss. The defendant noted, however, that market value is often difficult to ascertain and therefore, alternative methods of valuation should be employed. The appellate court rejected the defendant's argument, and held that it was reasonable for the district court to calculate the market value of each vehicle as the price the defendant negotiated with each dealership. The appellate court joined the Sixth Circuit in equating the market value of a particular item with the price a willing buyer would pay a willing seller at the time and place the property was taken. *See United States v. Warshawsky*, 20 F.3d 204, 213 (6th Cir. 1994). Additionally, the court noted that it was proper for the court to adopt the retail, rather than the wholesale, value of the cars, since all the dealerships from whom the defendant obtained the cars were engaged in the retail sale of automobiles.

United States v. Coviello, 225 F.3d 54 (1st Cir. 2000), *cert. denied*, 531 U.S. 1102 (2001). The district court did not err when it calculated the loss pursuant to USSG §2B1.1(b)(1) from the transfer of stolen property. The defendants either pled guilty or were convicted of charges of conspiracy to transport stolen property in interstate commerce, transportation of stolen property, conspiracy to launder money and money laundering; one defendant was also convicted of structuring to evade reporting requirements to the Internal Revenue Service. The defendants participated in a scheme to sell Microsoft software stolen from KAO Infosystems, a computer disk manufacturer. Using Microsoft's wholesale prices, the district court assessed a loss based on the value of the property at the time it was taken from Microsoft. The defendants first argued that the district court should have calculated KAO's loss because the property was stolen from KAO, not Microsoft, and because KAO was required to compensate Microsoft for the lost disks. Rejecting the argument, the court found that Microsoft had a greater ownership interest in the property because Microsoft authorized all KAO distributions of its property and because the value of the property resided not in the plastic material of the disks, of which KAO had some ownership interest, but rather Microsoft's intellectual property located on the discs. Moreover, the district court appropriately used Microsoft's wholesale prices to calculate the fair market value of the loss, despite the fact that Microsoft sometimes distributed its products at cheaper prices through alternative channels, because no evidence indicated that Microsoft would have sold the stolen products through those alternative channels. The court also rejected the defendants' arguments that the price should have been discounted based on blemishes, the lack of legitimate licenses on the disks, and an absence of packaging materials. There was no evidence of defects or that customers had complained of defects; the absence of a license only shows that the disks were sold without Microsoft's consent, which is no basis for a discounted price; and any reduction of value for a lack of packaging would have no effect on the sentence because the property's value would have to be reduced by $7,000,000 to warrant an adjustment under §2B1.1. Finally, the fair market value of the property was the appropriate measure of the loss, as opposed to the replacement cost of the disks or the defendants' financial benefit. Application Note 2 to §2B1.1, which provides for alternative measures of calculating loss, has applied to products that do not have market value, such as government documents; but, because the Microsoft products do have a market value, and a value that can be adequately calculated to provide a reasonable estimate required by USSG §2B1.1, the fair market value is appropriate to use.

In addition, the district court did not err when it enhanced the defendants' sentences by four levels under USSG §2B1.1(b)(4)(B) for being in the business of receiving and selling stolen property. When considering this enhancement, the First Circuit required that the sentencing court consider "'the totality of the circumstances, with particular emphasis on the regularity and sophistication of a defendant's operation.'" *Id*. at 64 (quoting *United States v. Richardson*, 14 F.3d 666, 674 (1st Cir. 1994); *see also United States v. McMinn*, 103 F.3d 216, 222 (1st Cir. 1997); *United States v. St. Cyr*, 977 F.2d 698, 703 (1st Cir. 1992). The court found that the defendants' operation satisfied this standard. The illicit operation, which purchased more than 40,000 stolen CD-ROMs, back-up tapes, and compact disks, valued at more than $17,000,000, over the course of more than two years, involved several of the company's employees and produced substantial profits. The sophisticated fencing operation sold to several international and non-local buyers, filtering revenues through multiple bank accounts to avert attention. The court also ruled that the fact that the company also sold legitimate products did not preempt it from the enhancement, noting that such enterprises were cause for greater concern. The court rejected Rosengard's argument that the enhancement could not apply to him because he was merely an employee of the company. Rosengard participated in most aspects of the operation, determining which products to purchase, receiving the stolen property, handling payments, and reselling the stolen goods. He also admitted to receiving about $20,000 for his dealings.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not err when it calculated loss under USSG §2B1.1 based on the total amount embezzled by the defendant rather than the loss suffered by the victim. The defendant pled guilty to embezzlement under 18 U.S.C. § 664. Over a period of three years, the defendant made several withdrawals from his company's profit sharing plan, totaling $938,000, but ultimately left a shortfall of less than $500,000 because he had repaid some of the money during that time. The district court calculated the loss under USSG §2B1.1 based on the total amount embezzled and not the actual shortfall. Consistent with Second Circuit interpretation of a similar loss provision in the fraud guideline, the court affirmed the district court decision. *See United States v. Brach*, 942 F.2d 141, 143 (2d Cir. 1991) (affirming a wire fraud sentence based on a loss calculation that "included the value of all property taken, even though all or part of it was returned"). Each illegal withdrawal constituted an act of embezzlement. Regardless of repayment, each time the defendant unlawfully withdrew money, he risked the business's ability to maintain its financial obligations. The court added that the defendant's acts of repayment could be grounds for departure under other guidelines.

§2B3.1 Robbery

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court erred when it included the value of a stolen car as a robbery-related loss for purposes of enhancing the defendant's sentence under USSG §2B3.1. The defendant was convicted of various state and federal charges stemming from a bank robbery that ended in a high-speed car chase and a house invasion. Based on a loss calculation that included the value of a car stolen on the morning of the bank robbery, the district court raised the offense level under USSG §2B3.1(b)(7). The court held that despite the fact that the defendant stole the car to provide transportation for the bank robbery, the car theft and the bank robbery were too disparate for the value of the car to be included in the loss from the bank robbery.

"[T]he two offenses [were] not a continuous event and [were] somewhat attenuated." *Id*. at 7. Furthermore, "robbery is only secondarily about value," and the value of the car was the only link established at sentencing between the car theft and the bank robbery. The court ruled that the one-level enhancement based on a loss calculation that included the value of the car was erroneous and vacated that part of the sentence.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The district court did not err in finding that the defendant made a threat of death during a robbery that warranted application of a two-level enhancement under USSG §2B3.1(b)(2)(F). During the robbery in question, the defendant, who did not have a gun, handed the teller a note which read, "Give me all your money or I'll start shooting," and told the teller "that he was not playing a prank." After the teller relinquished cash, the defendant apologized. A defendant need not explicitly communicate an intent to kill to be subject to the enhancement. *See* USSG §2B3.1, comment. (n. 6). The test is whether the defendant's conduct would instill in a reasonable person a fear of death. The circumstances of this case indicate that the defendant threatened to use a lethal weapon. The teller had no way of knowing that the defendant did not actually possess a gun.

United States v. Whooten, 279 F.3d 58 (1st Cir.), *cert. denied*, 536 U.S. 913 (2002). The district court did not err in applying the four-level enhancement under USSG §2B3.1(b)(4)(A) for abduction. The defendant claimed the four-level enhancement of USSG §2B3.1(b)(4)(A), which applies when a person is abducted to facilitate the commission of the offense or to facilitate escape, was erroneously applied to him. The defendant argued that as a matter of law, forcing one robbery victim to exit the store and walk 65 feet from the store's entrance did not amount to moving the victim to a different location. The First Circuit disagreed, noting that the defendant forced the victim at gunpoint, while threatening to kill her, to move outside the store and 65 feet into the parking lot and that this constituted a forced move to a different location. In addition, by forcing the victim to move, the defendant shielded himself from detection and provided himself with a potential hostage, thereby facilitating his escape. Moreover, the abduction enhancement is designed to deter against conduct that results in a victim's isolation, which can result in additional harm. Here, the defendant placed the victim at risk of additional harm, and this further reflected the appropriateness of the enhancement.

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Hughes, 211 F.3d 676 (1st Cir. 2000). The district court properly sentenced the defendant under USSG §2A1.1, the first degree murder guideline, cross-referenced under §2B3.2(c)(1). A jury convicted the defendant of attempted extortion, in violation of 18 U.S.C. § 1951, after the defendant murdered the president of the software company for which he worked, then told the company's management that the president had been kidnapped and was being held for ransom. He refused to inform management of the location for the exchange and attempted to exact the ransom money from the company to complete the exchange alone. The defendant was convicted of the company president's homicide in Mexico. The defendant first argued that USSG §2B3.2(c)(1) was superceded by 18 U.S.C. § 1119, which prohibited prosecution under section 1111 of United States nationals who kill other United States nationals outside the United States "'if prosecution has been

previously undertaken by a foreign country for the same conduct.'" 211 F.3d at 690 (quoting Section 1119). Rejecting the argument, the court noted that the defendant was prosecuted and punished under the extortion statute (section 1951), not under section 1111, and that section 1119 prohibits prosecutions, not sentencing enhancements. Furthermore, the Supreme Court permits the enhancement of sentences based on acts underlying previous prosecutions, including situations where "the defendant is subject to '*separate prosecutions* involving the same or overlapping "relevant conduct."' *Id.* (quoting *Witte v. United States*, 515 U.S. 389, 404 (1995)). The court next rejected the defendant's argument that the district court should have found that he committed voluntary manslaughter instead of murder, thus precluding the application of USSG §2B3.2(c)(1). The evidence that the defendant "purchased a gun, devised a plan to transport it to Mexico, surveyed the area of the crime to choose a suitable location to kill [the decedent], and planned for [the decedent] to arrive late at night" supported a finding of murder. Finally, the court rejected the defendant's argument that USSG §2B3.2(c)(1) only applies if the extortion victim, here the software company, dies. Drawing an analogy to USSG §2B3.2's multiple-victim enhancement provision, the court found that despite the defendant's failure to demand money from the decedent, the decedent was still a victim of the defendant's attempted extortion. Section 2B3.2 identifies "a plan to derail a passenger train or poison consumer products" as examples of extortion schemes for which a multiple-victim enhancement is warranted. USSG §2B3.2, comment. (n.7). Moreover, other provisions that include the term "victim" support the district court's decision. Section 2B3.2(b)(2), which addresses "excessive 'loss to *the victim*,'" represents a narrowly defined class of victims because only the target of an extortion can suffer the excessive financial loss discussed in the guideline; on the other hand, USSG §2B3.2(c)(1), which uses the article "a" to precede "victim," refers to a larger class of victims. 211 F.3d at 691. The Fifth Circuit similarly construes the term "victim" when applying a cross-reference guideline. *See United States v. Harris*, 104 F.3d 1465, 1474-75 (5th Cir.) (applying USSG §2B3.2(c)(1) where an individual was killed as a result of a robbery, but was not the target of the robbery), *cert. denied*, 522 U.S. 833 (1997). The court affirmed the sentence.

§2B4.1 Bribery in Procurement of Bank Loan and Commercial Bribery

United States v. Wester, 90 F.3d 592 (1st Cir. 1996). The district court erred in calculating loss under USSG §2B4.1 based upon the defendant's release from personal liability on a $12.4 million NEFR loan (obtained in exchange for arranging the $2.3 million loan to his partners in a land development project). The defendant made the following arguments for excluding the value of the $12.4 million loan from the loss calculation: 1) the $12.4 million should not be considered because the $2.3 million loan was not a quid pro quo, and 2) the valuation of the release at $12.4 million was incorrect because this represented the full amount of the loan. The court rejected the defendant's first argument, but accepted his second argument. The commentary to the sentencing guidelines indicates that the face value of the loan is not necessarily an appropriate figure to use for the purpose of calculating loss because, depending upon the circumstances, the value of a loan may be no greater than the difference in the interest rate obtained through the bribe. At least one court has found that "the value of a transaction is often quite different than the face amount of that transaction." *United States v. Fitzhugh*, 78 F.3d 1326, 1331 (8th Cir.), *cert. denied*, 519 U.S. 902 (1996). The court concluded

that it was plain error for neither the parties nor the probation officer to make any attempt to estimate reasonably the value of the release.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right[16]

§2C1.2 Offering, Giving, Soliciting, or Receiving a Gratuity[17]

§2C1.8 Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act[18]

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[19]

United States v. Beaudoin, 362 F.3d 60 (1st Cir. 2004). The defendants pled guilty to conspiracy to distribute cocaine and crack and possession of crack with intent to distribute. One defendant received an enhanced sentence. Police officers went to the motel room where the defendants were staying because they received an anonymous telephone tip that a dead body was in

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[16]Pending congressional approval, the Commission, effective November 1, 2004, will consolidate §2C1.1 and §2C1.7 as the new bribery and extortion guideline at §2C1.1 and consolidate §2C1.2 and 2C1.6 as the new gratuity guideline at §2C1.2; add two separate offense characteristics for "loss" and "status" and add other enhancements if the offense involved an "elected public official"or a "public official" in a high-level decision-making or sensitive position or the offender is a public official whose position involves the security of the borders of the United States; add to commentary a clarification of the meaning of "high-level decision-making or sensitive position."

[17]*See* Note 16.

[18]*See* USSG, App. C, Amendment 648.

[19]Pending congressional approval, the Commission, effective November 1, 2004, will add a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provides a definition of "interactive computer service;" increase penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons; and for triggering a ten year sentence for GHB at 30 gallons; add to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarify that Note 12 applies to a defendant-buyer in a reverse sting operation; provide a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repeal the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

the room as a result of a bad drug deal. One defendant came to the door and partially opened the door. Pat-down searches of the defendants revealed knives, crack cocaine, cash, and drug paraphernalia. Later, a search of the room pursuant to a search warrant was conducted and officers found a plugged-in skill saw with its safety cover duct taped. The district court enhanced the defendant's sentence for possession of a dangerous weapon based on the presence of the skill saw. On appeal, the defendant challenged the two-level increase in his offense level for possession of a dangerous weapon and argued that it was clearly implausible that the saw could have been used as a weapon because it was unwieldy and had to be plugged in to be operational. The First Circuit held that the defendant's arguments did not demonstrate clear error. The safety cover of the saw was duct-taped so the saw's blade could be engaged more easily. The incongruous presence of the saw in a motel room must be considered in conjunction with the fact that the defendant, as a convicted felon, knew that he could not lawfully possess a weapon. The Court of Appeals upheld the district's decision.

United States v. Boot, 25 F.3d 52 (1st Cir. 1994). *Chapman v. United States*, 500 U.S. 453 (1991), held that the entire weight of the carrier medium must be used to determine the amount of LSD attributable to a defendant. Subsequent to this ruling, Amendment 488 became effective, prescribing a 0.4 milligram per-dose formula in calculating LSD quantity. The defendant argued that Congress, by permitting Amendment 488 to take effect, was establishing a unitary per-dose "mixture and substance" formula for calculating LSD weight in both statutes containing mandatory minimum sentencing provisions and guideline sentencing range sentences. In deciding this issue of first impression, the circuit court held that "*Chapman* governs the meaning of the term 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v)." The amendment to the guideline did not override the applicability of that term for the purpose of applying any mandatory statutory sentence.

United States v. Brassard, 212 F.3d 54 (1st Cir. 2000). The district court properly calculated the defendant's sentence under USSG §2D1.1. A jury convicted the defendant of possession with intent to distribute cocaine and use of a firearm during and in relation to a drug trafficking offense after law enforcement trapped the defendant in a reverse sting operation. The defendant argued that because he could not have purchased the quantity of drugs to which he had agreed, the district court should have "'exclude[d] from the offense level determination the amount of controlled substance that . . . he . . . was not reasonably capable' of [purchasing]." *Id*. at 58 (quoting USSG §2D1.1, comment. (n.12)). The court ruled that the sentence above does not apply to the defendant's situation and identified the applicable sentence from the same application note. "'[I]n a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense . . . .'" USSG §2D1.1, comment. (n.12).

United States v. Burgos, 239 F.3d 72 (1st Cir.), *cert. denied*, 533 U.S. 910 (2001). The district court did not err when it imposed a life sentence under §2D1.1. The defendant had been convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846, and of using a firearm in relation to a crime of violence and aiding and abetting, under 18 U.S.C. § 924(c)(1). The court sentenced the defendant to life imprisonment under USSG §2D1.1(d)(1), which requires the application of the first degree murder guideline (§2A1.1) when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. The court rejected defendant's argument that the

district court failed to make detailed findings regarding the quantity of drugs attributable to him. Because the sentence was based on the fact that deaths had occurred, and not the quantity of drugs, the court found that any failure to make such findings was harmless. The court also rejected the defendant's argument that the murders should not have driven his sentence because they were not separately charged or proven beyond a reasonable doubt. Under USSG §2D1.1(d)(1), the murders need only be proven by a preponderance of the evidence. The sentence was affirmed.

United States v. Charles, 213 F.3d 10 (1st Cir.), *cert. denied*, 531 U.S. 915 (2000). The district court properly sentenced the defendants based on the total weight of the crack cocaine under USSG §2D1.1. The defendants argued that not only did the government not introduce sufficient scientific evidence regarding the melting point or water solubility of the seized substance to show that it constituted crack cocaine, but that the purity of the cocaine base involved in the offense was too low to constitute crack cocaine under USSG §2D1.1(c). Rejecting both arguments, the court affirmed the sentence. First, the only scientific evidence required by the First Circuit is evidence "'proving that, chemically, the contraband was cocaine base' . . . the government [can] bridge the evidentiary gap between cocaine base and crack cocaine by presenting lay opinion evidence . . . from 'a reliable witness who possesses specialized knowledge' (gained, say, by experience in dealing with crack or familiarity with its appearance and texture)." *United States v. Martinez*, 144 F.3d 189, 190 (1st Cir. 1998) (quoting *United States v. Robinson*, 144 F.3d 104, 108-09 (1st Cir. 1998), *cert. denied*, 534 U.S. 856 (2001)); *see also United States v. Ferreras*, 192 F.3d 5, 11 (1st Cir. 1999), *cert. denied*, 528 U.S. 1130 (2000). The government did not have to introduce evidence about the melting point or water solubility of the contraband because two chemists had already introduced evidence proving that the seized substances were cocaine base. The trooper's testimony regarding its appearance and consistency sufficiently determined that the substance was crack cocaine. Furthermore, the Supreme Court has established that a drug's purity level is irrelevant to sentencing. "'Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.'" 213 F.3d at 25 (quoting *United States v. Chapman*, 500 U.S. 453, 461 (1991)). The guidelines adopt this policy, stating that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." USSG §2D1.1(c), note (A).

United States v. Gomes, 177 F.3d 76 (1st Cir.), *cert. denied*, 528 U.S. 911 (1999). The district court did not err in finding the defendant accountable for an agreed-upon quantity of one kilo of cocaine for a deal never made rather than an ounce sample provided during negotiations. The defendant helped find a supplier for an informant posing as a drug purchaser. Prior to meeting with the supplier and the defendant, the informant stated that he wanted to purchase a kilo of cocaine. When the three met, the informant stated that he wanted an ounce sample "before I buy a brick." The supplier stated that a kilo or more was a better bargain, but the informant insisted on purchasing only an ounce. The kilo sale was never made. Citing the example in Application Note 12 to USSG §2D1.1, the defendant argued that the delivered amount rather than the amount agreed-upon should be used to determine the offense level. The judge did not find that the lesser amount "more accurately represented the scale of the offense," because the defendant did conspire with the supplier to make a kilo sale. The only reason the sale did not take place was because the informant did not accept the full amount.

United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993). The defendant was convicted of a cocaine and marihuana distribution conspiracy. The defendant purchased drugs from other members of the conspiracy for resale. On appeal, he argued that cocaine purchased from the other members for personal use should not be considered when determining his offense level under §2D1.1. The circuit court held that the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy."

United States v. Manzueta, 167 F.3d 92 (1st Cir. 1999). The defendant pled guilty to possession with intent to distribute 57.9 grams of crack cocaine. At sentencing, the defendant argued that cocaine base is not scheduled as a controlled substance and that the penalties for crack cocaine are disproportionate to those for powder cocaine. The circuit court rejected both arguments finding that crack, a form of cocaine base, is covered by the statute and Congress intended to provided higher penalties for crack.

United States v. Mateo-Sanchez, 166 F.3d 413 (1st Cir.), *cert. denied*, 526 U.S. 1164 1999). The district court did not err in finding two of five defendants accountable for the entire amount of cocaine involved in the conspiracy. The defendants were present at the site of a drug drop involving five or six individuals carrying sacks of cocaine and four vehicles. The defendants argued that 380 kilograms of cocaine was too large an amount to be foreseeable. The facts suggest that this was a large-scale operation and therefore it was proper to attribute to the defendants the entire amount of cocaine.

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996). The circuit court declined to decide the question of whether the Fourth Amendment exclusionary rule was applicable in the context of guideline sentencing proceedings. The court upheld the sentence imposed by the district court based solely on the conclusion that it was adequately supported by the facts established in the unobjected-to portions of the presentence report. The defendant argued that the district court erroneously included as "relevant conduct" his possession of a substantial quantity of cocaine that the court had earlier suppressed as the product of an illegal search. The district court held that the defendant's possession of the cocaine found at his apartment constituted "part of the same course of conduct . . . as the offense of conviction pursuant to §1B1.3(a)(2)." The district court, relying on cases from other circuits, held that the exclusionary rule did not apply in the sentencing context. *See, e.g., United States v. Tejada*, 956 F.2d 1256, 1262 (2d Cir.), *cert. denied*, 506 U.S. 841 (1992); and *United States v. Torres*, 926 F.2d 321, 325 (3d Cir. 1991). The appellate court declined to decide this case based on this issue because it did not think that the case presented a proper occasion to decide such an important question. Instead, the court held that the exclusionary rule did not bar the district court from considering the defendant's own voluntary statements included in the presentence report. The portion of the presentence report that recounted the defendants statements, to which he declined to object, provided an independently sufficient ground for the district court's finding at sentencing that the defendant possessed the cocaine at issue.

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000), *cert. denied*, 532 U.S. 996 (2001). The district court did not err when it enhanced the defendant’s sentence by two levels under

USSG §2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. §§ 952(a) and 963, as well as attempting to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 2. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty.'" *Id*. at 124 (quoting USSG §2X1.1(a)).

United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 519 U.S. 878 (1996). The circuit court held that Amendment 515 which added a new subsection (4) to guideline §2D1.1(b) would not be applied retroactively. Section 2D1.1(b)(4) [now at §2D1.1(b)(6)] states that if a defendant meets the requirements of §5C1.2(a) [safety valve] and has an offense level of 26 or greater, the sentence will be decreased by two levels. The circuit court noted that guideline amendments are applied retroactively if they clarify a guideline but are not retroactive if they substantively change a guideline. *See United States v. LaCroix*, 28 F.3d 223, 227 n.4 (1st Cir. 1994). The circuit court concluded that Amendment 515 is substantive because "[i]t added an additional and wholly new part to guideline §2D1.1(b)." Furthermore, the circuit court noted that the Sentencing Commission did not consider this amendment to be retroactive as it was not included in USSG §1B1.10(c).

United States v. Singleterry, 29 F.3d 733 (1st Cir.), *cert. denied*, 513 U.S. 1048 (1994). The district court did not err when it rejected defendant's argument that stiffer penalties for cocaine base offenses (*e.g.*, "crack") as opposed to cocaine powder offenses, violate the defendant's right to equal protection under the law. At the district court, the defendant offered evidence to demonstrate that the sentencing distinction between cocaine base and cocaine powder is either irrational, racially motivated, or both. On appeal, the defendant argued that the district court erroneously applied the relevant constitutional principles at the sentencing hearing. The First Circuit disagreed, and held that "'Congress had before it sufficient . . . information to make distinctions that would justify . . . more severe sentences for trafficking in or using cocaine base or crack than cocaine itself.'" (quoting *United States v. Frazier*, 981 F.2d 92, 95 (3d. Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993)). Furthermore, the First Circuit held that there are "racially neutral grounds for the classification that more 'plausibly explain' its impact on blacks." *Singleterry*, 29 F.3d at 741. Thus, there is insufficient evidence "'that the distinction drawn between cocaine base and cocaine was motivated by any racial animus or discriminatory intent on the part of either Congress or the Sentencing Commission.'" *Id*. (quoting *Frazier*, 981 F.2d at 95).

§2D1.11 Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy[20]

[20]Pending congressional approval, the Commission, effective November 1, 2004, will add a new enhancement to §2D1.11 for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; also provides, in a corresponding Application Note, a definition of "interactive computer service; provides two corresponding quantity options, similar to options added to §2D1.1 for

§2D1.12 Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy[21]

Part E Offenses Involving Criminal Enterprises and Racketeering

§2E2.1 Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence by four levels under USSG §2E2.1(b)(3)(A) for abduction in order to facilitate the commission of an offense. The defendant pled guilty to racketeering conspiracy, racketeering, making an extortionate extension of credit, collecting an extortionate extension of credit with extortionate means, conspiring to use extortionate means to collect a debt, and operating an illegal gambling business. Electronic surveillance tapes recorded statements by the defendant about his assault of a man who had defaulted on a loan owed to the defendant. Conflicting statements from the tapes revealed that he either followed his victim from a wake to a restaurant, behind which he assaulted the man, or, as the defendant argued, he tricked his victim into going to the restaurant by telling him that a long-time friend wanted to meet him there. Rejecting the defendant's argument that when he took his victim behind the restaurant, he displayed none of the physical force necessary to constitute an abduction, the court joined other circuits when it ruled that the force required by under USSG §2E2.1(b)(3)(A) need not be violent or physical. *See United States v. Saknikent*, 30 F.3d 1012, 1014 (8th Cir. 1994) (finding that "the abduction adjustment requires only that force necessary to overcome the particular victim's will" is sufficient); *see also, e.g., United States v. Romero*, 189 F.3d 576, 590 (7th Cir. 1999) (holding that under USSG §2A3.1(b)(5), kidnapping through inveiglement constituted abduction), *cert. denied*, 529 U.S. 1011 (2000). Moreover, the court found that a narrow interpretation of force under USSG §2E2.1(b)(3)(A) would constitute ineffective policy because "[a]n abduction accomplished by use of threat and fear carries the same dangerous consequences as an abduction accomplished by use of physical force . . . ." *Cunningham*, 201 F.3d at 28.

GHB, for increasing penalties for GBL, a precursor of GHB; provide statutory re-designations in §2D1.11; add white phosphorus and hypophosphorous acid (direct substitutes for red phosphorus in the production of methamphetamine) to the Chemical Quantity Table; and add a mitigating role reduction to §2D1.11, similar to that provided under §2D1.1, which provide net reductions that correspond with designated offense levels.

[21]Pending congressional approval, the Commission, effective November 1, 2004, will add a new enhancement to §2D1.12 for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; also provides, in a corresponding application note, a definition of "interactive computer service; provide an enhancement for offenses involving the stealing of anhydrous ammonia or transporting stolen anhydrous ammonia.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit[22]

United States v. Maldonado-Montalvo, 356 F.3d 65 (1st Cir. 2003). The district court erred in applying downward departures for overstatement of losses due to multiple causation and mental health. Appellants were convicted of introducing adulterated milk into interstate commerce. The district court departed downward from the guidelines sentencing range on the ground that the victims' loss was based primarily on factors other than the wrongful conduct of the defendants. The government appealed. At sentencing, the district court determined that each defendant was entitled to a downward departure and found that the loss calculation under §2F1.1 of the *United States Sentencing Guidelines Manual* overstated the amount of loss attributable to their wrongful conduct. The district court granted a downward departure for one of the defendants on the ground that he suffered from depression. The victim loss table in USSG §2F1.1(b)(1) presumes that the defendant alone is responsible for the entire amount of victim loss specified in the particular loss range selected by the sentencing court. Downward departures may be warranted where the defendant's fraud is not the sole cause of the loss. However, a "multiple causation" departure is permitted only if these extraneous factors are of a kind not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. None of the five factors considered by the district court: economic hardship, co-conspirator assistance, conduct of the victim's agents, sentencing manipulation and absence of public injury; constituted appropriate grounds for a downward departure. In the second departure, the First Circuit noted that departures based upon a defendant's mental conditions were discouraged. The court stated that, having examined the medical evaluation related to the defendant's mental condition, it was clear that the district court erred in determining that defendant's mental condition was extraordinary. The defendant's psychiatrist opined that the indictment had caused defendant major or severe depression, which resulted in business failures and family rifts. However, defendant's psychiatrist acknowledged that once placed on anti-depressant and anti-anxiety medications, the defendant showed marked improvement. Furthermore, the defendant consistently denied suicidal ideation. The court noted that although defendant's psychiatrist opined that a three-year term of imprisonment would be a catastrophic blow to the defendant, nothing in the record suggested that defendant's depression rose to the level of the extraordinary. Undoubtedly, imprisonment was stressful. However, with or without a §5H1.3 departure, the defendant would still be required to serve some prison time and would continue to receive the same effective treatment in prison. Finally the court stated that the defendant's commission of the criminal offense constituted the catastrophic event which precipitated his conviction and imprisonment, the adverse consequences flowed from the defendant's voluntary criminal conduct and ensuing guilty plea. Accordingly, the record disclosed no material basis, evidentiary or legal, for concluding that the sentencing guidelines permitted a §5H1.3 departure.

[22] *See* USSG App. C, Amendment 617.

United States v. Thurston, 358 F.3d 51 (1st Cir. 2004). The district court erred when it made downward departures based on sentence disparity and charitable work and failed to impose a fine on the defendant. The defendant was found guilty of conspiracy to defraud Medicare of more than $5 million in unneeded medical tests. The Presentence Report (PSR) recommended the statutory maximum of 60 months' imprisonment and noted the statute and guideline allowed for a fine. The court applied downward departures based on a potential sentence disparity with a co-conspirator and the defendant's charitable and community work, and ultimately sentenced defendant to three months in a halfway house, 24 months' supervised release and no fine. The Government appealed, arguing that sentence disparity alone is a forbidden departure and the defendant's charitable and community service was not so exceptional as to warrant such a departure. With the passage of the PROTECT act, the decision to depart from the guidelines based on factors not excluded under the act are reviewed *de novo.* In the First Circuit, however, the degree of departure will still be reviewed deferentially. Circuit law prohibits a district court from making a departure based on disparity alone. *See United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991). The sentencing statute prohibits a departure unless it is based on circumstances not adequately taken into consideration by the Sentencing Commission. 18 U.S.C. § 3553(b)(1). Section §5H1.11 discourages downward departures based on good works unless it is an exceptional case. Based upon the record, the defendant's charitable work and community service did not meet the criteria. Both the downward departures for disparity and charitable works were reversed. The district court declined to fine the defendant on the basis of disparity with his co-conspirator. Having reversed the downward departure for disparity, the court referred to USSG §5E1.2(a) which states "the court should impose a fine in all cases, except where the defendant establishes he is unable to pay and is not likely to become able to pay any fine." The defendant did not establish his inability to pay a fine. The court remanded the case for imposition of an appropriate fine.

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

§2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct[23]

§2G1.3 Travel and Transportation for Illegal Sexual Activity[24]

[23]Pending congressional approval, the Commission, effective November 1, 2004, will make conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct); add a special instruction to apply §3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in those cases in which more than one victim died.

[24]Pending congressional approval, the Commission, effective November 1, 2004, will create a new guideline, §2G1.3, for travel and transportation cases to specifically address Chapter 117 offenses under Title 18 (Transportation for Illegal Sexual Activity and Related Crimes) that are currently referenced in Statutory Appendix A to §§2G1.1 and 2A3.2; and provide under §2G1.3(c)(3), a cross-reference to §2A3.1, for offenses involving the conduct described in § 2241 or § 2242.

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production[25]

§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[26]

United States v. Woodward, 277 F.3d 87 (1st Cir. 2002). The defendant, convicted of child pornography and firearms charges, challenged the district court's application of the enhancement in USSG §2G2.2(b)(4), which provides for a five-level increase if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The First Circuit found that the defendant's "previous exploitative conduct involved multiple victims in numerous incidents over a four-year period" and the enhancement was appropriate. In so finding, the court rejected the defendant's claim that the previous instances of misconduct were too outdated (having occurred approximately 20 years earlier) to be properly considered. The court also rejected a claim that the past misconduct had to be "linked" to the offense of conviction to be considered a "pattern."

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[27]

§2G3.1 Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor[28]

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[25]Pending congressional approval, the Commission, effective November 1, 2004, will increase the base offense level in §2G2.1 to reflect the increase in the statutory maximum, from 10 to 15 years, for offenses under 18 U.S.C. § 2251; add a number of enhancements associated with the production of child pornography; add to the Commentary definitions of the following terms: "sexual act," "sexual contact," "sexually explicit conduct," "computer," "interactive computer service," "minor," and "distribution."

[26]Pending congressional approval, the Commission, effective November 1, 2004, will consolidate §§2G2.2 and 2G2.4 to avoid confusion in the application of these guidelines; provide alternative base offense levels, if the defendant was convicted of 18 U.S.C. § 2252(a)(4), 2252A(a)(5) (possession offenses) or § 1466 (solicitation offense), and a separate offense level for all other offenses; add a number of enhancements related to trafficking and receipt of child pornography; broaden the computer enhancement to include "interactive computer " as defined in 47 U.S.C. § 230 (f)(2) and to apply to offenses in which the computer (or an interactive computer service) was used for possession of pornographic material; add Commentary to §2G2.2 which counts each video, video-clip, movie, or similar recording as having 75 images; make several other minor changes to §2G2.2, Commentary, such as providing the definitions of "computer" and "image;" clarifying existing definitions of "minor" and "distribution;" and clarifying that a defendant does not need to intend to possess, receive, or distribute sadistic or masochistic images for application of this enhancement.

[27]*See* USSG App. C, Amendment 649.

[28]Pending congressional approval, the Commission, effective November 1, 2004, will refer the new PROTECT Act offense, Misleading Domain Names on the Internet (18 U.S.C. § 2252B), to §2G3.1 and provides a number of enhancements related to use of a misleading domain name on the Internet to induce minors to view

harmful materials; use of a computer or interactive computer service; and distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; resolved circuit conflict by adding §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) a condition limiting the use of a computer or an interactive computer service" in sex cases in which the defendant used such items.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

United States v. Molak, 276 F.3d 45 (1st Cir. 2002). The defendant was convicted of willfully failing to pay child support, in violation of 18 U.S.C. § 228. In calculating the guideline range, the district court looked to USSG §2J1.1, which in turn directed the court to apply USSG §2X5.1. Pursuant to that guideline, the court is directed to apply the "most analogous" guideline. Application Note 2 to USSG §2J1.1 states that for violations of 18 U.S.C. § 228, the most analogous guideline is 2B1.1, and that the amount of loss is the amount of child support that the defendant had failed to pay. The defendant claimed, however, that the amount of loss under §2B1.1 should not include support obligations accrued after the child's 18th birthday and should not include interest or costs. The First Circuit, looking to the language of the statute, legislative history and case law, rejected this challenge.

§2J1.2 Obstruction of Justice[29]

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. DiSanto, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 520 U.S. 1105 (1997). The district court correctly applied USSG §2K1.4(a)(1), the higher of two offense levels under the arson guideline, when computing the defendant's sentence and did not err in its finding that he "knowingly" created a substantial risk of death or bodily injury. The defendant argued that the district court should have applied USSG §2K1.4(a)(3), which requires computation of the base offense level as 2 plus the base offense level for "Fraud and Deceit." He contended that the overwhelming evidence at trial established that his primary purpose in setting the fire was to defraud the insurance company, not to create a substantial risk of serious bodily injury to bystanders. Similarly, the defendant argued that the district court's findings that he "knowingly" created this risk was not supported by a preponderance of the evidence. The appellate court disagreed, and held that the district court correctly applied USSG §2K1.4(a)(1) because it yielded the highest base offense level, based on its findings that the defendant had created a substantial risk of bodily injury. The circuit court treated the issue of whether the defendant knowingly created that risk within the meaning of USSG §2K1.4 as one of first impression, in that the court had not previously determined what level of knowledge was required under USSG §2K1.4(a)(1)(A). The circuit court applied a two-prong test: (1) whether the defendant's actions created a substantial risk; and (2) whether the defendant acted knowingly to create that risk. Relying upon the PSR, the circuit court held that the defendant clearly created a substantial risk by causing a potential for a fuel air explosion. *See United States v. Awon*, 135 F.3d 96, 104 (1st Cir. 1998) (upholding an enhancement under §2K1.4(a) for knowingly creating a substantial risk of death or serious bodily injury where people lived in the building the defendant burned).

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[29] *See* USSG, App. C, Amendment 647.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[30]

United States v. Brown, 169 F.3d 89 (1st Cir. 1999). The district court's application of a two-level increase under §2K2.1(b)(4) was not double-counting, even though the defendant was convicted of possession of a stolen firearm under 18 U.S.C. § 922(j). The base offense level takes into account the stolen nature of the firearm if "(1) the only offense to which USSG §2K2.1 applies for a given defendant is 18 U.S.C. § 922(j), and (2) the defendant's base offense level is determined under subsection (a)(7)." *Id*. (citing USSG §2K2.1, comment. (n. 12)). Here, the defendant's base offense level was calculated under subsection (a)(2), based on at least two prior felony convictions of either violent crimes or drug crimes.

United States v. Damon, 127 F.3d 139 (1st Cir. 1997). The district court erred in determining that the defendant's prior conviction for aggravated criminal mischief was a crime of violence and thereby calculating his base offense level to be 20 under USSG §2K2.1(a)(4)(A). The court of appeals held that, under the Supreme Court's categorical approach to the nature of the crime set forth in *Taylor v. United States*, 495 U.S. 575 (1990), *cert. denied*, 502 U.S. 888 (1991), it was error for the district court to look at the facts of the offense. Instead, the court should have looked at the statutory definition of aggravated criminal mischief. Damon was convicted under a subsection that prohibited damaging or destroying property in an amount exceeding $2,000 in order to collect insurance proceeds. The court of appeals noted that, under *Taylor*, this qualifies as a crime of violence if and only if a serious potential risk of physical injury to another is a normal, usual, or customary concomitant of the predicate offense as set forth in the statute. The court of appeals held that the offense did not necessarily involve a serious potential risk of physical injury to another. The government argued that Damon set fire to the house, and that arson does pose such a risk. The court of appeals agreed that arson posed such a risk, but stated that arson is a separate crime, and simply causing damage to property does not require the damage to be done by arson. According to the court, there are many easy ways to cause $2,000 in property damage which do not risk physical injury to others. Thus, the typical conduct reachable under the statute of conviction does not involve a serious potential risk of physical injury to another; the inquiry is limited to the "'usual type of conduct that the statute purposes to proscribe'" and does not explore "'the outer limits of the statutory language or the myriad of possibilities girdled by that language.'" *Id*. at 144 (quoting *United States v. Winter*, 22 F.3d 15, 20

[30]Pending congressional approval, the Commission, effective November 1, 2004, will increase the enhancement, for the offense involving a destructive device if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; but maintains a two-level enhancement for all other destructive devices; provide an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk of public welfare, and the risk of death or serious bodily injury that the destructive device created; adopt the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substituted statutory definitions for the definitions of "ammunition" and "firearm," and increase guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

(1st Cir. 1994), *cert. denied*, 517 U.S. 1126 (1996)). The district court was precluded under *Taylor* from looking into the nature of the predicate offense.

United States v. DeLuca, 17 F.3d 6 (1st Cir. 1994), *cert. denied*, 517 U.S. 1126 (1996). The district court correctly determined the defendant's base offense level based on his prior crime of violence pursuant to USSG §2K2.1(a). The defendant challenged the enhancement because the government failed to identify the nature of the threat which formed the basis of his prior state conviction for extortion. According to the defendant, the guidelines limit "extortion" to conduct which threatens another person while the state statute under which he was convicted reached "threats against the reputation, property or financial condition of another." R.I. Gen. Laws § 11-42-2. Since the government did not identify the nature of the threat, it failed to prove that he committed "a crime of violence." The First Circuit rejected this argument. First, the guidelines specifically list extortion as a crime of violence. There is no requirement that the crime must involve a threat against another person. Although the federal definition of "extortion" has a single, invariant meaning, that definition is not limited to the parameters of the Hobbs Act, 18 U.S.C. § 1951, as the defendant asserted. The court of appeals found that the state statute's broad definition of extortion fell well within the reach of USSG §4B1.2(1)(ii). Second, even if the sentencing court were limited by the definition of extortion found in the Hobbs Act, the fear element could be met not only by threats against the person, but also threats of economic harm. Although the state statute did not mirror the Hobbs Act verbatim, the two laws are sufficiently similar to discredit the defendant's argument. Third, although the guidelines are not statutes, principles of statutory interpretation still apply. Generally, "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." *Lamore v. Ives*, 977 F.2d 713, 717 (1st Cir. 1992). The defendant's argument that the guidelines limit extortion to threats of bodily harm would render the specific reference in USSG §4B1.2(1)(ii) [now §4B1.2(a)(2)] superfluous since that guideline clearly makes any prior crime that "has as an element the threatened use of physical force against the person of another" a crime of violence. §4B1.2(1)(i) [now §4B1.2(a)(1)]. Finally, the defendant's reliance on *United States v. Anderson*, 989 F.2d 310 (9th Cir. 1993) was unpersuasive. The *Anderson* court found that the defendant's prior conviction for attempted extortion did not fall within the scope of the Armed Career Criminal Act because that statute only reaches completed acts. *Id.* at 313. However, unlike the ACCA, the guidelines definition of "a crime of violence" specifically includes attempts to commit such an offense. USSG §4B1.2, comment (n.1).

United States v. Diaz, 285 F.3d 92 (1st Cir. 2002). The district court erred in departing upward, pursuant to USSG §2K2.1, comment. (n.16), for an offense posing a substantial risk of death or bodily injury to multiple individuals. The defendant was convicted of charges arising out of a melee in which he waved a gun at a crowd and during which an off-duty police officer was shot and killed by fellow officers who did not recognize that he was a police officer. The defendant challenged his sentence on several grounds, one of which was that the district court erroneously departed upward pursuant to Application Note 16 to USSG §2K2.1. That application note specifies four circumstances in which an upward departure might be warranted–when the number of firearms substantially exceeded 200, when multiple dangerous weapons such as machineguns and assault rifles were used, when the offense involved large quantities of armor-piercing ammunition, and when “the offense posed a substantial risk of death or bodily injury to multiple individuals.” The First Circuit found that the district

court had erred in departing upwardly based on the fourth prong, concluding that the defendant's actions in "brandishing a single small weapon in a single episode, with no evidence of an intent to fire, is insufficient to support a departure aimed at punishing conduct that puts multiple individuals at substantial risk of injury or death." *Id*. at 100. The court noted that the defendant's conduct had been accounted for by virtue of the four-level enhancement in USSG §2K1.2(b)(5), for possession of the firearm in connection with another felony offense.

United States v. Peterson, 233 F.3d 101 (1st Cir. 2000).[31] The district court did not err when it enhanced the defendant's sentence by four levels under USSG §2K2.1(b)(5) for possession of a firearm in connection with another felony offense, after the defendant was convicted of narcotics and firearms violations. Broadly construing the phrase "in connection with," the First Circuit will affirm this enhancement so long as possession of the firearm has "the potential to aid or facilitate" the other felony. *Id*. at 111 (quoting *United States v. Thompson*, 32 F.3d 1, 6 (1st Cir. 1994) (internal citation omitted)). The court affirmed, ruling that the readily accessible and proximate location of firearms in two apartments where the defendant had stored drugs supported the district court's conclusion that "it was [the defendant's] 'modus operandi to have guns near his stash of marijuana.'" 233 F.3d at 111 (citation omitted).

United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999). The district court did not err in finding that the defendant's prior felony conviction was for a crime of violence, which resulted in a four-level increase in his base offense level under USSG §2K2.1(a)(3). The defendant was convicted of being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). He began acquiring the firearms while on probation for two counts of conviction for second degree child molestation under Rhode Island law. The Rhode Island statute under which Sherwood was convicted, at the time he was charged, prohibited "sexual contact" with a person under 13 years of age. The court of appeals noted that, from the statute, the victim is at most 12 years old. The court agreed with the Fifth Circuit in *United States v. Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997), that child molestation crimes "typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures." The court concluded that there is a significant likelihood that physical force may be used to perpetrate this crime and found that the Rhode Island statute at issue punishes a crime of violence.

§2K2.6 Possessing, Purchasing, or Owning Body Armor by Violent Felons[32]

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[31]The court also reversed the district court decision to sentence the defendant as a career criminal under USSG §4B1.4. The court ruled that because the defendant's previous state conviction for breaking and entering did not involve criminal intent, it did not constitute a "violent felony" for which he could be sentenced as an armed career criminal under 18 U.S.C. § 924(e).

[32]Pending congressional approval, the Commission, effective November 1, 2004, will add this new guideline, §2K2.6, as the guideline reference for the newly created offense at 18 U.S.C. §931, which prohibits individuals with a prior state or federal felony conviction for a crime of violence from purchasing, owning, or possessing body armor;

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Nai Fook Li, 206 F.3d 78 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000). The district court did not err when it departed upward under §2L1.1, based on the conditions on a ship that constituted "dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon or substantially more than 100 aliens." USSG §2L1.1, comment. (n.5). A jury convicted defendants of conspiring to smuggle illegal aliens into the United States. Defendant Hui Lin objected to the increase on grounds that he did not mandate or encourage the poor conditions or the force used against the aliens. The court found that Hui Lin's authority over the stateside part of the conspiracy, his financial considerations, his use of an inadequate offloading vessel without regard that its use would require that the aliens forego sleep and fresh air, and his knowledge that enforcers were necessary to control passenger upheaval brought on by the mistreatment, demonstrated that he should have foreseen the poor conditions and abuse the aliens suffered. Defendant Ju Lin argued that there was insufficient evidence to warrant such a departure in his case. However, not only was Ju Lin in charge of the ship, and thus unlikely to be ignorant of the deplorable conditions or abuse, but Ju Lin assaulted two of the passengers. Defendants Li and Kwan argued that they did not deserve upward departures because they only served as translators and go-betweens, and thus could not have foreseen the unsanitary conditions. The court agreed with the district court findings that their responsibilities included more than they professed. Kwan, who proposed the illicit operation to the undercover agents, hired them to carry the aliens the final segment of the trip from China, participated in all of the negotiations with the agents, inspected the offloading vessel knowing it would have to carry 100 passengers, and informed an agent that minimal food was necessary on the offloading boat. Li also attended most of the negotiations and knew important information regarding the location of the vessel as well as finances; both defendants were aware of the need for enforcers and the lack of sleep and space that the passengers would suffer aboard the offloading vessel. The court also rejected Li and Kwan's argument that they received harsher upward departures than their codefendants. The court found, based on an adjustment calculation starting at the statutory mandatory minimum, which USSG §5G1.1(b) mandates when the statutory minimum exceeds the maximum guideline range, that the defendants actually received smaller departures than their codefendants. Li and Kwan had erroneously used the total offense level as a base for their calculations. All defendants appealed the six-level increase under USSG §2L1.1(b)(2)(C) [current version is nine-level increase] for smuggling 100 aliens. The defendants argued that many passengers were co-conspirators, and thus could not qualify under USSG §2L1.1 as being smuggled for profit. Rejecting the argument, the court ruled that because the offense included 109 aliens, only four of whom could not be counted because they were codefendants, the enhancement properly applied; the motive behind the smuggling was irrelevant. Moreover, the requirement that the offense be committed for profit does not apply to USSG §2L1.1(b)(2)(C), but rather to a three-level increase under USSG §2L1.1(b)(1). Defendants Mu, Li, and Ben Lin argued that they should have received a three-level downward adjustment under USSG §2L1.1(b)(1) for not committing the offense for profit;

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other enhancements and definition of terms, such as "felony offense," "defendant," and "used" will also be provided.

their sole reward for participation in the conspiracy was free transportation. While not in complete agreement with the district court, the First Circuit deferred to the district court and affirmed the finding that the defendants' valuable roles and responsibilities indicated that they would be paid beyond the benefit of free passage.

§2L1.2 Unlawfully Entering or Remaining in the United States[33]

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). The district court did not err in applying the aggravated felony enhancement in the earlier version of USSG §2L1.2. The defendant argued that the enhancement he received was improper because neither of the two previous offenses he committed before being deported were a conviction for an "aggravated felony" and at least one of the offenses was not a "conviction" under state law. The circuit court rejected the defendant's arguments and joined the Fifth, Ninth, and Eleventh Circuits in holding that whether a particular disposition counts as a "conviction" in the context of a federal statute is to be determined in accordance with federal law. *See Molina v. INS*, 981 F.2d 14, 19 (1st Cir. 1992). The appellate court also relied upon the Supreme Court's interpretation in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), in which the court held that "[w]hether one had been convicted within the language of [a federal] statut[e] is necessarily . . . a question of federal, not state, law, despite the fact that the predicated offense and its punishment are defined by the law of the State." *Id*. at 111-12. Additionally, the appellate court noted that even if the defendant's second prior possession offense was not a "conviction" his challenge to the application of the enhancement failed because his earlier conviction for cocaine possession was itself for an "aggravated felony."

United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001).[34] The district court did not err by finding that the defendant's previous state conviction for forgery constituted an aggravated felony for the purposes of enhancement. The commentary to USSG §2L1.2 specifies that "aggravated felony" has the meaning given it in 8 U.S.C. § 1101(a)(43). That statute states that an aggravated felony includes "'an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year . . . .'" *Id*. at 284-85 (quoting 8 U.S.C. § 1101(a)(43)(R)). Because the defendant received a one-year prison sentence for his forgery conviction, the crime constitutes an aggravated felony under section 1101.

United States v. Luna-Diaz, 222 F.3d 1 (1st Cir. 2000). The district court abused its discretion when it failed to count the defendant's vacated conviction as an aggravated felony for enhancement purposes under §2L1.2(b)(1)(A). The defendant was convicted of reentry after deportation in violation of 8 U.S.C. § 1326. Rejecting the government's argument that the appropriate measure for sentencing was not the defendant's current status, but rather his status at the time he was deported, the district court declined to apply the aggravated felony enhancement because a state court

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[33]*See* USSG App. C, Amendment 658.

[34]The court also affirmed the defendant's *Apprendi* appeal because the district court had sentenced him below the statutory maximum.

had overturned the defendant's prior aggravated felony conviction for which he was deported. Consistent with Tenth Circuit precedent, the only circuit to hear this issue, the court vacated the sentence on grounds that the language in USSG §2L1.2 and section 1326 supports the government's argument that the appropriate time frame is deportation, not sentencing for the instant offense. *See United States v. Cisneros-Cabrera*, 110 F.3d 746 (10th Cir.) (affirming decision to enhance section 1326(b)(2) conviction based on vacated conviction because "the relevant time frame for determining whether the sentence enhancement should apply is specifically provided by statute."), *cert. denied*, 522 U.S. 969 (1997). Section 1326(b) addresses aliens "whose removal was subsequent to a conviction for commission of an aggravated felony." Section 2L1.2 (the version then in effect) mandated an enhancement when the defendant "was deported after a criminal conviction . . . for an aggravated felony" and specifically addressed aliens either currently convicted of an aggravated felony or who have had prior such convictions. Moreover, this language, written in past tense, implies that the defendant's current status is irrelevant. Finally, unlike USSG §2L1.2, other guidelines and statutes that deal with previous convictions expressly prohibit inclusion of vacated convictions for sentencing purposes. *See, e.g.*, USSG §4A1.2, comment. (n.6) (exempting certain vacated convictions from the calculation of criminal history category); Armed Career Criminal Act, 18 U.S.C. § 924 (1994) (prohibiting the consideration of expunged or set aside convictions). The absence of an express exception to USSG §2L1.2(b) for vacated convictions precludes the court from reading such exception into the guideline. The court vacated the sentence and remanded for resentencing.

United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994). The defendant was deported to Columbia after he was convicted for two aggravated felonies. He illegally reentered the United States on September 5, 1991. He was "found" in the United States on December 19, 1991. Between September 5 and December 19, USSG §2L1.2(b)(2) was amended to require, rather than suggest, an increase in the base offense level for an alien whose deportation followed conviction for an aggravated felony. The district court was correct in sentencing the defendant under the amended version of the guideline because the act of illegally entering the United States can occur on three separate occasions: (1) when she/he enters the United States, (2) when she/he attempts to illegally enter the United States, (3) when she/he is "found" in the United States. Regardless of when the defendant entered the United States, he violated the statute when he was "found" in the United States and was properly sentenced in accordance with the guidelines in effect on that date.

§2L2.2 Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport[35]

[35]Pending congressional approval, the Commission, effective November 1, 2004, will add an Application Note permitting §2L2.2 (Fraudulently Acquiring Documents), arising from the same course of conduct, to be grouped with§2L1.2 (Unlawful Entry) under §3D1.2 (Multiple Counts); clarify that "use" includes cases involving an attempt to renew previously-issued passports; provide an upward departure provision for cases involving a defendant who fraudulently obtained or used a United States passport intending to enter the United States to engage in terrorist activity; and provided a four-level enhancement if the defendant fraudulently obtained or used a United States passport.

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce[36]

§2Q1.4 Tampering or Attempted Tampering with a Public Water System[37]

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[38]

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

United States v. Beras, 183 F.3d 22 (1st Cir. 1999). The district court did not err in assessing a seven-point enhancement for "loss" exceeding $120,000 under USSG §2F1.1(b)(1)(h). The defendant was convicted of failing to report that he was transporting over $10,000 out of the United States. The defendant's argument that the offense involved no "loss" is without merit because USSG §2S1.3, the applicable guideline, provides a base offense level of "6 plus the number of offense levels from the table in USSG §2F1.1 [now §2B1.1] . . . corresponding to the value of the funds." The $138,794 was the "value of the funds" the customs officers found on the defendant and codefendant.

[36]Pending congressional approval, the Commission, effective November 1, 2004, will add a two-level enhancement to §2Q1.2 for a defendant convicted under 49 U.S.C. § 5124 or 46312; provide an upward departure provision if the offense resulted in extreme psychological injury or was calculated for terroristic activity; delete 49 U.S.C. §60123(d) (penalty provision) from the statutory provisions referred to in §2Q1.2.

[37]*See* USSG App. C, Amendment 655.

[38]*See* USSG App. C, Amendment 634.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Characteristic)[39]

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000), *cert. denied*, 532 U.S. 996 (2001). The district court did not err when it enhanced the defendant's sentence by two levels under USSG §2D1.1(b)(2)(B) for acting as a captain aboard a vessel carrying a controlled substance. The defendant was convicted of conspiracy to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a) and 21 U.S.C. § 963, as well as attempting to import more than 5,000 pounds of marijuana, in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 963, and 18 U.S.C. § 2. The court found irrelevant the defendant's argument that the enhancement only applies to people actually convicted of importation of drugs. Section 2X1.1 mandates that the offense level for conspiracy and attempt include "'*any adjustments from* [*the substantive offense*] *guideline* for any intended offense conduct that can be established with reasonable certainty.'" *Id*. at 124 (quoting USSG §2X1.1(a)).

§2X3.1 Accessory After the Fact

United States v. Vega-Coreano, 229 F.3d 288 (1st Cir. 2000). The district court did not commit clear error when it declined to cap the defendant's offense level at 20 for conduct limited to harboring a fugitive, pursuant to USSG §2X3.1. The defendant pled guilty to violating 18 U.S.C. § 3 for being an accessory to a robbery after the fact. Finding that the record reflected actions exceeding merely harboring a fugitive, the court affirmed. Besides renting hotel rooms for the robbery participants to hide, the defendant assisted in the concealment of the stolen money and relayed important information between parties.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.2 Official Victim[40]

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[39]Pending congressional approval, the Commission, effective November 1, 2004, will amend special instruction in to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally (18 U.S.C. § 32–destruction of an aircraft or aircraft facilities; 18 U.S.C. §1993–terrorist attacks and other acts of violence against mass transportation systems; and 18 U.S.C. § 2332a - use of certain weapons of mass destruction), and not just in the context of the use of a MANPADS or similar destructive device.

[40]Pending congressional approval, the Commission, effective November 1, 2004, will restructure §3A1.2 (Official Victim) and provide a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was a Chapter Two, Part A (Offenses Against a Person).

United States v. Lee, 199 F.3d 16 (1st Cir. 1999). The district court did not err when it enhanced the defendant's sentence by three levels under the official victim guideline, §3A1.2(b), for "assault[ing an] officer in a manner creating a substantial risk of serious bodily injury" "during the course of the offense or immediate flight therefrom." After a traffic stop, the defendant struggled with several officers before they subdued him and found a loaded weapon in his waistband. The defendant pled guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Because the district court made no finding as to the defendant's state of mind at the time, the court was uncertain as to whether the defendant's actions satisfied the assault requirement of the enhancement. After establishing that the term "assault" in USSG §3A1.2(b) referred to the common law assault definition, and not the federal statute regarding assault of a federal officer (18 U.S.C. § 111) or the aggravated assault sentencing guideline (§2A2.2), the court found that the guideline policy of protecting official victims supports a finding that a defendant need only have knowledge that his actions will cause fear to commit assault under §3A1.2(b). Thus, as with an escaping felon who drives directly at an officer, knowing the officer's location but not necessarily wanting to hit him, "so long as the criminal has ample reason to know that fear will be caused, the lack of purpose to cause fear should not matter." *Id*. at 19*; see also, e.g., United States v. Garcia*, 34 F.3d 6, 11, 13 (1st Cir. 1994) (imposing a USSG §3A1.2(b) enhancement where an officer had to jump out of the way to avoid being hit by the defendant driving straight at police officers); *United States v. Stanley*, 24 F.3d 1314, 1322 (11th Cir. 1994) (adjusting defendant's sentence under USSG§3A1.2(b) for driving such that it endangered the lives of the officers trying to arrest him). Because the officers shouted that the defendant was grabbing for his waist as they attempted to grab his hands to stop him, the defendant must have known that his efforts to draw his gun would almost certainly alarm the officers. On this ground, the court affirmed the sentence. The court added that there is a fine line, often just "a matter of degree," between a three-level official victim enhancement under USSG §3A1.2(b) and a two-level reckless endangerment adjustment under USSG §3C1.2, and that it would likely defer to the district court's better "feel for the factual subtleties involved" in determining which adjustment was appropriate. 199 F.3d at 20. Furthermore, had the official victim adjustment not applied here, the defendant's conduct would have warranted a reckless endangerment enhancement.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Brown, 298 F.3d 120 (1st Cir.), *cert denied*, 537 U.S. 1096 (2002). The defendant was convicted of conspiracy to possess cocaine base with intent to distribute. On appeal, the defendant challenged the district court's enhancement under §3B1.1(c) for playing a managerial role in the drug conspiracy. Affirming the district court's enhancement, the First Circuit found evidence that supported the fact that the defendant (aka "Knowledge") supplied the drugs for the conspiracy that bore his alias (the "Knowledge" group); that he established a customer base; that the codefendant acted as a go-between or finder, with the defendant personally involving himself in completing the larger sales; that the defendant used the codefendant's apartment for transactions and as a safe house; that he exercised dominion over virtually all of the known quantities of drugs; and that he kept the great majority of the proceeds.

United States v. Cali, 87 F.3d 571 (1st Cir. 1996). The district court's holding enhancing the defendant's sentence based on his role as a manager was in error because the defendant managed property, but not people. USSG §3B1.1. However, the district court's alternative holding that a three-level upward departure was warranted because of the defendant's management of gambling assets was a proper assessment of an encouraged departure factor. USSG §3B1.1, comment. (n.2). The sentence was affirmed.

United States v. Gonzalez-Vazquez, 219 F.3d 37 (1st Cir. 2000). The district court did not err when it enhanced the defendant's sentence under USSG §3B1.1(b) for his role as a manager or supervisor. A jury convicted the defendant of conspiracy to distribute controlled substances and aiding and abetting the distribution of controlled substances within 1,000 feet of a school. The court ruled that the record sufficiently supported the role enhancement. The defendant "was second in command at the drug [distribution] point . . . [and] played a leadership role in arranging with [the confidential informant] to use her apartment for drug packaging." *Id*. at 44.

United States v. Nai Fook Li, 206 F.3d 78 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000). The district court did not err when it enhanced the defendant's sentence by four levels under USSG §3B1.1(a) for his role as a leader or organizer. A jury convicted the defendant of conspiring to smuggle illegal aliens into the United States. Affirming the enhancement, the court ruled that evidence that the defendant inspected the vessel to be used to bring the aliens to the United States, conducted negotiations with the undercover agents serving as owners of the vessel, and handled the finances regarding its use, sufficiently indicated that the defendant controlled the stateside branch of the conspiracy, thus warranting the enhancement. Moreover, even if the district court had erred, such error would have been harmless because under either circumstance the court would have raised the defendant's guideline range to the statutory minimum for the offense.

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001), *cert. denied*, 535 U.S. 910 (2002).[41] The district court did not err by enhancing defendants' sentences under USSG §3B1.1 for their supervisory roles. The defendants were sentenced to life imprisonment after being convicted of racketeering under 18 U.S.C. § 1962(c), conspiracy to commit racketeering under 18 U.S.C. § 1962(d), conspiracy to distribute crack cocaine under 21 U.S.C. § 846, and possession with intent to distribute crack under 21 U.S.C. § 841(a)(1). Arthur was also convicted of murder in aid of racketeering, pursuant to 18 U.S.C. § 1959. Affirming Patrick's enhancement for being an organizer or leader under USSG §3B1.1(a), the court found that the record supported the district court's decision. The record revealed that Patrick was the "ultimate decisionmaking authority in the [gang]," determining who could sell drugs and when to fight rival dealers, as well as recruiting accomplices and supplying large amounts of drugs. *Id*. at 27. The court also affirmed Arthur's supervisory role under

[41]The *Apprendi* arguments were rejected because the record established that no jury would have failed to convict defendants of the crimes for which they were convicted under the higher reasonable doubt standard. Furthermore, "the jury found beyond a reasonable doubt that Arthur committed murder, which carries a mandatory sentence of life imprisonment." 248 F.3d at 28.

§3B1.1(b) based on evidence that he "owned and distributed large quantities of crack . . . gave orders to younger [gang] members, and used violence to eliminate rivals." *Id*.

United States v. Picanso, 333 F.3d 21 (1st Cir. 2003). The defendant was convicted of conspiracy to distribute cocaine. He appealed his sentence, objecting to his designation as an organizer or leader. The court of appeals affirmed the role enhancement. The court found that the defendant was essentially a drug wholesaler, which meant he dealt in greater quantities of drugs than did his co-conspirators and received larger profits. However, the court noted that the greater quantities and larger profits cannot alone trigger the role enhancement because the base offense level already takes quantity (and, implicitly, profit) into account. The court found additional circumstances that, when taken together, warranted the role enhancement in this case. The court based its conclusion on the fact that the defendant supplied a substantial network of retailers, set the terms for his own transactions with them, was regarded as the kingpin by other conspirators, and–drawing inferences in favor of the ultimate finding–had some influence over the operations of the retailers themselves.

United States v. Stein, 233 F.3d 6 (1st Cir. 2000), *cert. denied*, 532 U.S. 943 (2001). The district court did not clearly err when it enhanced defendant's sentence by two levels for being an organizer, leader, manager, or supervisor under USSG §3B1.1(c). The defendant was convicted of bankruptcy fraud and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. §§ 152 and 371. Affirming the role enhancement, the court found that the district court could have reasonably concluded that the defendant and his wife planned and executed a scheme to defraud creditors through the use of a third party trust. The couple conveyed the property to a third party, then failed to disclose it throughout bankruptcy proceedings. During the concealment period, the defendant and his wife continued to make decisions regarding the property, including paying bills, receiving tax and insurance information, controlling the sale of the property, and spending the proceeds from its sale. The court added that there is no authority addressing whether §3B1.1 applies when two individuals act together to supervise another party, but noted that the defendant did not make that argument.

§3B1.2 Mitigating Role

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). The district court did not err in determining that the defendant's participation in an attempted robbery fell between a minor and a minimal role, thus warranting a three-level reduction in base offense level. The government had challenged the reduction, arguing that the district court impermissibly based this determination on the fact that the defendant's role as a lookout was less reprehensible than the roles of his codefendants, and not because he was less culpable. The circuit court rejected this argument, concluding that the record established the defendant was both less culpable than most of his codefendants and less culpable than the "average person" who commits the same offense. *See* USSG §3B1.2, comment. (nn.1-3).

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court did not err when it refused to reduce the defendant's sentence under USSG §3B1.2 for minimal or minor

participation. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. The court rejected the defendant's argument that his participation consisted of "infrequent, relatively low-level tasks." *Id*. at 148. The record revealed that the defendant "had unloaded a sizable drug shipment and had conducted surveillance" to support the conspiracy, which is sufficient to preclude a sentence reduction. *Id*. at 149. Moreover, the district court's calculation of his offense level had already addressed the defendant's concern. Despite the seizure of about 1,000 kilograms of cocaine and substantial quantities of heroin, marijuana, and other contraband during the course of the smuggles in which defendant participated, the district court only attributed to the defendant 50 to 150 kilograms of cocaine. Ruling that a sentencing court can decide not to grant a particular reduction if it finds that another adjustment has adequately addressed the specific offense characteristic, the court affirmed the denial of the role-in-the-offense reduction.

United States v. Portela, 167 F.3d 687 (1st Cir. 1999). The district court did not err in failing to notify the defendant in advance of the sentencing hearing that the court intended to reject the presentence report's recommendation that the defendant receive a two-level adjustment under USSG §3B1.2 for being a "minor participant." The government waited until the sentencing hearing to object to the PSR recommendation, but the court stated it would not have granted the adjustment even if the government had not objected. A defendant is not entitled to notice of a court's intention to diverge from adjustments recommended in the presentence report. "So long as the court's determination involved adjustments under the provisions of the guidelines and not departures from the guidelines, 'the guidelines themselves provide notice to the defendant of the issues about which he may be called upon to comment.'" *Id*. at 707 (quoting *United States v. Canada*, 960 F.2d 263, 266-267 (1st Cir. 1992)).

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999), *cert. denied*, 531 U.S. 902 (2000). The district court did not demonstrate clear error when it declined to reduce defendants' sentences under USSG §3B1.2 for minimal or minor participation. A jury convicted the defendants of possession with intent to distribute cocaine while on the high seas, in violation of 46 U.S.C. App. § 1903(a), (b)(1), and (f). The defendants appealed on the grounds that they were unaware of the scope and organization of the offense, had no sophisticated or supervisory responsibilities, and made no material decisions. Rejecting these arguments and affirming the sentences, the court ruled that the defendants' arguments are of little relevance to this §3B1.2 analysis because they were not convicted of conspiracy. Furthermore, the record showed that the defendants were the only individuals on the ship containing the cocaine and that no defendant was less culpable than his codefendants.

See United States v. Santos, 357 F.3d 136 (1st Cir. 2004), §1B1.2, p. 4.

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

United States v. Chanthaseng, 274 F.3d 586 (1st Cir. 2001). The district court did not err when it enhanced the defendant's offense level by two levels for abuse of trust under §3B1.3. The defendant, a mid-level bank employee with the titles of vault teller and branch operations supervisor, was convicted of making false bank statements relating to a scheme to steal nearly $1 million dollars

from the bank at which she worked. At sentencing, the district court increased her offense level by two levels for abuse of a position of trust, pursuant to USSG §3B1.3. The First Circuit affirmed this enhancement, noting that the enhancement is proper if the defendant "(1) occupied a position of trust *vis-á-vis* her employer; and (2) utilized this position of trust to facilitate or conceal her offense." *Id*. at 589. With respect to the first requirement, the First Circuit has held that a position of trust is characterized by professional or managerial discretion. The enhancement is only proper with respect to positions that have "substantial discretionary judgment that is ordinarily given considerable deference." USSG §3B1.3, comment. (n.1). In this case, the defendant occupied a position of trust because she was one of only a few employees allowed to countersign rapid deposit tickets (which facilitated her scheme) and her supervisor consistently failed to review these approvals, thus rendering her the branch's sole decision-maker for these transactions. The court emphasized that the inquiry is not whether the defendant's title or job description includes a discretionary element, rather, the inquiry is whether the person in fact had such trust. The second requirement, that the defendant used the position to facilitate or conceal the offense, was also clearly established in this case.

United States v. Noah, 130 F.3d 490 (1st Cir. 1997). The district court did not err in finding that the combination of abilities necessary to prepare and file tax returns electronically qualified as a special skill subject to enhancement under the guidelines. The defendant argued that electronic filing was a task anyone can master. The court of appeals noted that even if an average person can accomplish a specialized task with training, it does not convert the activity into an ordinary or unspecialized activity. "The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public."

United States v. O'Connell, 252 F.3d 524 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence for abuse of trust under USSG §3B1.3 after he pled guilty to making, possessing, and uttering counterfeit and forged securities, in violation of 18 U.S.C. § 513(a). The district court disagreed with the defendant's argument that he did not hold a position of trust because he could not sign checks and because an accountant oversaw his actions. Affirming the enhancement, the court ruled that the defendant's authority to access the line of credit to the business's checking account "suggested significant managerial discretion" and his close relationship with the owners of the business "rendered him uniquely trusted as an employee," establishing for sentencing purposes that he occupied a position of trust. *Id*. at 529.

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998). The district court erred in finding that the defendant's position as a switchboard operator at police headquarters was a "position of trust." When the defendant noticed a large group of DEA agents gathering at the station, she alerted her drug dealer friend, who canceled a sizable marijuana delivery that would have taken place that evening. The cancellation thwarted the law enforcement agents. The court of appeals stated that the district court should first have decided where there was a position of trust, and not simply gone to the second step of the analysis, whether the defendant used her position to facilitate a crime. Critical to the first step in the analysis is the question of whether the position embodies managerial or supervisory discretion, the signature characteristic of a position of trust, according to the application notes. The defendant had no such discretion and so could not receive the enhancement.

United States v. Sotomayor-Vazquez, 249 F.3d 1 (1st Cir. 2001). The district court did not err by enhancing the defendant's sentence by two levels for abuse of a position of trust under USSG §3B1.3. The defendant was convicted of conspiracy, two counts of embezzlement, and 24 counts of money laundering, in violation of 18 U.S.C. § 1956(a). The court rejected the defendant's arguments that he could not be characterized as one in a position of trust because he did not have the power to make decisions and other persons in the business had the authority disregard his advice. Citing precedent establishing that to warrant an enhancement, "a defendant need not legally occupy a formal 'position of trust,' nor have 'legal control,'" the court found that the defendant enjoyed the "type of discretion contemplated by the enhancement." *Id*. at 19 (quoting *United States v. Newman*, 49 F.3d 1, 8-9 (1st Cir. 1995) (superseded by statute on other grounds). The defendant controlled the company's finances, as well as played a significant role in the decisions made by other businesses with whom the company had direct relationships.

§3B1.4 Using a Minor to Commit a Crime

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001), *cert. denied*, 535 U.S. 910 (2002). The district court did not err by enhancing the defendant's sentence under USSG §3B1.4 for using juveniles to commit a crime. The defendant was sentenced to life imprisonment after being convicted of racketeering under 18 U.S.C. § 1962(c), conspiracy to commit racketeering under 18 U.S.C. § 1962(d), conspiracy to distribute crack cocaine under 21 U.S.C. § 846, possession with intent to distribute crack under 21 U.S.C. § 841(a)(1), and murder in aid of racketeering, pursuant to 18 U.S.C. § 1959. The court affirmed the defendant's USSG §3B1.4 enhancement despite the absence of evidence that he had employed minors. The court determined that under USSG §1B1.3(a), which requires that this enhancement be derived from "'all reasonably foreseeable acts ... of others in furtherance of the jointly undertaken criminal activity,'" a conspirator's sentence can be enhanced based on the "reasonably foreseeable" use of minors by co-conspirators in furtherance of the crime. USSG §1B1.3(a).

§3B1.5 Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence[42]

Part C Obstruction

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

United States v. Fournier, 361 F.3d 42 (1st Cir. 2004). The defendant pled guilty to one count of oxycodone distribution and one count of methamphetamine distribution. On appeal, he argued

[42]Pending congressional approval, the Commission, effective November 1, 2004, will add an application note to §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence) that precludes application of §3B1.5 where the defendant is convicted of 18 U.S.C. § 931; if convicted of another offense in which the body armor was used, §3B1.5 would apply.

that the sentencing court erred (1) in increasing his base offense level by two levels for obstruction of justice under §3C1.1, and (2) in refusing to reward him with a two-level reduction for acceptance of responsibility, pursuant to §3E1.1. The defendant contended that the district court should have made a particularized finding as to whether he had the specific intent to obstruct justice. The appellate court held that it did not have to decide whether there had to be a specific finding, as the evidence here clearly supported the district court's ultimate finding that the defendant intended to obstruct justice as defined by the guidelines. The record amply showed that he violated multiple bail conditions in an attempt to flee and obstruct justice. Likewise, the court of appeals found no merit in the defendant's second basis for appeal. Given that conduct resulting in an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct, and that at the same time the defendant has not shown any "extraordinary circumstances" to merit the reduction, the appellate court affirmed the district court's sentencing decision.

United States v. McGovern, 329 F.3d 247 (1st Cir. 2003). The appellate court affirmed the decision of the district court to impose a two-level upward enhancement pursuant to Note 4(c) to §3C1.1. The defendant was convicted of Medicare and Medicaid fraud, obstruction of a federal audit, and money laundering. The defendant contests the district court's ruling that the obstruction occurred "during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." He made both temporal- and identity-type arguments. He contended that the submission of false information to federal auditors took place before there was any criminal investigation and that the Medicaid/Medicare audits are not investigations of the offense of conviction. The court noted that it has already rejected both types of arguments. In *United States v. Emery*, 991 F.2d 907 (1st Cir. 1993), the court rejected the temporal argument, holding that the fact that there was no pending federal criminal investigation at the time of the obstruction did not disqualify a defendant from an enhancement where there was a "close connection between the obstructive conduct and the offense of conviction." *Id*. at 911; *see United States v. Mills*, 194 F.3d 1108, 1115 (10th Cir. 1999). In *United States v. Pilgrim Market Corp*., 944 F.2d 14 (1st Cir. 1991), the court addressed the identity argument, holding that obstruction of a U.S. Department of Agriculture investigation of the sale of contaminated meat was an investigation for purposes of the guideline where the subject matter of the administrative investigation and the indictment was the same, and the obstructive conduct was meant to hide evidence of criminal wrongdoing. *Id*. at 20-21. Based on its prior holdings, the court affirmed the district court's enhancement.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court did not abuse its discretion when it declined to enhance defendant's sentence for obstruction of justice under USSG §3C1.1. The government argued that its rebuttal witness's testimony, inconsistent with that of the defendant, demonstrated that the defendant had committed perjury at the sentencing hearing. However, the government witness had previously made a statement to defense counsel inconsistent with his rebuttal testimony and in support of defendant's testimony, of which the government was aware. Rejecting the government's argument that it was in no position to give notice because it could not know ahead of time how the defendant would testify or that it would seek a USSG §3C1.1 enhancement, the district court ruled that, as a factual matter, the government should have given the defense notice of the

change in its witness's testimony, making it clear that false testimony from the defendant would lay the foundation for an enhancement. Recognizing the substantial deference to be paid to the district court regarding this discretionary matter, the court affirmed the district court decision. "Unfair surprise in witness testimony is one instance where the judicious management of the trial process by the trial judge plays a critical role." *Id*. at 787. Here, the government knew that the defense was relying on erroneous information when it introduced the defendant's testimony.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[43]

United States v. Nedd, 262 F.3d 85 (1st Cir. 2001). The defendant was convicted of four counts relating to interstate threats and one related count of an interstate violation of a restraining order. There were three primary victims of the threats, and the district court had applied the grouping rules by victim. The First Circuit held that this was error, and that the court should have instead bundled the counts so that those that contained the exact same primary victims would be grouped, and those that had different permutations of victims would not. The district court's error was harmless because the correct grouping analysis would result in the same guideline range.

United States v. Sedoma, 332 F.3d 20 (1st Cir. 2003). The defendant was convicted of conspiracy to possess with intent to distribute marijuana, conspiracy to defraud, mail fraud, and wire fraud. The defendant challenged the sentence on the ground that the district court erred in failing to group the drug conspiracy and conspiracy to defraud counts. He argued that the conduct embodied in the conspiracy to defraud count--defrauding the public of its intangible right to the defendant's honest services–formed the basis of the upward adjustment to the drug conspiracy count for abuse of a position of public trust under §3B1.3. The appellate court agreed with the defendant and found that the district court committed plain error in failing to group the drug conspiracy and conspiracy to defraud counts under §3D1.2(c). The court found that the presentence report, which the district court adopted, unmistakably used conduct embodied in the conspiracy to defraud count as the basis for a two-level abuse of position of trust adjustment to the base offense level of the drug conspiracy count. Yet, conduct embodied in the conspiracy to defraud count also resulted in an additional two-level increase to the defendant's offense level for the drug conspiracy under the §3D1.4 combined offense level analysis. The court noted that grouping all of the counts into one group would avoid this second two-level addition (*i.e*, double-counting), which is the express purpose of §3D1.2(c). The court held that the conspiracy to defraud count embodied conduct that was treated as an adjustment to the guideline applicable to the drug conspiracy count and those counts should have been grouped under the plain language of *Guidelines Manual*, §3D1.2(c).

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[43]Pending congressional approval, the Commission, effective November 1, 2004, will add §2G3.1 to the list of guidelines at §3D1.2(d) since these offenses typically are continuous and ongoing in nature; and add §2X6.1 to list of offenses specifically excluded from being grouped under §3D1.2(d)).

§3D1.4 Determining the Combined Offense Level

United States v. Hernandez-Coplin, 24 F.3d 312 (1st Cir.), *cert. denied*, 513 U.S. 956 (1994). The circuit court affirmed the district court's decision to depart up from less than two years to nine years imprisonment. The defendant, convicted of two separate incidents of smuggling illegal aliens, subjected them to dangerous shipboard conditions and forced passengers overboard into heavy tides, which resulted in two drowning deaths. The circuit court vacated and remanded the sentence, however, based on the district court's misapplication of the grouping rules for multiple counts. The district court failed to combine the groups of closely related counts under USSG §3D1.4. This resulted in an incorrect starting point for the departure, and remand was required for resentencing from the correct combined base offense level of 13.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[44]

United States v. Cash, 266 F.3d 42 (1st Cir. 2001). The defendant pled guilty to bank robbery. Prior to his sentence, he attempted to escape from jail and assaulted his cell mate. In seeking a downward adjustment for acceptance of responsibility, the defendant argued that even if he was unrepentant about the escape attempt and assault, he could be repentant about the underlying bank robbery and deserving of the acceptance of responsibility adjustment. The court rejected this argument, finding that although a court may not require a defendant to accept responsibility beyond the offense of conviction, in this case, the defendant's behavior suggested that he had not truly accepted responsibility for the bank robbery–he had tried to escape sentencing for the bank robbery.

United States v. Cunningham, 201 F.3d 20 (1st Cir. 2000). The defendant pled guilty to racketeering conspiracy, racketeering, making an extortionate extension of credit, collecting an extortionate extension of credit with extortionate means, conspiring to use extortionate means to collect a debt, and operating an illegal gambling business. The parties had negotiated a plea agreement throughout December 1997 and January 1998. In March 1998, the defendant informed the government that he intended to plead guilty, which he did in April, but that he would contest the forfeiture allegations. At sentencing, the district court awarded a two-level reduction for acceptance of responsibility under USSG §3E1.1, but declined to award another level decrease, for timely notification of his intent to plead guilty, based on the defendant's late decision to plead guilty six weeks before trial and because the government still had to prepare for the forfeiture trial. On appeal, the defendant argued that the district court should not have considered the forfeiture trial in its USSG §3E1.1(b) determination because forfeiture is part of sentencing; the defendant further argued that there was no

[44]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion. *See* USSG, App. C, Amendment 649.

evidence that the government had prepared for trial or that his late notification affected the allocation of court resources. The court agreed with the defendant regarding forfeiture, citing Supreme Court precedent ruling that forfeiture "is an element of the sentence," operating as a penalty for violating racketeering laws, not as a separate offense. *Id*. at 24 (citing *Libretti v. United States*, 516 U.S. 29, 38-39 (1995)). However, the court noted that it could still uphold the district court decision if removal of that ground would not alter the district court's reasoning. Finding that the record was too ambiguous to determine whether the district court erred in not granting the third level, the court remanded for clarification. It suggested that on remand the district court determine the extent to which, if at all, the government prepared for trial before the defendant informed it of his decision to plead guilty, and whether the delay in the defendant's notification of such intention caused an inefficient allocation of court resources.

See United States v. Fournier, 361 F.3d 42 (1st Cir. 2004), §3C1.1, p. 35.

United States v. Franky-Ortiz, 230 F.3d 405 (1st Cir. 2000). The district court did not abuse its discretion when it refused to lower the defendant's offense level for acceptance of responsibility under USSG §3E1.1. A jury convicted the defendant of conspiring to distribute controlled substances and using and carrying firearms during and in relation to the commission of a drug-trafficking offense. Relying on commentary to USSG §3E1.1 discouraging its application in situations where the defendant proceeds to trial, "denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse," the court affirmed the district court decision. USSG §3E1.1, comment. (n.2). The record revealed that throughout the five-week trial, the defendant vehemently refuted the essential facts upon which he was convicted and admitted guilt and remorse only after being convicted and confronted with a life sentence. The district court did not err by determining that this case did not represent the rare occasion of post-conviction admission of guilt that warrants an acceptance of responsibility adjustment. Moreover, the defendant's argument that he proceeded to trial because he was dissatisfied with the plea offer does not support his acceptance of responsibility claim. Because no defendant can require leniency in return for a guilty plea and the government cannot prevent a defendant from admitting guilt, dissatisfaction with a plea offer does not offset a decision to proceed to trial, denying all guilt, for purposes of USSG §3E1.1.[45]

United States v. Portela, 167 F.3d 687 (1st Cir. 1999). The district court did not err in finding that the defendant who went to trial was not entitled to a reduction for acceptance of responsibility. The defendant argued that he was attempting to raise a legal issue by pursuing a claim that there were multiple conspiracies rather than a single conspiracy. The defendant had also pled not guilty to substantive, non-conspiracy counts and at sentencing continued denying being a member of the larger conspiracy of which he was convicted. The defendant had no support for his position that the

[45]The defendant also argued that he proceeded to trial to protect an objection to a pretrial motion. The court refused to consider the argument because not only was it not raised before the sentencing judge, but it was not discussed in defendant's appellate brief.

multiple conspiracy argument was not simply an "issue related to factual guilt," and the defendant did not express contrition before trial.

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999), *cert. denied*, 531 U.S. 902 (2000). The district court's decision not to reduce the defendants' sentences by two levels under USSG §3E1.1(a) for acceptance of responsibility was not clearly erroneous. A jury convicted the defendants of possession with intent to distribute cocaine while on the high seas. The defendants objected to the enhancement on grounds that "they cannot be punished for preserving their constitutional right to appeal by maintaining their innocence." *Id*. at 570. Joining other circuits, the court affirmed the sentences based on the defendants' decisions to proceed to trial and their maintenance of their factual innocence on appeal. *See, e.g., United States v. Davis*, 960 F.2d 820, 829 (9th Cir.), *cert. denied*, 506 U.S. 872 (1992); *United States v. McDonald*, 935 F.2d 1212, 1222 (11th Cir. 1991); *United States v. Monsour*, 893 F.2d 126, 129 (6th Cir. 1990). A USSG §3E1.1 reduction is a "special leniency" granted to remorseful defendants who accept responsibility early in the proceedings, the absence of which is not a punishment for defendants who assert their rights. The reality that defendants must make a "difficult choice" about whether to accept responsibility does not violate their right to trial or to appeal. 199 F.3d at 570-71. The court also rejected Javier's argument that he had expressed remorse. Not only did Javier fail to express regret or even mention the crime when he stated that he felt "'very bad about the position [he was] in,'" but he "appeared to express displeasure with the consequences of being convicted of the crime." *Id*. at 571.

United States v. Saxena, 229 F.3d 1 (1st Cir. 2000).[46] The district court did not err when it declined to adjust the defendant's sentence under USSG §3E1.1 for acceptance of responsibility. The defendant pled guilty to selling unregistered securities, engaging in prohibited transactions, mail fraud, and making false and fraudulent claims, after publishing a newsletter offering investment advice based on a computer program designed to reveal the most lucrative times to buy and sell certain securities. The district court refused to apply USSG §3E1.1 because, while out on bail awaiting sentencing, the defendant solicited subscriptions to an Internet newsletter whose advice, based on the same computer program, guaranteed to lead readers to huge profits. Affirming the decision, the court found that the district court could have reasonably interpreted the defendant's post-conviction conduct to be inconsistent with the genuine and candid contrition required under the guideline. The defendant's actions showed either an insensitivity or a lack of comprehension of the error of his crime. The district court could have also reasonably concluded from his actions that the defendant planned only to recognize that his first venture violated the technical securities laws, not that he had acted inappropriately.

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[46]The defendant also appealed the fine assessed under 18 U.S.C. § 3472(a), arguing that the district court did not consider all the factors required under section 3472(a). The court found that the sentencing court adequately followed the statute. The district court adopted the PSR, which included sufficient information regarding the defendant's finances and the potential effect on his family. Additionally, the defendant provided substantial information about his ability to pay a fine. Finally, the district court imposed a fine at the low end of the sentencing range, showing that he considered the necessary factors.

United States v. Vega-Coreano, 229 F.3d 288 (1st Cir. 2000). The district court did not clearly err when it refused to reduce the defendant's sentence under USSG §3E1.1 for acceptance of responsibility. The defendant pled guilty to violating 18 U.S.C. § 3 for being an accessory to a robbery after the fact. Based on her inconsistent testimony regarding when she first learned who participated in the robbery, the court affirmed the district court finding that the defendant had "wavered in her willingness to take complete responsibility for her criminal acts." *Id*. at 290. The court affirmed the sentence.

United States v. Walker, 234 F.3d 780 (1st Cir. 2000). The district court's refusal to reduce the defendant's sentence under USSG §3E1.1 for acceptance of responsibility was not clearly erroneous. The defendant pled guilty to embezzlement under 18 U.S.C. § 664. The court affirmed based on the district court's finding that despite his guilty plea, the defendant had participated in conduct inconsistent with acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Mateo, 271 F.3d 11 (1st Cir. 2001). At the time of his federal offense, the defendant was still under a criminal justice sentence relating to a state court case. Although his probationary term from the state case had been due to expire prior to the date of his federal offense, it had not because the defendant had failed to report to his probation officer and a warrant had been issued for his arrest. Subsequent to his federal sentencing, the defendant moved to terminate his state court probation; that motion was granted "*nunc pro tunc*" to the date on which the probation had originally been scheduled to expire (which was before the date of his federal offense). The defendant then argued in his federal appeal that the two-level enhancement applied by the district court on the basis that the defendant had been under a criminal justice sentence at the time of his offense had been improper. The First Circuit disagreed, finding that a defendant's criminal history is to be calculated at the time of sentencing. The court also rejected the defendant's position that the state court warrant had been issued erroneously and that therefore it should not have been held against him, finding that "in determining whether to add criminal history points under USSG §4A1.1(d), a sentencing court ordinarily is not required to look beyond the fact of the state-court record, but, rather, may give weight to an outstanding warrant without inquiring into the validity of that warrant." *Id*. at 16.

United States v. Roberts, 39 F.3d 10 (1st Cir. 1994). The district court sentenced the defendant under Criminal History Category II, based upon a 1986 state court diversionary disposition on a charge of driving under the influence of alcohol and operating a motor vehicle to endanger. Those charges were continued by the state court without a finding, upon the defendant's admission of sufficient facts to sustain a finding of guilt. The government urged that under USSG §4A1.1(c), the diversionary disposition was properly counted. The defendant urged the appellate court to follow the Seventh

Circuit's opinion in *United States v. Kozinski*, 16 F.3d 795 (7th Cir. 1994), that such a diversionary procedure amounts to diversion from the judicial process without a finding of guilt, for which no criminal history points may be awarded. The appellate court determined that the government had not carried its initial burden of proof to show that "what happened in 1986 was in substance an admission of guilt," and remanded the case to the district court. The appellate court noted that the district court could also determine that it would give the same sentence within the range regardless of whether it applied category I or II. Finally, the appellate court suggested that the Sentencing Commission might wish to examine this subject and the guideline.

United States v. Torres-Rosa, 209 F.3d 4 (1st Cir. 2000). The district court did not err when it included two prior Puerto Rico felony convictions in the criminal history calculus under USSG §4A1.1. The defendant pled guilty to conspiracy to possess within intent to distribute cocaine. The defendant argued that his Puerto Rico convictions should not count because the sentencing guidelines make no specific mention of Puerto Rico when they describe the jurisdictions from which relevant convictions can originate for purposes of calculating criminal histories. *See* USSG §4A1.1, comment. (backg'd). The court had previously rejected the same argument, ruling that because Congress has granted to Puerto Rico "'the degree of autonomy and independence normally associated with States of the Union,'" there could be no clear error unless the defendant showed "'that the Sentencing Commission meant to exclude felony convictions in Puerto Rico Commonwealth Courts for enhancement purposes.'" 209 F.3d at 9 (quoting *United States v. Morales-Diaz*, 925 F.2d 535, 540 (1st Cir. 1991) (internal quotation omitted). The defendant failed to satisfy this burden; the court affirmed the criminal history calculation.[47]

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

United States v. Caldwell, 358 F.3d 138 (1st Cir. 2004). The defendant appealed the imposition of a 223-month sentence after a spree of state crimes, a brief interlude in the State of Maine's Adult Drug Treatment Program, and a more dangerous spree of federal offenses, including an armed bank robbery. The First Circuit held that any error in the district court's calculation of the defendant's criminal history was harmless, and thus affirmed the district court's sentence of 223 months' imprisonment. However, the court found that the district court should have indicated whether the defendant's federal sentence was imposed consecutively or concurrently to his undischarged state sentences, which necessitated a remand solely for that purpose. The defendant challenged the district court's calculation of his criminal history on the ground that under §4A1.2 it should have treated his two

[47]The defendant also argued that he should have been able to withdraw his plea because he did not know when he pled guilty that the Puerto Rico convictions would be calculated into his sentence. The court rejected the argument for several reasons. The court found such ignorance to be implausible, the defendant waited more than one month after the PSR was filed before he moved to withdraw his plea, and the defendant failed to profess his innocence or identify any error in the plea proceedings. Moreover, the defendant did receive the benefit of the plea bargain, despite the increase in the government's recommended sentence. Pursuant to the plea agreement, the district court reduced his sentence for acceptance of responsibility, attributed a lower quantity of drugs to him, and dismissed other charges; the agreement did not stipulate a criminal history level.

Oxford County convictions as related. The Court of Appeals found that if the defendant's two Oxford County convictions had been treated as related, they would have netted two, instead of three, criminal history points, and his criminal history score would have fallen from eleven to ten. However, the court concluded that a criminal history score of ten would still have left the defendant in Criminal History Category V, leaving his sentencing guideline range unchanged. Accordingly, the court concluded that any error in the district court's calculation of the defendant's criminal history was harmless. The defendant also challenged the district court's refusal to order that his federal sentence run concurrently to his four undischarged state sentences. The Court of Appeals agreed with the district court that it lacked the power to order the defendant's state sentences to begin to run, and that, under the unusual circumstances of this case, the district court's lack of power to order a state sentence to begin to run posed a significant practical impediment to the defendant's achieving concurrent service of his state and federal sentences, should the federal sentences be imposed to run concurrently. However, the court found no basis for concluding that these practical problems deprived the district court of its discretion, or the power to exercise that discretion, to impose its sentence concurrently or consecutively to the undischarged state sentences. (§5G1.3 (c)) Accordingly, the court remanded to permit the district court to exercise its discretion to impose the defendant's federal sentence to run concurrently, partially concurrently or consecutively to his undischarged state sentences. Therefore, the court affirmed the district court's calculation of the defendant's criminal history and its imposition of a 223-month sentence of imprisonment. The court remanded for the limited purpose of having the district court indicate whether that sentence is imposed concurrently with or consecutively to the defendant's undischarged state sentences.

United States v. Castro, 279 F.3d 30 (1st Cir. 2002). The defendant challenged the district court's consideration of his prior probationary sentence for disorderly conduct when it calculated the defendant's criminal history. According to the defendant, a violation of his probation for this charge could not have resulted in jail time and, as a result, the sentence was not the type of "probation" contemplated by the guidelines. The First Circuit rejected this argument, noting that USSG §4A1.2(c) provides that sentences for disorderly conduct are counted if "the sentence was a term of probation of at least one year . . . ." Since Castro's probationary sentence was at least one year, the district court had been correct in counting it.

United States v. DiPina, 230 F.3d 477 (1st Cir. 2000). The district court appropriately included the defendant's juvenile disposition when it determined his criminal history category under USSG §4A1.2, thus preventing the application of the safety valve provision. The court rejected the defendant's argument that his juvenile disposition for unlawful delivery of heroin was a diversionary disposition and thus, under USSG §4A1.2(f), could not be counted as a prior sentence.[48] Because the guidelines do not define a diversionary disposition, the court reviewed examples of such dispositions from this and other circuits. Consistent with previous decisions, the First Circuit held that cases where courts do not defer adjudication or sentencing, but rather enter a finding and impose a sentence

[48]The defendant made the same arguments for two other juvenile dispositions, but the court did not address them because including the heroin disposition alone precluded the application of the safety valve provision.

immediately after hearing arguments, do not constitute diversionary dispositions. *Cf. United States v. Morillo*, 178 F.3d 18, 21 (1st Cir. 1999) (holding that a "continuance without a finding," based on an admission of facts sufficient for a guilty finding, was a diversionary disposition); *see also United States v. Shazier*, 179 F.3d 1317, 1319 (11th Cir. 1999) (stating that "[§4A1.2(f)] does not apply to sentences where confinement is imposed and served"); *United States v. Crawford*, 83 F.3d 964, 966 (8th Cir.) (rejecting an argument that a completed sentence constituted a diversionary disposition), *cert. denied*, 519 U.S. 903 (1996). The juvenile court did not defer adjudication or sentencing of the defendant's heroin sales charge. It entered a finding of delinquency and immediately sentenced the defendant to 18 months' incarceration at a facility for serious juvenile offenders. Finally, the court rejected the defendant's arguments that his admission of sufficient facts did not constitute a guilty plea for purposes of USSG §4A1.2(a)(1). The court had concluded earlier that in order for an admission of sufficient facts to constitute a guilty plea, the court must find that "the defendant confessed to certain events or that other evidence proves such events, and that the events constituted a crime." *United States v. DiPina*, 178 F.3d 68, 75 (1st Cir. 1999). The court found that the record reflected that the defendant's admission of sufficient facts satisfied that standard.

United States v. Doe, 18 F.3d 41 (1st. Cir. 1994). The district court did not err in departing from the sentencing guideline range of 21 to 27 months to 72 months' imprisonment for possessing a gun after a previous felony conviction; the district court found that the guideline range did not adequately reflect the defendant's prior criminal record. The court found that a lawful basis for departure included one of the defendant's prior dangerous offenses, which was already counted under the criminal history section. Despite finding some dismal truth in the defendant's assertion that many felonies involve guns and violence, the court did not believe that the "felon in possession" guideline automatically rules out consideration of a departure based on dangerous features of an offense. The court also accepted as a basis for departure the defendant's uncounted, juvenile dissimilar offenses. The defendant asserted that the guidelines forbid criminal history departures, where, as here, the departure rests on a juvenile's uncounted criminal conduct. *See United States v. Samuels*, 938 F.2d 210 (D.C. Cir. 1991); *United States v. Thomas*, 961 F.2d 1110 (3d Cir. 1992). The First Circuit disagreed. Section 4A1.2, comment. (n.7) does not mention a departure for the presence of uncounted, earlier, dissimilar conduct. This absence of guidance, coupled with the Commission's statement that the guidelines "do not limit the kinds of factors, whether or not mentioned anywhere else in the guidelines that could constitute grounds for departure in an unusual case," allows the district court to depart based on uncounted juvenile dissimilar convictions. Moreover, the district court's reliance upon subsequent guidelines amendments to provide an analogous range was lawful.

United States v. Dubovsky, 279 F.3d 5 (1st Cir. 2002). In an earlier Massachusetts state case the defendant had admitted facts sufficient to support a conviction on a marijuana charge. The judge had continued the charge without a finding of guilt. Later, the charges were dismissed. Subsequent to the dismissal, the defendant pled guilty in federal court to an unrelated drug charge. Following his federal plea, but before his sentence, the defendant filed a motion to seal records relating to his earlier state case in state court. That motion was granted. In sentencing the defendant on the federal charge, the district court found the defendant ineligible for the safety valve because he had more

than one criminal history point, as a result of the earlier state case. The defendant appealed this finding, claiming that the state case had been "expunged" and therefore should not have counted for criminal history purposes. The First Circuit cited its earlier precedent, *United States v. Morillo*, 178 F.3d 18 (1st Cir. 1999), for the proposition that a Massachusetts "continuance without a finding" is considered a prior sentence under §4A1.1. With respect to whether this sentence had been expunged, the First Circuit pointed to the language of Application Note 10 to USSG §4A1.2 and found that "expungement within the meaning of the guidelines's structure is best determined by considering whether the conviction was set aside because of innocence or errors of law." 279 F.3d at 8. In *Dubovsky's* case, the court found that the Massachusetts case had not been dismissed or sealed based on innocence or legal errors.

United States v. Gonzalez-Arimont, 268 F.3d 8 (1st Cir. 2001). The First Circuit found that juvenile convictions under Puerto Rico law are sealed and kept confidential but are not "expunged" within the meaning of the guidelines. It was therefore proper for the district court to take them into account in determining criminal history.

United States v. Gray, 177 F.3d 86 (1st Cir. 1999). The district court did not err in assessing one point for the defendant's prior adjudication for theft, even though the state law bars consideration of the adjudication by "any court subsequently sentencing the juvenile after the juvenile has become an adult." It is not clear that the state statute was intended to prevent federal courts from counting such adjudications at sentencing, and if that were the case, the law would fail under the Supremacy Clause. States may not "dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes."

The district court did not err in assigning one criminal history point for a misdemeanor conviction the defendant received without being represented by counsel. Because the defendant received only time-served for the offense, the district court stated that the defendant bore the burden of proving that he had not waived his right to counsel. The defendant presented a copy of the docket sheet showing that the defendant was arrested and pled guilty on the same day and there was no indication that the defendant was represented by counsel. The defendant did not testify at the sentencing hearing and did not submit a sworn affidavit that he had not waived counsel. The defendant wrongfully assumed that the silent docket would shift the burden to the government. The defendant's "proof of a defective conviction was inadequate."

United States v. Morillo, 178 F.3d 18 (1st Cir. 1999). The district court did not err in counting as a prior sentence a state court sentence of "a continuance without a finding" (CWOF) for violating a domestic violence restraining order. The defendant filed an "admission to facts sufficient for a finding of guilty" and executed a written waiver of his constitutional rights. The defendant was required to complete one year of unsupervised probation, during which he was charged in federal court with drug distribution. The court assessed one point for the CWOF under USSG §4A1.1(c) and two points under USSG §4A1.1(d) because the defendant was arrested for the federal offense while on CWOF probation. The CWOF amounted to a diversionary disposition resulting from an admission of

guilt under USSG §4A1.2(f) because under state law the defendant's "admission" is considered a "tender of a plea of guilty."

United States v. Nicholas, 133 F.3d 133 (1st Cir. 1998). The district court did not err in counting, for criminal history purposes, the defendant's "admission to sufficient facts" on Massachusetts state charges of larceny and forgery, a procedure the state labeled a "continuance without finding." Under the Massachusetts system in effect at the time, an "admission to sufficient facts" meant an admission to facts sufficient to warrant a finding of guilty.

United States v. Ticchiarelli, 171 F.3d 24 (1st Cir.), *cert. denied*, 528 U.S. 850 (1999). In resentencing the defendant after the case had been remanded, the district court erred in including as a "prior sentence" under USSG §4A1.2(a)(1) a sentence imposed after the original sentencing. After the defendant's original sentencing on the instant offense, he was convicted and sentenced for a Florida offense. He then appealed his original district court sentence based on the district court's drug calculation for an offense involving hashish oil and marijuana, and the case was remanded with instructions that the district court treat hashish oil as marijuana. When an original sentence is vacated and remanded only for resentencing, "prior sentence" means a sentence prior to the original sentence. Law of the case doctrine and the mandate rule do not permit *de novo* resentencing on all sentencing issues, thus upon resentencing the court may not treat the Florida offense as a prior sentence.

United States v. Troncoso, 23 F.3d 612 (1st Cir. 1994), *cert. denied*, 513 U.S. 1116 (1995). In addressing an issue of first impression, the circuit court affirmed the lower court's determination that the defendant's state sentence for sale of cocaine was a "prior sentence" within the meaning of USSG §4A1.2. The defendant was in the United States illegally after he had been previously deported in 1988. He was convicted on a state offense for the sale of cocaine for which he received a suspended sentence in April 1993. In August 1993, he was convicted of violating 8 U.S.C. § 1326 based on his earlier deportation and was sentenced. He argued that the state offense of selling cocaine was part of the instant offense because he was arrested for the state offense while committing the federal offense. The circuit court joined the Sixth and Tenth Circuits in concluding that the relevant inquiry is "whether the 'prior sentence' and the instant offense involve conduct that is severable into two distinct offenses." *Id*. at 616; *see United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Banashefski*, 928 F.2d 349 (10th Cir. 1991). Since the state drug conviction required proof of different elements from the immigration offense, the two constituted severable offenses and the state conviction was properly determined to be a "prior sentence" for criminal history purposes.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Brewster, 127 F.3d 22 (1st Cir. 1997), *cert. denied*, 523 U.S. 1086 (1998). The district court did not err in departing upward based on defendant's lengthy history of uncharged spousal abuse, even though this conduct was dissimilar to the defendant's offense of conviction. The court of appeals held that a departure based on the inadequacy of a defendant's criminal history score can be based on prior dissimilar conduct that the defendant was not charged with

or convicted of, if the conduct is so serious that, unless it is considered, the criminal history category will be manifestly deficient as a measure of the defendant's past criminal behavior or likely recidivism.

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001). The district court's upward departure pursuant to USSG §4A1.3 on grounds that the defendant's criminal history was under-represented was not erroneous. The defendant argued that the district court did not provide a sufficient rationale for the five-level departure, making a determination based solely on his criminal history score without considering the nature and context of his prior convictions. Understanding that there was no specific test for determining the reasonableness of a decision, the First Circuit did not require a detailed analysis of a sentencing decision such as "'explaining in mathematical or psuedo-mathematical terms each microscopic choice made in arriving at a precise sentence,'" but merely required a reasonable justification from which the appellate court can "'gauge the reasonableness of the departure's extent.'" *Id*. at 64 (quoting *United States v. Emery*, 991 F.2d 907, 913 (1st Cir. 1993)). In light of the deferential standard of review, the court found that, in addition to excessive criminal history points, the concern the district court expressed regarding the defendant's "consistent recidivism" and "violent nature" of the defendant's burglaries represented sufficient reasoning for the departure. *Id*. at 64. Moreover, compared to prior First Circuit upward departures under USSG §4A1.3, the 18 percent increase in sentence was relatively minor. *See, e.g., United States v. Brewster*, 127 F.3d 22, 31 (1st Cir. 1997) (affirming an approximately 50 percent increase for uncounted prior convictions and uncharged domestic violence), *cert. denied*, 523 U.S. 1086 (1998); *United States v. Hardy*, 99 F.3d 1242, 1253 (1st Cir.1996) (affirming a 300 percent upward departure); *United States v. Black*, 78 F.3d 1, 7-8 (1st Cir.) (affirming an approximately 30 percent increase on the basis of a criminal history score of 21), *cert. denied*, 519 U.S. 901 (1996); *United States v. Doe*, 18 F.3d 41, 48-49 (1st Cir.1994) (affirming about a 167 percent increase in sentence); *United States v. Emery*, 991 F.2d at 914 (affirming about a 41 percent increase on the basis of a criminal history score of 20); *United States v. Brown*, 899 F.2d 94, 96 (1st Cir.1990) (affirming an approximately 133 percent departure on the basis of a criminal history score of 20); *United States v. Diaz-Villafane*, 874 F.2d 43, 51-52 (1st Cir.) (affirming a 264 percent upward departure), *cert. denied*, 493 U.S. 862 (1989).

United States v. Mayes, 332 F.3d 34 (1st Cir. 2003). The defendant pled guilty to selling .63 gram of crack cocaine to an undercover police officer, in violation of 21 U.S.C. § 841(a)(1). The defendant objected to the presentence report and requested a downward departure, contending that criminal history category (CHC) VI over-represented the actual seriousness of his criminal history and the likelihood that he would commit further crimes. He raised two distinct concerns on appeal: (1) the relatively small quantity of drugs involved in the offense of conviction; and (2) the overstated criminal history category resulting from the district court's failure to take into account his prior drug rehabilitation efforts. The First Circuit held that although drug rehabilitation efforts may warrant a departure under §4A1.3, it is for the defendant to demonstrate that any such efforts were in fact "exceptional." *Id.* citing *United States v. Craven*, 239 F.3d 91, 99-100 (1st Cir. 2001) ("The touchstone of extraordinary rehabilitation is a fundamental change in attitude."). The appellate court affirmed the district court's decision, noting that whether the district court believed it lacked the discretionary power to depart downward did not matter because any departure under §4A1.3 would have constituted an abuse of

discretion. The court found that the defendant's efforts at drug rehabilitation–"two short-lived, unsuccessful, court-imposed, drug-treatment regimens utterly failed to meet the required benchmark." *Id.* Further, the defendant's criminal history placed him squarely within the career-offender "heartland," thus warranting an incarcerative sentence of substantial duration. The defendant committed not only the two predicate offenses that triggered his career-offender status, but a total of eight serious felonies, including larceny, armed assault, and distributing illegal drugs within a school zone. Far from mere aberrant behavior, the defendant accumulated four convictions for either possessing or distributing illicit drugs during the eight-year period between 1993 and 2001.

United States v. Mendez-Colon, 15 F.3d 188 (1st Cir. 1994). The district court departed upward after determining that the defendant's criminal history score underrepresented his criminal history. The defendant claimed the extent of the departure was unreasonable and appealed. The circuit court found that although the district court properly explained why it was departing, it did not explain why this case was so egregious as to warrant departure beyond Category VI. The case was remanded for reconsideration in light of USSG §4A1.3 which directs the sentencing court to move horizontally across the sentencing table until it finds a criminal history category which provides a more appropriate punishment. The court should only depart beyond Category VI when the case involves "an egregious, serious criminal record," in which case the sentencing court must "explain carefully" why the circumstances are "special enough" to warrant such a departure. USSG §4A1.3.

United States v. Snyder, 235 F.3d 42 (1st Cir. 2000), *cert. denied*, 532 U.S. 1057 (2001). The district court did not err when it refused to depart downward under USSG §4A1.3 on grounds that the defendant's criminal history category overstated the severity of his criminal record. The defendant argued that the district court failed to recognize his USSG §4A1.3 request for downward departure because the district court mistook his claim for an argument for departure based on extraordinary rehabilitation. Rejecting the defendant's argument, the court ruled that there was no evidence to show that the district court misunderstood the request. Furthermore, the defendant's record of violent crime justified the sentence. The sentence was affirmed.[49]

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Brackett, 270 F.3d 60 (1st Cir. 2001), *cert. denied*, 535 U.S. 1003 (2002). The defendant was sentenced as a career offender. Approximately two years later, two predicate state court convictions were vacated. The defendant then moved in federal court pursuant to 28 U.S.C. § 2255 for release from federal detention, arguing his resentencing as a non-career offender would result

[49]The defendant also argued that he should have been granted a departure under USSG §5K2.0 on the following grounds: erroneous jury instruction, improper payment to a witness by the government in exchange for testimony, and lack of a compelling interest to justify federal prosecution of a purely local matter. The court rejected all these arguments because none were relevant to sentencing.

in a sentence of time served. The district court denied his petition on the grounds that it was untimely. The First Circuit affirmed. Title 28, U.S.C. § 2255(4) provides that a one-year statute of limitation applies, running from the latest of "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." The defendant argued that this provision means that the one-year period runs from the date on which the state vacated the prior criminal conviction. The First Circuit, however, found that the one-year period begins on the "the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." *Id*. at 68. Although the court recognized that there could be cases where this reading would work an injustice, it noted that there may be other mechanisms that could be used, including equitable tolling. The court found that in any event, this defendant was not a candidate for equitable tolling.

United States v. Delgado, 288 F.3d 49 (1st Cir.), *cert. denied*, 537 U.S. 1062 (2002). The district court did not err in relying on a police report relating to prior state court conviction to determine that the state charge of breaking and entering was a "crime of violence" for purposes of the career offender guideline. Although the district court recognized that the police report may not be reliable in all respects, it was reliable with respect to where the breaking and entering took place, in this instance a dwelling. Under USSG §4B1.2, a crime of violence includes a felony burglary of a dwelling.

United States v. Fernandez, 121 F.3d 777 (1st Cir. 1997). The district court did not err in concluding that the defendant's prior conviction for assault and battery on a police officer qualified as a predicate crime of violence for career offender purposes. Although the defendant argued that, under Massachusetts law, the crime can include both violent and non-violent variants, the court of appeals held that the offense usually involves force against another, and requires purposeful and unwelcome contact with a person the defendant knows to be a law enforcement officer on duty. The fact that violence and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer was sufficient to make the crime, categorically, a crime of violence.

United States v. Mangos, 134 F.3d 460 (1st Cir. 1998). The district court did not err in counting the defendant's prior conviction under Massachusetts law for assault and battery as a crime of violence for career offender purposes. The court of appeals examined the elements of assault and battery under Massachusetts common law, noting that a battery may be "harmful" or merely "offensive." Because the state law included both violent and arguably non-violent offenses, the court looked to the charging document to determine that the crime of which the defendant was convicted was a crime of violence.

United States v. Santos, 131 F.3d 16 (1st Cir. 1997). The district court was correct in concluding that the defendant's act in sending a threatening letter to the President of the United States was a crime of violence for career offender purposes. The court of appeals noted that the offense has as an element the threatened use of physical force against another and held that it was irrelevant that the defendant either did not intend to carry out the threat or lacked the ability to do so.

United States Supreme Court

United States v. LaBonte, 520 U.S. 751 (1997). The Supreme Court resolved a split among the Courts of Appeals, deciding that Amendment 506 promulgated by the Sentencing Commission amending commentary to USSG §4B1.1, the career offender guideline, is "at odds with the plain language of [28 U.S.C.] § 994(h)." In 28 U.S.C. § 994(h), Congress directed the Commission to "assure" that prison terms for categories of offenders who commit a third felony drug offense or crime of violence be sentenced "at or near the maximum term authorized" by statute. The Supreme Court held that by the language "maximum term authorized," Congress meant the maximum term available for the offense of conviction, including any applicable statutory sentencing enhancements. The enhanced penalty, from 20 to 30 years' imprisonment, is brought before the court by the prosecutor by filing a notice under 21 U.S.C. § 851(a)(1). The amendment to USSG §4B1.1's commentary at note 2 had provided that the unenhanced statutory maximum should be used, in part because the unenhanced statutory maximum "represents the highest possible sentence applicable to all defendants in the category" because section 851(a)(1) notices are not filed in every applicable case. The Supreme Court responded that "Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity." "[T]he phrase 'at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender 'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account." The judgment of the First Circuit at 70 F.3d 1396 (1st Cir. 1995) is reversed. The Commission's amended commentary is at odds with the plain language of the statute at 28 U.S.C. § 994(h), and "must give way." *Cf. Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute").

§4B1.2 Definitions of Terms Used in Section 4B1.1

See United States v. Delgado, 288 F.3d 49 (1st Cir.), *cert. denied*, 537 U.S. 1062 (2002), §4B1.1, p. 48.

United States v. Dueno, 171 F.3d 3 (1st Cir. 1999). The district court erred in counting as a career offender predicate the defendant's prior conviction for breaking and entering. The statute defining the offense made it a crime to "in night time, break and enter a building, ship, vessel, or vehicle, with intent to commit a felony." When a statute encompasses conduct that would constitute a crime of violence and conduct that would not, the court "may not hold a mini-trial on the particular facts underlying the prior offense to determine whether the defendant's conduct was violent," although it may "peek beneath the coverlet" to examine the indictment, complaint, and/or jury instructions. Here, it was not clear from the complaint whether the defendant entered a dwelling or a vehicle. Although the presentence report described the prior offense as an invasion into a home followed by vandalism, the description was based on a police report that was not part of the court file. Because the evidence is insufficient as a matter of law to support finding that the prior conviction constituted a crime of violence, the case was remanded. *See also United States v. Damon*, 127 F.3d 139 (1st Cir. 1997); and *United States v. Sherwood*, 156 F.3d 219 (1st Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999).

§4B1.4 Armed Career Criminal

United States v. Ellis, 168 F.3d 558 (1st Cir. 1999). The district court erred in finding that the defendant possessed weapons "in connection" with a controlled substance offense under USSG §4B1.4(b)(3)(A). The defendant was convicted at trial under 18 U.S.C. § 922(g)(1) (felon in possession of a shotgun, revolver, or ammunition) and 18 U.S.C. § 841(a)(1), 841(b)(1)(C) (cultivating marijuana). During a search pursuant to a warrant, agents discovered 65 marijuana plants in a secret compartment in a detached garage. The weapons in question were found nowhere near the marijuana in a bureau in a the defendant's bedroom. The government admitted that it was difficult to get to the weapons because of furniture in the room, which suggests that the weapons were largely inaccessible. The government argued unsuccessfully on appeal that the there was a sufficient nexus connecting the weapons to the marijuana because (1) 80 percent of drug crimes in Maine involve firearms violations; (2) the defendant hid his crop; and (3) marijuana is worth $2,000 per pound. The government also argued that two other weapons found on the premises could also support an "in connection with" finding and that the total number of weapons (eight) was further evidence of the connection. The district court failed to make explicit findings to support the enhancement.

United States v. Fortes, 141 F.3d 1 (1st Cir.), *cert. denied*, 524 U.S. 961 (1998). Possession of a sawed-off shotgun is a "violent felony," for purposes of the Armed Career Criminal Act. The court of appeals held that although possession of a firearm by a felon is not a violent felony, certain specialized weapons, such as silencers, machine guns, and sawed-off shotguns, have been found by Congress to be inherently dangerous and lacking in lawful purpose. The court relied on analogies to the career offender guideline's definition of "crime of violence."

§4B1.5 Repeat and Dangerous Sex Offender Against Minors[50]

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Jimenez-Martinez, 83 F.3d 488 (1st Cir. 1996). The First Circuit, in an issue of first impression, held that the safety valve (§5C1.2) requires the defendant to provide information to the prosecutor, not to the probation officer. The district court denied the defendant the safety valve because he did not provide information to the "Government" as required under USSG §5C1.2(5). The defendant appealed, arguing that his disclosure to the probation office satisfied the requirement of "providing information to the Government." §5C1.2(5). The circuit court concluded that the "Government" in USSG §5C1.2(5) and section 3553(f)(5) refers to the prosecuting authority rather than the probation office. The circuit court noted that USSG §5C1.2 is properly understood in

[50] *See* USSG App. C., Amendment 615.

conjunction with USSG §5K1.1. The court stated: "it seems evident that §5K1.1's reference to the 'government' and to 'substantial assistance in the investigation or prosecution of another person' contemplates the defendant's provision of information useful in criminal prosecutions." The court added that the legislative history of USSG §5C1.2 requires disclosure of information that would aid prosecutors' investigative work. The circuit court noted that while full disclosure to the probation officer may assist the officer in preparing the defendant's presentence report, the probation officer does not create a presentence report with an eye to future prosecutions or investigations. Thus, the circuit court affirmed the district court's holding that the defendant did not satisfy the requirements of the safety valve.

United States v. Marquez, 280 F.3d 19 (1st Cir. 2002). The defendant challenged the district court's failure to grant him a reduction under the safety valve, USSG §5C1.2. The district court had found that although the defendant had met the first four criteria, his proffer had been insufficient to satisfy the fifth requirement that he truthfully provide to the government all information and evidence relating to the offense. The First Circuit affirmed, holding that the government does not need to produce rebuttal evidence in order for the district court to find that the defendant had not been fully forthcoming. Rather, a "sentencing court may reject a safety valve proffer based on its reasoned assessment of the defendant's credibility in light of the facts – and [ ] the court may do so without the benefit of independent rebuttal evidence." *Id*. at 24. In addition, the court rejected the defendant's argument that the safety valve reduction can only be denied if the withheld information is "material." The court noted that the safety valve requires the defendant to provide "all information to the government."

United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996). The appellate court vacated and remanded the defendant's sentence for the district court to make supplemental findings to clarify on the record why it declined to grant the defendant relief from the mandatory minimum sentence pursuant to USSG §5C1.2. The defendant argued that she met the conditions set forth in the "safety value" provision and had explained the limits of her involvement in the conspiracy. Under USSG §5C1.2, a defendant may avoid the mandatory minimum and be sentenced below the applicable guideline term if the defendant meets the five requirements set forth in the provision, including cooperating fully with the government. The sentencing court held that the defendant had not cooperated fully with the government and had failed to negotiate for relief from the mandatory minimum in her plea agreement. The government did not specify details, however, concerning what the defendant had failed to provide. The circuit court noted that just because the government did not believe the defendant was a passive participant in the drug trafficking offense, did not automatically make her ineligible for relief under the guidelines. The court noted that mere speculation as to the extent of the defendant's cooperation was not intended by the guidelines, and should not be enough to thwart the defendant's efforts to avoid the imposition of a mandatory minimum sentence.

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. However, the district court did err in concluding that USSG §5C1.2 requires the defendant to

offer himself for debriefing in order to satisfy the requirement that the defendant truthfully provide to the government all information and evidence that he possessed. In this case, the defendant pled guilty to conspiracy to distribute drugs and to five substantive counts of possession with intent to distribute. At sentencing, the defendant asked the court to apply the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court ruled that Congress had intended the safety valve for defendants who tried to cooperate by being debriefed by the government. On appeal, the defendant argued that no debriefing requirement exists. Agreeing with the defendant, the court noted that nothing in 18 U.S.C. § 3553(f) specifies the form or place or manner of the disclosure. However, because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and evidence to the government, the defendant who declines to offer himself for a debriefing takes a very dangerous course. When a defendant's written disclosure is drawn almost verbatim from a government affidavit, nothing prevents the government from pointing out suspicious omissions or the district court from deciding, as it did in this case, that it is unpersuaded of full disclosure.

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000). The district court erred when it refused to sentence the defendant under the safety valve provision, pursuant to USSG §5C1.2. The defendant pled guilty to conspiracy and drug charges stemming from two smuggling incidents. Despite the fact that the defendant satisfied the qualifying criteria in USSG §5C1.2, the district court refused to impose the safety valve on grounds that the plea agreement, which prohibited "'adjustments to the offense level'" beyond those "expressly delineated in the [a]greement," prohibited such application. *Id*. at 151. In reversing this decision, the court found that the agreement, which addresses adjustments, does not preclude the use of the safety valve. Whereas adjustments, which are included in Chapter Three of the *Guidelines Manual*, address offense levels, Chapter Five, which encompasses the safety valve under USSG §5C1.2, consists of "other provisions that guide the ultimate sentencing determination." *Id*. The safety valve's intent is to limit the application of mandatory minimum sentences, not to per se affect the offense level. Consistent with Congress's intentions when it established the safety valve, the court ruled that if a defendant satisfies the criteria for the safety valve, the sentencing court is required to impose it. Because "the safety valve is a congressional device, [t]he court cannot reject it on equitable grounds, but must sift through the statutory criteria and, if it determines that those criteria have not been met, must elucidate specific reasons why the provision does not apply." *Id*. at 152. The court remanded the case for resentencing.

United States v. Woods, 210 F.3d 70 (1st Cir. 2000). The district court did not clearly err when it denied the defendant's safety valve request under USSG §5C1.2 on grounds that the defendant did not "truthfully provide to the Government all information and evidence . . . concerning the offense." The defendant was convicted of attempting and conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Affirming the decision, the court found that the defendant's history of involvement in drug conspiracies, including weekly cocaine sales of 5,000

kilograms, reasonably implied that the defendant knew more information than he disclosed, such as the identities of other participants in the drug distributions.[51]

United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995). The district court did not err in denying the "safety valve" provision to the defendant. The defendant argued that he was entitled to a reduction of the ten-year mandatory minimum sentence under 18 U.S.C. § 3553(f), which in certain circumstances gives the trial court authority to impose a sentence shorter than the otherwise mandatory minimum sentence. The circuit court held that the defendant did not meet the fifth requirement of 18 U.S.C. § 3553(f), which requires a defendant to truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The defendant contended that by unwittingly being recorded by an undercover agent while discussing his plans to distribute cocaine and admitting the allegations by pleading guilty, he has satisfied the truthfulness requirement of 18 U.S.C. § 3353(f). The circuit court rejected the defendant's argument, holding that a defendant has not "provided" to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversation conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. In addition, the circuit court held that the requirement is not satisfied merely because a defendant pleads guilty.

Part D Supervised Release

§5D1.2 Term of Supervised Release[52]

United States v. Riggs, 347 F.3d 17 (1st Cir. 2003). The Government did not breach a plea agreement by recommending a term of imprisonment at the high end of the sentencing range and the district court did not err when it imposed a term of supervised release within the sentencing guidelines. The defendant pled guilty to possession of cocaine. The defendant argued that 1) the government breached the plea agreement by suggesting defendant receive the maximum sentence under the law after it agreed to recommend a sentence based on an agreed upon drug quantity, and 2) the district court erred in imposing a term of supervised release that exceeded the sentencing guidelines' range for an offense involving an unspecified amount of cocaine base, without advance notice. The parties agreed that a drug quantity of between 35 to 49 grams be used for sentencing purposes. With the defendant's total offense level and criminal history category, this yielded a range of between 130 and

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[51]The defendant also argued that the district court should have sentenced him based on two kilograms of cocaine, the amount he had intended to purchase, and not four kilograms, which the undercover officer urged him to buy. The court found that this single transaction did not represent an "extreme and unusual case" of sentencing factor manipulation. *Id*. at 75 (quoting *United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1995)). The transaction involved a reasonable market price, the undercover agents did not pressure the defendant or show any indication of an illegitimate motive, and the defendant was a seasoned drug dealer.

[52]Pending congressional approval, the Commission, effective November 1, 2004, will conform §5D1.2 (Terms of Supervised Release) to be consistent with changes in the PROTECT Act to terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

162 months' imprisonment. The government recommended 162 months. The court noted that while the recommendation was at the high end of the range, it was within the guidelines for the agreed drug quantity and did not violate the plea agreement. The defendant's second argument treats supervised release as an upward departure because no drug quantity was alleged in the indictment or determined by the court beyond a reasonable doubt. The defendant claims he could not receive greater than the maximum supervised release for an unspecified quantity of cocaine under 21 U.S.C. § 841(b)(1)(C)–two to three years. *See* USSG §5D1.2(a)(2) (providing a term of supervised release for a Class C felony shall be "at least two years but not more than three years"). Instead, the defendant pled guilty to possession of between 35 and 49 grams of cocaine, making it a 21 U.S.C. § 841(b)(1)(B) offense, which is a class B felony under the guidelines. Section 5D1.2(a)(1) becomes the applicable guideline, which calls for "at least three years but not more than five years" of supervised release. The district court's imposition of a five-year term of supervised release did not exceed the guideline range.

§5D1.3 Conditions of Supervised Release

United States v. Brown, 235 F.3d 2 (1st Cir. 2000). The district court did not commit plain error when it required the defendant to abstain from consuming alcoholic beverages as a condition of his supervised release under USSG §5D1.3. The defendant pled guilty to distributing cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1). The court first rejected the defendant's argument that he did not receive sufficient advance notice of the district court's intent to depart in this manner. Holding that advance notice is not necessary if the condition is one which falls within the range of standard conditions articulated in the guidelines, the court ruled that the condition imposed by the district court was merely an extension of USSG §5D1.3(c)(7), which prohibits excessive drinking. In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court held that judges must give advance notice of their intentions to depart upward *sua sponte.* A defendant may rarely be able to claim unfair surprise when a court establishes conditions of supervised release because the guidelines contemplate that the court will tailor supervised release conditions to fit the offense and the offender. *See, e.g.*, *United States v. Warren*, 186 F.3d 358, 366 n.5 (3d Cir. 1999) (declining to apply *Burns* to a supervised release condition restricting travel); *United States v. Mills*, 959 F.2d 516, 519 (5th Cir. 1992) (holding that an occupational restriction did not constitute an upward departure). The court then rejected the defendant's argument that the record revealed no reasonable rationale for imposing the condition. Several circuits have recognized that the "critical test is whether the challenged condition is sufficiently related to one or more of the permissible goals of supervised release." *Id*. at 6; *United States v. Bull*, 214 F.3d 1275, 1278 (11th Cir.), *cert. denied*, 531 U.S. 1056 (2000); *United States v. Crandon*, 173 F.3d 122, 127 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999), *cert. denied*, 531 U.S. 1131 (2001); *United States v. Carter*, 159 F.3d 397, 400 (9th Cir.1998); *United States v. Wilson*, 154 F.3d 658, 667 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999). Finding that the facts reflected such a relationship with the defendant's criminal history, the safety of the general public, and deterrence from future crime, the court affirmed the district court's decision. The defendant's criminal record, which included several alcohol-related offenses, showed not only that the defendant had a longstanding history of alcohol abuse, but also that alcohol played a significant role in the commission of

his prior offenses, reflecting the defendant's tendency to commit crimes while intoxicated. Furthermore, the district court's finding that the defendant became a drug dealer to support his addiction suggested that the condition might serve as a deterrent from future criminal activity.

United States v. Merric, 166 F.3d 406 (1st Cir. 1999). The district court did not err in imposing as a condition of supervised release a requirement that the defendant repay the government $3,000 in counsel fees paid for his representation. The condition is "reasonably related" to deterrence, which is a statutory consideration required by Congress. The defendant can afford to pay. The condition is consistent with the guidelines because USSG §5D1.3 contains numerous repayment provisions. Although the Commission did not include payment of counsel fees as a standard condition of supervised release, the guideline does state that the court may impose other conditions consistent with 18 U.S.C. § 3583(d).

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. D'Andrea, 107 F.3d 949 (1st Cir. 1997). The district court did not err in assessing restitution against the defendant in the amount of $2.2 million, despite the defendant's claimed inability to pay. A sentencing court must consider the following factors in assessing restitution: amount of loss sustained by the victim; the financial resources of the defendant; the financial needs and earning ability of the defendant; the defendant's dependents; and such other factors as the court deems appropriate. Despite the sentencing court's skepticism as to the defendant's ability to make restitution payments, the restitution order is valid. There is no requirement that the defendant be found to have an ability to repay the amount ordered. Instead, there must only be an indication that the sentencing court considered all of the relevant factors in making its determination.

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996). The district court erred in ordering the defendant to make restitution to banks whose loss, although caused by the defendant, was not caused by the specific conduct that was the basis of the offense of conviction. The defendant was convicted of conspiring to make false statements on 21 loan applications to 3 FDIC-insured financial institutions. Several additional banks, however, had been defrauded during the course of the defendant's criminal conduct. At sentencing, the district court noted that in 1990 Congress broadened the definition of "victim" in the Victim and Witness Protection Act ("VWPA") to include "any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Applying 18 U.S.C. § 3663(a)(2), the district court ordered the defendant to make restitution to all of the banks defrauded as a result of the criminal conduct. On appeal, the court noted that the retroactive application of 18 U.S.C. § 3663(a)(2) violated the Ex Post Facto Clause. In so holding, the court aligned itself with the courts of appeals that have already addressed the issue. *See, e.g., United States v. Elliott*, 62 F.3d 1304, 1313-14 (11th Cir. 1995), *cert. denied*, 519 U.S. 859 (1996); *United States v. DeSalvo*, 41 F.3d 505, 515 (9th Cir. 1994); *United States v. Jewett*, 978 F.2d 248, 252-53 (6th Cir. 1992).

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996). In considering this issue of first impression, the district court did not err in applying the 1990 amendments to the Victim and Witness Protection Act, which provide that "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." This amendment replaced prior court rulings which had limited restitution to "loss caused by the specific conduct that was the basis of the offense of conviction." The court required the defendant to make restitution payments to computer companies which were not listed as defrauded in the indictment under which the defendant was convicted, but whose contact with the defendant occurred during the same period and in the same manner as the fraud for which the defendant was convicted. The circuit court rejected the defendant's first argument that the instance of fraud not contained in the indictment did not fit within the "specifically defined" scheme for which he was responsible. The courts of appeals have consistently upheld restitutionary sentences based on evidence sufficient to enable the sentencing court to demarcate the scheme including its "mechanics . . . the location of the operation, the duration of the criminal activity and the methods used to effect it." *United States v. Henoud*, 81 F.3d 484, 489 n.11 (4th Cir. 1996); *United States v. Turino*, 978 F.2d 315, 318 (7th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). The determination as to whether there exists a unitary scheme should be based on the "totality of the circumstances." Undisputed evidence supported a finding in this case that the defendant undertook to defraud multiple computer companies by renting several drop boxes, placing all orders within a two-week period, using interstate wires and paying for the goods with counterfeit instruments in each case.

United States v. Royal, 100 F.3d 1019 (1st Cir. 1996). The district court did not err in assessing $30,000 in restitution under USSG §5E1.1. The defendant was convicted of one count of conspiracy and eight counts of mail fraud related to fraudulent student loan checks. At that time, a defendant could only be ordered to pay restitution for losses "caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990). An individual convicted of a conspiracy, however, may be held responsible for conduct of co-conspirators in furtherance of the conspiracy that are reasonably foreseeable. Consequently, the defendant's restitution amount may include more than just the $9,870 attributable to the mail fraud counts. The defendant also contended that the district court based its loss determination on events occurring prior to his joining the conspiracy. As the defendant waived this issue by failing to raise it below, he must show an error affecting "substantial rights" to reverse the district court's determination. Noting that the district court ordered the defendant to pay only $30,000 of the original $500,000 restitution amount because of his inability to satisfy the entire amount, the appellate court found that it was unlikely that the figure would drop to less than $30,000 even if it had not included losses attributable to conduct occurring before the defendant joined the conspiracy.

See United States v. Thurston, 358 F.3d 51 (1st Cir. 2004), §2F1.1, p. 18.

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Parkinson, 44 F.3d 6 (1st Cir. 1994). The district court sentenced the defendant to 240 months' imprisonment to be served concurrently with his undischarged state sentence. The defendant argued that the sentence was actually a departure from his guideline range of 210-262 months because he was not credited for the 48 months he had already served on his state sentence. The appellate court held that time served in prior state custody is not included under USSG §5G1.3(c) in deciding whether a sentence is within the applicable guideline range. The Sentencing Commission "carefully distinguished a 'sentence for the instant offense' from the 'total punishment'." "This is appropriate even were the total punishment beyond the range calculated under USSG §5G1.2, because that section is a guide, not a mandate." Moreover, although the sentence was not a departure, a criminal history departure would have been justified in this case based on the defendant's 23 criminal history points and his commission of two bank robberies within one month of his release from a 15-year sentence.

United States v. Quinones, 26 F.3d 213 (1st Cir. 1994). The district court did not err in imposing consecutive sentences as an upward departure for the defendant's multiple carjacking offenses. The district court reasoned that the defendant's extreme conduct justified a sentence longer than the 180-month statutory maximum that Congress established for carjacking offenses, 18 U.S.C. § 2119(1), and imposed a sentence that was the equivalent of consecutive sentences based on the low end of the defendant's sentencing guideline range. The defendant argued that §5G1.2 required the imposition of concurrent sentences. The circuit court joined the Ninth and Eleventh Circuits in concluding that the lower court possesses the power to impose consecutive or concurrent sentences in a multiple-count case. *See United States v. Perez*, 956 F.2d 1098 (11th Cir. 1992); *United States v. Pedrioli*, 931 F.2d 31 (9th Cir. 1991). However, that power to deviate from the standard concurrent sentencing paradigm should be classified as a departure and the lower courts must follow departure protocol. Although the district court was correct in determining that the defendant's conduct was significantly atypical, the circuit court remanded for clarification, directing the district court to provide reasons for the extent of the departure, or conduct a new sentencing hearing.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Austin, 239 F.3d 1 (1st Cir. 2001). The district court did not double count, punishing the defendant twice for the same conduct, under USSG §5G1.3(c). The defendant was convicted in a Massachusetts state court for crimes committed there while fleeing police after robbing a New Hampshire bank. He was later convicted of federal charges of bank robbery, use of a firearm in a crime of violence, possession of a firearm by a prohibited person, interstate transportation of stolen property, and interstate transportation of a stolen vehicle, all stemming from the same incident. The defendant argued that comments made by the state court judge showed that the state court held him accountable for conduct on which federal sentencing enhancements were based, violating USSG §5G1.3's goal of preventing duplicative penalties. Finding the state court's comments to be "oblique and ambiguous at best," the court ruled that the state court did not sentence defendant for any conduct outside the scope of the state convictions. *Id*. at 6. Therefore, because the state had not already

punished the defendant for conduct the federal sentence had fully taken into account, there was no risk of duplicative punishment in violation of USSG §5G1.3.

See United States v. Caldwell, 358 F.3d 138 (1st Cir. 2004), §4A1.2, p. 42.

Part H Specific Offender Characteristics

§5H1.3 Mental and Emotional Conditions (Policy Statement)

See United States v. Maldonado-Montalvo, 356 F.3d 65 (1st Cir. 2003), §2F1.1, p. 18.

§5H1.5 Employment Record (Policy Statement)

United States v. Thompson, 234 F.3d 74 (1st Cir. 2000). The district court erred when it departed downward under USSG §5H1.5 based on the defendant's employment record. The defendant pled guilty to one count of distributing cocaine base, in violation of 21 U.S.C. § 841(a)(1). After struggling with the questions of what constituted the baseline and how to distinguish an extraordinary employment record and extraordinary family ties and responsibilities, the district court decided that "'[i]n a sentencing regime whose aim is to eliminate unwarranted disparities between similarly situated offenders, ordinary should be determined by comparing [the] defendant *with others convicted of the same crime.*'" *Id.* at 77 (quoting district court sentencing memorandum and judgment). Upon review of other distribution of cocaine base convictions throughout the jurisdiction from around the time of the offense through the interim before sentencing, paying close attention to offenders from the same housing project convicted in the same year, the district court concluded that the defendant's almost consistent employment since he withdrew from high school and his relationship with and responsibilities to his family represented an extraordinary case warranting a downward departure. Vacating the sentence, the court ruled that the district court erred by limiting her comparison to convictions of crack cocaine sales. The court explained that the comparison should have focused on extraordinary cases involving employment records and family ties and responsibilities, not on convictions for distributing crack cocaine. "'A court should survey those cases where the discouraged factor [*e.g.*, employment record] is present *without limiting its inquiry to cases involving the same offense*, and only then ask whether the defendant's record stands out from the crowd.'" *Id.* (quoting *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995)).

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[53]

United States v. Mejia, 309 F.3d 67 (1st Cir. 2002). The district court did not err in refusing to grant the defendant a downward departure on the grounds that his motivation for committing the

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

crime of illegal reentry was to care for his daughter. The appellate court found that the defendant's "motivation" argument was semantically and practically equivalent to a motion based on family ties and responsibilities. Nothing in §5H1.6 suggests that family ties and responsibilities is a discouraged factor only with respect to assessing the consequences of defendant's incarceration; it also is discouraged with respect to assessing the culpability for a crime.

See United States v. Thompson, 234 F.3d 74 (1st Cir. 2000), §5H1.5, p. 58.

§5H1.11 Military, Civic, Charitable or Public Service; Employment Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. DeMasi, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). On the government's cross-appeal, the appellate court held that the district court erred in departing downward based on the defendant's history of charitable work and community service in comparison with that of the "the typical bank robber," rather than comparing him to "other defendants with comparable records of good works." The district court should have surveyed those cases where a factor ordinarily discouraged under USSG §5H1.11 is present, without limiting its inquiry to cases involving bank robbers, and only then ask whether the defendant's case was sufficiently unique to justify a departure.

See United States v. Thurston, 358 F.3d 51 (1st Cir. 2004), §2F1.1, p. 18.

Part K Departures

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

United States v. Doe, 170 F.3d 223 (1st Cir. 1999). The district court denied the defendant's request for specific performance of a plea agreement, which provided that the government had "sole discretion" over whether to file a motion for a downward departure based on substantial assistance in two cases. The defendant had been sentenced in 1995 on one drug case and in a plea agreement for a later indictment, the government agreed to recommend a downward departure in both cases, if defendant provided substantial assistance. In addition to stating that the government would have "sole discretion" on whether to file a motion, the plea agreement stated that "the defendant's failure to 'make a case' shall not relieve the government of exercising its discretion" under Fed. R. Crim. P. 35(b) or USSG §5K1.1. At a hearing on the defendant's cooperation, the government alleged that the defendant's cooperation came too late; the defendant argued that the government failed to follow up on his information until the evidence was time-barred. The appellate court agreed with the judges in both cases who found that the defendant had not alleged that the government's failure to file a motion was the result of an unconstitutional bias. The appellate court did not decide whether *Wade v. United States*, 504 U.S. 181 (1992), authorizes challenges if the government's refusal to file a motion is based on "bad faith" when there is a signed plea agreement. In this case, the defendant could not show "bad faith." His allegations amounted to "simply . . . a claim that the government acted carelessly or unreasonably." Further, in the case not under consideration by the appellate court, the district court found that the defendant did not provide substantial assistance. Thus, the defendant's contract claim on the instant claim is barred by that finding.

United States v. Garcia-Velilla, 122 F.3d 1 (1st Cir. 1997). The government was not compelled under the terms of its plea agreement with the defendant to recommend a substantial assistance downward departure. The defendant had breached the plea agreement by refusing to provide the names of those who had supplied her with cocaine while she was out on bail, in derogation of her obligation under the agreement to provide all information known to her regarding any criminal activity.

United States v. Mills, 329 F.3d 24 (1st Cir. 2003). The defendant pled guilty to a one-count information charging him with racketeering in violation of 18 U.S.C.S. § 1962(c). Mills cooperated with authorities and testified at the trial of John Tibbs, an associate of Mills who committed several murders. In its §5K1.1 motion, the government emphasized that prior to Mills' cooperation, the government had no evidence of who had committed these murders, and that Mills had helped free an innocent man who had been wrongly convicted of one of these murders. The government also stated that Mills had "limited involvement" in one murder and his involvement in another consisted only of driving Tibbs to and from the scene. In its supplemental sentencing memorandum, the government took the position that based on Mills' cooperation, the danger he exposed himself to, the relative culpability of his codefendants, and the sentences they received, the court should depart downward and Mills should receive a sentence of ten years. However, the district court declined to follow the parties' sentencing

recommendations in light of Mills' involvement in several of the murders and his leadership role in a dangerous, violent enterprise. The court then sentenced Mills to 20 years, with a two-year credit for time served on a state sentence for drug trafficking. The defendant argued, *inter alia*, that the district court erred by invoking a categorical "murder is different" sentencing policy, ignoring its responsibility to consider the guideline factors under §5K1.1. The district court found that the information provided was accurate by a fair preponderance of the evidence. In addition, the district court discussed the government's 5K1.1 motion and found that Mills' assistance was "as great, if not greater than any other case with which I am personally aware or which has been referenced here." However, the district court remained unconvinced and refused to depart. In explaining the resulting 18-year sentence, the district court concluded: "Here's what's driving the sentence. I treat murder different. I think that's the appropriate judgment of society. I recognize that your sentence is a maximum of 20, and I have discounted the 24 months for the time you've already served as part of this conspiracy. But, I truly treat murder different. I see no way to do otherwise." The appellate court held that the sentencing guidelines do not contain any rule making §5K1.1 departures unavailable to defendants involved in murder conspiracies or to defendants who are leaders in violent or dangerous criminal enterprises. Rather, it held that the Sentencing Commission has directed the district court, under §5K1.1, to review the extent of cooperation and exercise its discretion in determining the extent of the departure on "an individual basis." The First Circuit concluded that the district court's use of a self-imposed sentencing practice or policy in evaluating a substantial assistance motion presented the possibility, if not the likelihood, that the mandate of §5K1.1 to conduct an individualized evaluation could have been violated. The court held that while the district court did not explicitly say that it would never depart where the defendant was guilty of murder conspiracy, its comments could be interpreted as amounting to the same thing. Because the district court's response to this extensive information was simply: "I treat murder different," the court felt that it was unable to determine whether the court engaged in an appropriate §5K1.1 individualized evaluation. The appellate court vacated the sentence imposed by the district court and remanded for resentencing.

United States v. Torres, 33 F.3d 130 (1st Cir. 1994), *cert. denied*, 513 U.S. 1098 (1995). The circuit court rejected the defendant's equal protection challenge to the substantial assistance rubric under 18 U.S.C. § 3553(e) and USSG §5K1.1. The First Circuit concluded that the fact that a low-level drug offender with little substantial assistance to offer may receive a higher sentence than a high-level drug dealer who has plenty of information to trade does not render the substantial assistance departure unconstitutional. Rather, the equal protection challenge is easily defeated because the government's interest in offering leniency in exchange for useful information is rationally based. The circuit court also rejected the defendant's claim that the substantial assistance departure conflicts with Congress's objective of achieving fairness in sentencing. The circuit court reasoned that examination of the various statutes in which Congress has referred to the purposes of sentencing reveals a cross-current of objectives other than fairness. In promulgating section 3553(e), Congress specifically expressed its intent to provide these departures. The circuit court added that an argument not raised but worth noting is whether the definition of substantial assistance under USSG §5K1.1 as only that assistance which results in further arrests or prosecutions is too narrow and should include "good faith" efforts to assist.

§5K2.0 Grounds for Departure (Policy Statement)[54]

United States v. Amirault, 224 F.3d 9 (1st Cir. 2000). The district court did not err when it departed upward under USSG §5K2.0 after the defendant pled guilty to possessing items containing visual depictions of minors engaged in sexually explicit conduct. Drawing an analogy to USSG §2G2.2(b)(4), which provides for an increase in offense level if the defendant participates in a pattern of conduct involving sexual abuse of minors, the district court departed upward because the defendant had sexually assaulted his minor sisters-in-law 20 years earlier. The defendant raised several objections to the departure. The court first rejected the defendant's argument that the guidelines prohibited departures based on analogies to other guidelines, allowing only departures based on relevant conduct under USSG §1B1.3. Section 1B1.3, which pertains to adjustments to the offense level based on a defendant's overall behavior, is different from departures for misconduct not leading to a conviction, permitted by the guidelines so long as the misconduct "relate[s] meaningfully to the offense of conviction." *Id*. at 12*; see also United States v. Kim*, 896 F.2d 678, 684 (2d Cir. 1990). Finding that the nude photographs of the sisters-in-law found in the defendant's child pornography collection linked the instant conviction to the previous assaults, the court affirmed the upward departure. The court also rejected the defendant's argument that the 20-year-old incident occurred too long ago to be counted. Continuing with the analogy to USSG §2G2.2, the court found that there is no temporal limit to the use of such misconduct for enhancement purposes. "'If the defendant engaged in the sexual abuse or exploitation of a minor *at any time* (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) . . . an upward departure may be warranted.'" *Id*. at 13 (quoting USSG §2G2.2, comment. (n.2)). Next, despite finding credibility in the defendant's argument challenging the reliability of the victims' statements, made 20 years after the incidents and soon after he and their sister decided to divorce, and his unrecorded and unconfirmed alleged confessions made immediately after his arrest, the court ruled that it could not overcome the deferential standard for reviewing the district court's findings, sufficiently supported by the record. The defendant next objected to the extent of the departure. Upholding the five-level departure, the court explained not only that has the First Circuit upheld more severe departures than this 70 percent increase, but that USSG §2G2.2(b)(4) provides a five-level increase; and the sexual abuse guideline (2A3.1) would have demanded a significantly higher sentence than that imposed by the district court. Finally, the defendant argued that the departure violated *ex post facto* protections and due process. Citing Supreme Court precedent establishing that consideration of prior misconduct at sentencing only punishes the instant offense, the court ruled that the departure was not an *ex post facto* violation, despite the fact that the conduct occurred before either possession of child pornography became a federal crime or the sentencing guidelines were enacted, because the enhancement punished the current crime of possession of child pornography. *See United States v. Witte*, 515 U.S. 389, 401 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was

[54]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by adding language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. *See* USSG App. C, Amendment 649.

convicted."). The court also extended to the area of departures the principle that "a sentencing court may consider as relevant conduct acts which could not be independently prosecuted because of the passage of time" and found that the departure did not violate his constitutional right to a statute-of-limitations defense. 224 F.3d at 15 (citing *United States v. Valenti*, 121 F.3d 327, 334 (7th Cir. 1997) (listing supporting cases)); *see also United States v. Dolloph*, 75 F.3d 35, 40 (1st Cir.) (allowing consideration, as relevant conduct, of acts not tried within the court's jurisdiction), *cert. denied*, 517 U.S. 1228 (1996). Furthermore, due process does not prohibit sentencing courts from considering prior conduct when evaluating an upward departure. *See also United States v. Ortiz-Santiago*, 211 F.3d 146, 148 (1st Cir. 2000) (holding that it did not have jurisdiction to hear appeal because defendant failed to show that the district court mistakenly believed it had no authority to depart based on defendant's "responsibility to care for his ailing father").

United States v. Bogdan, 284 F.3d 324 (1st Cir. 2002). The district court had granted the defendant a downward departure based on a combination of factors–the defendant's role as a father, his efforts to make amends with his ex-wife, his introspection and the appreciation he had shown for his wrongful conduct. The government appealed and the First Circuit reversed. The First Circuit noted that the defendant's parental role and efforts to make amends with his ex-wife fell within the category of family ties, which is a discouraged factor under the guidelines. In addition, the defendant's introspection and appreciation for his criminality had been taken into account by the acceptance of responsibility credit. Since all of the factors upon which the district court relied were either discouraged or taken into account by the guidelines, a departure on these grounds could only be justified if the factors were present, either individually or in combination, in some exceptional degree. The court found that in this case they were not.

United States v. Brennick, 134 F.3d 10 (1st Cir. 1998). The district court departed downward in sentencing the defendant for failure to pay to the government his employees' wage and social security taxes. The court of appeals held that the first reason cited by the district court for departure, the defendant's intent to eventually pay the taxes, could take the case out of the heartland of the tax evasion guideline. Because usually a tax evader intends to deprive the government of the taxes owed, the defendant's apparent intent only to delay payment was not typical of the heartland case of tax evasion. The second reason cited, however, that the tax loss to the government overstated the seriousness of the offense because the losses were due to multiple causes, was not a proper basis for departure. The district court "borrowed" this departure factor from the fraud guideline, but the court of appeals held the factor was inappropriate. The court of appeals remanded for the district court to explain more adequately the decision to depart and extent of departure.

United States v. Craven, 239 F.3d 91 (1st Cir. 2001). The district court erred when it departed downward under USSG §5K2.0 for extraordinary presentence rehabilitation based in large part on an *ex parte* conversation with a court-appointed expert. The court ruled that an *ex parte* conversation with a court-appointed expert could not be used to obtain critical information upon which the court would rely in determining a sentence. If the district court needs additional information, "it must either (1) make a written request for a supplemental report" which it must provide to all parties pursuant

to 18 U.S.C. § 3552(d), "or (2) bring the expert into court to be questioned in the presence of the parties." *Id*. at 102. The court further determined that because the *ex parte* conversation tainted the basis of the departure decision, the court could not decide whether the departure was warranted. The conversation dealt with a "substantive sentencing matter . . . [which] was plainly determinative of the court's decision to depart . . . [and] the government had no realistic opportunity to challenge the expert's conclusions . . . ." *Id*. at 103. Furthermore, the district court summary of the conversation was the only available record of the conversation. Finally, applying Seventh Circuit rationale, the court held that a different judge should resentence the defendant because it would be too difficult for the current judge to maintain an appearance of impartiality and disregard the information she had received during the *ex parte* conversation. *See Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996) (disqualifying a judge because the unjustified *ex parte* discussions with court-appointed experts were not in the record and thus "[w]hat information passed to the judge, and how reliable it may have been, [were] unknowable"), *cert. denied*, 519 U.S. 1111 (1997). The court annulled the departure, vacated the sentence, and remanded for resentencing before a different judge.

United States v. DeLeon, 187 F.3d 60 (1st Cir.), *cert. denied*, 528 U.S. 1030 (1999). The district court believed that a defendant's status as a deportable alien was not a valid ground for a downward departure. However, the court also stated that even if he had the power to depart, there was no justification to do so in this case. Because the refusal to grant the departure was a valid, discretionary refusal to depart, the appellate court left open the question as to whether a defendant's status as a deportable alien could be a valid basis for departure.

United States v. Dethlefs, 123 F.3d 39 (1st Cir. 1997), *cert. denied*. 525 U.S. 953 (1998). The district court erred in departing downward based on the defendants' decision to plead guilty. The district court viewed the guilty pleas as conduct facilitating the administration of justice, in the light of the significant conservation of judicial resources that resulted in the complex drug and tax case. The court of appeals held that, in theory, a defendant's early agreement to plead guilty and ancillary conduct may have consequences so far beyond ordinary expectations as to warrant a downward departure for facilitating the administration of justice; however, the factors cited by the district court (the length and complexity of the anticipated trial, the need to relocate the proceedings) did not make the case sufficiently atypical to warrant the departures made by the district court.

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996). The district court did not err in granting an upward departure based upon either the defendant's criminal history involving similar offenses or the type of weapons involved in the offense. With respect to defendant's prior criminal activity, USSG §4A1.3 specifically encourages upward departures based on reliable information that a defendant previously engaged in prior similar adult criminal conduct not resulting in a conviction. Given the defendant's recent, persistent and escalating record of violent behavior, the appellate court found it was not an abuse of discretion for the sentencing court to depart upward. In reaching this conclusion, the circuit court rejected the argument that the Commission's decision against making weapon type a specific offense characteristic under USSG §2K2.1 precluded a judicial finding that some types of weapons are more dangerous than others. In this particular case, the use and indiscriminate disposal of

multiple weapons elevated the dangerousness of the offense, in keeping with the fact that heightened dangerousness occasioned by the usage and indiscriminate abandonment of the firearms is an encouraged factor for departure. Because this departure was based on both USSG §§4A1.3 and 5K2.0, the court's departure from Level 18, Criminal History Category III to Level 18, Criminal History Category VI was justified as an unguided departure.

United States v. LeBlanc, 24 F.3d 340 (1st Cir.), *cert. denied*, 513 U.S. 896 (1994). The district court erred in granting the defendants' motion for downward departure. Although the defendants pled guilty to money laundering, 18 U.S.C. §§ 1856, 1857, the district court concluded that their criminal conduct was really gambling and departed downward. The circuit court disagreed and concluded that the lower court interpreted the scope of the money laundering statute too narrowly. The defendants' conduct did fall squarely within the "heartland" of a typical money laundering case; in addition to conducting an illegal gambling business, both defendants actively laundered the money generated by the gambling business, instructing the gamblers to make their checks payable to fictitious payees and negotiating the checks.

United States v. Limberopoulos, 26 F.3d 245 (1st Cir. 1994). The district court misunderstood the basic objectives and interplay between the unlawful drug trafficking statute, 21 U.S.C. § 841 and the unlawful drug prescription statute, 21 U.S.C. § 843, resulting in an incorrect downward departure. The district court's finding that section 843 only applies to pharmacists while section 841 applies to non-pharmacists was incorrect. The correct distinction between the two statutes is that section 843 punishes unlawful record-keeping by pharmacists and section 841 punishes the unlawful drug distribution by anyone, including pharmacists.

United States v. Louis, 300 F.3d 78 (1st Cir. 2002). The district court did not err in refusing to grant a departure based on the defendant's family ties and responsibilities. The defendant had argued that because his son was biracial, it was important for the parent of color to be present and involved in the son's life. The appellate court found that the hardship that would be visited on the defendant's family by virtue of his incarceration would not match the hardship suffered by other families in cases where no departure was granted. The defendant's family ties and circumstances simply did not remove his case from the "heartland."

United States v. Maldonado, 242 F.3d 1 (1st Cir. 2001). The district court erred by departing downward pursuant to USSG §5K2.0 on grounds of taxpayer expense. The defendant pled guilty to possession with intent to distribute cocaine and heroin, in violation of 21 U.S.C. § 841(a)(1), and the judge departed downward based on his concern about the "waste of taxpayer money" on someone who would be deported after he completed his sentence. *Id*. at 4. The court noted that *Koon v. United States*, 518 U.S. 81, 96 (1996), allows for consideration of extraordinary cases not specifically addressed by the Commission, and that, in extraordinary cases, the guidelines have authorized consideration of expense. *See, e.g.*, USSG §5H1.1 (home confinement may be less costly than incarceration as a form of punishment for an elderly and infirm defendant); §5H1.4 (home detention may be less costly than incarceration as punishment for a seriously infirm defendant). Four

circuits have also supported deportability as a justification for departure in extraordinary cases. *See, e.g., United States v. Tejada*, 146 F.3d 84, 88 (2d Cir. 1998) (per curiam); *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) (cited with approval in *United States v. DeBeir*, 186 F.3d 561, 569 (4th Cir. 1999)*; cf. also United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994). Finding that the Commission was clearly aware that "deportable aliens commit crimes, that drug sentences are lengthy, and that prisons are expensive," the court ruled that the case was not extraordinary and thus the departure was impermissible. 242 F.3d at 5. The court remanded to the district court for resentencing.

United States v. Morrison, 46 F.3d 127 (1st Cir. 1995). The defendant was sentenced as a career offender. He asserted that he should be granted a downward departure from that sentence because he was not a typical career offender, and the criminal history category overrepresented his criminal history. He argued that the offense of conviction, a robbery, should be merged with one of the predicate offenses, because they were part of a "downward spiral" brought on by alcohol abuse and depression. The defendant argued that the district court judge's statement: "if I felt I had the authority to depart, I would" showed that the district court mistakenly believed that it did not have the authority to depart. The appellate court held that in determining whether the sentencing court believed it lacked authority to depart, or whether it was merely refusing to exercise its power, the appellate court will "consider the totality of the record and the sentencing court's actions reflected therein." "We do not consider any single statement in a vacuum." Viewing the circumstances as a whole, the appellate court ruled that the sentencing judge knew that he had authority to depart in the case at bar, but chose not to exercise that power under the facts presented in the present case.

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996). The district court erred in holding that the loss of jobs to innocent employees occasioned by defendants' imprisonment was categorically excluded as a basis for departure by USSG §5H1.2, which lists "vocational skills" as a discouraged factor for consideration in the departure decision. In reaching this conclusion the district court relied upon precedential case law, which viewed the Commission's policy statement as being based on the underlying principle that a sentencing judge may grant a departure given the defendant's ability to make work-related contributions to society only in extraordinary situations. However, the district court judge explicitly noted that, if the possibility for business failure were a legally sufficient basis for departure under the guidelines, he would make a departure sufficient to keep the business functioning. The circuit court reversed based upon the Supreme Court's reasoning in *Koon v. United States*, 518 U.S. 81 (1996). In *Koon*, the Supreme Court noted that if a special factor under consideration is a discouraged factor, the court should depart only if the factor is present to an exceptional degree or if the case in some way differs from the ordinary case. Categorical rejection of a particular departure factor is inappropriate, because Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. A court, in deciding whether there exists an aggravating or mitigating circumstance of a kind or to a degree not considered by the Commission, should consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission. With the exception of the factors courts may not consider under any circumstance, the guidelines do not limit the departure factors for unusual cases, because this would

exceed the policymaking authority vested in the Commission. Further, the circuit court disagreed with the government's argument that the loss of employment to innocent employees falls within the meaning of "vocational skills." Given these conclusions and the court's desire to allow the parties to produce qualitative and quantitative evidence which may have been precluded by the district court's categorical approach, the case was remanded for further findings.

United States v. Padro Burgos, 239 F.3d 72 (1st Cir.), *cert. denied*, 533 U.S. 910 (2001). The district court did not err when it declined to depart downward to resolve a disparity in sentences. The defendant had been convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846, and of using a firearm in relation to a crime of violence and aiding and abetting, under 18 U.S.C. § 924(c)(1). The court sentenced the defendant to life imprisonment under USSG §2D1.1(d)(1), which requires the application of the First Degree Murder guideline (§2A1.1) when deaths occur under circumstances constituting murder in violation of 18 U.S.C. § 1111. The defendant argued that the district court did not know that it had authority to depart downward to resolve the disparity between the life sentence imposed by the district court and the quantity-based sentence he would have received had no deaths occurred. Finding no evidence to show either that the district court was unaware that it had authority to depart or that it would have preferred to depart, the court rejected the defendant's argument and affirmed the life sentence. The district court never addressed the issue of a departure because the defendant never requested it. Moreover, the district court demonstrated no reluctance to impose a life sentence, commenting that the life sentence would "serve both as a punitive factor against the defendant and as a deterring factor to those . . . that lack respect for life and for the law[]." *Id*. at 77. The sentence was affirmed.

United States v. Pereira, 272 F.3d 76 (1st Cir. 2001). The government appealed a downward departure granted on the basis of extraordinary family circumstances. The First Circuit reversed, finding that the care provided by the defendant in the 20 hours a week spent by him with his elderly parents was not "irreplaceable." Downward departures based on family circumstances are discouraged and therefore only appropriate in exceptional cases. The court found that "[a]s long as there are feasible alternatives of care that are relatively comparable to what the defendant provides, the defendant cannot be irreplaceable," and "[g]iven the network of friends and family to care for [the] parents in his absence, we find nothing extraordinary or exceptional about [his] family circumstances." *Id*. at 83.

United States v. Pierro, 32 F.3d 611 (1st Cir. 1994), *cert. denied*, 513 U.S. 1119 (1995). The defendant was convicted of interstate transportation of stolen property and money laundering. The defendant appealed the district court's decision not to depart downward, arguing the district court incorrectly believed it lacked the legal authority to depart. The defendant argued that the district court should have departed downward because the only reason he laundered money was to further his underlying crime. The circuit court rejected this argument, holding that "Congress meant this statute [money laundering] to address, among other things, conduct undertaken subsequent to, although in connection with, an underlying crime, rather than merely affording an alternative means of punishing the underlying crime itself." Therefore, his reason for money laundering does not constitute an appropriate

basis for departure. The defendant's next justification for a downward departure was that his offense was impermissibly "double counted" because the same money was used to compute the offense level for the money laundering offense and the interstate transportation offense. The defendant dealt in stolen property worth $2,500,000 and laundered $3,500,000 in profits from the resale of the property. The circuit court found that no impermissible double counting occurred; the defendant was merely being punished for these two activities separately. Lastly, the circuit court rejected the defendant's claim that the sentencing court should have departed downward because his sentence was disproportional to his offense as compared to other co-conspirators.

United States v. Portela, 167 F.3d 687 (1st Cir. 1999). The court did not err in finding that the government's reverse-sting operation against the defendant was not so unusual as to constitute grounds for departure. The court indicated that sting operations take place all the time and that there was no factual basis to support finding the defendant's case atypical. The court made appropriate findings and exercised its discretionary decision not to depart.

United States v. Rosales, 19 F.3d 763 (1st Cir. 1994). The appellate court affirmed the district court's decision to depart upward based on the defendant's numerous uncharged acts of similar misconduct. The "frequent and continuous" nature of the defendant's sexual abuse of children was uncontested. The court vacated and remanded the sentence, however, because the district court did not explain its reason for the degree (nine levels) of the departure. Without such an explanation, the appellate court could not evaluate the reasonableness of the nine-level departure.

United States v. Sachdev, 279 F.3d 25 (1st Cir. 2002). The defendant appealed the district court's refusal to downwardly depart on the basis of his claimed duress. The defendant had claimed that he had committed the offense (cashing bad checks) because he had felt threatened to repay money invested by a former friend in his business. The First Circuit held that the guidelines ordinarily require a threat of physical harm when coercion is proffered as a basis for departure. Here, the district court had found that no such explicit threats had been made. To assess whether implicit threats had been made, a court should consider (1) the actual intent of the threat-maker; (2) the subjective understanding of the defendant; and (3) whether as an objective matter a person in defendant's position would reasonably consider the act/statement to be a serious threat of physical injury (or other type of threat recognized by USSG §5K2.12). In addition, the defendant must have committed the offense "because of" the coercion, blackmail or duress. The circuit court upheld the district court's finding that the defendant's belief that he was in physical danger was not reasonable.

United States v. Snyder, 136 F.3d 65 (1st Cir. 1998), *cert. denied*, 532 U.S. 1057 (2001). The district court erred in departing downward based on the disparity between the sentence the defendant would have received if convicted under state law and the sentence mandated under the Armed Career Criminal guideline. The court of appeals held that this was not a mitigating circumstance that took the case out of the heartland of armed career criminal cases and justified a downward departure. Nor was the trial court's concern for the unreviewable discretion of the United States

Attorney in prosecuting the matter in federal court when it is proscribed by both state and federal law a valid factor on which to base a departure.

United States v. Twitty, 104 F.3d 1 (1st Cir. 1997). The district court did not err in granting an upward departure based upon both the large number of guns involved in the offense and the endangerment to public safety because the two are not duplicative. The appellate court rejected the defendant's argument that a penalty for endangerment to public safety was inherent in the guidelines and accounted for by the enhancement provisions, so that imposing an additional departure was "double dipping." The appellate court accepted the finding that this was an unusual case falling outside the "heartland" of the guidelines. The sentencing court was in a superior position to determine whether the defendant's responsibility for putting more than 225 handguns with obliterated serial numbers onto the street warranted a more severe penalty than that called for under the enhanced sentencing guideline range.

United States v. Vasquez, 279 F.3d 77 (1st Cir. 2002). The defendant, convicted of illegal reentry, appealed the district court's refusal to grant him a downward departure based on the range of adverse collateral consequences he faced as a convicted alien (*e.g.*, ineligibility for prison boot camp and certain rehabilitative programs). Applying the principles enunciated in *Koon v. United States*, 518 U.S. 81 (1996), the First Circuit found that the only persons sentenced within §2L1.2, the applicable guideline, would be deportable aliens. As a result, the Sentencing Commission "must have taken into account not only the immigration status of prospective offenders, but also the collateral consequences that would flow from that status within the federal prison system." *Id*. at 80. Accordingly, consequences such as those faced by the defendant could not remove the case from the heartland, and a departure would be inappropriate.

§5K2.2 Physical Injury (Policy Statement)

United States v. Sanders, 197 F.3d 568 (1st Cir. 1999), *cert. denied*, 530 U.S. 1238 (2000). The district court did not err when it departed upward by 144 months under §5K2.2 based on significant personal injury to the victim. After shooting his girlfriend in the head, permanently disabling her, the defendant pled guilty to being a felon in possession of a firearm and of using of a firearm during a drug trafficking crime, in violation of 18 U.S.C. §§ 922(g)(1) and 924(c). As part of the plea agreement, the government did not pursue a state conviction for attempted murder. The defendant appealed the enhancement based on the absence of a full explanation and the unreasonable extent of the departure calculation, which significantly exceeded the mandatory minimum and nearly doubled the guideline maximum. Rejecting the defendant's first argument, the court noted the district court's comparison to state law, noting that the defendant's sentence was three years less than the maximum state sentence for attempted murder, but four and one-half years longer than a likely state sentence for the defendant's gun charges. With respect to the defendant's second argument, the court explained that while the departure was significant, it was not unprecedented. *See, e.g., United States v. Carrion-Cruz*, 92 F.3d 5, 6 (1st Cir. 1996) (affirming a departure from 365 months to life imprisonment); *United States v. Rostoff*, 53 F.3d 398, 411 (1st Cir. 1995) (listing cases upholding

departures up to 380 percent higher than the guideline maximums). Affirming the sentence, the court ruled that attempted murder combined with serious physical harm to the victim warranted such a significant departure. Moreover, while the 324-month sentence far exceeded the 235-month maximum sentence for second degree murder, the court stated that the discrepancy only demonstrates that there are different methods of measuring departures. "The concepts of 'reasonable' departure and 'abuse of discretion' reflect the reality that there are often a set of permissible outcomes available to the district court." *Id*. at 572. For example, one could argue that an analogy to the second degree murder guideline is too lenient because it does not account for the brutality of the defendant's actions, the victim's permanent injury, or the affect of her injuries on her family.[55]

§5K2.11 Lesser Harms

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996). The district court erred in concluding that §5H1.4 barred a downward departure under USSG §5K2.11, the "lesser harms" provision. The facts indicate that the defendant used marijuana to cope with depression and to prevent suicide. Although finding that a reduced sentence under USSG §5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide, the district court believed that USSG §5H1.4, which states that drug dependence is not a reason for a departure, precluded such a departure. The circuit court noted that USSG §5K2.11 is set forth in a different part than USSG §5H1.4, and §5H1.4 is not intended to negate departures set forth in Chapter Five, Part K. The court noted that USSG §5K2.11 contains a limitation on the "lesser harms" provision that states that "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." Noting that the avoidance of suicide, rather than the drug use itself, drives the application of USSG §5K2.11, the circuit court stated that the interest in punishing drug manufacturing could be thought to be reduced in this case because the alternative to the defendant's drug use was suicide. The government urged that the classification of marijuana as a Schedule I substance under the Controlled Substance Act "evidences a legislative determination that marijuana 'has no currently accepted medical use for treatment'" and, therefore, a departure is precluded. The circuit court rejected this argument, stating that such a classification does not bear on the question of whether the defendant acted "in order to avoid a perceived greater harm." The circuit court vacated the defendant's sentence and remanded

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[55]The defendant also argued that the 24-month increase at resentencing was unconstitutional. Despite a warning from the district court that it could result in a higher sentence, the defendant requested a resentencing after an intervening Supreme Court decision prompted the district court to vacate the defendant's conviction of use of a firearm during a drug trafficking crime. *See Bailey v. United States*, 516 U.S. 137 (1995) (defining use of a firearm to require active operation of the firearm during the drug offense). The district court had intended to strike the 60-month sentence imposed for that firearm conviction, which would have resulted in a 300-month sentence, 24 months shorter than that imposed at resentencing. However, because the current 324-month sentence does not exceed the original 360-month sentence, the district court did not violate the defendant's constitutional rights. Moreover, "this and other courts have permitted a new sentence to be calculated after one element has been eliminated, without treating *parts* of the prior sentence as a limit on the new one." *United States* v. *Sanders*, 197 F.3d at 573; *see also United States v. Townsend*, 178 F.3d 558, 566-69 (D.C. Cir. 1999); *United States v. Davis*, 112 F.3d 118, 120-23 (3d Cir.), *cert. denied*, 522 U.S. 888 (1997); *Woodhouse v. United States*, 109 F.3d 347, 347-48 (7th Cir.), *cert. denied*, 522 U.S. 851 (1997). The court affirmed the sentence.

for resentencing with the instruction that the defendant's sentence be reduced to the mandatory minimum of 60 months, instead of the 70-month guideline sentence.

§5K2.13 Diminished Capacity (Policy Statement)[56]

United States v. Aker, 181 F.3d 167 (1st Cir. 1999). The district court erred in failing to state clearly the grounds for refusing to grant a downward departure based on diminished capacity. The record was confusing as to what standard the judge applied in denying the departure. Several times he stated that a USSG §5K2.13 departure was "discouraged" and certainly not "encouraged." Because it was uncertain what standard the judge applied, the case was remanded to the district court for further consideration.

§5K2.20 Aberrant Behavior (Policy Statement)[57]

United States v. Rodriguez-Rivera, 318 F.3d 268 (1st Cir. 2002). The district court correctly denied defendant's motion for a downward departure based on aberrant behavior. The defendant's money laundering scheme neither lacked significant planning nor was limited in duration. *See* USSG §5K2.20 comment. (n.1).

§5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)[58]

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Claudio, 44 F.3d 10 (1st Cir. 1995). The district court did not abuse its discretion in refusing to postpone the defendant's scheduled sentencing to hear live medical testimony relating to his family circumstances. The district court later offered to accept at the sentencing hearing a proffer of what the absent medical expert's testimony would have been. The circuit court, citing *United States v. Tardiff*, 969 F.2d 1283, 1286 (1st Cir. 1992), reasoned that there is no automatic right to present live testimony at sentencing, and that testing the value of proposed live testimony by proffer–especially where a postponement would be involved–accords with "common practice and good

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[56]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by adding language prohibiting departures for diminished capacity and for aberrant behavior in certain child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

[57]*See* Note 56.

[58]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by adding this downward departure policy statement limiting the consideration of certain specific offender characteristics as grounds for departure in certain child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

sense." The circuit court concluded that none of the defendant's arguments showed that the proffer was inadequate in conveying the substance of the medical testimony.

United States v. Garafano, 36 F.3d 133 (1st Cir. 1994). The defendant was convicted in a jury trial of demanding and accepting bribes in violation of the Hobbs Act, 18 U.S.C. § 1951. However, the defendant was charged with multiple briberies and it was unclear whether the jury convicted him of all of the briberies or only one, and the dates of the conduct. The case was remanded for resentencing for the trial court to make an independent assessment of the trial evidence to determine the amount and dates of the bribes for sentencing purposes, to clarify the record.

ALL CHAPTERS: MISCELLANEOUS AMENDMENTS

Several technical and conforming changes were made to various guideline provisions:

– §1B1.3 (Relevant Conduct); §1B1.4 (Information to Be Used in Imposing Sentence); §1B1.8 (Use of Certain Information)–make conforming changes to various guideline provisions and commentary as a result of departure amendments previously made in furtherance of the PROTECT Act, Public Law 108-21.

– §§6A1.1 (Presentence Report); 6A1.2 (Disclosure of Presentence Report); 6A1.3 (Resolution of Disputed Factors); 6A1.4 (Notice of Possible Departure); 6B1.1 (Plea Agreement Procedure); and 6B1.3 (Procedure upon Rejection of a Plea Agreement)–incorporate in Chapter Six (Sentencing Procedures and Plea Agreements) the amendments made to Rules 11 and 32 of Federal Rules of Criminal Procedure, effective December 1, 2002.

– §2B1.1 (Fraud/Theft)– create a special rule in Note 4(B)(ii) for determining the number of victims in offenses involving public mail collection and delivery units (*e.g.*, apartment bank boxes); and modify §2B1.1(b)(10) to be applicable to offenses involving authentication features by providing two-level enhancement and a minimum offense level of level 12 in response to the PROTECT Act that created a new offense prohibiting trafficking of authentication features in 18 U.S.C. § 1028(a)(8).

– §2X6.1 ((Use of Minor to Commit a Crime of Violence)–create a new guideline, at §2X6.1, in response to a new offense provided at 18 U.S.C. § 25 (Use of Minors in Crimes of Violence) created under the PROTECT Act; provide application notes that the adjustment under §3B1.4 (Use of a Minor) is inapplicable if §2X6.1 is used; and, provide rules for the grouping of multiple counts.

– §4B1.2 ((Definition of Terms Used in Section 4B1.1)–expand the definition of "crime of violence" in Application Note 1 of §4B1.2 to include the unlawful possession of any firearm described in 26 U.S.C. § 5645(a); and adopt a categorical rule that possession of a firearm described in 26 U.S.C. §5845(a) is a "crime of violence."

– §4B1.4 (Armed Career Criminal)– provide an application note in §4B1.4 to address an apparent "double counting" issue that appears to be present when a defendant is convicted both of 18 U.S.C. § 922(g) (Felon in Possession) and also of an 18 U.S.C. § 924(c) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or a similar offense carrying a mandatory minimum consecutive penalty such as 18 U.S.C. § 844(h) (Use of Explosives) and 18 U.S.C. § 929(a) (Use of Restricted Ammunition); and provide an upward departure for those cases that result in a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level under §4B1.4(b)(3)(A) and the criminal history enhancement under §4B1.4(c)(2) had been applied.

APPLICABLE GUIDELINES/EX POST FACTO

See United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994), §2L1.2, p. 27.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. McDonald, 121 F.3d 7 (1st Cir. 1997), *cert. denied*, 522 U.S. 1062 (1998). The district court's failure to inform the defendant at his guilty plea that he faced a mandatory minimum sentence was harmless error because the defendant was sentenced to 15 months longer than the statutory minimum, without reference to the statutory minimum.

United States v. Medina-Silverio, 30 F.3d 1 (1st Cir. 1994). The district court erred in its procedural application of Fed. R. Crim. P. 11. At the district court plea proceeding, the Rule 11 transcript of the defendant's plea proceeding merely incorporated, by reference only, the defendant's Petition to Enter a Plea of Guilty. On appeal, the defendant objected to the incorporation procedures, arguing that it was too simplistic for the purposes of Rule 11. The government responded to the defendant's objection by asserting that any error made by the district court was harmless in light of the fact that the defendant completed his Petition to Enter a Plea of Guilty with the assistance of counsel. The First Circuit disagreed with the government, and held that a "total failure to conduct the plea colloquy mandated by Rule 11 cannot be considered harmless error, even where writings evidence the defendant's apparent cognizance of the information which should have been imparted in open court." *United States v. Bernal*, 861 F.2d 434, 46 (5th Cir. 1988), *cert. denied*, 493 U.S. 872 (1989).

United States v. Moure-Ortiz, 184 F.3d 1 (1st Cir. 1999). The district court erred in departing downward from the sentence of 84 months called for by a plea agreement under Fed. R. Crim. P. 11(e)(1)(C). The defendant and the government entered into a plea agreement under Rule 11(e)(1)(C) in which the parties agreed to a sentence of 84 months' imprisonment. The court accepted the agreement and the defendant pled guilty. At the sentencing hearing, the court departed downward based on the defendant's severe physical impairment and imposed a sentence of 63 months. Once the court accepted the 11(e)(1)(C) agreement, the court was without power to impose a sentence other

than the 84-month term. The parties, both the defense and the government, are entitled to the benefit of the bargain. The district court must either vacate the sentence and sentence the defendant to 84 months or reject the agreement and allow the parties to come up with another agreement or go to trial.

United States v. Ramirez-Benitez, 292 F.3d 22 (1st Cir. 2002). The district court's colloquy with the defendant regarding the consequences of his plea satisfied the requirements of Federal Rule of Procedure 11. The defendant, who was ruled ineligible for the safety valve because his drug offense involved a firearm, contended on appeal that the district court had erred in not inquiring as to the applicability of the safety valve provision before accepting his guilty plea. However, since use of a firearm was not an element of the offense to which he pled guilty, there was no requirement that it be discussed during the plea proceedings.

Rule 35

United States v. Fahm, 13 F.3d 447 (1st Cir. 1994). The defendant appealed the district court's reconsideration and subsequent one-month increase of his original sentence 30 days after it had been entered. According to Rule 35(c), the sentencing court may, within seven days after imposing a sentence, correct the sentence where there was an arithmetical, technical, or other clear error. The circuit court, finding that the district court had no inherent power to reconsider its original sentence, held that because the maximum time allowed under Rule 35 had long since passed, the original sentence must be reinstated.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(e)

See United States v. Fortes, 141 F.3d 1 (1st Cir.), *cert. denied*, 524 U.S. 961 (1998), §4B1.4, p. 51.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000))

United States v. Bailey, 270 F.3d 83 (1st Cir. 2001). The defendant was convicted at trial of marijuana conspiracy charges. Although the defendant had requested that the jury be asked to determine the weight of drugs attributable to him, the district court, pre-*Apprendi*, had declined to give such an instruction. The Supreme Court then decided *Apprendi* prior to the defendant's sentencing. At sentencing, over the defendant's objection, the district court determined that the defendant was responsible for a total of 320 kilograms of marijuana, calculated the applicable sentencing guideline range to be 262 to 327 months, and sentenced the defendant to 262 months. The First Circuit reversed, finding that *Apprendi* had been violated (because the sentence exceeded the default statutory maximum of five years) and that the error could not be harmless. In so holding, the court noted that "[t]he error cannot be harmless where, as here, the defendant has contested the omitted element and

the evidence is sufficient to support a contrary finding." *Id*. at 89 (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)). It concluded by stating that: "To say that the weight of the drugs properly attributable to [the defendant] was supported by overwhelming evidence, as we must in order to find harmless error, is simply not possible given the facts of this case." *Bailey*, 270 F.3d at 89-90.

United States v. Caba, 241 F.3d 98 (1st Cir. 2001). The defendant was convicted of five counts of drug trafficking, one of which involved crack cocaine. He was sentenced to 293 months, followed by an eight-year term of supervised release and acquitted on the crack cocaine count. The district court included the 143.7 grams of crack cocaine involved in the acquitted count as relevant conduct under USSG §1B1.3(a)(2) in determining the applicable sentencing guidelines range. Upon filing an information the government put the defendant on notice of its intention to seek a sentencing enhancement based on defendant's prior felony drug conviction, increasing his statutory maximum from 20 to 30 years. On appeal, the defendant argued that the *Apprendi* rule extended to increasing his sentence based on the district court's finding that the government had shown by a preponderance of the evidence that the defendant possessed crack cocaine as a part of the conspiracy. The court held that *Apprendi* did not apply to "guideline calculations (including, *inter alia*, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum."

United States v. Collazo-Aponte, 281 F.3d 320 (1st Cir.), *cert. denied*, 537 U.S. 869 (2002). The defendant raised several *Apprendi*-based challenges to his sentence. In one, he argued that 21 U.S.C. § 841(b), which provides graduated penalties for violations of 21 U.S.C. § 841(a)(1) (proscribing the manufacture, distribution and possession with intent to distribute controlled substances), is unconstitutional on its face after *Apprendi*. The circuit court rejected this claim, finding that "none of the provisions of section 841(b) contradicts *Apprendi*'s mandate." *Collazo-Aponte*, 281 F.3d at 325. The statute does not require judges, as opposed to juries, to determine facts that increase a penalty beyond the otherwise applicable statutory maximum, nor does it require the relevant facts to be determined by a preponderance of the evidence. The court rejected the defendant's further claim that section 841(b) is unconstitutional because it does not require a finding beyond a reasonable doubt that the defendant knew of the specific quantity of cocaine involved in the offense. The court found no support in the statutory language for such a *mens rea* requirement and noted that "the presumption in favor of a scienter requirement should only apply 'to each of the statutory elements that criminalize otherwise innocent conduct.'" *Id*. at 326 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3 (1994)). Drug quantity is not relevant to the criminality of the defendant's behavior.

United States v. Duarte, 246 F.3d 56, 62 (1st Cir. 2001). The defendant's act of signing of a plea agreement in which the defendant accepted responsibility for a specified amount of drugs may have violated *Apprendi* but it also precluded the defendant from claiming prejudice either by omission of the drug quantity in the indictment or absence of the drug quantity in the jury's determination.

United States v. Eirby, 262 F.3d 31 (1st Cir. 2001). The First Circuit held that when a defendant is sentenced to less than the default statutory maximum for violating section 841(a), 20 years

in prison, *Apprendi* is irrelevant. The defendant was convicted of conspiracy to distribute cocaine base and was sentenced to 66 months, after the district court made a downward departure from 120 months for defendant's substantial assistance. On appeal, the defendant challenged his sentence as an *Apprendi* violation arguing that the drug quantity determination, made pursuant to a preponderance of the evidence standard, exposed him to a higher mandatory minimum sentence and thus offended *Apprendi*. *Id.* at 35. The court found that the *Apprendi* doctrine offered no advantage to a defendant who was sentenced to a term less than the otherwise applicable statutory maximum. *Id.* at 37. The court concluded no *Apprendi* violation existed because application of section 841(b)(1)(B) provided a sentence of up to 40 years, and the district court actually sentenced the defendant to 66 months, a figure well below the statute's maximum. *Id*. at 39. *See also United States v. Burgos*, 254 F.3d 8, 15 (1st Cir.) (no *Apprendi* violation where defendant's sentence of 108 months fell within the statutory maximum of 20 years), *cert. denied*, 534 U.S. 1010 (2001); *United States v. Baltas*, 236 F.3d 27, 41 (1st. Cir.) (no constitutional error occurred when the district court sentences the defendant within the statutory maximum, regardless of the fact that drug quantity was never determined by the jury beyond a reasonable doubt), *cert. denied*, 532 U.S. 1030 (2001).

United States v. Gomez-Estrada, 273 F.3d 400 (1st Cir. 2001). The oft-quoted core holding of *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In this case, the First Circuit rejected a defendant's claim that the carve-out in *Apprendi* for "the fact of a prior conviction" does not pertain where the defendant has not himself admitted the fact of the prior conviction. It found that the district court had properly enhanced the defendant's sentence on the basis of his prior conviction for an aggravated felony, "even though the existence of that conviction was not admitted by the [defendant], nor charged in the indictment, nor proved to a jury beyond a reasonable doubt." *Gomez-Estrada*, 273 F.3d at 402. *See also United States v. Bradshaw*, 281 F.3d 278, 294 (1st Cir.) (reconfirming that the strictures of *Apprendi* do not apply to sentence-enhancement provisions based on prior criminal convictions and therefore refusing to apply *Apprendi* to prior convictions under Three Strikes Law, 18 U.S.C. § 3559(c), *cert. denied*, 537 U.S. 1049 (2002)); and *United States v. Moore*, 286 F.3d 47, 50-51 (1st Cir. 2002) (reaffirming in ACCA context that the *Apprendi* rationale does not apply to sentence-enhancement provisions based on prior convictions), *cert. denied*, 537 U.S. 907 (2002).

United States v. Goodine, 326 F.3d 26 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 1600 (2004). The district court did not violate *Apprendi* by sentencing the defendant to a 20-year term of imprisonment. The defendant had been convicted at trial of a violation of 21 U.S.C. § 841 and was subject to a term of imprisonment of ten years to life based on the quantity of crack cocaine (5-50g) found by the jury and the fact that he had a prior felony drug conviction. The district court, however, found that the defendant was responsible for a greater quantity of crack cocaine (309g), which triggered a mandatory minimum term of imprisonment of 20 years with a maximum term of life. But for the mandatory minimum of 20 years (240 months), the otherwise applicable guideline range would have been 168-210 months of imprisonment. The defendant argued that his sentence of 20 years violated

Apprendi because the mandatory minimum sentence of 20 years exceeded the high end of his guideline range. The First Circuit affirmed the sentence, finding that the defendant's argument would require a jury to make findings as to all facts relevant to sentencing ranges and adjustments, and nothing in *Apprendi* or subsequent cases calls into question the sentencing guidelines. In this case, pursuant to §5G1.1(b), the mandatory minimum sentence became the guideline sentence.

United States v. Houle, 237 F.3d 71 (1st Cir.), *cert. denied*, 532 U.S. 1074 (2001). The First Circuit held that no *Apprendi* violation occurred when the district court sentenced the defendant within the statutory maximum, even though the drug quantity was never determined by the jury beyond a reasonable doubt. *Id.* at 80. The defendant was convicted of conspiracy to possess with intent to distribute and to distribute cocaine and sentenced to 160 months. *Id.* at 78. On appeal, the defendant argued that the district court erroneously imposed a sentence in excess of the lowest statutory mandatory minimum, and invited the court to read *Apprendi* more broadly to include mandatory minimums. *Id.* at 80. The court determined that the length of the defendant's sentence was based on the sentencing guidelines, and not by referring to the minimum sentence of 120 months provided by statute. *Id.* at 80. In support of its position, the court cited *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in which the Supreme Court authorized legislatures to increase minimum penalties based upon non-jury factual determinations, as long as the penalty imposed did not exceed the maximum range. *Id*. Because *Apprendi* expressly stated that *McMillan* was still good law, the court concluded that the increase in defendant's mandatory minimum did not implicate *Apprendi* because his sentence still remained within the statutory maximum. *See also United States v. Lafrieniere*, 236 F.3d 41, 49 (1st Cir.) (same), *cert. denied*, 532 U.S. 1030 (2001); *United States v. Barnes*, 251 F.3d 251, 260 (1st Cir.) (an incarcerative sentence of no greater than 20 years for importing, or conspiring to import, any quantity of cocaine falls below the default statutory maximum for such an offense and therefore does not violate *Apprendi*), *cert. denied*, 534 U.S. 967 (2001).

United States v. Martinez-Medina, 279 F.3d 105 (1st Cir.), *cert. denied*, 537 U.S. 921 (2002). The First Circuit held that an *Apprendi* violation can be harmless. In this case, the district court had determined with respect to two defendants that they were accountable for in excess of 150 kilograms of cocaine. Their guideline ranges were calculated to be 324 to 405 months and 292 to 365 months, and each, after upward departures, received a life sentence. The defendants were sentenced before *Apprendi* was decided and raised *Apprendi*-based challenges on appeal. The First Circuit noted that there was no bar to applying *Apprendi* to the defendants' direct appeals, but found that "it is settled that an *Apprendi* error can be harmless where the evidence overwhelmingly establishes the minimum drug quantity needed to justify a higher statutory maximum." *Id*. at 121-22. In this case, the court found that the government had adduced at trial "overwhelming evidence" that the drug conspiracy had involved at least five kilograms of cocaine and noted that neither of the defendants seriously denied that fact. Since this quantity is sufficient to trigger the statutory maximum of life, any *Apprendi* error was harmless.

Sepulveda v. United States, 330 F.3d 55 (1st Cir.), *cert. denied*, 124 S. Ct. 427 (2003). In a case of first impression, the First Circuit determined whether the *Apprendi* rule applied retroactively

to cases on collateral review. The appellate court affirmed the district court's determination that the *Apprendi* rule did not apply retroactively because infringement of the rule did not seriously diminish the accuracy of convictions and it did not alter the commonly accepted understanding of the bedrock procedural elements of the criminal justice system. Rather, the court stated, the *Apprendi* rule clarified the proper factfinding roles of judge and jury. Hence, it joined every court of appeals that thus far had decided the question and held that the *Apprendi* rule fails to qualify as a watershed rule within the meaning of the second exception outlined in *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, the court concluded that the *Apprendi* rule has no retroactive application to cases in which the judgment of conviction became final before *Apprendi* was decided.

United States v. Terry, 240 F.3d 65 (1st Cir.), *cert. denied*, 532 U.S. 1023 (2001). The First Circuit held that a judge-finding of a prior conviction as a sentence enhancing factor did not conflict with *Apprendi*. *Id*. at 65. The defendant was convicted of distribution of cocaine, attempted possession with intent to distribute and conspiracy and was sentenced to 27 years' imprisonment. On appeal, the defendant challenged the calculation of his sentence based on the district court's determination of (1) his prior conviction for a drug offense, (2) the quantity of drugs involved in the conduct underlying the convictions, and (3) additional quantities of drugs involved in "relevant conduct for which he was not charged or convicted." *Id*. at 72. The court noted that 21 U.S.C. § 841(b)(1)(C) provided a statutory maximum of 20 years, regardless of the drug amount, except where there is a prior finalized conviction, in which case the statutory maximum would be 30 years. The court determined that defendant's sentence of 324 months, or 27 years, fell within the 30-year maximum sentence when there is a prior drug felony. *Id*. at 73. Citing *Almandarez-Torres v. United States*, 523 U.S. 224 (1998), in which it was held that "the use of the fact of a prior conviction in sentencing, where that fact was found by the judge rather than the jury, did not violate the right to a jury trial," the court concluded that *Apprendi* did not apply to the defendant's 27-year sentence. *Id*. at 74.