SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SECOND CIRCUIT

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Second Circuit
Case Law Highlights

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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Amato, 46 F.3d 1255 (2d Cir. 1995), *cert. denied*, 517 U.S. 1126 (1996). The district court erred in sentencing a defendant convicted of a Hobbs Act conspiracy robbery under USSG §2B3.1. The Second Circuit ruled that although the district court should have applied USSG §2X1.1, the conspiracy guideline, instead of USSG §2B3.1, the robbery guideline, the district court's error did not affect the defendant's sentence because USSG §2X1.1 adopts by cross-reference all of the adjustments of USSG §2B3.1. This ruling modified the Second Circuit's holding in *United States v. Skowronski*, 968 F.2d 242 (2d Cir. 1992). In *Skowronski*, the Second Circuit had ruled that USSG §2B3.1 was applicable to Hobbs Act robbery conspiracies because USSG §2E1.5 assigned Hobbs Act robberies, including robbery conspiracies, to USSG §2B3.1. Section 2X1.1, which is applicable to conspiracies which are not expressly covered by another guideline section, was therefore inapplicable due to USSG §2E1.5. *Id* at 250. In revisiting this issue, the Second Circuit ruled that the deletion of USSG §2E1.5 from the guidelines eliminates any suggestion that USSG §2B3.1 covers conspiracies, thus making USSG §2X1.1 the applicable section for Hobbs Act conspiracies. The distinction between USSG §§2B3.1 and 2X1.1 is important because USSG §2B3.1 provides adjustments for losses that are realized in contrast to USSG §2X1.1 which provides adjustments for losses that are intended. The defendant in this case argued that the district court had incorrectly enhanced his sentence by two levels for intended but unrealized loss. The appellate court affirmed the enhancement, ruling that the defendant was liable under USSG §2X1.1 for intended conspiratorial conduct. The court added that the defendant may be entitled to receive a three-level decrease under USSG §2X1.1(b)(2) because the conspiracy did not ripen into a substantially completed offense. The appellate court remanded the case to decide this issue and noted that if the sentence calculated under USSG §2X1.1 was higher than under USSG §2B3.1 because of a denial of the reduction while increasing for the intended loss, the defendant would be entitled to be sentenced under USSG §2B3.1 as it existed at the time of the offense, to avoid an ex post facto problem.

United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995), *cert. denied*, 516 U.S. 1135 (1996). The district court erred in sentencing the defendant for a less severe crime than the crime encompassed by the jury verdict. The jury convicted the defendant of attempting to commit a sexual act by force. 18 U.S.C. § 2246(3). The district judge, characterizing the case as "atypical," calculated the defendant's sentence under the less punitive section for abusive sexual contact (§2A3.4), rather than the guideline for aggravated sexual abuse (§2A3.1). The district court concluded that fellatio was

better defined as sexual contact, rather than a sexual act. The government appealed, and the circuit court agreed with the government that 18 U.S.C. § 2246(a)(2)(B) states that fellatio is a sexual act. In addition, the circuit court held that a district court's decision to sentence based on its view of the evidence rather than the jury's view is reversible error. The circuit court concluded that because "there was sufficient evidence to support the jury verdict, the district court's decision to sentence the defendant for a lesser crime cannot be sustained." *Id.* at 465.

United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996). The district court did not err in applying USSG §2X4.1, misprision of a felony, rather than USSG §2J1.2, obstruction of justice, to defendant's failure to testify at trial. The circuit court stated that although the government offered plausible reasons why the obstruction guideline is more appropriate than the misprision guideline for criminal contempt, the district court judge was entitled to apply the misprision guideline in this case. The court concluded that the sentencing judge's decision in determining which guideline was the most analogous offense guideline in this case was predominately an application of a guideline to the facts, a decision "to which we should give due deference." *See Koon v. United States*, 518 U.S. 81, 134 (1996).

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

United States v. Bryce, 287 F.3d 249 (2d Cir.), *cert. denied*, 537 U.S. 884 (2002). The district court did not err in its determination that resentencing after remand could take into account relevant conduct that was outside the scope of the original mandate. The defendant argued that the district court was precluded from a *de novo* sentencing by the mandate from the Second Circuit, handed down after his initial appeal. However, the Second Circuit held that intervening circumstances not considered by the Second Circuit must be weighed as relevant conduct by the district court on remand, even if the relevant conduct leads to an increased sentence. *Bryce*, 287 F.3d at 253-254. In *Bryce*, between the first sentencing and the remand for resentencing, the government uncovered evidence that the defendant was involved in the murder of a key witness. 287 F.3d at 254. The Second Circuit held that even though the suspicion of his involvement in the murder existed at the time of his first sentence, "new evidence that clearly implicates a defendant in a crime can also be considered as intervening circumstances that a judge must consider during resentencing." *Bryce*, 287 F.3d at 254.

United States v. Feola, 275 F.3d 216 (2d Cir. 2001). The district court did not err in allowing the relevant conduct for failing to file a federal income tax return to enhance a concurrent sentence on a count for bank fraud. Although the resulting sentence exceeded the statutory maximum for failing to file a federal income tax return, it did not exceed the statutory maximum for the bank fraud. The court noted that determination of the total tax loss attributable to the offense may include "all conduct violating the tax laws . . . as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." USSG §2T1.1, comment. (n.2). The district court did not err in including the relevant conduct despite the defendant's contention that he was unaware that the funds were the result of embezzlement because the court found that the defendant knowingly submitted false income tax returns (and understated his income) during those

years. *See United States v Bove*, 155 F.3d 44, 47-48 (2d Cir. 1998); *United States v. Silkowski*, 32 F.3d 682, 287 (2d Cir. 1994) (uncharged conduct may be considered relevant conduct for sentencing purposes). *See* §§2T1.1, 3B1.2-1.5, 5G1.2.

United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000). The defendant was charged with tax evasion, mail fraud and conversion. The underlying conduct revealed that between 1990 and 1992 the defendant had converted money from the Mason Tenders District Council Welfare Fund by creating a separate account over which he had exclusive control and diverting funds meant to pay medical specialists into that account. He would then direct the specialists to seek repayment from the Welfare Fund, causing the Fund to pay twice for the specialists' services. *Id.* at 317. The defendant did not pay taxes on the converted funds. *Id.* The court severed the fraud and conversion counts and proceeded to trial on the tax counts. The defendant was convicted and a sentencing hearing was held to determine relevant conduct. The district court concluded that the conduct underlying the mail fraud and conversion counts was relevant conduct under USSG §1B1.3. Further, the court concluded that the fraud and conversion counts are grouped but that these counts should not be grouped with the tax evasion counts. As a result, the district court calculated defendant's offense level at least level 20. The circuit court reversed. The court upheld the district court's finding that the mail fraud and conversion counts were relevant conduct under USSG §1B1.3. In reaching this conclusion, the court noted that a "good first step" in determining whether the conduct was relevant conduct is to determine whether the counts would have been grouped under USSG §3D1.2(d), as USSG §1B1.3(a)(2) defines relevant conduct in terms of the grouping rules. *Id.* at 319. The court found that fraud, conversion and tax evasion all measure the harm involved by the amount of loss and that the offenses are of the same "general type" as evidenced by the application of the sentencing guidelines. Each offense produced identical offense levels, which are determined by application of loss tables. *Id.* at 319-20. Applying the court's decision in *United States v. Napoli*, 179 F.3d 1, 11 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000) (money laundering and fraud counts should not be grouped because the offense level for fraud is based on amount of loss and money laundering is based on "society's disapprobation of the activity"), the panel concluded that tax evasion and fraud and conversion would be grouped under USSG §3D1.2(d). *Fitzgerald*, 232 F.3d at 320, *accord United States v. Petrillo*, 237 F.3d 119, 124-25 (2d Cir. 2000) (mail fraud and tax evasion counts should be grouped under 3D1.2(d) as both offense levels are determined by amount of loss and both offenses were part of a "single continuous course of criminal activity and involved the same funds"). However, the court found that because the conduct underlying the fraud and conversion counts were properly treated as relevant conduct to the defendant's conviction on the tax counts, it was erroneous to do a multi-count analysis. Rather, as relevant conduct, the district court should "aggregate the loss attributable to all of Fitzgerald's offenses." *Fitzgerald*, 232 F.3d at 320-21. This resulted in an offense level of 19.

United States v. Maaraki, 328 F.3d 73 (2d Cir. 2003). The defendant stole 655 calling card numbers with the objective of allowing his associates to use them. On appeal, the defendant argued that the entire loss amount attributed to him was not reasonably foreseeable and, therefore, should not have been used to increase his base offense level under USSG §2F1.1(b)(1). The court stated, however, that the applicable test is not one of reasonable foreseeability. Under §1B1.3, "the

requirement of reasonable foreseeability applies only in respect to the conduct of others;" it "does not apply to conduct that the defendant personally undertakes, aids, [or] abets." USSG §1B1.3, Application Note 2. The court noted that subsections (A) and (B) are not mutually exclusive. It stated that when acquiring the property of another person was the specific objective of the offense, a defendant who aided or abetted that acquisition is to be held responsible for the loss without regard to the foreseeability of his associates' acts. In this case, the court found that the defendant's conduct plainly aided and abetted the subsequent fraudulent uses of the unauthorized devices by his associates, which cost the victims hundreds of thousands of dollars. Given his personal conduct in aiding and abetting the costly calls, the court held that defendant's accountability for those losses was established under §1B1.3(a)(1)(A), which does not require proof of foreseeability. Accordingly, the court concluded that the district court's calculation of the fraud loss attributable to the defendant was correct.

See United States v. McLean, 287 F.3d 127 (2d Cir. 2002), Post-*Apprendi*, p. 92.

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court erred in not determining the scope of the defendants' agreement before finding that the conduct of the co-conspirators was reasonably foreseeable to all defendants, as defined in USSG §1B1.3(a)(1)(B). For this guideline section to apply, the court must first make *particularized findings* to determine the scope of the agreement. If the scope covers the conduct in question, then the court must "make a *particularized finding* as to whether the activity was foreseeable to the defendant." *Id*. at 118 (emphasis added); *see United States v. Molina*, 106 F.3d 1118, 1121 (2d Cir. 1997). The court remanded the sentences of all defendants to make *particularized findings* with respect to the scope of their agreements before reaching the issue of whether the murder was reasonably foreseeable (emphasis added). The court also held that the original basis for finding foreseeability, the use of violence by coalition members in other circumstances, was inadequate.

The district court erred in failing to determine the scope of each defendant's agreement before finding whether the co-conspirators' conduct was reasonably foreseeable to all defendants. The defendants belonged to a labor coalition that extorted money and jobs and were considered to be "supervisors" within the organization. During their involvement with the organization, a member of the coalition killed a member of a rival coalition. The defendants were sentenced to enhanced sentences based on the court's finding that the murder committed by the defendants' co-conspirator was relevant conduct and should be calculated into the sentences of each defendant. The Second Circuit concluded that because the evidence was such that a reasonable fact finder could find, but would not be required to find, that two "supervisors" entered into joint agreement with the shooter in furtherance of the conspiracy, the case needed to be remanded so that the district court could determine the scope of the defendants' agreement to eliminate the rival gang. *See United States v. Yu*, 285 F.3d 192 (2d Cir. 2002) (holding that an appeals court will not overturn a finding regarding relevant conduct where there is a sufficient basis for a finding that the relevant conduct was reasonably foreseeable).

See United States v. Rizzo, 349 F.3d 94 (2d Cir. 2003), §2B1.1, p. 10.

United States v. Shonubi, 103 F.3d 1085 (2d Cir. 1997). The appellate court remanded for resentencing after reversing, for a second time, the district court's determination of the amount of drugs attributable to defendant under relevant conduct. The defendant was convicted of smuggling 427.49 grams of heroin into the United States from Nigeria in his gastrointestinal tract. The defendant had made seven other trips to Nigeria in the 15 months prior to his arrest. Implicitly finding that these other trips had also been for the purpose of importing heroin, at the first sentencing hearing the district court multiplied by 8 the 427.29 grams and imposed a sentence based on 3,419.2 grams. On the first appeal, the Second Circuit held that specific evidence, such as drug records, admissions, or live testimony, was required to calculate drug quantities taken into account under relevant conduct. The court remanded for such findings. On remand, the district court held an elaborate hearing and imposed the same sentence. On this second appeal, the circuit court emphasized that "a more rigorous standard [than preponderance of the evidence] should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence." *Id*. at 1089. "The specific evidence we required to prove a relevant conduct quantity of drugs for purposes of enhancing a sentence must be evidence that points specifically to a drug quantity for which the defendant is responsible." *Id*. at 1089-90. The court stated that when it had cited drug records, admissions and live testimony as examples of specific evidence, it meant records of the *defendant's* drug transactions and the *defendant's* admissions, and testimony of the *defendant's* drug transactions.

United States v. Silkowski, 32 F.3d 682 (2d Cir. 1994). The district court did not err in including as relevant conduct activity for which the applicable statute of limitations had expired. The defendant pleaded guilty to theft of public funds in violation of 18 U.S.C. § 641. He argued that the district court was prohibited from using in its calculation of loss, monthly social security benefits that fell outside the five-year statute of limitations period. The circuit court disagreed, noting that relevant conduct is to be construed broadly and may include conduct which constitutes a "repetitive behavior pattern of specified criminal activity" even if that behavior pattern exceeds temporal limitations. Further, USSG §1B1.4 expressly permits "without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." However, the district court did err by considering for restitution purposes the loss generated by the conduct which was outside the statute of limitations. "[T]he scope of conduct that a district court may consider in determining the amount of loss [to be repaid as restitution] is governed by different" principles. Absent an express agreement to the contrary, the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-3664, and *Hughey v. United States*, 495 U.S. 411 (1990), limit the amount of restitution to losses caused by the offense of conviction. The circuit court concluded that the express terms of the defendant's plea agreement did not contain any reference to restitution for losses beyond the count of conviction. Accordingly, "the statute of limitations applies to the calculation of the amount of loss for purposes of restitution in this case." *Silkowski*, 32 F.3d at 690.

United States v. Williams, 247 F.3d 353 (2d Cir. 2001). The court held that, in sentencing a defendant convicted of possession with the intent to distribute, where there is no conspiracy at issue, the trial court must exclude drug quantities intended for personal use. It reasoned that drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they

are not part of the same course of conduct, or common scheme as drugs intended for distribution. *Id.* at 356. The Second Circuit follows the majority view in a circuit split on this issue.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Jackson, 59 F.3d 1421 (2d Cir. 1995), *cert. denied*, 517 U.S. 1139 (1996). The district court did not err by sentencing the defendant to the mandatory minimum ten-year term of imprisonment mandated by 21 U.S.C. § 841(b)(1)(A) for persons convicted of possessing with intent to distribute certain mixtures or substances containing 50 grams or more of cocaine base. The defendant argued on appeal that the district court erred in imposing the sentence because the substance in the defendant's possession was not "crack," and the Sentencing Commission amended the guidelines to define only crack as a "mixture or substance . . . which contains cocaine base." The defendant relied upon the Eleventh's Circuit's ruling in *United States v. Munoz-Realpe*, 21 F.3d 375, 376-79 (11th Cir. 1994), that the term "cocaine base" would mean "crack" for the purposes of §2D1.1(c). The circuit court refused to join the Eleventh Circuit, and ruled that it was bound to follow its previous ruling in *United States v. Palacio*, 4 F.3d 150 (2d Cir. 1993), *cert. denied*, 510 U.S. 1166 (1994), that amendment 487 "cannot revise the statutory interpretation" already made in the defendant's first case. The circuit court further noted in *Palacio* that "[e]ven if the Commission's pending view of the term `cocaine base' in the guidelines might have influenced us to adopt a congruent interpretation of the statutory term as an original matter, once we have construed the statute, we will not interpret it in the absence of new guidance from Congress." *Palacio*, 4 F.3d at 154.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not violate the ex post facto clause in sentencing the defendant using the guidelines (1993 version) in effect at the time of his sentence. The defendant argued that the district court should have used the 1989 *Guidelines Manual* instead because that manual was in effect when all the acts were committed by the defendant. The circuit court noted that where application of the guidelines in effect at sentencing would result in a more severe sentence than the version in effect at the time of the commission of the offense, the ex post facto clause requires use of the earlier version of the guidelines. *See United States v. Rivers*, 50 F.3d 1126, 1129 (2d Cir. 1995). The circuit court concluded that the 1993 guidelines provision for §2F1.1(b)(1)(m) was not more severe than the 1989 guidelines for §2F1.1(b)(1)(m), and that the district court did not err in using the 1993 guidelines.

United States v. Keller, 58 F.3d 884 (2d Cir. 1995). The district court improperly sentenced the defendant under guidelines no longer in effect at the time of his sentencing. The defendant argued that the district court failed to credit the time he had served in state prison for armed robbery against his federal sentence for possession of a firearm while a convicted felon. He specifically asserted that his sentence is controlled by an amendment to the sentencing guidelines enacted after the date of his offense, but before he was sentenced. The defendant contended that the guidelines in effect at the time of his sentencing should have been used by the court (1993 guidelines) because they allow for the credit

to his sentence. The district court instead applied the 1989 guidelines in effect on the date of the offense, which did not permit sentence credit. The appellate court noted that generally, a sentencing court must use the version of the guidelines in effect at the time of the defendant's sentencing, not at the time of the offense. *See* 18 U.S.C. § 3553(a)(4)(1988); *United States v. Reese*, 33 F.3d 166 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092 (1995). However, when the guidelines are amended after the defendant commits a criminal offense, but before he is sentenced, and the amended provision calls for a more severe penalty than the original one, those guidelines in effect at the time the offense was committed govern the imposition of sentence. The use of the guidelines in effect at the time of the offense are used to avoid an ex post facto violation. The circuit court noted that the sentencing guidelines state that "[t]he *Guidelines Manual* in effect on a particular date shall be applied in its entirety," §1B1.11(b)(2), and that "[i]f the court determines that the use of the *Guidelines Manual* in effect on the date the defendant is sentenced would violate the ex post facto clause" the guidelines in effect on the date of the offense are to be used §1B1.11(b)(1). *See Miller v. Florida*, 482 U.S. 423 (1987). In the case at bar, the circuit court concluded that no ex post facto violation would have occurred had the district court followed the general rule and used the guidelines in effect at the time of the sentencing. The defendant would not have been disadvantaged under the 1993 guidelines because he would have received credit for the time served. Therefore, the district court's failure to apply the 1993 guidelines in effect at the time of the sentencing was plain error.

United States v. Keigue, 318 F.3d 437 (2d Cir. 2003). The appellate court vacated the defendant's sentence, and remanded the case for resentencing. The court found that the defendant's presentence report incorrectly stated that an *ex post facto* issue would exist if he were sentenced under the 2001 sentencing guidelines, and therefore the district court sentenced defendant to 15 months' imprisonment under the 1998 guidelines. The sentencing guidelines explicitly mandate that a court use the version of the guidelines in effect on the date of the defendant's sentencing. *See* USSG §1B1.11(a) (2002). The court noted that the exception to this rule is when the version of the guidelines in effect at the time of sentencing is more severe than the version in effect when the offense was committed, in which case there is an *ex post facto* problem and the earlier guidelines should be applied. Because the court determined that the defendant's offense level under the 1998 guidelines would have been 13 and under the 2001 guidelines would have been 12, it held that there was no *ex post facto* issue. The appellate court explained that even though the defendant's 15-month sentence fell within the overlapping portion of both the 1998 and 2001 sentencing ranges, because the district court indicated that it intended to sentence defendant in the middle of the applicable range, his sentence would have been only 13 months under the 2001 guidelines. Accordingly, it was error for the district court to calculate the defendant's offense level using the expired version of the guidelines.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in determining that USSG §2A1.1 should apply under USSG §2B3.2 because the murder at issue was premeditated and not done in the heat of the moment. Under USSG §2A1.1, "willful, deliberate, malicious, and premeditated killing" is considered to be murder in the first degree. Looking to case precedent, the court referenced a Seventh Circuit case which held "the fact that cruelty or brutality is manifested in a killing will raise an inference of malice and the length of time of premeditation is not material." *United States v. Brown*, 518 F.2d 821, 828 (7th Cir.), *cert. denied*, 423 U.S. 917 (1975). Thus, the crime was properly found to have met the definition as outlined in USSG §2A1.1. *See* USSG §2B3.2.

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001), *cert. denied*, 537 U.S. 847 (2002). The district court did not err in sentencing the defendant under §2A1.1, the guideline for first-degree murder. The defendant was convicted for crimes surrounding a bombing of the World Trade Center. The defendant argued that his involvement with the actual bombing was attenuated to make inappropriate the application of the guideline. The Second Circuit stated that "the first-degree murder guideline is properly applied to arson resulting in death, even if a defendant did not know or intend that death would result" under *United States v. Tocco*, 135 F.3d 116 (2d. Cir. 1998). The Second Circuit held that a downward departure can be made for a lack of *mens rea*, but such a departure is not mandatory and its denial is unreviewable absent circumstances not present in this case.

§2A1.4 Involuntary Manslaughter[1]

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

Part B Offenses Involving Property

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

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[1]Effective November 1, 2003, the Commission amended §2A1.4 to reflect the seriousness of those offenses involving manslaughter. *See* USSG App. C, Amendment 652.

[2]Effective May 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended §2A4.1 to reflect the seriousness of those offenses. *See* USSG App. C, Amendment 650.

[3]Effective November 1, 2003, the Commission, in response to a congressional directive in the Homeland Security Act of 2002, Pub. L. 107-296, made several modifications to §§2B1.1, 2B2.3, 2B3.2, and 2M3.2 to address the serious harm and invasion of privacy that can result from offenses involving the misuse of, or damage to, computers. *See* USSG App. C, Amendment 654. *See also* USSG App. C, Amendments 617 and 647.

United States v. Aleskerova, 300 F.3d 286 (2d Cir. 2002). The defendant was convicted of possessing and conspiring to sell stolen artwork. The artwork was originally stolen after WWII from the Bremen Museum and subsequently stolen from the Baku Museum. In a case of first impression, the court looked at whether the loss under §2B1.1 should be measured by the value to the original victim (*i.e.*, the Bremen Museum) or the value to the last victim (*i.e.*, the Baku Museum) where a defendant is in possession of stolen property with a cloud on its title due to an earlier, unrelated theft. In a cross-appeal, the government contends principally that, in sentencing the defendant under §2B1.1, the district court erred in reducing the loss amount by improperly reducing the estimated value of the Bremen drawings due to their initial theft from the Bremen Museum in 1945. The appellate court found that a loss determination that reflects the value of the artwork to the last possessor who operates on the legitimate market is both reasonable and permissible under §2B1.1. The court explained that given the state of uncertainty created by the cloud on the title and the ongoing dispute over which museum could claim legitimate ownership of the drawings, the district court's decision to identify the "victim" as the Baku Museum (the entity directly impacted by the loss due to the chain of theft in which the defendant participated) and not the Bremen Museum (an earlier owner whose claim was uncertain and whose loss, if loss there be, was the fault of a different set of actors) was not clearly erroneous for purposes of §2B1.1. With respect to the determination of value, the appellate court stated that the district court had the authority to exercise its discretion to use an alternative measure for loss that accounted for values of the artwork to the Baku Museum other than its fair market price, such as its value in generating revenue or its replacement cost, if such evidence had been presented. *See* USSG §2B1.1, comment. (n.2) (1998).

United States v. Kostakis, 2004 WL 691658 (2d Cir. April 2, 2004). The government appealed a grant of a downward departure of six offense levels based on the district court's determination that the defendant's conduct was outside the heartland of §2B1.1(b)(8)(B). On appeal, the government asserted that the district court erred both by finding that unsophisticated conduct was outside the heartland of §2B1.1(b)(8) and by finding that the defendant's conduct was unsophisticated. The defendant committed his offense and the district court sentenced him prior to the effective date of the PROTECT Act. The Second Circuit therefore joined the other circuits that have considered this issue and have uniformly held that the PROTECT Act applies to cases pending on appeal when the Act was enacted. Applying the *de novo* standard of review solely to the facts the district court assumed to exist, the Court of Appeals found that the district court's departure was impermissible because, as described in the government's proffer, the defendant's conduct appeared to have been rather sophisticated. The government alleged that the defendant made false entries in two oil record books between April 16, 2001 and January 16, 2002, on 30 separate occasions. These entries concealed the fact that the defendant routinely instructed his subordinates to dump oily water directly into the sea, most often at night. These falsified entries had numerous technical components, and were made with the purpose of deceiving the Coast Guard. The government further alleged that upon apprehension the defendant made false statements regarding these activities to the Coast Guard and hid equipment used to discharge the oily water into international waters. The Second Circuit did not comment on whether the district court correctly found that unsophisticated conduct falls outside the heartland of the six-level

enhancement found in USSG §2B1.1(b)(8)(B). The Court held there were no facts supporting the district court's finding that the defendant's conduct was not complex.. Thus, rather than ruling on a hypothetical case, the court reserved decision on whether such a departure was appropriate for a case where the defendant's conduct is actually found to be unsophisticated. The court vacated and remanded the district court's decision.

United States v. Rizzo, 349 F.3d 94 (2d Cir. 2003). The defendant challenged the district court's application of a two-level sentencing enhancement, pursuant to §2B1.1(b)(3), for an offense that involved the theft from the person of another on the grounds that there was insufficient evidence to support such an enhancement. The Second Circuit concluded that the district court could not plausibly have found, based on the government's evidence, that the defendant's offense involved "jointly undertaken criminal activity" including theft from the person of another. The court therefore held that the district court's application of the "theft from the person of another" sentencing enhancement was clearly erroneous. Section 2B1.1(b)(3) is applicable only if the defendant's offense involved theft, without use of force, of property that was being held by another person or was within arm's reach of that person. The government, however, did not produce evidence from any of the defendant's seven victims indicating that documents were taken from their persons. The government argued that the fact that the defendant used documents relating to seven different individuals during a nine-month time period made it more likely that at least one was a victim of a pick-pocket or purse-snatcher. The court found that the mere fact that the defendant had a large number of victims within the short time period, however, did not establish how the victims' documents or information were obtained. The court also concluded that the government's evidence did not prove that the defendant engaged in joint criminal activity. As a result, the court held that the district court clearly erred in applying §§1B1.3(a)(1)(B) and 2B1.1(b)(3), and remanded to the district court for resentencing without application of §2B1.1(b)(3).

United States v. Robie, 166 F.3d 444 (2d Cir. 1999). The district court erred in calculating the loss based on the defendant's gain where the victim, the United States Postal Service, incurred no loss. The defendant was convicted of stealing misprinted Richard Nixon postage stamps, which he exchanged for approximately $64,000 in collectors' stamps. Because the Postal Service would have destroyed the misprinted stamps, there was no "loss" for guideline purposes. The district court substituted the loss for the value of the stamps to the defendant. Gain is not a proxy for loss when there is none. *See United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995); *United States v. Anderson*, 45 F.3d 217, 221-22 (7th Cir. 1995). The case was remanded for resentencing, with a reminder that under application note 15, an upward departure may be warranted if the loss calculation does not fully capture the harmfulness of the conduct.

§2B3.1 Robbery

United States v. Jennette, 295 F.3d 290, *cert. denied*, 537 U.S. 1076 (2d Cir. 2002). The appellate court affirmed the district court's decision to increase the defendant's offense level pursuant to section 2B3.1(b)(2)(F), which provides a two-level increase to a defendant's offense level for making a

"threat of death" during the commission of a robbery, based upon the defendant's statement to the bank teller, "I have a gun." The appellate court explained that taken together, the defendant's statements to the teller–to give him the money and that he had a gun–are equivalent to the guideline's model statement "Give me the money or I will shoot you." The only difference between the two statements is that the defendant's statements required the teller to draw a single inference–that is, that the defendant was willing to use the gun that he claimed to have, if the teller did not comply with his demand. The court found that this was a very small inferential step for a teller to make, particularly during the confusion and understandable anxiety of a robbery. Accordingly, it concluded that a reasonable teller, when faced with a bank robber who demands money and states that he has a gun, normally and reasonably would fear that his or her life is in danger.

United States v. Lee, 2001 U.S. App. LEXIS 25380 (2d Cir. 2001), *cert. denied*, 535 U.S. 955 (2002). The district court properly applied a four-level enhancement under USSG §2B3.1 for serious bodily harm, even without expert medical testimony regarding the victim's condition. USSG §1B1.1 defines serious bodily harm as "injury involving extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." USSG §1B1.1, comment. (n.1(j)). Even without the expert testimony, the court held that the victim himself was competent to testify about his hospitalization and year-long hearing impairment, both of which individually meet the definition of serious bodily harm as defined in USSG §1B1.1. *Id*. at 22-23. *See* USSG §1B1.1.

United States v. Matthews, 20 F.3d 538 (2d Cir. 1994). The district court erred in applying a four-level increase for the presence of a dangerous weapon that was "otherwise used" in the course of a bank robbery. The circuit court held that pointing a toy gun at robbery victims and making verbal threats constitutes "brandish[ment]," not "other[] use[]." Therefore, the three-level enhancement for "brandish[ment]" should have been applied instead of the four-level enhancement for "other[] use[]." The Second Circuit noted that the Fifth and Seventh Circuits have held that a defendant who points a gun while making an explicit threat should receive a four-level enhancement for "use[]" of the weapon, but attributed the circuit split to differences in standards of review and case facts.

United States v. Velez, 357 F.3d 239 (2d Cir. 2004). The defendant pleaded guilty to two counts of conspiracy to interfere with commerce by robbery. The district court sentenced defendant principally to concurrent terms of 120 months and 63 months. On appeal, he argued that the district court erred by applying the six-level enhancement for an intended loss of $5,000,000 under §2B3.1(b)(7)(G), as the intended loss was not properly determined. The court found no error in the district court's refusal to apply the three-level reduction under §2X1.1(b)(2). However, it found that the district court's finding that defendant specifically intended to steal a substantial amount was insufficiently grounded in the record to warrant a six-level enhancement under §2B3.1(b)(7)(G). The court noted that Application Note 2 to §2X1.1 states that the only "specific offense characteristics" from the guideline for the substantive offense that apply are those that are determined to have been "specifically intended" or "actually occurred." The note goes on to caution that "speculative specific offense

characteristics will not be applied." In imposing a sentence under §2X1.1 on a conspiracy conviction, a district court must make appropriate findings of the defendant's intention to cause a loss falling into a particular range delineated by §2B3.1(b) before it may apply an enhancement under that guideline. Therefore, the court vacated the judgment and remanded for resentencing.

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

United States v. Brumby, 23 F.3d 47 (2d Cir.), *cert. denied*, 513 U.S. 896 (1994). The district court properly enhanced the defendant's sentence five levels for a co-conspirator's display of a deadly weapon. USSG §2B3.2(b)(3)(A)(iii). The defendant argued that the gun was not "displayed" because it was never pointed at the victim. Because the guidelines do not define "display," the circuit court considered the plain meaning of the term and concluded that the removal of the revolver from the defendant's pouch in full view of the victim constituted a "display" of the weapon within the meaning of the USSG §2B3.2.

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in determining that a rival coalition member was a victim as defined in USSG §2B3.2(c)(1) and under the Hobbs Act. The defendants referred to USSG §2B3.2(c)(1) in their argument that the victim at issue must be a direct, and not indirect, victim of the extortionate scheme. The defendants contended that application of USSG §2B3.2(c)(1) in this context must be limited to direct targets of the extortion or innocent bystanders (not rival coalition members) who are killed. The court disagreed and found that for extortion crimes, "' a victim' is most reasonably construed to include all persons killed to carry out the extortionate scheme." 273 F.3d 91 at 118.

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The district court did not err in enhancing the defendant's sentence under USSG §2B3.2 for extortion by threat of force or injury. The defendant was convicted of hostage-taking and conspiring to interfere with commerce by extortion. The court found that the adjustment was appropriate under the rule, which permits an adjustment for a victim's loss or a demand greater than $50,000. The court stated that the defendant originally demanded $68,000 in ransom to release the victim and ignored the fact that he ultimately agreed to accept $5,300. The court rejected the appellant's analogous argument that an application note in USSG §2D1.1 states that a defendant's sentence may be reduced if he shows that he did not intend or was not reasonably able to supply a negotiated amount of narcotics. The court cited the plain language of USSG §2B3.2 to refute this argument and stated that there was no doubt the defendant made the demand of $68,000. The sentence was in compliance with the table contained in USSG §2B3.2 and was affirmed.

Part C Offenses Involving Public Officials

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

Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property[4]

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[5]

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995). The circuit court vacated the defendant's conviction and remanded for retrial. In addressing the defendant's sentence, the court instructed that, if the defendant is convicted on retrial, whether of conspiracy, or possession with intent to distribute, the district court must specify the basis of its drug quantity determination. Although the jury acquitted the defendant of the conspiracy charge in the first trial, "the district court was entitled to make its sentencing determination based upon his conspiratorial acts so long as it determined by a preponderance of the evidence that those conspiratorial acts took place." *Id*. at 17-18. *See United States v. Eng*, 14 F.3d 165, 170 n.2 (2d Cir.), *cert. denied*, 513 U.S. 807 (1994). If the defendant was engaged in a conspiracy, the district court should include the entire amount of heroin the defendant intended to possess–not just the amount of heroin actually possessed by the defendant.

United States v. Caban, 173 F.3d 89 (2d Cir.), *cert. denied*, 528 U.S. 872 (1999). The district court did not err by determining the defendant's offense level based on the 50 kilograms of real and sham cocaine the government stocked in a warehouse in a reverse sting operation, even though the government "had in effect predetermined this offense level." *Id*. at 91. The defendant pled guilty to drug conspiracy and firearms charges. The offense was the result of a sting operation to set up a leader of a ring that robbed drug stash houses. The defendants were caught attempting to steal 5 kilograms of cocaine and 45 kilograms of phony cocaine the government had stocked in a warehouse. On appeal, the defendant argued that the offense level should have been based only on the amount of cocaine that he and the codefendants were reasonably capable of obtaining because the quantity of drugs was dependent on the amount of cocaine supplied by the government. In support of this argument, the defendant relied on commentary to USSG §2D1.1 that addresses a particular reverse sting situation. USSG §2D1.1, comment. (n. 15). The Second Circuit found that the district court did not err in finding that the defendant intended to steal 50 kilograms. The defendant knew beforehand that the warehouse

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[4]Effective January 25, 2003, the Commission, in response to a congressional directive in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, created a new guideline, §2C1.18, in order to reflect the significantly increased statutory penalties for campaign finance crimes (formerly misdemeanors under the Federal Election Campaign Act of 1971). *See* USSG App. C, Amendment 648.

[5]Effective November 1, 2003, the Commission amended §2D1.1 to provide sentences for oxycodone offenses using the weight of the actual oxycodone instead of calculating the weight of the entire pill. *See* USSG App. C, Amendment 657.

would contain at least 50 kilograms; he saw 50 kilograms in the warehouse; and attempted to steal that amount without making any attempt to withdraw from the conspiracy. The Second Circuit did note that the current guidelines address the potential for government abuse in reverse stings only in situations were the government increases the quantity by discount pricing. "We invite the Sentencing Commission's attention to some more comprehensive measure that would consider what happens when a reverse sting involves a theft in which the government sets the bait rather than a purchase in which the government sets the price." *Id* at 94.

United States v. Dallas, 229 F.3d 105 (2d Cir. 2000). The issue on appeal was whether to include six ounces of cocaine when calculating defendant's offense level for conspiring to distribute cocaine, where the defendant agreed to sell the amount but later substituted flour for cocaine. The court found that, pursuant to USSG §2D1.1, comment. (n. 12), if the defendant intended to distribute the cocaine and was reasonably capable of doing so, the six ounces are part of the total quantity involved. The defendant originally agreed and intended to sell cocaine, but later that same day he decided to substitute flour for the cocaine. The court held that the original intent, once formed and communicated became part of the conduct underlying the conspiracy and should be included in the guidelines calculation of offense level. *Id.* at 111. Further, the district court's finding that the defendant was reasonably capable of supplying the six ounces, based on the fact that he had provided similar (though slightly lesser) amounts on two prior occasions after a brief delay, was not clearly erroneous. *Id.*

United States v. Gomez, 103 F.3d 249 (2d Cir. 1997). The circuit court affirmed the district court's sentence based on 125 grams of heroin despite the defendant's argument that he lacked the financial capacity to purchase so much. The court noted that Application Note 12 to USSG §2D1.1 requires that the agreed upon amount of the substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. The commentary also states that if a defendant establishes that he or she was not reasonably capable of providing the agreed upon quantity, the court shall exclude from the offense level determination the amount of controlled substance that defendant was not reasonably capable of providing. The defendant argued that this provision required the sentencing court to consider whether he was reasonably capable of purchasing the amount agreed upon. The court rejected this argument, noting that the language of Application Note 1 clearly indicates that the negotiated quantity is conclusive except where the defendant was the putative seller and neither intended nor was able to produce that amount. Application Note 12 also states that in a reverse sting, where the amount actually delivered is controlled by the government, the agreed upon amount is the proper basis for calculations. The defendant was involved in a reverse sting and the court held that the agreed upon amount accurately reflected the scale of the offense.

United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003). The defendant was charged with conspiracy to import five or more kilograms of cocaine into the United States and other crimes. Before sentencing, the defendant admitted that he lied when he testified at trial, and he provided the

government with a full accounting of his role in the crime. The district court denied his motion for a downward adjustment pursuant to §2D1.1(b)(6) on the basis that the defendant's commission of perjury at trial disqualified him from safety valve eligibility as a threshold matter. The appellate court vacated the district court's decision and remanded for resentencing. The court stated that it found no basis for concluding that a defendant's perjury at trial can disqualify him from safety valve eligibility at the threshold, where the defendant is otherwise found to meet the statutory criteria for relief. The court noted that in *United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999), it held that so long as a defendant makes a complete and truthful proffer at the time of the commencement of the sentencing hearing, he complies with section 3553(f)(5)'s disclosure requirement even if he earlier lied to the government or obstructed its investigation. *Id*. at 106, 108-09. Accordingly, the court held that a sentencing court may not disqualify a defendant at the threshold from eligibility for safety valve relief based solely on his commission of perjury at trial, where the defendant otherwise fulfills the statutory criteria under 18 U.S.C. § 3553(f)(1)-(5).

United States v. Moreno, 181 F.3d 206 (2d Cir.), *cert. denied*, 528 U.S. 977 (1999). The more lenient statutory maximum penalty applicable to powder cocaine, rather than the penalty applicable to crack, should be used to determine the sentences of the defendants convicted by general verdict of conspiracy to possess multiple types of controlled substances. The defendants were convicted of various charges, including a violation of 21 U.S.C. § 846 (conspiracy to violate narcotics laws). The district court found the defendants responsible for over 1.5 kilograms of crack cocaine, and sentenced them to life imprisonment, pursuant to the mandatory minimum required under 21 U.S.C. § 841(b)(1). The court did not determine the amount of powder cocaine attributable to the defendants. Because it is unclear from the general verdict whether the jury convicted the defendants of conspiring to possess each of the controlled substances, the court must assume that the conviction was for the conspiracy to possess the charged substance that carries the most lenient statutorily required minimum sentence. *See United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998), *cert. denied*, 531 U.S. 968 (2000). Thus, upon remand, the district court must determine the amount of powder cocaine involved in the offense. Because the defendants' relevant conduct includes 1.5 kilograms of cocaine, if the court finds that the amount of powder cocaine is greater than 5 kilograms, then the statutory maximum of life imprisonment is still available. If the court finds that between 500 grams and 5 kilograms of powder cocaine was involved in the offense, then the maximum sentence available under 21 U.S.C. § 841(b)(1)(B) will be 40 years' imprisonment.

United States v. Rivera, 293 F.3d 584 (2d Cir. 2002). The district court did not err in its choice of USSG §2D1.1 as the appropriate guideline for determining the guideline range based on the offense level provided. Amendment 591 applies only to the choice of an offense guideline, not to the subsequent selection of a base offense level. The defendant in *Rivera* was convicted of conspiracy to distribute and possession with intent to distribute heroin; therefore, the Second Circuit held that selection of USSG §2D1.1 as the sentencing guideline was appropriate. The defendant argued that the

choice of his base offense level was precluded by Amendment 591.[6] Furthermore, USSG §1B1.3 requires the sentencing court to consider specific offense characteristics once the appropriate guideline has been selected. Therefore, since the sentencing court selected the appropriate guideline based on his actual charged offense and not his relevant conduct there was no error.

See United States v. Rodriguez, 288 F.3d 472 (2d Cir. 2002), Post-*Apprendi*, p. 94.

United States v. Sherpa, 265 F.3d 144 (2d Cir. 2001). The district court did not err in refusing to deduct two offense levels pursuant to §2D1.1(b)(6) when a defendant failed to satisfy the criteria for safety valve relief. The defendant was convicted of one count of conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(i) and 846. He could not receive the reduction under §2D1.1 because he had two more criminal history points than was permitted under the criteria for safety valve relief at §5C1.2.

United States v. Stephenson, 183 F.3d 110 (2d Cir.), *cert. denied*, 528 U.S. 1013 (1999), and *cert. denied*, 533 U.S. 940 (2001). A defendant convicted of a general conspiracy to distribute cocaine and crack is not entitled to resentencing when the offense of conviction has no impact on the statutory maximum and the guideline range exceeds the statutory minimum term that would apply if the jury's verdict had specified that the offense involved crack cocaine. The defendant argued that his minimum sentence should have been based on the 10-year minimum applicable to a cocaine offense for a defendant with a previous felony drug conviction instead of the 20-year minimum sentence applicable to a crack offense for a defendant with a previous felony drug conviction. The defendant's guideline range of 292-365 months' imprisonment was higher than either statutory minimum, thus there was no need for resentencing.

United States v. Stevens, 19 F.3d 93 (2d Cir. 1994). The defendant challenged the 100 to 1 equivalency of powder to crack cocaine found in USSG §2D1.1(c), the guidelines Drug Quantity Table, alleging that it has a disparate impact on African-Americans violative of the equal protection component of the Fifth Amendment's Due Process Clause. The Second Circuit joined six other circuits in holding that the equivalency is "rationally related to the legitimate governmental purpose of protecting the public against the greater dangers of crack cocaine." *See United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993) (*per curiam*); *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir. 1992); *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993); *United States v. Galloway*, 951 F.2d 64, 65-66 (5th Cir. 1992) (*per curiam*); *United States v. Turner*, 928 F.2d 956, 959-60 (10th Cir.), *cert. denied*, 502 U.S. 881 (1991); and *United States v. Lawrence*, 951 F.2d 751, 754-55 (7th Cir. 1991).

[6]Amendment 591 deleted Application Note 3 to USSG §1B1.2, which provided that it would be appropriate for the court to consider the actual conduct of the defendant when selecting the guideline.

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001). The district court erred in sentencing the defendant to a sentence beyond the statutory maximum, based on the judge's findings under a preponderance standard of the amount of drugs involved in the offense, a factor which was not mentioned in the indictment nor presented to the jury. In the instant case, the judge made a finding of the amount of drugs involved, which resulted in a sentencing range of ten years to life under 21 U.S.C. § 841(b)(1)(A). Had there been no such finding, the defendant would have been sentenced to a statutory maximum of 20 years under 21 U.S.C. § 841(b)(1)(C) and USSG §2D1.1. The defendant argued that the amount of drugs involved was an issue of fact that should be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Following *Apprendi*, the court held that because the type and quantity of drugs can raise the defendant's sentence above the statutory maximum of 21 U.S.C. § 841(b)(1)(C), they are elements of the charged offense and must be charged in the indictment and proved to a jury beyond a reasonable doubt. *Id*. at 663. The court held "following Apprendi's teachings . . . if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury." *Id.* at 660. The court also held that the failure to charge drug type and quantity in the indictment or submit the question to the jury is subject to plain error review, thus overruling *United States v Tran*, 234 F.3d 798, 806 (2d Cir. 2000). However, the court also held that this would not apply if the sentence imposed is not greater than the statutory maximum for the offense charged in the indictment and found by the jury. 274 F.3d 655 at 673. *See* USSG §1B1.3.

See United States v. Yu, 285 F.3d 192 (2d Cir. 2002), Post-*Apprendi*, p. 95.

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002). The district court erred in imposing a sentence above the maximum for the substance with the lowest range for which there is sufficient evidence to support a conviction. The Second Circuit held that there was sufficient evidence to support a conspiracy to distribute marijuana and thus the maximum sentence was 60 months–the maximum sentence for marijuana under 21 U.S.C. § 841(b)(1)(D). The Second Circuit further held that the error also affected the fundamental fairness of the trial because the defendant had already served more than two years beyond the appropriate maximum sentence. Therefore, the Second Circuit ordered the if the government agreed to resentence under the right statutory provision they will release him permanently, if the government does not agree the court will vacate the conviction and remand the case with an order that any sentence imposed be reduced by the time he has already served.

Part F Offenses Involving Fraud or Deceit[7]

§2F1.1 Fraud and Deceit

[7]Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, Amendment 617.

United States v. Berg, 250 F.3d 139 (2d Cir. 2001). The appellate court held that because there was a lack of evidence of aggravated criminal intent on the part of the defendant, the district court was correct in refusing to apply the two-level sentence enhancement for violation of judicial process, pursuant to USSG §2F1.1(b)(4)(B). The defendant's company, Independent Tool and Mold, Inc., filed a petition for Chapter 7 Bankruptcy. The defendant, who was president of the company, signed the bankruptcy form in which he disclosed the existence of assets. However, the defendant later misused the assets, but then disclosed the misuse. The defendant pled guilty to 18 U.S.C. § 152 which provides, in pertinent part, that a person who "knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court . . ." The district court refused to apply the two-level enhancement for violation of a judicial process pursuant to USSG §2F1.1(b)(4)(B) because the enhancement was contrary to circuit precedent from *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997) (*in dicta*, the court intimated that the phrase violation of judicial process did not extend to the concealment of assets in bankruptcy), and because there was a lack of evidence of aggravated criminal intent. The government appealed, arguing that the defendant's concealment of assets amounted to an abuse of the bankruptcy process under the standards adopted by other circuits. The appellate court noted that *Carrozella* no longer provides a viable analysis because *United States v. Kennedy*, 233 F.3d 157 (2d Cir. 2000), rejected *Carrozella's* dicta, and concluded that the enhancement should also apply to bankruptcy fraud. However, in the case at bar, the appellate court upheld the district court's finding that the enhancement would not apply because there was a lack of evidence of aggravated criminal intent on the part of the defendant. The appellate court noted that the Sentencing Commission's Amendment 597 requires a two-level enhancement "if the offense involved a . . . (B) a misrepresentation during a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order. The appellate court noted that the present case did not fit within either of these two categories because there was no evidence that the defendant made a false misrepresentation and there was no specific order violated. The appellate court found that because the defendant had not intentionally omitted assets the enhancement should not apply.

United States v. Burns, 104 F.3d 529 (2d Cir. 1997). The district court did not err in calculating the amount of loss under USSG §2F1.1. The defendant was a program manager for Northeast Rural Water Association (NRWA), a nonprofit, federally funded agency. His position was funded by an EPA grant to the National Rural Water Association (National). Subsequent to NRWA and national contracting for the defendant's position, the defendant, while still receiving his federal salary, moved to Massachusetts to attend Harvard's Public Administration program full-time. With help from his sister, an NRWA employee, the defendant submitted time sheets indicating full-time work for NRWA while he was attending Harvard. His apartment, furnished with office equipment, was paid for with federal funds. The defendant was convicted of wire fraud, concealment of a material fact and use of a false document. At sentencing, the defendant's offense level was increased by four based on a loss of $21,186 ($13,463 for the apartment, travel and per diem, plus $8,723 for salary loss). The defendant appealed the loss calculation, contending that his obligations to NRWA were fulfilled and that NRWA met all of its contractual obligations with National and, therefore, there was no salary loss. Stating that the evidence did support the fact that the defendant did some work for NRWA while at

Harvard, the district court determined loss by taking the number of hours the defendant participated in the Harvard program and multiplied that by a reasonable hourly rate. Noting that the sentencing guidelines state that "the loss need not be determined with precision," USSG §2F1.1, comment. (n.8), the appellate court found the calculation was not clearly erroneous. The district court also found losses totaling $13,463 for apartment expenses, parking, and mileage and per diem expenses related to travel to Boston. The defendant asserted that he was authorized to open a "Boston office" and completed his work for NRWA while at Harvard. The appellate court rejected this argument, pointing to the jury's finding that the defendant did not work full-time for NRWA while attending Harvard and that the leasing of the apartment was for his personal use.

United States v. Carrozzella, 105 F.3d 796 (2d Cir. 1997). The district court did not err in imposing a 15-level enhancement based upon a finding that the defendant's actions resulted in a $10,000,000 to $20,000,000 loss. The defendant was an attorney involved in a fraudulent investment scheme whereby he persuaded individuals, some of whom were clients, to turn over large sums of money in return for a promised tax-free, fixed rate of return on their investment. Although the defendant made sporadic interest payments on some of these investments to prevent the investors from demanding repayment of their principal, the scheme eventually failed and the investors lost much of their investment. The defendant argued that in calculating of loss, the amount of his repayments in the form of interest should be subtracted from the known investor deposits. The court rejected this approach and calculated the amount of loss as including the value of property taken, regardless of whether a portion has been returned. *See United States v. Mucciante*, 21 F.3d 1228, 1238 (2d Cir.), *cert. denied*, 513 U.S. 949 (1994).

United States v. Cheng, 96 F.3d 654 (2d Cir. 1996). The district court did not err in finding that the defendant had caused a loss of $3.5 million based on unlawful receipt and redemption of food stamps. The defendant, who owned and operated a wholesale food supplier, began receiving food stamps as payment for supplies, which he was not authorized by the USDA to do. The defendant, in turn, used $1.8 million in food stamps to pay one of his suppliers, who had illegally gotten USDA approval to receive food stamps. In 1992, the defendant illegally received approval for his business to receive food stamps and converted $1.7 million in food stamps into cash. The defendant argued that the 13-level enhancement for causing a loss of $3.5 million was incorrect. The defendant's argument was based on USSG §2F1.1 n.7(d) which states that "[i]n a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses." The defendant argued that to divert food stamps from the intended recipient or uses, one must illegally obtain the stamps from the original food-stamp recipient. The defendant asserts that because he received the stamps second-hand, and not directly from food-stamp recipients, his conduct does not fall within Application Note 7(d). Finding that the defendant's actions were part of the original wrongdoer's conversion of food-stamps into money, the circuit court held that the defendant's conduct caused a loss. In reaching this decision, the circuit court analogized this chain of events to receipt of stolen goods, which for purposes of determining loss is treated similarly to the original theft itself.

United States v. Ferrarini, 219 F.3d 145 (2d Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001). The court concluded that the Sentencing Commission has the legal authority to promulgate a definition of "financial institution," which includes institutions that are not federally insured, even though such a definition is broader than the one offered in the mandate from Congress in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat.183 (directing the Commission to establish guidelines for fraud that "substantially jeopardizes the safety and soundness of a *federally insured financial institution.*") (emphasis added). The appellate court further concluded that premium finance companies, including the company in question, are entities whose financial peril endangers the general public and whose functions are sufficiently bank-like to constitute financial institutions under USSG §2F1.1(b)(7).

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant was convicted of a single count of conspiracy to commit wire fraud. The defendant argued that his sentence was inappropriate because the court incorrectly calculated the amount of loss found to be attributable to his conduct. The defendant claimed that he should have been sentenced at a base offense level of 23, rather than 24, because the evidence did not support a finding that he was responsible for losses totaling $1,500,000 pursuant to USSG §2F1.1(b)(1). The Second Circuit disagreed, holding that USSG §2F1.1 loss calculations need not be calculated with precision, they need only be reasonable estimates. The fact that the district court relied on "ball-park" figures by co-conspirators was a sound basis for determining the amount of loss involved in the offense. Additionally, the court held that the defendant should be held responsible for the total amount of loss, rather than the amount of the defendant's sales figures.

United States v. Klisser, 190 F.3d 34 (2d Cir. 1999), *cert. denied*, 529 U.S. 1112 (2000). The impossibility of actual loss does not require use of a zero loss figure. The defendant was convicted of wire fraud for proposing to set up a sham investment opportunity with an undercover agent posing as a pension fund accountant. The defendant cited *United States v. Galbraith*, 20 F.3d 1054 (10th Cir.), *cert. denied*, 513 U.S. 889 (1994) to support his argument that because the sting operation involved a fictitious victim, the correct loss figure was zero. The court based the offense level on the defendant's intended loss of several million dollars. The Second Circuit joined the Eleventh, Seventh, Ninth and District of Columbia Circuits in rejecting the reasoning of *Galbraith*[8] to hold that the district court properly based the offense level on the defendant's intended loss.

United States v. Savin, 349 F.3d 27 (2d Cir. 2003). The defendant pled guilty to wire fraud, but the government appealed defendant's sentence arguing that the sentencing court improperly failed to apply the sentence enhancement under §2F1.1(b)(6)(B) (1995) for an offense affecting a foreign investment company. The government argued that the district court erred in failing to apply a four-level enhancement for an offense that "affected a financial institution" and from which "the defendant derived

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[8]*United States v. Schlei*, 122 F.3d 944, 996 (11th Cir. 1997), *cert. denied*, 523 U.S. 1077 (1998); *United States v. Studevent*, 116 F.3d 1559, 1561-64 (D.C. Cir. 1997); *United States v. Robinson*, 94 F.3d 1325, 1327-29 (9th Cir. 1996); *United States v. Coffman*, 94 F.3d 330, 336-37 (7th Cir. 1996).

more than $ 1,000,000 in gross receipts." The government contends that the district court should not have defined "foreign investment company" according to the law of Luxembourg, the country in which the affected entity was registered and had its principal place of business, but according to United States federal law. The Second Circuit concluded that the Sentencing Commission was not without authority to treat "any state or foreign . . . investment company" as a "financial institution" in the application note to section 2F1.1(b)(6)(B); the application note is therefore valid as applied to investment companies generally. The court remanded for resentencing for the district court to look to the United States federal law to determine the meaning of "foreign investment company."

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

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitationof a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[9]

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[10]

United States v. Demerritt, 196 F.3d 138 (2d Cir. 1999). The defendant was convicted of one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), after he was found in possession of over 700 computer files depicting child pornography. The court upheld the two-level increase for possessing ten or more books, magazines, periodicals, films, video tapes, or "other items" under USSG §2G2.4(b)(2), finding specifically that computer files are "items" within the meaning of the guideline provision. *Id.* at 141. Additionally, the court concluded that it was not double counting to also enhance the defendant's sentence for use of a computer, pursuant to USSG §2G2.4(b)(3), as these enhancements address different harms. USSG §2G2.2(b)(2) is meant to address the quantity of pornography possessed, whereas USSG §2G2.4(b)(3) addresses Congress' concern regarding the use of a computer to commit such an offense. *Id.* at 142.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

United States v. Cefalu, 85 F.3d 964 (2d Cir. 1996). The defendant was convicted of criminal contempt for his refusal to testify fully before the grand jury and at the drug conspiracy trial of a captain in the Gambino family, despite a grant of immunity. After serving some 18 months for civil contempt, he was convicted of criminal contempt, and sentenced to 33 months imprisonment pursuant

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

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

to 18 U.S.C. § 3553(b). The Contempt guideline at USSG §2J1.1 directs the court to apply USSG §2X5.1, which instructs the court to look to the most analogous guideline, or in the absence of a sufficiently analogous guideline, to proceed under 18 U.S.C. § 3553(b). The Sentencing Commission does not provide a specific sentencing range for criminal contempt offenses because they are very context-specific. Although the government asserted that the Obstruction of Justice guideline was most analogous in this case, and the defendant asserted that the most analogous guideline was Failure to Appear by a Material Witness, the appellate court cited the district court's reasons for declining to use those guidelines, and found no error. The district judge determined that there was no sufficiently analogous guideline. Employing the provisions of 18 U.S.C. § 3553(b), the district court looked to the guidelines for direction and decided that USSG §2X4.1, Misprision of Felony, was somewhat similar to the scenario in defendant's case where, despite his knowledge of the crime and grant of immunity, he refused to testify. The appellate court explained that although other guidelines may have fit, it gave deference to the district court's application of the guidelines to the facts, and the sentence was not "plainly unreasonable."

§2J1.2 Obstruction of Justice[11]

Part K Offenses Involving Public Safety

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

United State v. Ahmad, 202 F.3d 588 (2d Cir. 2000). The defendant was convicted of possessing a firearm with an obliterated serial number, four silencers and a sawed off shotgun. At the time these weapons were seized, seven other firearms were found in his possession. The district court enhanced defendant's sentence four levels based on the seven additional firearms under USSG §2K2.1(b)(1). The appellate court reversed, concluding that USSG §2K2.1, application note 9, requires that the guns be a part of the underlying offense. The court rejected the government's argument that possession of the additional guns in violation of state law constituted relevant conduct. In order for state offenses to be considered relevant conduct, the conduct involved must amount to a federal offense lacking only the jurisdictional element. *Id.* at 591.

United States v. Griffiths, 41 F.3d 844 (2d Cir. 1994), *cert. denied*, 514 U.S. 1056 (1995). The defendant was convicted of possessing a firearm as an illegal alien in violation of 18 U.S.C. § 922(g)(5). The district court applied a two-level enhancement to his base offense level pursuant to USSG §2K2.1(b)(4) because the firearm he possessed was stolen. On appeal, the defendant asserted that the enhancement was unconstitutional because no proof was required that he knew or had reason to believe that the firearm was stolen. Although the appellate court has previously held that USSG

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

§2K2.1(b)(4) does not contain a scienter requirement, *see United States v. Litchfield*, 986 F.2d 21, 22-23 (2d Cir. 1993) (*per curiam*), the court had not addressed the constitutional question. The appellate court cited the opinions of several circuit courts, and adopted the rationales applied in those opinions in deciding that "§2K2.1(b)(4) as construed in USSG §2K2.1, comment. (n.19), does not violate the due process clause. . . ." *See United States v. Richardson*, 8 F.3d 769, 770 (11th Cir. 1993), *cert. denied*, 510 U.S. 1203 (1994); *United States v. Sanders*, 990 F.2d 582, 584 (10th Cir.), *cert. denied*, 510 U.S. 878 (1993) (distinction drawn between strict liability crimes and strict liability sentencing enhancements); *United States v. Goodell*, 990 F.2d 497, 498-500 (9th Cir. 1993) (the enhancement does not alter the statutory maximum penalty, negate the burden of proof for the underlying offense, negate the presumption of innocence, or create a separate offense calling for a separate penalty); *United States v. Mobley*, 956 F.2d 450, 454-459 (3d Cir. 1992) (government has legitimate interest in punishing possession of stolen firearm and putting burden on person receiving firearm to ensure that his possession is lawful); *United States v. Singleton*, 946 F.2d 23, 25-27 (5th Cir. 1991), *cert. denied*, 502 U.S. 1117 (1992) (difference between strict liability crimes and enhancements). The district court's decision was affirmed.

United States v. Nevarez, 251 F.3d 28 (2d Cir. 2001). The appellate court concluded that the district court did not abuse its discretion by determining that the defendant was a "prohibited person," because he was an unlawful user of a controlled substance, and therefore subject to an increase in his base offense level, pursuant to USSG §2K2.1(a)(6). The defendant was convicted of illegally selling firearms in violation of 18 U.S.C. § 922(a)(1)(A) and the district court sentenced the defendant under USSG §2K2.1(a)(6) because 1) the PSR stated that "beginning in 1970, the defendant reportedly smoked marijuana and ingested cocaine on an intermittent basis," and 2) because he had tested positive for cocaine while on bail in this case. The defendant appealed, arguing that he should not be considered a prohibited person because he did not use drugs on a regular basis. The appellate court noted that the defendant's concession that he used illegal drugs over almost a 30-year period plainly indicated he had a persistent drug problem. Furthermore, this conclusion is further supported by the defendant having tested positive while out on bail for the current offense. The appellate court also rejected the defendant's argument that he should not be considered a prohibited person because there was no connection between his drug use and the crimes to which he pled guilty. The appellate court noted that no such connection is required as the defendant's unlawful use of a controlled substance need not be simultaneous with the actual sale of the firearm as long as it occurs "during the time period charged as part of the indictment." *See United States v. Bernardine*, 73 F.3d 1078, 1082 (11th Cir. 1996). Here, the defendant's long history of drug use encompassed the period of time in which the indictment alleged he conspired to sell the firearms.

United States v. Shepardson, 196 F.3d 306 (2d Cir. 1999), *cert. denied*, 528 U.S. 1196 (2000). The district court properly interpreted "prohibited person" as used in USSG §2K2.1(a)(4)(B) to include someone charged by a state felony information. The plain language of Application Note 6 of USSG §2K2.1 provides that a "prohibited person" includes someone who "is under *indictment* for . . . a crime punishable by imprisonment for more than one year." USSG §2K2.1, comment. (n.6) (emphasis added). The Second Circuit rejected the plain language analysis, however, in favor of an

examination of the statutory framework behind USSG §2K2.1. Section 2K2.1 applies to convictions of 18 U.S.C. § 922. 18 U.S.C. § 921(a)(14) states that the term "indictment," as used in section 922, "includes an indictment or *information* in any court under which the crime punishable by imprisonment for a term exceeding one year may be prosecuted." Accordingly, the court applied the same definition to Application Note 6.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States[12]

Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001). The district court erred by ordering an alien to be deported under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act of 1952, (INA) as an alien convicted of an aggravated felony based on his New York state conviction for operating a vehicle while intoxicated. The petitioner appealed on the basis that a felony DWI conviction is not a crime of violence that is required to fulfill the definition of aggravated felony under 18 U.S.C. § 16(b)(2000). Under the INA, "any alien who is convicted of an aggravated felony at any time after admission is deportable." The Second Circuit found that a felony DWI conviction does not amount to a crime of violence under 18 U.S.C. § 16(b) for purposes of defining an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). The court used a categorical approach to determine that under section 16(b), crime of violence is to be analyzed by the nature of the crime. The law that the defendant had violated, New York Vehicle and Traffic Law section 1192.3, in its entirety, states that "no person shall operate a motor vehicle while in an intoxicated condition." The court concluded that not all violations of NYVTL 1192.3 are crimes of violence because risk of physical force is not a requisite element of the statute. The Second Circuit cited *United States v. Rutherford*, 54 F.3d 370 (7th Cir.), *cert. denied*, 516 U.S. 914 (1995), to show that while "drunk driving involved a serious potential risk of physical injury," it did not involve "use of physical force." The court held that risk of physical injury did not justify the drastic measure involved in the deportation of an alien. The court vacated the deportation order and remanded the case for resentencing.

United States v. Fernandez-Antonia, 278 F.3d 150 (2d Cir. 2002). The district court did not err in enhancing the defendant's offense level after a calculation that his prior conviction constituted a violent felony under USSG §2L1.2. The defendant claimed that the New York statute that defines attempt is overly broad, however the Second Circuit disagreed. The Court noted that attempts are generally included in the definition of aggravated felony under the commentary to USSG §2L1.2. The defendant attempted to argue that there was a significant difference between the federal requirement of a "substantial step" to constitute an attempt and the New York requirement of "dangerous proximity." *Id*. at 162. However, the court stated that any differences in the language is "more semantic than real" *Id*. at 163. Therefore, the court held that because a conviction of attempting to commit an aggravated

[12]Effective November 1, 2003, the Commission revised §2L1.2 to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions and to clarify the meaning of some of the terms used in §2L1.2(b)(1). *See* USSG App. C, Amendment 658.

felony constitutes enough to trigger the increase under USSG §2L1.2 and there is no significant difference between the federal definition of attempt and the New York definition of attempt, the district court did not err in concluding that the 16-level increase was appropriate.

United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997). The district court did not err in enhancing the defendant's sentence on the basis that he had been convicted of an aggravated felony prior to his deportation pursuant to USSG §2L1.2(b)(2). The Second Circuit held that the defendant's 1991 conviction for attempted robbery met the guidelines' definition of a conviction for an aggravated felony. Section 2L1.2, Application Note 7, defines aggravated felony as any crime of violence for which the term of imprisonment imposed is as least five years; or any attempt . . . to commit any such act[,] . . . whether in violation of state or federal law." The appellate court noted that a crime of violence is clearly defined as an offense which has as an element of use, attempted use, or threatened use of physical force against a person or property of another. Additionally, the appellate court affirmed the district court's indeterminate sentence, which imposed a maximum of five years, holding that the defendant's sentence constituted a "sentence of at least five years" as required by the guidelines.

United States v. Luna-Reynoso, 258 F.3d 111 (2d Cir. 2001). The district court did not err in applying an enhancement under section 1326(b) and USSG §2L1.2(b)(1)(A) for an illegally reentering alien who had been deported after conviction of an aggravated felony. The defendant argued that his predeportation offense of burglary was not within the definition of aggravated felony at the time of the conviction. Burglary was not included in the definition of aggravated felony until 1996, nine years after the defendant was convicted of that charge. The defendant relied on *United States v. Westcott*, 159 F.3d 107 (2d Cir. 1998), *cert. denied*, 525 U.S. 1084 (1999), to argue that the new definition of aggravated felony cannot encompass newly included crimes for which the defendant had been convicted prior to the expansion of the definition. The court stated that this argument was unsupported by *Westcott*, where the court held that the defendant's prior offense, first-degree robbery, was not an aggravated felony within the meaning of section 1326(b)(2), but it was an aggravated felony under USSG §2L1.2(b)(2). *See id*. The Second Circuit agreed with the district court's declaration that when Congress added burglary to the definition of aggravated felony, the new definition was to be used immediately, regardless of when the newly included offenses had been committed. The court stated that the district court correctly applied USSG §2L1.2(b)(1)(A) to the defendant, recognizing his 1987 burglary conviction as a conviction for an aggravated felony as required by 8 U.S.C. § 1101(a)(43)(G).

See United States v. Mercedes, 287 F.3d 47 (2d Cir.), *cert. denied*, 537 U.S. 900 (2002), Federal Rules of Criminal Procedure 11, 32, Post-*Apprendi*, pp. 86.

United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001). In a splintered opinion, the Second Circuit held that a defendant convicted of illegal reentry following deportation must receive a 16-level increase, pursuant to USSG §2L1.2(b)(1)(A), for reentry after commission of an "aggravated felony," even though the defendant was convicted of a misdemeanor. The Immigration and Nationality Act ("INA") defines "aggravated felony" as certain enumerated crimes

"for which the term of imprisonment [sic] at least one year." 8 U.S.C. § 1101(a)(43)(F) & (G). The defendant was convicted of three misdemeanors and sentenced to a suspended term of imprisonment of one year for each misdemeanor in Rhode Island state court. The INA states that a "term of imprisonment" includes "the period of incarceration or confinement ordered by the court of law regardless of any suspension of the imposition or execution of the imprisonment or sentence in whole or in part." The court reasoned that the INA language indicates that the "actual term imposed is ordinarily the definitional touchstone." *Id.* at 154. In dissent, Judge Straub reasoned that there is no indication that Congress intended to depart from the plain meaning of the term "aggravated felony," yet the statute conflicts with that plain meaning. Accordingly, he finds the INA ambiguous on its face and states that the rule of lenity requires that the definition exclude misdemeanor offenses. *Id*. at 156-61.

United States v. Simpson, 319 F.3d 81 (2d Cir. 2002). The defendant pled guilty to illegal reentry by an aggravated felon. The defendant appealed his sentence, contending that the district court erred in imposing an eight-level sentence enhancement under §2L1.2(b)(1)(C)), instead of a four-level enhancement under §2L1.2(b)(1)(E). The appellate court affirmed the sentence imposed by the district court based on the express language of USSG §2L1.2(b) and its understanding of the meaning of the term "aggravated felony" as used in that guideline. It explained that a drug trafficking offense is an "aggravated felony" when it is: (1) an offense punishable under the Controlled Substances Act, and (2) can be classified as a felony under either state or federal law. *See United States v. Pornes-Garcia*, 171 F.3d 142, 145 (2d Cir. 1999); *United States v. Polanco*, 29 F.3d 35, 38 (2d Cir. 1994). The court noted that the defendant's convictions were all for misdemeanors under New York law. However, the crimes for which the defendant was charged under New York law were also punishable under federal law. Thus, the court concluded that the district court properly held that each of the defendant's three prior convictions for Criminal Sale of Marijuana in the Fourth Degree under New York law were "aggravated felonies" for purposes of sentencing under the guidelines because, under the Controlled Substance Act, all three are punishable as felonies. Having found that the defendant's misdemeanor convictions under New York law were "aggravated felonies" for purposes of the guidelines, the district court correctly followed the directions of the guidelines and applied the greater of the two arguably applicable sentence enhancement levels, with the result that the defendant received the eight-level enhancement prescribed by USSG §2L1.2(b)(1)(c)).

United States v. Ubaldo-Hernandez, 271 F.3d 78 (2d Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002). The district court did not violate *Apprendi* or the defendant's rights under the *Ex Post Facto* Clause by enhancing his sentence based on his pre-deportation conviction for an aggravated felony, though it was not classified as such when that conviction was entered. The court held that such an argument lacks merit for the reasons stated in *United States v. Luna-Reynoso*, 258 F.3d 111, 115-116 (2d Cir. 2001). In addition, the Supreme Court had previously held that such a conviction does not need to be alleged in an indictment or proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This court had also decided previously that *Apprendi* does not overrule *Almendarez-Torres*. *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir.) (*per curiam*), *cert. denied*, 532 U.S. 1045 (2001). The court did note that the defendant is asserting this issue on appeal to preserve it for review.

Part Q Offenses Involving the Environment

§2Q1.4 Tampering or Attempted Tampering with a Public Water System[13]

§2Q2.1 Offenses Involving Fish, Wildlife, and Plants

United States v. Koczuk, 252 F.3d 91 (2d Cir. 2001). The district court improperly departed downward in a case involving defendants who smuggled over $11 million of caviar (*i.e.*, sturgeon roe) without obtaining a permit from Russia. The Second Circuit rejected two of the district court's reasons for departure. First, the district court found that a 15-level enhancement based on the retail value of the smuggled goods overstated the seriousness of the offense because the defendants' conduct did not result in any discernable economic "loss." The appellate court explained that although USSG §2Q2.1(b)(3)(A) instructs the sentencing court to increase the offense level by the corresponding number of levels from the loss table for the fraud guideline in section 2F1.1, section 2Q2.1(b)(3)(A) is only concerned with the *table* in section 2F1.1 and does not incorporate section 2F1.1's concept of "loss." Rather, section 2Q2.1(b)(3)(A) focuses on the fair market value of the caviar. *Koczuk* at 98.

The Second Circuit also rejected the district court's reason that the crime was outside the heartland of cases concerning offenses involving fish and wildlife. The district court noted that the case was unusual because (1) the importation of sturgeon roe is merely "regulated" and not "prohibited"; and (2) part of the reason for the sturgeon regulation was to assist the Russian economy. The appellate court found these reasons inadequate because the district court failed to "analyze the particular facts of appellants' case and compare them with those of other cases that typically fall within section 2Q2.1. Instead, it carved out a general exception to section 2Q2.1 for *all cases* involving the illegal importation of sturgeon roe . . . A sentencing court cannot depart downward because it finds that an entire class of offenses, defined by regulation and treaty, is outside the "heartland" of a guideline." *Koczuk* at 98.

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors

United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995). The district court did not err in departing downward one offense level from the guidelines sentence because of the impact that imprisonment of the defendant would have on his employees. The defendant was convicted of a Sherman Act violation (§2R1.1), and the district court departed down one level in order to be able to sentence the defendant to probation instead of prison. The government appealed the downward departure, contending that such departure is inconsistent with the deterrence rationale of USSG §2R1.1. The commentary to the antitrust guideline (§2R1.1) reflects the view that to deter potential violators, antitrust offenders should generally be sentenced to prison. The circuit court agreed with the government's position, but held that this case involved mitigating circum-stances not adequately taken

[13]Effective November 1, 2003, §2Q1.5 was deleted by consolidation with 2Q1.4 in response to a congressional directive in the Safe Drinking Water Act, 42 U.S.C. § 300i-1(a). *See* USSG App. C, Amendment 655.

into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b) (1988). The circuit court analogized this situation to departures for extraordinary family situations. *See United States v. Johnson*, 964 F.2d 124, 128 (2d Cir. 1992). "[B]usiness ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate," however, "departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees." The court noted that without the defendant, two companies would likely end up in bankruptcy, and 150-200 employees would lose their jobs. On this basis, the circuit court concluded that the district court's determination that this was an extraordinary case was not in clear error, and affirmed the sentence.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[14]

United States v. Finkelstein, 229 F.3d 90 (2d Cir. 2000). At sentencing, the court concluded that the defendant consciously avoided knowing that the money he laundered was the proceeds of drug activity. The appellate court found that, although proof did not establish that the defendant had actual knowledge of the source of the funds, the conscious avoidance doctrine was applicable at sentencing and defendant's guideline calculation properly included a three-level enhancement pursuant to USSG §2S1.1(b)(1) ("defendant knew or believed that the funds were proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances.").

United States v. Moloney, 287 F.3d 236 (2d Cir.), *cert. denied*, 537 U.S. 951 (2002). The district court did not err in calculating the defendant's sentence as if his money laundering promoted an unlawful activity. Under USSG §2S1.1, if the defendant is deemed to have laundered money in promotion of another unlawful activity, his base offense level is higher than if the money laundering is deemed to merely conceal his fraudulent activity. Both the district court and the Second Circuit agreed, however, that the scheme in this case used the purportedly legitimate but actually fraudulently obtained money to attract further investors or investments. This sort of scheme is appropriately sentenced as money laundering in promotion of another illegal activity.

United States v. Napoli, 179 F.3d 1 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2002). The district court did not err in its application of USSG §2S1.1. The defendant argued that his money laundering offenses should have been grouped with his fraud offenses based on the retroactive application of guidelines Amendment 634. However, the Second Circuit held that Amendment 634

[14]Effective November 1, 2003, the Commission, in response to a congressional directive in the USA PATRIOT Act of 2001, Pub. L. 107-56, amended §2S1.1 by eliminating the six-level enhancement for terrorism because such conduct was adequately accounted for by the terrorism adjustment at §3A1.4 (Terrorism). *See* USSG App. C, Amendment 655.

was a substantive change rather than merely a clarification and therefore it could not be applied retroactively.

United States v. Sabbeth, 277 F.3d 94 (2d Cir. 2002). The district court did not err in determining that Application Note 6 to USSG §2S1.1 is substantive and thus cannot be applied retroactively. Though the guidelines commentary did note that the amendment was resolving a circuit split (but did not characterize the amendment as "clarifying"), the court decided that the amendment is substantive in that it now calls for fraud and money laundering offenses to be grouped. *Id*. at 96; *see* USSG supplement to App. C, amend. 634, at 235. The court used a three-factor test from the Third Circuit: (1) the language of the amendment, (2) its purpose and effect, and (3) whether the guideline and commentary in effect at the time of sentencing is consistent with the amended sentencing manual. *United States v. Diaz*, 245 F.3d 294, 303 (3d Cir. 2001). The court found that because the amended USSG §2S1.1 redefines the calculations for the separate money laundering and underlying offense counts, the note does "far more than simply 'clarify'." 277 F.3d 94 at 97. Therefore, the court held "because the amendment regarding grouping of money laundering and its underlying offenses is a substantive change to the sentencing guidelines, it cannot apply retroactively to affect Sabbeth's sentence." *Id.* at 99.
See USSG §1B1.10.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

United States v. Bryant, 128 F.3d 74 (2d Cir. 1997). The defendant was convicted of 22 counts of assisting in the preparation of false federal income tax returns. On appeal, the defendant argued that the $600,000 loss attributed to him with respect to unaudited returns was speculative and unfair. The Second Circuit disagreed, holding that the amount of loss attributed to the defendant was reasonable. The court reasoned that the calculation of loss does not require certainty or precision. The court relied, in part, on the commentary to USSG §2T1.1 which states that "the amount of the tax loss may be uncertain," and it envisions that "indirect methods of proof [may be] used . . .". *Id*.at 76. According to Application Note 8 to USSG §2F1.1, estimates may be based upon the approximate number of victims and an estimate of the average loss to each victim. Therefore, it is permissible for the sentencing court to estimate the loss resulting from his offenses by extrapolating the average amount of loss from known data and applying that average to transactions where the exact amount of loss is unknown.

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The district court did err in not considering the unclaimed but valid deductions that the defendant could have made, but the error was harmless because the defendant could provide no proof that the potential deductions would have been treated as salary. The intent of the guideline calculations is to reflect the revenue lost by the federal government through fraud. Although the defendant claims that if it had been reported it would have been deductible, without proof the Second Circuit held that the error was harmless.

Part X Other Offenses

§2X3.1 Accessory After the Fact[15]

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Blount, 291 F.3d 201 (2d Cir. 2002), *cert. denied*, 537 U.S. 1141 (2003). The district court did not err in its analysis that defendant Blount was a manager or supervisor. The

[15]Effective November 1, 2003, the Commission amended §2X3.1 by raising the maximum offense level from 20 to 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense. *See* USSG App. C, Amendment 655.

Second Circuit held that the record, which showed that Blount was in charge of the day-to-day operations of the drug distribution conspiracy and also that he regularly supervised other members of the conspiracy to make certain that distribution was running smoothly, was sufficient for a finding that he played an aggravating role in the conspiracy. Thus, the Second Circuit held that any claim that the district court erred in finding that he had played an aggravating role was without merit.

United States v. Burgos, 324 F.3d 88 (2d Cir. 2003). The defendant pleaded guilty to one count of conspiracy to commit bank fraud. The defendant challenged a three-level upward adjustment to his base offense level premised on his role as manager or supervisor. The court of appeals held that the district court erred in concluding that the defendant was a "manager" or "supervisor" of the offense. It noted that a defendant may properly be considered a manager or supervisor if he 'exercised some degree of control over others involved in the commission of the offense . . . or played a significant role in the decision to recruit or to supervise lower-level participants.' *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002) (quoting *Ellerby v. United States*, 187 F.3d 257, 259 (2d Cir. 1998) (*per curiam*)), *cert. denied*, 123 S. Ct. 938 (2003). The court found that the two facts on which the district court premised the role adjustment did not support the adjustment. The court concluded that it can as easily be found that the defendant (as broker) was serving his co-conspirator as his co-conspirator (as thief) was serving the defendant. Moreover the court noted that a demand that a debtor pay up, or make an advance, does not support an inference that the debtor is a subordinate. If anything, the debtor's nonpayment to the defendant suggests independence.

United States v. Dennis, 271 F.3d 71 (2d Cir. 2001). The district court did not err in allowing the use of special interrogatories on drug quantity determination and on imposing an enhancement under USSG §3B1.1(b) without submitting to the jury because the resulting sentence did not exceed the statutory maximum. The court has already upheld the use of special interrogatories on drug quantities to be used in sentencing. *See United States v. Jacobo*, 934 F.2d 411, 416-417 (2d Cir. 1991); *United States v. Campuzano*, 905 F.2d 677, 678 (n.1) (2d Cir.), *cert. denied*, 498 U.S. 947 (1990). In addition, "his [Dennis'] sentence of 168 months was well below the sentence he could have received with no finding of drug quantity whatsoever." 271 F.3d 71 at 74. *See United States v. Breen*, 243 F.3d 591, 599 (2d Cir.), *cert. denied*, 534 U.S. 894 (2001). For this reason, the court also rejected the defendant's argument that his sentence was improperly enhanced under USSG §3B1.1. Thus, pursuant to prior decisions in the Second Circuit, the court found that *Apprendi* does not affect the district court's authority to determine facts for sentencing at or below the statutory maximum. 271 F.3d 71at 74. *See United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 533 U.S. 960 (2001).

United States v. Jimenez, 68 F.3d 49 (2d Cir. 1995), *cert. denied*, 517 U.S. 1148 (1996). The district court erred in failing to enhance the defendant's sentence based on his managerial role. The defendant was convicted of conspiracy to distribute narcotics and was sentenced to 262 months' imprisonment. On appeal, the government argued that the district court was obligated to enhance the defendant's sentence for his aggravating role because it had explicitly found that the defendant was a manager of the drug conspiracy. The circuit court ruled that the language of USSG §3B1.1 "is

mandatory once its factual predicates have been established." *Id*. at 51-52 (quoting *United States v. Friedman*, 998 F.2d 53, 58 (2d Cir. 1993) (obstruction of justice); *see also United States v. Dunnigan*, 507 U.S. 87 (1993) (enhancement for perjury). The circuit court noted that since the district court had explicitly determined that the defendant was a manager or supervisor of a drug organization, an enhancement was required. The circuit court remanded the case for the district court to determine whether the drug organization involved five or more participants.

United States v. Melendez, 41 F.3d 797 (2d Cir. 1994). The defendant was a postal employee who stole over $700,000 of public money from a restricted area where registered mail is placed. The appellate court affirmed the district court's decision to apply an upward adjustment under USSG §3B1.3 based on the defendant's abuse of a position of trust. However, the appellate court remanded for the district court to reconsider the four-level upward adjustment it applied under USSG §3B1.1(a) for "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive . . ." because the rationale the district court relied upon was not clear from the record. *Id*. at 799. The appellate court noted that an adjustment based on the number of participants would be improper because the requisite number of criminally culpable individuals was not present, but an adjustment could be considered under the "otherwise extensive" prong. The appellate court remanded to allow the district court to "supplement the record with the factual basis for its determination." *Id*. at 800.

United States v. Paccione, 202 F.3d 622 (2d Cir.), *cert. denied*, 530 U.S. 1221 (2000). The defendants were convicted of arson, conspiracy to commit arson, and mail fraud. The court concluded that in addition to the two defendants, three other individuals were knowingly involved in the crime. The court upheld the district court's finding that the defendants were organizers and leaders of criminal activity involving five or more participants. USSG §3B1.1(a). Specifically, the court held that "a defendant may be included as a participant when determining whether the criminal activity involved 'five or more participants' for purposes of a leadership role enhancement under USSG §3B1.1." *Id.* at 625. This decision is in accord with all other circuits' rulings on this issue. *See United States v. Hardwell*, 80 F.3d 1471, 1496 (10th Cir. 1996), *cert. denied*, 523 U.S. 1100 (1998); *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990); *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

§3B1.2 Mitigating Role

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995). The district court "misapprehended the proper circumstances" in which a reduction for a minor role in the offense is warranted. USSG §3B1.2. The government appealed the district court's two-level reduction for minor role in the offense. USSG §3B1.2. The district court stated that the defendant's conduct was minor in relation to the other defendants, and noted that the defendant was "a minor participant *vis-à-vis* the role of his co-conspirators." The circuit court held that "the Sentencing Commission intends for culpability to be gauged relative to the elements of the offense of conviction, not simply to co-perpetrators." *See United*

States v. Pena, 33 F.3d 2, 3 (2d Cir. 1994). The circuit court concluded that the fact that the defendant played a minor role in his offense "*vis-à-vis* the role of his co-conspirators is insufficient, in and of itself, to justify a two-level reduction," and stated that the defendant must have similarly played a minor role in comparison to the average participant in such a drug case.

United States v. Rivera, 2002 U.S. App. LEXIS 414 (2d Cir.), *cert. denied*, 535 U.S. 1071 (2002). The district court did not err in its refusal to grant the defendant a decrease under USSG §3B1.2(b) for being a minor participant in the criminal activity. The district court found that the defendant packaged the drugs to be distributed and was privy to detailed methods of the operation. Thus, the court held "given Rivera's responsibilities in the conspiracy and her proclaimed intimate knowledge of its operations and personnel, we see no clear error in the court's finding that Rivera did not play merely a minor role." *Id*. at **3.

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001), *cert. denied*, 537 U.S. 847 (2002). The district court did not err in refusing to grant the defendant a downward departure for playing a "minor" or "minimal" role in the offense for which he was convicted. The defendant argued that his level of culpability in the crime was less than that of his co-conspirators. The Second Circuit stated that under *United States v. Ajmal*, 67 F.3d 12, 18 (2d Cir. 1995), even if this contention were true, the defendant would have to show that his role was "minor" or "minimal" relative to both his co-conspirators in this crime and to participants in other arson conspiracies leading to death. At trial, it was revealed that the defendant not only agreed to the essential nature of the plan, but was one of the conspiracy's architects. Thus, the role defendant played in the crime did not meet the definitions of "minor" or "minimal" found in USSG §3B1.2. *See United States v. Yu*, 285 F.3d 192 (2d Cir. 2002) (holding that where a defendant's action was not minor compared to an average participant even if it was minor compared to his co-conspirators, he is not generally entitled to a minor role adjustment).

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

United States v. Barrett, 178 F.3d 643 (2d Cir. 1999). The district court did not err in finding that a vice-president of the sales department of a corporation abused his position of trust by submitting false invoices and check requests to embezzle $714,000. The defendant argued that he did not hold a fiduciary position with his employer because he was involved in sales rather than financial operations. The Second Circuit found that the defendant's position as vice president facilitated his crime because he was able to submit requests for checks without review and had access to records that enable him to create false invoices. His position provided freedom to commit a difficult-to-detect wrong. The Second Circuit also rejected the defendant's assertion that the adjustment was inapplicable because he held no position of trust with the bank. The defendant's relationship with his employer, which had a relationship with the bank, enabled the defendant to commit and conceal his crime.

United States v. Crisci, 273 F.3d 235 (2d Cir. 2001). The district court did not err in applying two-level enhancements under USSG §3B1.3 after the defendant was convicted of bank fraud (18 U.S.C. § 1344) and making false statements to federal law enforcement agents (18 U.S.C.

§1001). Despite the defendant's contention that he was not in a position of trust and he did not have the authority to cash the checks, the court had already held "the sentencing increase applied where defendant's position with his employer facilitated his ability to request fraudulent checks and the bank was a secondary victim of his fraud" and thus the application of the enhancement was proper. *See United States v. Barrett*, 178 F.3d 643, 645-47 (2d Cir. 1999).

United States v. Downing, 297 F.3d 52 (2d Cir. 2002). The defendants, a certified public accountant and a former employee of the same firm, were convicted of conspiracy to commit wire fraud and securities fraud. The appellate court held that the district court properly increased the defendants' base offense level by two pursuant to §3B1.3. The defendants argued that §3B1.3 should not apply to them because the conspiracy never progressed to a stage at which they used their accounting skills in a manner that significantly facilitated the commission or concealment of the offense. Despite the absence of binding precedent in the case law, the court concluded, on the basis of general principles set forth in the guidelines and the approach to similar cases taken by other circuits, that §3B1.3, like most specific offense characteristics, applies to inchoate crimes if the district court determines "with reasonable certainty" that a defendant "specifically intended" to use a special skill or position of trust in a manner that would have significantly facilitated the commission or concealment of the object of the conspiracy.

United States v. Lavin, 27 F.3d 40 (2d Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court did not err in enhancing the defendant's offense level for use of a special skill pursuant to USSG §3B1.3. The defendant installed electronic equipment in automatic teller machines which he used to obtain account and personal identification numbers to be used on counterfeit credit cards. He argued that Application Note 2, which provides that a "`[s]pecial skill' is one not possessed by members of the general public and [which] usually require[s] substantial education, training or licensing," establishes that the enhancement only applies to those who possess special skills as a result of educational or professional training. The circuit court rejected this argument based on its decision in *United States v. Spencer*, 4 F.3d 115, 120 (2d Cir. 1993) ("the word `usually' in the application note indicates that the enhancement is not reserved solely for professionals") because the defendant possessed and used electronic skills not generally possessed by the public to significantly facilitate his criminal conduct.

United States v. Ntshona, 156 F.3d 318 (2d Cir. 1998). The district court did not err in enhancing the defendant's physician's sentence for abuse of a position of trust based on her signing false certificates of medical necessity for Medicare reimbursement. The defendant argued that an abuse of trust is the essence of the crime of Medicare fraud and therefore already accounted for in the base offense level. The court of appeals explained, however, that the abuse of trust need not be entirely unrelated to the commission of the offense. The court adopted the view of other circuits to hold that a doctor convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under USSG §3B1.3. *See United States v. Rutgard*, 116 F.3d 1270, 1293 (9th Cir. 1997); *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995).

§3B1.5 Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence[16]

[16]Effective November 1, 2003, the Commission, in response to a directive in the 21st Century Department of Justice Appropriations Act, Pub. L. 107-273, created a new Chapter Three adjustment at §3B1.5 to provide an enhancement for any crime of violence or drug trafficking crime in which the defendant used body armor. *See* USSG App. C, Amendment 659.

Part C Obstruction

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

United States v. Blount, 291 F.3d 201 (2d Cir. 2002), *cert. denied*, 537 U.S. 1141 (2003). The district court did not err in its finding that the defendant attempted obstruction of justice within the meaning of USSG §3C1.1 when he gave perjurious testimony. The defendant argued that although he was a drug dealer he had only distributed marijuana, however, he also testified that he did in fact distribute cocaine. The defendant argued that there were discrepancies as to whether he testified that he had never distributed cocaine or just that he had never distributed it in certain contexts. However, the Second Circuit held that his claim was without merit based on the trial court transcripts. Therefore the Second Circuit held that the obstruction enhancement was proper.

United States v. Carty, 264 F.3d 191 (2d Cir. 2001). The district court did not err in imposing an obstruction of justice enhancement after the defendant willfully fled to the Dominican Republic and stayed there to avoid sentencing. The defendant claimed that the guideline did not apply because the court did not make a requisite finding that he had the "specific intent to obstruct justice." The Second Circuit held that the defendant's willful avoidance of a judicial proceeding was inherently obstructive of justice and worthy of a two-level enhancement under USSG §3C1.1. The court held that because the defendant's actions were made in order to avoid sentencing, he acted with specific intent to obstruct justice, making it unnecessary for the court to use the precise words "intent to obstruct justice."

United States v. Cassiliano, 137 F.3d 742 (2d Cir. 1998). The defendant was convicted of one count of wire fraud. On appeal, the defendant challenged the obstruction of justice enhancement to her sentence. The district court granted the adjustment because her conduct was obstructive because she alerted another individual that he was a target of an investigation. The Second Circuit affirmed the district court's enhancement, holding that the defendant's obstructive conduct was willful. Under USSG §3C1.1, a defendant is to have her offense level increased by two levels if she "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense." The defendant alerted one of the principal targets of the government's investigations shortly after agreeing to cooperate with the investigation. The court noted that the defendant's own statements acknowledged that she was unhappy with the government's prospective investigation of her friend and that she was fully cognizant of the fact that her tips would prevent the further collection of evidence.

United States v. Crisci, 273 F.3d 235 (2d Cir. 2001). The district court did not err in applying a two-level enhancement under USSG §3C1.1 after the defendant was convicted of bank fraud (18 U.S.C. §1344) and making false statements to federal law enforcement agents (18 U.S.C. §1001). The district court properly held that there does not need to be a specific finding regarding intent to obstruct justice and that the jury could rely on the false statements conviction. In looking at the application notes to the guideline, the court noted "where there is a separate count of conviction for

such conduct," the adjustment may apply to conduct relating to the official investigation of the instant offense. *Id*. at 240.

United States v. Feliz, 286 F.3d 118 (2d Cir. 2002). The district court did not err in holding that a wilful attempt by the defendant to support a false alibi by having people lie to the police constitutes wilful obstruction of justice for the purpose of USSG §3C1.1. The defendant argued that wilful obstruction of justice only includes "unlawful attempts to influence witnesses once formal proceedings have been initiated." *Feliz*, 286 F.3d at 119. The Second Circuit noted however that USSG §3C1.1 specifically includes obstruction during investigation, prosecution, or sentencing. Citing a recent decision in *United States v. White*, 240 F.3d 127 (2d Cir. 2001), *cert. denied*, 124 S. Ct. 157 (2003), the court held that obstruction of justice may occur both pre- and post-arrest. *Feliz*, 286 F.3d at 121. Furthermore, although the defendant argued that the prosecution failed to establish a requisite intent to commit obstruction of justice, the Second Circuit held that this was not true. In fact, the court held that the requirement of proving requisite intent is satisfied merely by showing that there is no dispute as to the underlying facts. *Id*.

United States v. Vegas, 27 F.3d 773 (2d Cir.), *cert. denied*, 513 U.S. 911 (1994). Contrary to the government's argument, *United States v. Dunnigan*, 507 U.S. 87 (1993), and *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993), *cert. denied*, 535 U.S. 932 (2002), do not stand for the assertion that every time a defendant is found guilty, despite his testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, these decisions hold that when the court wishes to impose the enhancement over the defendant's objection, the court must consider the evidence and make findings to establish a willful impediment or obstruction of justice. In this case the district court determined that the evidence of perjury was not sufficiently clear to determine whether the perjury had or had not been committed, therefore an additional penalty for obstruction of justice was not required.

United States v. Ventura, 146 F.3d 91 (2d Cir.), *cert. denied*, 525 U.S. 919 (1998). The district court properly departed upward based on the defendant's conduct of submitting false birth documents. The documents which purported to have been issued by the government of Honduras, would have established that the defendant was a juvenile at the time he committed certain obstructive conduct, thereby making him a candidate for more lenient sentencing treatment. The court of appeals held that, even though submitting the false birth documents expressly falls under the obstruction guideline, the two-level obstruction increase was inadequate to account for all of the defendant's obstructive behavior. The departure was proper to the extent that the defendant's atypical obstructive conduct took his case outside the heartland of the obstruction guideline.

Part D Multiple Counts

§3D1.1 Procedure for Determining Offense Level on Multiple Counts

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2. p. 36.

§3D1.2 Groups of Closely Related Counts[17]

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The district court erred by grouping the defendant's offenses under USSG §3D1.2(c) rather than under USSG §3D1.2(d). The government claimed that there was error in the grouping of the defendant's mail fraud and tax evasion counts. Essentially the government claimed that the grouping should have been under USSG §3D1.2(c)–which groups offenses that are "closely related"–rather than under USSG §3D1.2(d)–under which crimes are grouped that are of the "same general type." The Second Circuit held that grouping of offenses is not optional, but rather is required by the guidelines. The Second Circuit also noted that USSG §3D1.2(d) was the appropriate guideline for fraud and tax evasion cases. Furthermore, if there is a choice to be made between guidelines, crimes that fall within a quantifiable harm fall under USSG §3D1.2(d). Finally, the Second Circuit held that this error was a substantial harm to society because the defendant received a much more lenient sentence than he otherwise would have. Therefore, the sentence was vacated and the case remanded.

United States v. McCarthy, 271 F.3d 387 (2d Cir. 2001). The district court properly decided not to group the defendant's convictions of embezzlement and money laundering because there were "separate victims and separate offenses." This court has previously held that victims of fraud are those who lost money or property as a result, while the victim of money laundering is society at large. *Id*. at 400. *See United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000). Finding that the offenses involved different harms to different victims, the counts cannot be grouped under USSG §3D1.2(6). In addition, the court refused to find that the offenses were "so highly interwoven" so as to allow grouping, thereby following the previous finding that the victims and offenses are different. *Id.* at 401.

United States v. Napoli, 179 F.3d 1 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000).[18] The district court did not err in refusing to group the defendant's fraud and money laundering counts. The offense involved a scheme to defraud foreign buyers to make large deposits in exchange for large quantities of cigarettes, which were never delivered. At the direction of the defendant, codefendants dispersed the proceeds in casinos, gambling, and various accounts. The defendant used some of the funds to finance a gourmet market and for his daily living expenses. At sentencing, the district court refused to group the fraud and money laundering counts stating that the counts were "unrelated." The counts cannot be grouped under USSG §3D1.2(b) because they do not involve the same victim. The victim of a fraud is the person who lost the money or property as a direct result of the fraud. The victim

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

[18]Effective November 1, 2001, §2S1.1 was amended. Where a defendant is sentenced on a count of money laundering and a count of conviction for the underlying offense that generated the laundered funds, the counts will group under §3D1.2.

of a money laundering offense is ordinarily society at large. This is not a case where the money laundering was so interwoven in the fraud scheme that the fraud victim is also the direct victim of the money laundering. The counts cannot be grouped under §3D1.2(d) because the offenses are not of the "same general type." Even though the guidelines covering money laundering and fraud both measure the gravity of the offense based in part on the amount of money involved, "only the offense level for fraud is based 'primarily' on these quantities." *Id* at 10. Grouping fraud and money laundering counts can also produce an anomalous result in those cases in which only a small portion of the fraud funds are laundered. In this case, the defendant would receive a higher offense level if his counts were grouped than if they were not. Accord *United States v. Kalust*, 249 F.3d 106 (2d Cir.), *cert. denied*, 534 U.S. 894 (2001) (holding that money laundering counts and the substantive counts do not group).

United States v. Sabbeth, 262 F.3d 207 (2d Cir. 2001).[19] The district court did not err in refusing to "group" the defendant's money laundering offenses and bankruptcy fraud under USSG §3D1.2(b). The defendant was designated within Criminal History Category I; his offense level for the money laundering was 28; his offense level for the bankruptcy count was 24. The money laundering and fraud counts were not grouped, therefore, the district court counted the offense level of 28 as applicable to the money laundering count and added two enhanced levels for the bankruptcy fraud pursuant to USSG §3D1.4. The defendant's total offense level was then increased from 28 to 30 and his sentencing range was raised. Sabbeth argued that his case, like that of *United States v. Napoli*, 179 F.3d 1(2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000), involved the type of "highly interwoven" fraud and money laundering the court stated could be grouped if they are so "highly interwoven . . . that the victim" of each is the same. *See* 179 F.3d at 8 (n.3). The Second Circuit rejected this argument, stating that in *Napoli* the court held that fraud and money laundering should not be grouped together under USSG §3D1.2(b) because the rule permits different counts to be grouped together only where they "involve the same victim and two or more acts and transactions connected by a common criminal objective or constituting part of a common scheme or plan." Here, Sabbeth's offenses caused different harms to different victims, society at large and the banks he deceived, therefore, the rule did not apply.

§3D1.3 Offense Level Applicable to Each Group of Closely Related Counts

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2, p. 36.

§3D1.4 Determining the Combined Offense Level

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2, p. 36.

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[19] *Id.*

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[20]

United States v. Austin, 17 F.3d 27 (2d Cir. 1994). The defendant challenged the district court's refusal to grant a reduction for acceptance of responsibility. The circuit court remanded for resentencing, and held that the district court had no basis to deny the defendant a reduction for acceptance of responsibility when the defendant refused to provide information that was outside the "fruits and instrumentalities " of the offense of conviction. The court held that the refusal to accept responsibility for conduct beyond the offense of conviction may only be used to deny a reduction under USSG §3E1.1 when the defendant is under no risk of subsequent criminal prosecution for that conduct. However, a defendant's voluntary assistance in recovering "fruits and instrumentalities" outside the offense of conviction may be considered as a factor for granting acceptance of responsibility. *See United States v. Oliveras*, 905 F.2d 623, 628-30 (2d Cir. 1990).

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002). The district court did not err in finding that the defendant's post-plea conduct was inconsistent with a finding of acceptance of responsibility. Although the district court agreed that the defendant pled guilty in a timely fashion, his conduct after that plea, including his presence at the Department of Motor Vehicles (the scene of his crimes) and his association with people "from his criminal past" while there were indicative that he continued to engage in criminal behaviors. *Guzman*, 282 F.3d at 184-185. The Second Circuit held that it will only overturn a district court decision with regard to acceptance of responsibility if the factual determination is without foundation; it would not overturn the district court's decision here.

United States v. McLean, 287 F.3d 127 (2d Cir. 2002). The district court did not err in finding that the defendant failed to accept responsibility. The district court has discretion to decide whether a defendant has accepted responsibility and if the decision has some foundation, the findings will not be disturbed.

United States v. Ortiz, 218 F.3d 107 (2d Cir. 2000). The court concluded that the district court's denial of USSG §3E1.1 adjustment based on defendant's continued and repeated use of marijuana while on pretrial release, after plea, and after being specifically admonished to discontinue use, was not an abuse of discretion.

United States v. Rood, 281 F.3d 353 (2d Cir. 2002). The district court erred in applying its discretion in deciding not to award the defendant the three-level decrease available for acceptance of responsibility based on USSG §3E1.1(b). The district court granted the defendant the two-level decrease for acceptance of responsibility based on USSG §3E1.1(a) but refused to grant him the

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[20]Effective April 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one-level reduction and incorporating language requiring a government motion. *See* USSG, App. C, Amendment 649.

three-level decrease basing its decision on "conduct other than the factors and criteria listed in" the subsection. *Rood*, 281 F.3d at 356. The Second Circuit held that because USSG §3E1.1(b) delineates specific factors that the defendant must meet in order to qualify for the reduction, if the defendant meets those factors, the sentencing court does not have discretion not to award the reduction. Although in this case the government argued against awarding a reduction for acceptance of responsibility the government conceded that if it was awarded, the defendant did meet the requirements of USSG §3E1.1(b). Thus, based on the district court's own findings, the defendant should have been awarded the three-level decrease.

United States v. Yu, 285 F.3d 192 (2d Cir. 2002). The district court did not err in refusing to grant the defendant an extra point reduction for acceptance of responsibility where the belated plea was not sufficiently timely so as to conserve government resources.

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The district court did not err when it refused to grant the defendant a two-level adjustment for acceptance of responsibility. The court followed the PSR's recommendation against a reduction for acceptance of responsibility because the defendant's statements reflected a lack of recognition that he had committed the crime. The PSR revealed that the defendant stated that the crime had nothing to do with him, that he was paid to do the job and therefore supposed to take the blame for the crime, that he was only a "middle person," and that he did not understand how the jury could have convicted him. The court ruled that these grounds were sufficient to deny the adjustment.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Aska, 314 F.3d 75 (2d Cir. 2002). In a case of first impression, the court concluded that although it is double counting to increase a defendant's criminal history points because he was under a sentence when he failed to surrender to serve that sentence, it is not impermissible double counting because the language of the guidelines and the Sentencing Commission's actions make clear that the Sentencing Commission intended the provision to apply in this case. The defendant was convicted of passport fraud. The court ordered him to surrender to serve his sentence, but he failed to do so. The defendant was subsequently arrested and indicted for the crime of failing to report for sentence. The defendant argued that the district court engaged in impermissible double counting by adding two criminal history points under §4A1.1(d) on the ground that his crime of failing to surrender was committed while under a criminal justice sentence, the precise conduct underlying his base offense level. The appellate court noted that although the Second Circuit has never addressed the application of §4A1.1(d) to a failure to surrender case, four other circuits have found that the provision applies to a failure to surrender. In addition it noted that every circuit to consider the question has found the §4A1.1(d) enhancement to be applicable in the analogous situation of a defendant being sentenced for

escaping from imprisonment. Here, the Sentencing Commission's intention that the enhancement should apply is demonstrated by: (1) the unmistakable language of the guidelines, which makes no exception for failure-to-report cases under § 4A1.1(d); (2) the Sentencing Commission's statement in its response to FAQs that § 4A1.1(d) applies to escape cases; and (3) the guidelines' explanation in §4A1.2(n) and the §4A1.1(d) commentary that failure to report for sentence is to be treated as an escape from that sentence. Accordingly, the appellate court affirmed the sentence imposed by the district court.

United States v. Driskell, 277 F.3d 150 (2d Cir.), *cert. denied*, 537 U.S. 855 (2002). The district court did not err when, in calculating the defendant's criminal history under USSG §4A1.1, it included a prior conviction under the "youthful offender" provisions of New York state law. The court recognized that the language of USSG §4A1.1 limits consideration of convictions committed before age 18 to only those that resulted in an adult conviction, but also looks to the language of USSG §4A1.2(d) as allowing for the consideration of certain additional offenses committed prior to age 18. This court has previously held that a youthful offender adjudication, received by the defendant who was under age 18 at the time of that offense, does not result in an expungement for purposes of sentencing under the guidelines and may therefore be considered in calculating the defendant's criminal history. *Id*. at 154. *See United States v. Matthews*, 205 F.3d 544, 548-549 (2d Cir. 2000). In determining whether he was convicted as an adult, the court held that issues such as the nature of the prior proceeding, the nature of the prior conviction, the sentence received, and the time actually served should all be considered. 277 F.3d 150 at 157. *See United States v. Pinion*, 4 F.3d 941, 944 (11th Cir. 1993). Thus, because the defendant's prior offense was attempted murder in the second degree, he was convicted in adult court and was not qualified as a "youthful offender" until sentencing. Because the sentence exceeded one year and one month, the prior adjudication qualified as an "adult conviction" under USSG §4A1.1 for sentencing purposes. The defendant also challenged the meaning of "convicted" under USSG §4A1 .2(d), which the court held to mean that "the defendant either has been found guilty of or has pled guilty to an offense and not whether the court has entered a final judgment after a finding of guilt." 277 F.3d 150 at 157. *See* USSG §4A1.2.

United States v. Lopez, 349 F.3d 39 (2d Cir. 2003). The district court did not err when it counted a conviction as a "prior sentence," even though the conduct underlying the 2001 Texas conviction had occurred after the conduct underlying the 1994 New York conviction. In 1994, defendant was arrested for selling drugs to an undercover agent, fled the United States and was arrested in 2001 while attempting to smuggle drugs into the United States. When sentencing for the 1994 offense, the district court counted the 2001 offense as a prior sentence under the meaning of USSG §4A1.1(a). The defendant appealed, arguing the 2001 offense came after the 1994 offense and could not be counted as a prior sentence. The court rejected the argument, stating the term "prior sentence" is "not directed at the chronology of the conduct, but the chronology of the sentencing." *United States v. Espinal*, 981 F.2d 664, 668 (2d Cir. 1992). Section 4A1.1 "makes no exception for a prior sentence imposed for a crime that took place after the crime currently before the sentencing judge." *United States v. Flowers*, 995 F.2d 315, 317 (1st Cir. 1993). Defendant was sentenced for the 2001 offense eight months before being sentencing for the 1994 offense.

United States v. Martinez-Santos, 184 F.3d 196 (2d Cir. 1999). To determine whether a prior minor offense is "similar" to an excludable offense listed under USSG §4A1.2(c), a court should use the "multi-factor approach" rather than the "elements" approach. The defendant argued that three of his convictions, including subway fare beating and scalping bus transfer tickets, should not be included in his criminal history score because they were "similar" to the minor offenses listed under USSG §4A1.2(c). The district court stated that the fare beating and transfer scalping offenses "hurt society generally and hence are not victimless crimes." *Id*. at 198. Under USSG §4A1.2(c), certain listed offenses and "offenses similar to them" are excluded from the calculation of criminal history score. The Circuits have varying ways of determining whether a certain offense is "similar" to an offense listed in USSG §4A1.2(c). The Fifth Circuit takes a "multi-factor approach," *see United States v. Hardeman*, 933 F.2d 278, 281 (5th Cir. 1999) ("common sense approach . . . all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." The First, Third, and Fourth Circuits use a more limited approach and determine the similarity between the offenses based on "the degree of commonality between the 'elements' or 'substance' of the conduct underlying the listed offenses and the conduct underlying potentially 'similar offenses." *Martinez*, 184 F.3d at 200. After reviewing the various arguments in support of the various interpretations of "similar," the Second Circuit adopted the multi-factor approach and directed district courts to use the factors in *Hardeman* "as well as any other factor the court reasonably finds relevant in comparing prior offenses and listed offenses." *Martinez*, 184 F.3d at 206.

United States v. Matthews, 205 F.3d 544 (2d Cir. 2000). The court held that a defendant's prior New York State youthful offender adjudication for possession of a weapon was not "expunged" within the meaning of USSG §4A1.2(j) and thus, the district court properly included it in its calculation of criminal history. Application Note 10 to USSG §4A1.2 provides that prior convictions that have not been "expunged" but instead "set aside . . . for reasons unrelated to innocence or errors of law, *e.g.*, . . . to remove the stigma associated with a criminal conviction" should be counted when determining a defendant's criminal history category. *Id.* at 546. The court determined that the New York Youthful Offender statute merely removes the stigma associated with a criminal conviction and does not expunge the conviction because it requires that all records and papers relating to a case involving a youthful offender adjudication be kept confidential, but those documents are still made available to the New York State division of parole and probation department for use in carrying out their duties. *Id.* (citing N.Y. Crim. Proc. Law § 720.35.2 (McKinney Supp. 1999)). The court determined that the New York legislature knew how to provide for a complete expungement (because it had done so in other statutes), but deliberately chose not to do so here. *Id.* at 547. The court also distinguished the New York youthful offender statute to a Vermont juvenile statute which provides that the proceedings "shall be considered never to have occurred, all index references thereto shall be deleted, and the person, the

court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry. *Id.* at 546.

United States v. Morales, 239 F.3d 113 (2d Cir. 2000). The issue on appeal was whether a second-degree harassment conviction under N.Y. Pen. L. § 240.26 is similar to the offenses listed in USSG §4A1.2(c)(1) so as not to be counted in the criminal history calculation. The appellate court held that, when applying the multi-factor test to determine whether a conviction is similar to the listed offenses, *see United States v. Martinez-Santos*, 184 F.3d 196 (2d Cir. 1999) (adopting multi-factor approach), for a statute such as the harassment, that applies to a broad range of conduct, the sentencing court must make a fact specific inquiry into the underlying conduct of the conviction when applying the "similar to" test. The appellate court examined the facts of the case and concluded that Morales' harassment second conviction should not count. The court reasoned that the complainant in the underlying offense (defendant's girlfriend) had actually started the argument and Morales had hit her in response to her throwing household objects at him. *Morales*, 239 F.3d at 118-19. Applying other factors of the multi-factor test, the court found that New York defines harassment as a disorderly persons offense, not an assault. Significantly, the maximum punishment that may be imposed is 15 days and Morales actually received a conditional discharge. The court noted that the level of culpability is not necessarily greater for harassment than for some of the listed offenses, like resisting arrest, which can include violent conduct. *Id.* at 119. Finally, the court found significant the district court's conclusion that Morales' harassment conviction did not indicate a likelihood of recidivism as it was an isolated instance that occurred three years prior to the instant offense. *Id.* at 120.

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

United States v. Harris, 13 F.3d 555 (2d Cir. 1994). The district court did not err in departing upward from Criminal History Category VI (sentencing range of 9-15 months) to impose a sentence of 54 months based on the inadequacy of the defendant's criminal history score. USSG §4A1.3. The record indicated that the defendant had a criminal history score of 27, had 15 prior convictions that were not counted in his criminal history score because they were too old, and cashed stolen money orders less than 7 months after his release from an 8-year sentence for robbery. In a case of first impression, the circuit court addressed the 1992 amendments to USSG §4A1.3. The amendments provide that sentencing courts "should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." *Id.* at 558. The circuit court held that the guideline "merely suggest[s] an approach, rather than mandating a step-by-step analysis." "The 12-level departure was `reasonable.'"

United States v. Miller, 263 F.3d 1 (2d Cir. 2001). The district court did not err in using a defendant's prior arrest record to refuse to depart downward under USSG §4A1.3. The Second Circuit stated that while USSG §4A1.3 states that "a prior arrest record itself shall not be considered," conduct underlying such arrests may be considered in order to make an upward departure.

United States v. Mishoe, 241 F.3d 214 (2d Cir. 2001). The district court may not depart from career offender guidelines, under USSG §5K2.0, based solely on the fact that one of defendant's priors involved only a "street level" sale of narcotics. *Id.* at 219. However, if the court concludes that the defendant's overall criminal history category overstates the seriousness of his/her criminal history, it may depart under USSG §4A1.3. Factors to consider include: the quantity of drugs involved in defendant's prior offenses, his/her role in the offense, the sentences previously imposed and the amount of time previously served compared to the current sentencing range. *Id.* at 219.

United States v. Simmons, 343 F.3d 72 (2d Cir. 2003). The district court did not err when it used Canadian convictions to determine defendant's criminal history category because the foreign convictions are reliable information that the defendant's criminal conduct was inadequately represented. The defendant was found guilty of illegal sexual conduct with a minor and videotaping the conduct, violations of 18 U.S.C. §§ 2423(a) and 2251(a), respectively. Defendant had numerous convictions, all obtained in Canadian courts. The district court, examining each conviction separately, eliminated several older convictions, one for which background information was unavailable, and counted the remaining convictions toward defendant's criminal history category, which was increased from Criminal History Category I to Category IV. The defendant argued that foreign sentences were excluded under USSG §4A1.2. The court agreed, but noted that USSG §4A1.3 authorizes departures if reliable information exists that indicates the adequacy of the criminal history category does not reflect the seriousness of the defendant's criminal conduct or likelihood to commit other crimes. The section specifically identifies foreign sentences as the type of information upon which a departure may be based. The district court noted that Canadian convictions are very similar to convictions in the United States and are a reliable source of information for a departure under §4A1.3. The Second Circuit affirmed this reasoning and noted the lower court examined each conviction in detail, eliminating several that would not have been allowed had they been convictions from a United States court.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Boonphakdee, 40 F.3d 538 (2d Cir. 1994). In its cross-appeal, the government asserted that the district judge erred in determining that defendant Francisco was not a "career offender" under USSG §4B1.1. The appellate court agreed, and remanded the case for the district judge to resentence Francisco as a career offender. The district court had held that because the defendant's two prior felonies had been consolidated for sentencing, they could not be considered "two prior felony convictions" for purposes of applying USSG §4B1.1. The defendant had committed two prior felonies, one marijuana trafficking, and one manslaughter, separated by an intervening arrest. According to USSG §4A1.2, comment. (n.3), these prior sentences "are by definition `not considered related"' because they were separated by an intervening arrest. The appellate court noted that other circuits had reached the same result. *See United States v. Hallman*, 23 F.3d 821, 825 (3d Cir.), *cert. denied*, 513 U.S. 881 (1994); *United States v. Springs*, 17 F.3d 192, 195-96 (7th Cir.), *cert.*

denied, 513 U.S. 955 (1994); *United States v. Gallegos-Gonzalez*, 3 F.3d 325, 327 (9th Cir. 1993).

United States v. Gibson, 135 F.3d 257 (2d Cir. 1998). Upon the government's cross-appeal, the appellate court vacated the sentence and remanded for resentencing. The district court erred in departing downward from Criminal History Category VI to Criminal History Category I. The district court erroneously held that the Career Offender guideline punished the defendant twice by enhancing both his offense level and criminal history category. Guideline 4B1.1 does not impermissibly "double count." "Congress, and the Sentencing Commission acting under congressional authority, are generally free to assign to prior convictions in the sentencing calculus whatever consequences they consider as appropriate." *Id*. at 261.

United States v. Jones, 27 F.3d 50 (2d Cir.), *cert. denied*, 513 U.S. 955 (1994). The district court did not err in concluding that the defendant was a career offender. The defendant challenged the lower court's reliance on a prior conviction which the defendant claimed was obtained in violation of his due process rights. The circuit court relied on *United States v. Custis*, 511 U.S. 485 (1994), in which the Supreme Court held that a defendant can collaterally attack a prior conviction at sentencing only if he was deprived of counsel during the state court proceeding. Since the defendant was represented by counsel on his prior conviction, his claim was meritless. The circuit court further noted that *Custis* applies whether the sentencing enhancement occurs as a result of the guidelines, of the Armed Career Criminal Act, or any other statutory sentencing enhancements that are based on prior felony convictions.

United States v. Mapp, 170 F.3d 328 (2d Cir.), *cert. denied*, 528 U.S. 901 (1999). The district court did not err in finding that the defendant was a career offender based on two state robbery convictions for which the defendant was sentenced on the same day to concurrent nine-year terms of imprisonment. For purposes of the related case doctrine, cases are not considered consolidated simply because a defendant received concurrent sentences imposed on the same day. There must exist a "close factual relationship between the underlying convictions." *Id.* at 338. The defendants prior convictions both occurred in May. The first involved a gun-point robbery of an individual as he left a bank. The second robbery occurred the next day and involved a gun-point robbery of several individuals in a parked car. The district court did not clearly err in finding that there was not a close factual relationship between the two offenses because the robberies occurred at separate locations and involved different participants and victims.

United States v. Nutter, 61 F.3d 10 (2d Cir. 1995). The Sentencing Commission did not exceed its statutory mandate by including in Application Note 1 of USSG §4B1.1 conspiracies to commit controlled substance crimes. The defendant pleaded guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and was sentenced to 188 months' imprisonment. The defendant claimed on appeal that the Sentencing Commission lacked authority to include the crime of conspiracy to commit a controlled substance offense as a predicate for sentencing as a career offender under

USSG §§4B1.1 and 4B1.2. The circuit court noted that its decision is controlled by *United States v. Jackson*, 60 F.3d 128 (2d Cir.), *cert. denied*, 516 U.S. 980 (1995). In *Jackson*, the Second Circuit held that the Sentencing Commission's authority to promulgate USSG §4B1.1 was not confined to 28 U.S.C. § 994(h) but could also be found in 28 U.S.C. § 994(a). A narcotics conspiracy conviction, therefore, could be a predicate for a career criminal enhancement.

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

United States v. Palmer, 68 F.3d 52 (2d Cir. 1995). The district court erred in ruling that the defendant's previous felony conviction constituted a "crime of violence" within the meaning of USSG §4B1.2. The defendant was convicted of knowingly possessing firearms and ammunition in interstate commerce by a felon and was sentenced pursuant to USSG §2K2.1(a)(4) which enhances a defendant's sentence if he has "one prior felony conviction of . . . a crime of violence," resulting in an enhancement of the defendant's base offense level from 12 to 20. *See* USSG §2K2.1. The defendant argued on appeal that his previous conviction was not a "crime of violence" within the meaning of USSG §4B1.2. The circuit court noted the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), which discussed the definition of a "violent felony." The circuit court ruled that the terms used to define a "violent felony" in 18 U.S.C. § 924(e)(2)(B) are substantially identical to the definition of "crime of violence" in USSG §4B1.2. The circuit court further noted that according to the Supreme Court's approach in *Taylor*, a crime is a violent felony or crime of violence if the terms in the statute, standing alone, satisfy the definitions in 18 U.S.C. § 924(e)(2)(B) or USSG §4B1.2. If, however, "the statute reaches both conduct that satisfies these definitions and conduct that does not, then the charging and the jury instructions may be consulted to determine whether the prior conviction was imposed for conduct that qualifies for enhancement purposes." *Palmer*, 68 F.3d at 55-56. The circuit court disagreed with the district court's conclusion that the defendant's conviction under the state statute was a crime of violence because "the actual wording of the statute demonstrates that it has [the required] elements." *Id.* at 56. The circuit court ruled that the state statute covers conduct that falls outside of the definitions, thus requiring a court to use the second approach of *Taylor* to determine if the defendant's prior conviction constitutes a "crime of violence." The circuit court concluded that the indictment, information and jury instructions in the defendant's case were not helpful. The circuit court rejected the government's contention that a sentencing court may rely on the presentence report for its "crime of violence" determination. The circuit court recognized that "courts have emphasized the limitations upon a sentencing court's inquiry to establish that a defendant has previously been convicted of a `crime of violence.'" *Id*. at 57. The circuit court ruled that to rely on the presentence report in this case would be similar to the "elaborate fact-finding process" criticized by the Supreme Court in *Taylor*, 495 U.S. at 601, and "that employment of the PSR in this case would be at odds with both *Taylor*, the applicable guidelines commentary and the vast majority of the pertinent circuit precedents." *Palmer*, 68 F.3d at 59. The circuit court concluded that there "are not available in this case `easily produced and evaluated court documents' . . . that entitled us to determine that [the defendant] was convicted of a "crime of violence." The circuit court held that the defendant could not be sentenced pursuant to USSG §2K2.1(a)(4)(A).

§4B1.3 Criminal Livelihood

United States v. Burgess, 180 F.3d 37 (2d Cir. 1999). The district court properly applied the criminal livelihood enhancement in sentencing the defendant for a passport fraud offense, which was part of a "larger and sustained pattern of criminal conduct" that the defendant engaged in as a livelihood. The defendant admitted that he had established a lifestyle of perpetrating frauds by establishing a false identity, opening accounts in false names, then relocating to another city to repeat the same type of scheme. Although the passport fraud offense by itself is not income producing, the record indicates that the fraudulent passports enabled the defendant to travel anonymously to perpetrate additional bank frauds. The court properly inferred, based in part on the defendant's claim that he made $3,000 a month and the lack of proof of any other employment, that the defendant obtained more than 2,000 times the existing hourly wage. *See* USSG §4B1.3, comment. (n.2).

§4B1.4 Armed Career Criminal

United States v. Moore, 208 F.3d 411 (2d Cir.), *cert. denied*, 531 U.S. 905 (2000). After trial, it was determined that defendant had a previously undiscovered assault conviction, which resulted in application of the ACCA enhancements. The defendant argued that due process required that the government advise him of his exposure to this sentencing enhancement before trial. The court held that there is no constitutional requirement that the defendant be put on notice before trial that a sentencing enhancement under the ACCA may be sought after conviction. *Id*. at 414, citing *Oyler v. Boles*, 368 U.S. 448, 454 (1962). The court joined the First and Fourth Circuits, the only other circuits to reach this issue, in so ruling. *United States v. O'Neal*, 180 F.3d 115, 126 (4th Cir. 1999); *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990).

United States v. Paul, 156 F.3d 403 (2d Cir. 1998). The district court properly sentenced the defendant as an armed career criminal. The defendant argued that certain of his previous convictions were too remote in time to serve as predicate convictions for purposes of the armed career criminal statute, 18 U.S.C. § 924(e). The court of appeals held that there is no temporal limitation on the convictions that may be taken into account in determining whether a defendant is an armed career criminal.

§4B1.5 Repeat and Dangerous Sex Offender Against Minors[21]

[21]Effective November 1, 2001, the Commission created a new guideline (§4B1.5) that aims to incapacitate repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor (but to whom §4B1.1 does not apply). The new guideline also provides a five-level increase in the offense level and a minimum offense level of 22 for defendants who are not subject to either §4B1.1 or to §4B1.5(a) and who have engaged in a pattern of activity involving prohibited sexual conduct with minors. *See* USSG App. C., Amendment 615. Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline. *See* USSG, App. C, Amendment 649.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.3 Conditions of Probation

United States v. Bello, 310 F.3d 56 (2d Cir. 2002). The defendant was convicted for possession of a gambling device and for credit card theft. The district court imposed a sentence consisting of five years of probation, the first ten months of which were to be spent in home detention. As a condition of probation, the court imposed *sua sponte* a television bar on the defendant during his home detention. The district court explained that the television restriction was designed to force "deprivation and self-reflection," and thus encourage the defendant to conquer a habit of recidivism. The appellate court found that the television bar was not reasonably related to factors appropriately considered for sentencing purposes, including the defendant's history and circumstances, and the abatement of his criminality. Thus, the imposition of the bar for the stated purpose of promoting self-reflection and remorse exceeded the district court's broad discretion. Accordingly, the appellate court remanded for resentencing.

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant participated in a fraud scheme in which travel agencies sold airline tickets to customers and then failed to remit the proceeds to the airlines. The district court's restitution order instructed the defendant to pay $1.6 million in restitution, and the Second Circuit affirmed, holding that the district court properly considered the defendant's ability to pay. Despite the fact that the PSR concluded the defendant was only able to pay a portion of the restitution, the district court spent a considerable amount of time discussing the defendant's assets. The court concluded that, in light of the facts that his three children were in parochial school, that the defendant owned several pieces of real estate, he drove at least one Jaguar, and that properties held in his wife's name were "a charade," the defendant had available assets to pay the restitution order in full. The Second Circuit noted that absent a plea agreement, a sentencing court may award restitution for losses directly resulting from the "conduct forming the basis for the offense of the convictions."

United States v. Peterson, 248 F.3d 79 (2d Cir. 2001). The district court sentenced defendant to a term of probation after a conviction for bank larceny and imposed a series of conditions based on a prior conviction for incest. These conditions included, *inter alia*, the following: (1) restriction of defendant's possession and use of a computer and access to the Internet; (2) sex offender counseling at the direction of the probation officer; (3) third-party notification of prior and instant conviction at the direction of the probation officer; and (4) restricted accesses to parks and recreational facilities where children congregate. The circuit court struck down a number of conditions and remanded for re-sentencing. The court concluded that the internet prohibition was overly broad and not reasonably necessary to protect public or defendant's family as it did not reasonably related to the prior offense, which did not involve a computer. Further, the court found that this condition was an

impermissible occupational restriction. *See* USSG §5F1.5, *see also* 18 U.S.C. § 3563(b)(5). The court also found that the defendant could be referred for sex offender counseling but that the condition as imposed was ambiguous. The court indicated that if the decision to send the defendant to counseling was the probation officer's, then it was an impermissible delegation of authority to the probation officer. If, however, the phrase "at the direction of the probation officer" simply meant that the officer was to handle the details of the treatment, the condition was proper. Third-party notification of the defendant's prior incest conviction was found to be an occupational restriction. Such restrictions may only be based on the offense of conviction, not a prior conviction, therefore, the condition could not be imposed. *See* USSG §5F1.5. *See also* 18 U.S.C. § 3563(b)(5). As to notification of the bank larceny, the appellate court concluded that this was also an improper delegation of authority to the officer. The court must determine whether and in what circumstance such notification is required. Finally, while the sentencing court could restrict the defendant from visiting places where children congregate, the Second Circuit held that the condition was ambiguous and over broad because it could preclude the defendant from visiting recreational facilities, like national parks and adult gyms, where children do not necessarily congregate.

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Lahey, 186 F.3d 272 (2d Cir. 1999). The district court mistakenly believed that it was required to impose a prison sentence of at least one month in sentencing the defendant for a class B felony. The defendant pled guilty to bank fraud. At sentencing, the court remarked that "if permitted by law, I would give him six months home detention." *Id*. at 274. (The court stated that the defendant's unusual family circumstances and responsibilities justified a downward departure.) The defendant appealed and asked that the case be remanded for re-sentencing. Neither the statute of conviction (18 U.S.C. § 1341), nor the "B-Felony rule," (18 U.S.C. § 3561), required the judge to impose a minimum prison term. Although the "B-Felony rule" prohibits a defendant convicted of a class B felony from receiving a sentence of probation, no minimum term of imprisonment is required. *See United States v. Elliot*, 971 F.2d 620 (10th Cir. 1992) ("[A] sentence of zero months does not literally violate the prohibition on probation in 18 U.S.C. § 3561(a)(1)."). The defendant's offense level placed him in Zone B of the sentencing table. Under the three options in USSG §5C1.1(c), the minimum sentence required is at least one month's imprisonment. The transcript of the sentencing hearing indicates that the court may not have realized it had the authority to depart from the requirement in USSG §5C1.1. The case was remanded to determine whether the court recognized its authority to depart. If the court did not, then the defendant should be resentenced "in accordance with the court's proper recognition of the extent of its authority." *Id*. at 275.

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

United States v. Conde, 178 F.3d 616 (2d Cir. 1999). The district court did not err in refusing to find the defendant eligible for relief under the safety valve, even after finding the defendant eligible for a reduction for acceptance of responsibility. The disclosure requirement for the safety valve reduction is different from the disclosure requirement for acceptance of responsibility. Section 5C1.2 requires that the defendant disclose to the government "all information and evidence the defendant has concerning his own offenses as well as that of co-conspirators." The guideline covering acceptance of responsibility focuses on the defendant's acceptance of individual responsibility. The government's agreement that the defendant qualified for acceptance of responsibility did not bar the government from objecting to application of the safety valve.

United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003). The defendant was convicted of conspiracy to import five or more kilograms of cocaine and related offenses. At his sentencing hearing, the defendant moved for safety valve relief and a corresponding two-level reduction in his base offense level in light of his post-conviction proffer to the government. *See* 18 U.S.C. § 3553(f); USSG §§5C1.2(a), 2D1.1(b)(6). The government did not oppose the motion and agreed that the defendant had satisfied the requirements of the safety valve. However, the district court denied the defendant's motion. The district court stated that even if the defendant was eligible, the decision whether to grant safety valve relief was discretionary. The district court denied the defendant's motion for a downward adjustment on the basis that the defendant's commission of perjury at trial disqualified him from safety valve eligibility. On appeal, the defendant argued that the district court erred in denying the safety valve adjustment on the sole basis of his prior perjury. The Second Circuit reiterated its analysis from *United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999), in which it held that so long as a defendant made a complete and truthful proffer at the time of the commencement of the sentencing hearing, the defendant complied with 18 U.S.C. § 3553(f)(5)'s disclosure requirement even if the defendant earlier lied to the government or obstructed its investigation. Relying on *Schreiber*, the court held that a sentencing court could not disqualify a defendant from eligibility for safety valve relief based solely on his commission of perjury at trial, where the defendant otherwise fulfilled the statutory criteria under section 3553(f)(1)-(5). Accordingly, since the district court made no independent findings with respect to the defendant's compliance with the safety valve criteria, the district court's denial of the defendant's request for a downward adjustment pursuant to §2D1.1(b)(6) was vacated and remanded.

United States v. Resto, 74 F.3d 22 (2d Cir. 1996). The district court did not err in refusing to apply the safety valve provision to the defendant. To qualify for a sentence reduction pursuant to USSG §5C1.2, the defendant must not have more than one criminal history point, as determined under the sentencing guidelines. The defendant had four criminal history points, placing him in Criminal History Category III. The district court, however, determined that this overstated his criminal history, and granted him a downward departure from Category III, to Category I, pursuant to USSG §4A1.3. The defendant argued that because he was treated as if he had only one criminal history point, "he should be found to come within the specifications of 18 U.S.C. § 3553(f)." *Id*. at 28. The circuit court rejected this argument, and held that "the safety valve provision is to apply *only* where the defendant does not have more than 1 criminal history point." *Id*.

United States v. Reynoso, 239 F.3d 143 (2d Cir. 2000). In a splintered opinion, the Second Circuit held that the district court properly denied safety valve relief to a defendant who provided the government with objectively false information, even though she subjectively believed the information provided to the government was true. 18 U.S.C. § 3553(f)(5) requires a defendant to prove both that the information he or she provided to the government was objectively true and that he or she subjectively believed that such information was true. *Id*. at 146. The court reasoned that an examination of several dictionaries' definitions of "truthful" encompass both a subjective belief in the truth of information conveyed and the conveyance of true information. In a dissenting opinion, Judge Calabresi opined that Section 3553(f)(5) only requires the defendant to "truthfully provide[]" information to the government (*i.e*., the use of an adverb reflects the statute's emphasis on the defendant's state of mind), rather than requiring "truthful information."

United States v. Schreiber, 191 F.3d 103 (2d Cir. 1999). The district court erred in denying defendant safety valve relief. Although the defendant repeatedly lied to prosecutors, he provided a truthful written proffer prior to the time of the sentencing hearing. 18 U.S.C. § 3553(f)(5) requires, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or a common scheme or plan . . ." *See also* USSG §5C1.2(5). The Second Circuit reasoned that "nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing 'not later than' sentencing." *Id.* at 106.

United States v. Sherpa, 265 F.3d 144 (2d Cir. 2001). The district court did not err in failing to depart downward for a defendant convicted of one count of conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(b)(1)(B)(i) and 846. The defendant argued that his sentence should be vacated and the case should be remanded to the district court for resentencing because the district court mistakenly believed that it lacked the power under USSG §4A1.3 to depart below the imprisonment range stated in the guidelines for the Criminal History Category I attached to his base offense level. The Second Circuit stated that a downward departure below the lower limit of the applicable sentencing guidelines range for Criminal History Category I on the basis of the minor nature of a defendant's criminal history was not permissible.

United States v. Smith, 174 F.3d 52 (2d Cir. 1999). The district court erred in finding that one defendant satisfied the disclosure requirement of the safety valve after the defendant repeatedly refused to communicate with the government. The record at sentencing established that the defendant conceded he did not communicate with anyone from the United States Attorney's office. Because the defendant offered no evidence that he complied with USSG §5C1.2(5), the Second Circuit did not decide whether information provided to a probation officer that ultimately assists a prosecutor may satisfy the disclosure requirement. Here, the court made no factual findings to support its conclusion

that the defendant satisfied the disclosure requirement. The case was remanded for resentencing with "instructions not to afford [the defendant] a two-level decrease under section USSG §2D1.1(b)(6)." *Id*. at 56. The codefendant's case was also remanded for resentencing because the court failed to make factual findings to support its conclusion that the codefendant satisfied the disclosure requirement and that the defendant did not possess a firearm in connection with the offense.

United States v. Tang, 214 F.3d 365 (2d Cir. 2000). A defendant who provided information to the government but withheld the name of one individual in Hong Kong out of a legitimate fear for the safety of his family did not satisfy the fifth criteria under safety valve statute. There is not a "fear-of-consequences" exception to the safety valve provision. *Id.* at 370-71.

Part D Supervised Release

§5D1.1 Imposition of a Term of Supervised Release

United States v. Cunningham, 292 F.3d 115 (2d Cir. 2002). The district court did not err in imposing a term of supervised release based on a letter grade determined by the statutory maximum rather than his personal guideline range. The defendant argued that according to 18 U.S.C. § 3559 he should have been assigned a felony letter grade based on the guideline range determined by the sentencing court. However, the Second Circuit disagreed and stated that the language of section 3559 is plain and therefore it was appropriate for the district court to assign him a felony letter grade based on the statutory maximum for his offense of conviction.

United States v. Thomas, 135 F.3d 873 (2d Cir. 1998). The district court erred in sentencing the defendant to nine months' home detention, followed by three years of supervised release. "[S]upervised release can never be imposed without an initial period of imprisonment." *Id*. at 875. *See* 18 U.S.C. § 3583(a); USSG §5D1.1. The district court made several subsequent modifications to the sentence, altering the sentence from three years of supervised release to three years of probation followed by nine months of home confinement, and then again modifying the sentence to three years' probation with a condition of nine months of home confinement. The subsequent modifications occurred after seven days, and were therefore not permissible under Fed. R. Crim. P. 35(c), nor did they qualify as corrections of clerical errors under Rule 36.

§5D1.2 Term of Supervised Release

See United States v. Cunningham, 292 F.3d 115 (2d Cir. 2002), §5D1.1, p. 51.

§5D1.3 Conditions of Supervised Release

See United States v. Balogun, 146 F.3d 141 (2d Cir. 1998), 18 U.S.C. § 3583(d), p. 90.

United States v. Bok, 156 F.3d 157 (2d Cir. 1998). The district court did not err in ordering the defendant to make payments against his personal income tax liability as a condition of supervised release. The defendant, who had been convicted of tax evasion, argued that the payment order was effectively an order of restitution, which must be authorized by statute. The court of appeals held that 18 U.S.C. § 3583(d) permits the district court to impose as a condition of supervised release "any condition set forth as a discretionary condition in section 3583(b)(1) through (b)(10)." Among the discretionary conditions of probation in section 3583(b) is the requirement that the defendant make restitution to a victim of the offense (but not subject to the limitation of section 3663(a)). Thus, the court of appeals concluded, a plain reading of sections 3583(d) and 3563(b) permits a judge to award restitution as a condition of supervised release without regard to the limitations in section 3663(a). The court noted that its earlier opinion in *United States v. Gottesman*, 122 F.3d 150 (2d Cir. 1997), did not mandate a different result; *Gottesman* involved a plea agreement, which raised unique concerns.

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant was convicted of wire fraud and ordered to pay $1.6 million in restitution. The Second Circuit held that a condition of the defendant's supervised release, which subjected the defendant to searches of his person and property by the probation department to secure information related to his financial dealings, was appropriate. The district court noted the defendant's lack of candor in the past relating to his financial status, including concealing documents and filing false complaints, warranted such searches of his property. *See United States v. Germosen*, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999), §5B1.3, p. 47.

United States v. Handakas, 329 F.3d 115 (2d Cir. 2003). The defendant was convicted of conspiracy to commit mail fraud, conspiracy to launder money, illegally structuring financial transactions to evade reporting requirements, failure to file a currency report, making a materially false representation, and conspiracy to defraud the United States. The defendant's sentence included, as a condition of supervised release, a prohibition against working on government contracts. On appeal, the defendant, relying on Fed. R. Crim. P. 43(a), argued that the written judgment was erroneous because it included an occupational condition omitted from the oral pronouncement of his sentence. In accord with Rule 43(a), the Second Circuit has ruled that in the event of a conflict between the oral pronouncement of sentence and the written judgment, the oral pronouncement generally controls because the defendant is present at the announcement of the sentence, but not when the judgment is later entered. However, the Second Circuit has not rigidly disregarded all conditions of supervised release later included in a judgment but omitted from the oral pronouncement of sentence. *See United States v. Truscello*, 168 F.3d 61 (2d Cir. 1999) (permitted the later inclusion of conditions listed as mandatory or standard in §5D1.3(a) and (c)); *United States v. Asuncion-Pimental*, 290 F.3d 91 (2d Cir. 2002) (permitted the later inclusion of conditions recommended by §5D1.3(d) where the facts warranting such conditions are present); *United States v. Thomas*, 299 F.3d 150 (2d Cir. 2002) (permitted the later inclusion of basic administrative requirements that are necessary to supervised release). In the instant case, the occupational restriction was not a mandatory or standard condition listed in §5D1.3(a) and (c), nor a recommended condition listed in §5D1.3(d). And it clearly was not a

basic requirement for the administration of supervised release. However, the court noted that occupational restrictions are listed as item (4) in §5D1.3(e); these subsection §5D1.3(e) conditions may be appropriate on a case-by-case basis. The court concluded that a remand was nevertheless appropriate to allow reconsideration of this matter and because this was a non-standard condition of supervised release.

United States v. Reyes, 283 F.3d 446 (2d Cir.), *cert. denied*, 537 U.S. 822 (2002). The district court did not err in holding that convicted persons serving a term of supervised release have a diminished expectation of privacy. Furthermore, such expectation of privacy is particularly diminished for this defendant because the terms of his supervised release included a "Standard Condition" recommended by USSG §5D1.3(c)(10), which states that the defendant must allow a probation officer to visit at any time and to seize any contraband in plain view when he arrives. Finally, the Second Circuit held that federal probation officers are generally charged with overseeing periods of supervised release including "the requirement that the supervisee not commit further crimes." *Reyes*, 283 F.3d at 470. Therefore in *Reyes*, the district court did not err in denying the defendant's motion to suppress evidence since a defendant on supervised release has a diminished expectation of privacy even in his own home.

United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002), *cert. denied*, 537 U.S. 1157 (2003). The district court erred in imposing a condition of supervised release that prohibited the defendant from accessing a computer, the Internet, or bulletin board systems without the approval of his probation officer. The defendant pled guilty to receiving child pornography and the questioned condition was imposed as a special condition of his supervised release. The Second Circuit noted that while it is appropriate for a sentencing court to impose a special condition of supervised release, that condition must be (1) reasonably related to the statutory factors governing the selection of sentences, (2) involve no greater deprivation of liberty than is reasonably necessary for the statutory purposes of sentencing, and (3) be consistent with Sentencing Commission policy statements. *Sofsky*, 287 F.3d at 126. The Second Circuit held, however, that such a restriction as to cut the defendant off from all use of a computer or the internet was too great of a deprivation of his liberty in relation to his crime. The Second Circuit further noted that the government was free to argue for random checks of the defendant's hard drive or for some other type of monitoring that could prevent the defendant from using his computer for child pornography.

United States v. Thomas, 299 F.3d 150 (2d Cir. 2002). The defendant pled guilty to access device fraud, by charging on credit cards that did not belong to him. At his sentencing hearing, the defendant was sentenced orally to three years of supervised release; the oral sentence did not contain all of the conditions of the supervised release. On appeal, the defendant challenged five of the conditions of his supervised release that were included in the written judgment, but had not been articulated orally at his sentencing hearing. The Second Circuit noted that the first two "special" conditions in the defendant's written judgment were listed in §5D1.3(d). Since the district court required the defendant to pay restitution, and the guidelines recommended the imposition of these

conditions, the district court's failure to articulate them orally was irrelevant. The court then noted that the fourth and fifth "special" conditions of the defendant's release, namely that the defendant report to the nearest probation office within 72 hours of release from custody and that he be supervised by the district of his residence, were clearly basic administrative requirements that were necessary to supervised release. Because these conditions were routinely imposed administrative requirements, their inclusion in the written judgment did not violate Fed. R. Crim P. 43(a). However, the court found that the third "special" condition of the defendant's release, prohibiting the defendant from possessing any identification in the name of another person or any matter assuming the identity of any other person, violated Fed. R. Crim. P. 43(a). The court reached this conclusion because the third "special" condition encompassed non-criminal behavior and it did not overlap with any of the mandatory or standard conditions of release. Furthermore, unlike the fourth and fifth "special" conditions of the defendant's release, the third requirement was not necessary to clarify or carry out any of §5D1.3's mandatory or standard conditions. Accordingly, the court affirmed all of the district court's "special conditions," with the exception of the third condition.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

See United States v. Bok, 156 F.3d 157 (2d Cir. 1998), §5D1.3. p. 52.

United States v. Giwah, 84 F.3d 109 (2d Cir. 1996). The district court erred in assessing a restitution order requiring the defendant to pay 15 percent of his annual gross earnings to the victims of his fraud because the court failed to consider the factors set forth in 18 U.S.C. § 3664(a), which requires the court to consider "the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." The circuit court remanded the restitution order because the sentencing court failed to consider the financial needs of the defendant and his dependents. On remand, the district court must find whether 15 percent of the defendant's salary is an unduly harsh restitution order. The circuit court noted that the standard of review would have been more deferential if the trial court had provided a rationale reflecting consideration of the factors set forth in section 3664.

United States v. Lussier, 104 F.3d 32 (2d Cir. 1997). The court of appeals affirmed the district court's dismissal for lack of subject matter jurisdiction over the defendant's motion pursuant to 18 U.S.C. § 3583(e)(2) to amend a previously imposed order of restitution. The defendant was convicted of various banking crimes and his sentence included a restitution order, which he did not dispute on direct review. The defendant subsequently brought this motion to amend the restitution order, arguing that it violated *Hughey v. United States*, 495 U.S. 411 (1990), which restricted the amount of restitution to the victim's loss directly traceable to the offense underlying a count of conviction. The defendant argued that the restitution order was a condition of his supervised release,

and section 3583(e)(2) permitted modification of terms of supervised release. The court of appeals affirmed the district court's ruling that illegality of a restitution order was not grounds for modification under section 3583(e)(2). The court noted that the legality of a condition was not a listed factor for courts to consider under the subsection in deciding whether to modify, reduce or enlarge the terms of supervised release, nor did the context of the provision support the defendant's position. Finally, the court maintained that such an interpretation would disrupt the established statutory scheme governing appellate review of illegal sentencing.

United States v. Thompson, 227 F.3d 43 (2d Cir. 2000), *cert. denied*, 534 U.S. 903 (2001). The district court properly imposed a $5,000 fine on a defendant who was convicted of illegal re-entry into the country after his prior felony conviction for bank fraud. Agreeing with the Third, Seventh and Tenth Circuits, the Second Circuit rejected the defendant's argument that he will never be able to pay a fine before he is deported.

§5E1.2 Fines for Individual Defendants

United States v. Leonard, 37 F.3d 32 (2d Cir. 1994). The defendants argued that the Commission exceeded its authority in promulgating USSG §5E1.2, which allows the costs of imprisonment to be imposed on the defendant. The appellate court agreed with the Seventh Circuit's reasoning in *United States v. Turner*, 998 F.2d 534 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993), which held that the Commission had the authority to promulgate USSG §5E1.2 because the guideline considers the seriousness of the defendant's offense and deters others. The appellate court agreed with the Seventh Circuit that USSG §5E1.2 is authorized by 28 U.S.C. § 994(c)(3) & (6), which states that the Commission should consider the "nature and degree of the harm caused by the offense" and "the deterrent effect . . . [on] others." Additionally, imposition of costs does not constitute an upward departure. On cross-appeal, the government argued that the sentencing court departed upward pursuant to USSG §5E1.2. The government's argument is without merit. Although the government did bring USSG §5E1.2 to the court's attention, the sentencing court never referred to it in it's reasons for departing; rather, it listed six inappropriate reasons. However, the defendant's sentence was vacated because the defense counsel was not given adequate notice concerning the possibility of an upward departure.

United States v. Sellers, 42 F.3d 116 (2d Cir. 1994), *cert. denied*, 516 U.S. 826 (1995). In addressing an issue of first impression which has split the circuits, the appellate court joined the Seventh and Ninth Circuits in holding that a fine for costs of imprisonment and supervised release may be assessed under USSG §5E1.2(i), without first imposing a punitive fine under USSG §5E1.2(c). *See United States v. Turner*, 998 F.2d 534, 536-37 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993), *cert. denied*, 511 U.S. 1006 (1994). The appellate court chose not to follow the decisions of the First, Fifth, Tenth and Eleventh Circuits, which have held that the district court may not impose a fine under USSG §5E1.2(i) unless the court also imposes a fine from the fine table at USSG §5E1.2(c). *See United States v. Norman*, 3 F.3d 368, 370 (11th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); *United States v. Fair*, 979 F.2d

1037, 1042 (5th Cir. 1992); *United States v. Corral*, 964 F.2d 83, 84 (1st Cir. 1992); *United States v. Labat*, 915 F.2d 603, 606-07 (10th Cir. 1990). The appellate court interpreted the language of USSG §5E1.2(i) permitting an "additional" fine for costs as an expression of the Commission's intention that a defendant's total fine, including the cost of imprisonment, may exceed the relevant fine range listed in subsection (c).

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The district court did not err in its initial calculation of the defendant's sentence, however the court will have to recalculate the sentence on remand because the Second Circuit held that the grouping of the defendant's offenses under USSG §3D1.2 must be adjusted. The defendant claimed that the district court erred in imposing consecutive sentences. The Second Circuit held that the district court did not err, and also noted that the sentencing court should run sentences consecutively only to the extent necessary to get to the total punishment for the grouped offenses. *See United States v. Blount*, 291 F.3d 201 (2d Cir. 2002) (noting that the sentencing court is required to impose consecutive sentences when necessary to achieve total punishment).

United States v. Cordoba-Murgas, 233 F.3d 704 (2d Cir. 2000). The district court may depart from the guidelines "total punishment" stacking provision, *see* USSG §5G1.2, if it finds there are aggravating or mitigating circumstances not adequately taken into consideration by the sentencing commission. *Id.* at 709. Specifically, a court may depart where findings as to uncharged relevant conduct made by the sentencing court by the preponderance of the evidence standard substantially increase the defendant's sentence under the guidelines. Accord *United States v. White*, 240 F.3d 127, 137 (2d Cir. 2001).

See United States v. McLean, 287 F.3d 127 (2d Cir. 2002), Post-*Apprendi*, p. 92.

See United States v. Outen, 286 F.3d 622 (2d Cir. 2002), Post-*Apprendi*, p. 93.

United States v. White, 240 F.3d 127 (2d Cir. 2001). The appellate court concluded that the guideline concept of total punishment requires a court to impose sentences on separate counts consecutively where the guideline range is higher than the statutory maximum on any one count. The court ruled that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is inapplicable to a sentencing judge's decision, required by the Guidelines, to run sentences consecutively. Further, "preponderance of the evidence" standard applies when determining relevant conduct under this section for determining "total punishment." *Id.* at 135. Accord *United States v. McLeod*, 251 F.3d 78 (2d Cir.), *cert. denied*, 534 U.S. 935 (2001).

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment[22]

United States v. Garcia-Hernandez, 237 F.3d 105 (2d Cir. 2000). The defendant was serving a state sentence for a parole violation. The conduct leading to his violation was his illegal reentry into the country. He was then convicted of illegal reentry in district court. The defendant argued that his sentence must run concurrently under USSG §5G1.3(b), which requires concurrent sentences where "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense . . . ." The circuit court held that the defendant's state sentence was actually a sentence for his original offense (a drug conviction), not the violation conduct of illegal reentry, and therefore was not accounted for in his guideline offense level for illegal reentry. Accordingly, the district court properly applied USSG §5G1.3(c) (district court has the discretion to run sentence, concurrent, partially concurrent or consecutive). *Id.* at 107-08.

See United States v. Los Santos, 283 F.3d 422 (2d Cir. 2002), §5K2.0, p. 69.

United States v. Maria, 186 F.3d 65 (2d Cir. 1999). The district court erred in concluding that Application Note 6 to USSG §5G1.3 precluded the court from imposing a concurrent sentence. In sentencing a defendant who commits a federal offense while on probation, parole, or supervised release, a court is not required to impose a sentence consecutive to the term imposed for the violation of probation, parole, or supervised release.[23] The defendant was convicted in State court and placed on parole for an offense in 1994 and was subsequently deported. In 1995 and 1996, the defendant was arrested a number of times, and in 1996, his State parole was revoked and he was sentenced to four years imprisonment. In 1997, he pleaded guilty in federal court to illegal reentry. The district court stated that under Application Note 6, to USSG §5G1.3, the court was required to impose a sentence that would run consecutively to the State revocation sentence. Subsection (c) of USSG §5G1.3 is a policy statement that vests broad discretionary authority in the sentencing court. Application Note 6 requires that "the sentence for the instant offense *should* be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release," when the defendant commits a the instant offense while on probation, parole, or supervised release. The use of the terms "should" and "incremental" are consistent with the discretionary authority granted district judges under USSG §5G1.3(c). The Second Circuit has previously held that the use of "should" in the guidelines does not mean "shall." *See United States v. Harris*, 13 F.3d 555 (2d Cir. 1994) (use of "should" in USSG §4A1.3 is not a mandatory provision, but instead offers "guidance" for structuring criminal history

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[22]Effective November 1, 2003, the Commission amended §5G1.3 to address a number of issues that resolved circuit conflicts regarding the application of §5G1.3. *See* USSG App. C, Amendment 660.

[23]The Second Circuit acknowledged that its holding is in conflict with decisions in the First, Fifth, and Ninth Circuits. *See United States v. Alexander*, 100 F.3d 24, 26-27 (5th Cir. 1996); *United States v. Gondek*, 65 F.3d 1 (1st Cir. 1995); *United States v. Bernard*, 48 F.3d 427 (9th Cir. 1995).

departures). Application Note 6's cross reference to USSG §7B1.3, p.s., which states that a revocation sentence should be consecutive to any other sentence, is a "recommendation" and not a requirement. Finally, the use of the word "incremental" in Note 6 suggests an intent to impose a moderate additional penalty rather than a fully consecutive sentence. The case was remanded for resentencing.

United States v. McCormick, 58 F.3d 874 (2d Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's sentence consecutively to his state sentence. The defendant argued that the sentence should be concurrent because the district court was bound by USSG §5G1.3(c) and Application Note 3 to impose a sentence that most closely approximated the sentence he would have received had he been sentenced at one time for all his offenses. The circuit court stated that while sentencing courts should "consider" the methodology of Note 3 in determining a reasonable incremental punishment, "the commentary's plain language does not make it the exclusive manner in which a court must sentence a defendant serving an undischarged term." *United States v. Lagatta*, 50 F.3d 125, 128 (2d Cir. 1995). The appellate court held that the district court met the requirements of USSG §5G1.3(c) because the judge expressly stated at sentencing that the consecutive sentence would result in a reasonable incremental punishment and the calculations were presented to the court.

United States v. Perez, 328 F.3d 96 (2d Cir.), *cert. denied*, 124 S. Ct. 283 (2003). The defendant raised on appeal whether §5G1.3(a), mandating that certain sentences run consecutively, conflicted with, and was therefore trumped by, 18 U.S.C. § 3584, directing a sentencing court to weigh various factors in deciding whether to impose a concurrent or consecutive sentence. The Second Circuit noted that, although this issue remained undecided in its court, there was no current dispute among the other circuits regarding this question. In other words, the courts of appeals that had considered the matter all agreed that §5G1.3(a) and 18 U.S.C. § 3584 did not conflict, and that the consecutive sentence mandate of §5G1.3(a) precluded concurrent sentencing except insofar as the sentencing judge identified grounds for a downward departure. *See United States v. Schaefer*, 107 F.3d 1280, 1285 (7th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998); *United States v. Flowers*, 995 F.2d 315, 316-17 (1st Cir. 1993); *United States v. Gullickson*, 981 F.2d 344, 349 (8th Cir. 1992); *United States v. Shewmaker*, 936 F.2d 1124, 1128 (10th Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991); *United States v. Stewart*, 917 F.2d 970, 973 (6th Cir. 1990); *United States v. Miller*, 903 F.2d 341, 349 (5th Cir. 1990); *United States v. Rogers*, 897 F.2d 134, 137 (4th Cir. 1990); *United States v. Fossett*, 881 F.2d 976, 980 (11th Cir. 1989).

United States v. Rivers, 329 F.3d 119 (2d Cir. 2003). The defendant pled guilty to distribution of crack cocaine. The district court sentenced the defendant to 64 months, and ordered the sentence to be served concurrently with defendant's state sentence. Additionally, the district court, *sua sponte* and over the government's objections, adjusted the defendant's sentence pursuant to USSG §5G1.3(b) by deducting the 18 months the defendant had already served in state prison–leaving the

defendant with a total of 46 months remaining to complete his sentence. The government appealed and argued that, because the defendant's minimum sentence is set by 21 U.S.C. § 841(b)(1)(B), the district court was not authorized under §5G1.3 to adjust the sentence, and that any adjustment for time served would result in a sentence lacking the mandatory minimum prescribed by the statute. The issue on appeal was whether, or to what extent, §5G1.3(b) applied to statute-based mandatory minimum sentences. The Second Circuit noted that several circuits had reviewed this question and rejected the government's argument. *See United States v. Ross*, 219 F.3d 592, 594 (7th Cir. 2000); *United States v. Dorsey*, 166 F.3d 558, 564 (3d Cir. 1999); *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995); *United States v. Kiefer*, 20 F.3d 874, 876-77 (8th Cir. 1994). The court agreed with its sister circuits. The court held that so long as the total period of incarceration, after the adjustment, is equal or greater than the statutory minimum, the statutory dictate has been observed and its purpose accomplished. In the instant case, the defendant was sentenced to an aggregate period of 64 months, above the minimum sentence mandated by 21 U.S.C. § 841(b)(1)(B). The resulting adjusted sentence the district court imposed for the totality of the conduct amounted to the sentence intended by the statute. Accordingly, the district court's sentence was affirmed.

United States v. Thomas, 54 F.3d 73 (2d Cir. 1995). The district court did not err in requiring the defendant's sentences to run consecutively. Although the defendant had two prior convictions that were part of the same course of conduct as the present offense, he also had a conviction that was not. Accordingly, the district court correctly imposed consecutive sentences pursuant to USSG §5G1.3(b).

United States v. Whiteley, 54 F.3d 85 (2d Cir. 1995). While on parole for a state murder conviction, the defendant disappeared. He resurfaced in Virginia where he was convicted in federal court for armed bank robbery. After his conviction in Virginia, the defendant was charged and convicted of federal bank robbery in Connecticut. Section 5G1.3(a) requires the court to apply consecutive sentences if the instant offense was committed while the defendant was on escape status. The defendant was on escape status when he was convicted in Virginia. However, the Virginia federal district court incorrectly imposed a federal sentence concurrent to the Connecticut state sentence. The Connecticut federal district court, aware of the Virginia federal district court's error, decided that the defendant was an escapee when all later federal offenses were committed. Therefore, it applied USSG §5G1.3(a) and imposed consecutive sentences. Because the defendant was subject to multiple undischarged terms of imprisonment, the sentencing court should have determined, for each prior sentence, whether USSG §5G1.3(a), (b) or (c) applied. Section 5G1.3(a) applied to the defendant's state conviction, thus requiring a consecutive sentence. However, USSG §5G1.3(a) did not apply to the Virginia conviction because the defendant was not on escape status from the Virginia offense when the Connecticut federal offense occurred. Therefore, the court applied USSG §5G1.3(c). Section 5G1.3(c) is a policy statement that requires the sentence for the instant offense to run consecutive to any prior undischarged term of imprisonment "to the extent necessary to achieve a reasonable incremental punishment for the instant offense." Although other circuits interpreting USSG §5G1.3(c) require the court to perform the USSG §5G1.3 methodology before abandoning it, *see United States*

v. Brassell, 49 F.3d 274 (7th Cir. 1995); *United States v. Johnson*, 40 F.3d 1079 (10th Cir. 1994); *United States v. Wiley-Dunaway*, 40 F.3d 67, 70-71 (4th Cir. 1994); *United States v. Redman*, 35 F.3d 437 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995), the Second Circuit only requires consideration of a reasonable incremental penalty, and consideration of the Commission's preferred methodology. In the defendant's case, however the Virginia federal district court's error rendered USSG §5G1.3's commentary inapplicable. Therefore, the Connecticut federal district court had full discretion to determine the defendant's sentence. Remand was not necessary in this case because the district court imposed the minimum term of imprisonment.

United States v. Williams, 260 F.3d 160 (2d Cir. 2001), *cert. denied*, 535 U.S. 1006 (2002). Although the district court erred in failing to apply USSG §5G1.3(b) when determining the defendant's sentence, the decision was upheld because application would not have changed the defendant's sentence. The defendant argued that the district court should have applied USSG §5G1.3 to credit him for time served on his state conviction. "Section 5G1.3 states that if there is an undischarged term of imprisonment for an offense that has been 'fully taken into account in the determination of the offense level for that offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.'" *Id*. at 163. The Second Circuit held that because the state offense was not fully taken into account in the defendant's sentence, his sentence did not have to run concurrently with his state sentence.

Part H Specific Offender Characteristics

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

United States v. Herman, 172 F.3d 205 (2d Cir. 1999). The district court's erroneous finding that the defendant had been drug free "for almost two years" could not justify a downward departure for extraordinary rehabilitative efforts. The defendant was convicted of two sales of a small amount of marijuana to undercover agents within 1,000 feet of a school and an unrelated scheme to defraud a health care benefit program. He faced a career offender sentence based on two prior felony convictions. At sentencing, the district court found that the defendant had been "drug free for over two years," despite the record of the colloquy, which showed that it was unclear how long the defendant had been drug free. The district court also failed to make findings to show that the defendant's rehabilitative efforts made it less likely that the defendant would commit future crimes. The case was remanded for further findings and resentencing.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[24]

United States v. Ekhator, 17 F.3d 53 (2d Cir. 1994). The district court erroneously concluded that it lacked the discretion to depart downward *sua sponte* based on the defendant's family conditions. The defendant entered a plea agreement in which she agreed not to move for a downward departure. Prior to sentencing, defense counsel advised the court that the defendant was a widow with five children, three of whom suffered serious health problems. However, pursuant to the plea agreement, counsel did not move for a departure. During the defendant's sentencing, the district court indicated that it wished the law provided him with the authority to grant a departure. The government argued that because Second Circuit precedent established that family circumstances could form the basis of a downward departure, *see United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992), and because the district court judge had granted downward departures *sua sponte* in previous cases, the statement made at the defendant's sentencing merely indicated that the judge chose not to grant the departure. The Second Circuit disagreed, interpreting the statement to mean that the judge believed he lacked the discretion to depart *sua sponte*. The judgement was vacated and the case was remanded for resentencing.

United States v. Galante, 111 F.3d 1029 (2d Cir. 1997). The district court did not abuse its discretion in determining that extraordinary family circumstances warranted a downward departure. The government appealed, contending that the defendant faced no more family responsibilities than a typical married defendant with two children. Although his family obviously would suffer when he was incarcerated, the government asserted that nothing about these family circumstances was extraordinary. Moreover, the government argued that family circumstances, although not a forbidden basis for departing outside the Guidelines' heartland, are a discouraged basis for departure because the Sentencing Commission has deemed them to be not generally relevant. The circuit court rejected the government's argument and held pursuant to their interpretation of USSG §5H1.6 that a sentencing court can depart under these circumstances when family relationships are deemed "exceptional." *See United States v. Londono*, 76 F.3d 33, 36 (2d Cir. 1996). The circuit court, applying the abuse of discretion standard set forth in *Koon v. United States*, 518 U.S. 81 (1996), maintained that "exceptional" is a subjective term and sentencing courts are in the best position to make comparisons and decide what combination of circumstances take a specific case out of the ordinary and makes it exceptional. In granting substantial deference to the discretion of the lower court, the circuit court looked to the sentencing judge's emphasis on the limited earning capacity of the defendant's wife and her difficulty with the English language. Additionally, the lower court focused on the fact that the defendant was the principal support for his family and had no other family members living in close proximity to help assist them financially. Although the government argued that socio-economic

[24]Effective April 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended this departure factor by adding language that prohibits this departure in child crimes and sexual offenses.

conditions were not to be considered in determining a downward departure, the circuit court held that the policy statement to USSG §5H1.10 does not mean that the economic dependency of a family on a defendant should be irrelevant when determining whether family circumstances are sufficiently extraordinary to allow a downward departures under USSG §5H1.6. In a strong dissent, one circuit judge argued that the removal of a source of family income and the disruption of family life were normal consequences after the imposition of a prison sentence. In support of this contention, the dissent pointed to several lower court decisions which have denied departures in circumstances that were no less compelling than the circumstances in the present case. Similarly, other circuits, including the Fourth, Fifth, Seventh, and Ninth have strictly reviewed "family circumstances" departures and have often reversed, reasoning that the disintegration of existing family life or relationships is insufficient to warrant a departure, as that is to be expected when a family member engages in criminal activity that results in a period of incarceration. The dissenting judge reasoned that the district court's speculation that the defendant's family might "require some assistance in the future" hardly brought the case into the orbit of extraordinary.

Part K Departures

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

United States v. Brechner, 99 F.3d 96 (2d Cir. 1996). Upon the government's appeal, the appellate court vacated the sentence and remanded the case to the district court for resentencing. The district court erred in finding that the government breached its cooperation agreement in refusing to file a motion for downward departure for the defendant's substantial assistance. After being charged with tax evasion, the defendant entered into a written cooperation agreement with the government to provide substantial assistance in return for a downward departure under USSG USSG §5K1.1. As part of the terms of that agreement, the defendant promised to provide '"truthful, complete, and accurate information."' *Id*. at 98 (quoting the cooperation agreement). The defendant actively helped the government in a related bribery investigation which led to an arrest. However, during a debriefing session with the government, the defendant denied receiving kickbacks related to his tax fraud scheme. At that point, defendant's attorney interrupted the session to speak with his client in private, and upon resuming the session, the defendant admitted receiving such payments. Based on the defendant's original misrepresentation and the difficult prospects of prosecuting the arrested individual with the defendant as the sole witness, the government declined to move for a downward departure. The district court ruled that the government's refusal to file the motion was in bad faith, and granted defendant's motion for specific performance. In examining the government's appeal, the standard of review requires the court to examine "if the government has lived up to its end of the bargain," and whether it acted fairly and in good faith. *United States v. Knights*, 968 F.2d 1483, 1486 (2d Cir. 1992). The cooperation agreement specifically released the government from its obligation to file a USSG §5K1.1 letter if the defendant gave false information. Based on this, the appellate court noted that the defendant failed to live up to his end of the bargain by falsely denying the receipt of kickbacks. The district court, however, had found this breach to be immaterial because the defendant subsequently corrected his misstatements. The appellate court disagreed, finding that the false statements undermined the defendant's credibility as a future witness. The fact that the defendant would be the only government witness in the subsequent prosecution made his lack of credibility even more problematic. The defendant asserted that the government knew at the time of the agreement that a convicted "tax cheat" would be the sole witness. However, the appellate court found that the government, at the time of agreement, did not know that the defendant would lie during cooperation. In any event, the agreement expressly allowed for the government's release from the agreement in such a situation, and thus the government was acting within its rights.

United States v. Campo, 140 F.3d 415 (2d Cir. 1998). The district court erroneously refused to consider the merits of the government's USSG §5K1.1 motion for a downward departure based on the defendant's substantial assistance to law enforcement authorities. The government conceded that because the prosecutor refused to recommend a specific sentence this case would fall within the limited category of refusals to depart which were reviewable upon appeal. The Second Circuit held that because the district court judge failed to exercise his informed discretion when

presented with the USSG §5K1.1 motion, the defendant's sentence was "imposed in violation of the law," 18 U.S.C. § 3742(a)(1). Accordingly, the Second Circuit vacated the judgment of the district court and remanded the case for resentencing to consider the government's USSG §5K1.1 motion. Additionally, the appellate court instructed the lower court that the failure of the U.S. Attorney's office to recommend specific sentences in future cases cannot prevent the court from exercising its own informed discretion in considering USSG §5K1.1 motions.

United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995). The district court erred in refusing to conduct an evidentiary hearing to determine whether the government acted in bad faith in refusing to file a USSG §5K1.1 motion in violation of a plea agreement. The defendant pleaded guilty to conspiring to distribute hashish. Upon arrest, the defendant agreed to assist the government thus contributing to the arrest of three drug traffickers. After sending a written agreement indicating satisfaction with the defendant's assistance, the government then determined that the defendant was not being truthful and decided not to execute the plea agreement that had been previously signed by both the defendant and the government. On appeal, the government argued that no binding plea agreement existed and even if it did, that the defendant had breached it by his conduct. The defendant argued that the district court erred in failing to conduct an evidentiary hearing to determine if the government acted in bad faith. The circuit court ruled that the district court had abused its discretion in failing to consider significant evidence and by failing to take important testimony. The circuit court noted that the circumstances under which a hearing will be granted to a defendant alleging bad faith on the part of the government is outlined in *United States v. Knights*, 968 F.2d 1483, 1487 (2d Cir. 1992). The circuit court further determined that at a minimum a district court should consider any evidence with a significant degree of probative value and should rest its findings on evidence that provides a basis for appellate review. The circuit court concluded that the district court in this case should have conducted a broader inquiry into the government's refusal to make a USSG §5K1.1 motion.

United States v. Yee-Chau, 17 F.3d 21 (2d Cir. 1994). The defendant was convicted of drug related charges. The defendant argued that the government acted in bad faith by failing to move for a downward departure, and breached his cooperation agreement. The Second Circuit affirmed, finding that the government's refusal to make the USSG §5K1.1 motion was justified given the fact that the defendant was unwilling to perform when originally requested to do so. Furthermore, assuming that the defendant's refusal to comply when asked amounted to a breach, if the government's repudiation of the agreement prior to calling the defendant to testify had the unintended collateral effect of enhancing the defendant's credibility, it was irrelevant because the government was acting in good faith.

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The district court erred in departing downward. The defendant was convicted for illegally reentering the United States following deportation and was sentenced to 57 months' imprisonment, five years supervised release and a $50 special assessment. The district court corrected the defendant's sentence six months later and re-sentenced the defendant to 24 months' imprisonment, two years' supervised release and a $50 special assessment. Section 2L1.2(b)(2) requires a 16-level enhancement when deportation follows an aggravated felony conviction. The defendant had been previously convicted for possession with intent to distribute cocaine, an aggravated felony. The district court departed downward on the basis that the defendant had received a statutory minimum sentence for the single cocaine offense. The circuit court noted its previous decision on this issue in *United States v. Polanco*, 29 F.3d 35 (2d Cir. 1994). In *Polanco*, the circuit court ruled that "because [the defendant's] conviction was for an offense punishable under the Controlled Substances Act, one of the statutes enumerated under section 924(c)(2), the offense rises to the level of `aggravated felony' under USSG §2L1.2(b)(2) and 8 U.S.C. § 1326(b)(2), regardless of the quantity or the nature of the contraband or the severity of the sentence imposed." *Id.* at 38 (emphasis added). The circuit court noted that its decision in *Polanco* "left no room for the district court to conclude" that USSG §2L1.2 did not completely account for the circumstances of [the defendant's] drug offense. *Abreu*, 64 F.3d at 75. The circuit court held that the sentencing enhancement applied to the defendant regardless of the underlying facts of the crime. The circuit court also ruled that the three-year period between the defendant's drug trafficking conviction and deportation was not an appropriate reason for a downward departure.

United States v. Adelman, 168 F.3d 84 (2d Cir. 1999). The district court did not abuse its discretion in imposing a four-level upward departure based on its finding that multiple persons were affected by threats the defendant made to a federal judge. The defendant pled guilty to 18 U.S.C. § 1001, and was sentenced under USSG §2A6.1 (threatening or harassing communications). The defendant, while extremely intoxicated, made a number of phone calls to the United States Marshall's service to make threats against a federal judge, including one false claim that he had one of the judge's children. The district court found that the defendant's threats affected the judge's three children supported the four-level upward departure. The multiple victim factor takes the case out of the heartland of USSG §2A6.1, which does not account for harm to multiple victims. The court fashioned the extent of the departure based on the grouping principles of USSG §3D1.4 by creating a hypothetical count for each of the victims of the threat. The court did not abuse its discretion in using this method.

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

United States v. Amaya-Benitez, 69 F.3d 1243 (2d Cir. 1995). The district court erred in considering facts underlying a proper aggravated felony conviction that was the predicate for an enhanced sentence under USSG §2L1.2(b)(2). The defendant was convicted under 8 U.S.C. § 1326(b) for illegally reentering the United States after being deported following a conviction for an aggravated felony. The district court increased the offense level by 16 pursuant to USSG §2L1.2(b)(2), but departed downward on the basis that the prior conviction over-represented the defendant's criminal behavior because of the "questionable basis" for his prior conviction. The government appealed on the ground that the court erred in examining facts underlying the aggravated felony conviction. The circuit court, examining two recent Supreme Court decisions, concluded that "a court may not look to the facts underlying a predicate conviction to justify a departure from a guideline imposed sentence on the basis of mitigating or aggravating circumstances surrounding such conviction." In *Taylor v. United States*, 495 U.S. 575, 602 (1989), the court, in examining 18 U.S.C. § 924(e), concluded that the statute "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense," not to evidence underlying the conviction. In *Custis v. United States*, 511 U.S. 485 (1994), the court ruled that 18 U.S.C. § 924(e) did not authorize "collateral attacks" such as challenges to the constitutionality of the prior convictions used for sentencing under section 924(e). In reaching these decisions, the court noted the language of the statute, the legislative history, the "practical difficulties and potential unfairness" in essentially rehearing the prior case if the court looked to the facts underlying the conviction," and the interest in promoting the finality of judgments. The circuit court, applying the reasoning of *Taylor and Custis*, concluded that once the court determines that the defendant's conviction encompasses the elements of an aggravated felony under USSG §2L1.2, the court may not inquire further.

United States v. Bala, 236 F.3d 87 (2d Cir. 2000). The court held that "imperfect entrapment" is a possible ground for a downward departure as there is nothing in the guidelines to prohibit consideration of conduct by the government, that is not enough to give rise to the defense of entrapment, but is nonetheless "aggressive encouragement of wrong doing." *Id.* at 92-93.

United States v. Bennett, 252 F.3d 559 (2d Cir. 2001), *cert. denied*, 535 U.S. 932 (2002). The district court upwardly departed ten years because the defendant's wife refused to forfeit assets in her name. The circuit held that the refusal of a third party to relinquish assets was not a proper ground for departure because it undermined the third party's statutory rights to contest the forfeiture.

United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir.), *cert. denied*, 531 U.S. 911 (2000). The defendants, who were convicted of illegally reentering the United States, appealed the district court's finding that it did not have the authority to downwardly depart. The defendants had argued that the court should depart based on the sentencing disparity that resulted from the charging policy of the U.S. Attorney's office in the Southern District of California versus the policy in the Southern District of N.Y. In the Southern District of California, defendants are offered a plea to two counts of 8 U.S.C. § 1326, with a resulting sentence of 30 months (the maximum statutory exposure). Thus, defendants in the Southern District of California do not face the 20-year statutory maximum

under 8 U.S.C. § 1325 and the 16-level guideline enhancement of USSG §2L1.1. The circuit court affirmed the district court, finding that "noninvidious plea-bargaining practices are not a permissible basis for departure." *Id.* at 706.

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not err in granting a downward departure based on mitigating circumstances not taken into account by the guidelines and the fact that the loss overstated the seriousness of the defendant's offense. The circuit court characterized the district court's departure as a "discouraged departure"–a departure where the factors in question were considered by the Commission but may be present in such an "unusual kind or degree" as to take the case out of the "heartland" of the crime in question and to justify a departure. *See United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). The circuit court ruled that the departure was within the district court's discretion and was reasonable. The circuit court recognized that district courts have a "special competence" in determining if a case is outside the "heartland" as they hear more cases dealing with the guidelines. The circuit court noted that although it may have reached a contrary decision with regard to whether the defendant's conduct was within the "heartland" of fraud cases, the court deferred to the district court's view of the case.

United States v. Cawley, 48 F.3d 90 (2d Cir. 1995). The district court did not err in making an upward departure pursuant to USSG §5K2.0 (18 U.S.C. § 3553(b)) for defendant's perjury at his supervised release violations hearing. The defendant claimed that the guidelines did not authorize an upward departure for perjury at a hearing on revocation of supervised release. Section 5K2.0 allows an upward departure where "there exists an aggravating circumstance of a kind, or degree not adequately taken into consideration . . ." in formulating the guidelines. The Second Circuit held that "[w]hile the Guidelines for sentencing upon violations of supervised release make no explicit provision for a defendant's perjury at a violation hearing . . . perjury would constitute 'an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration' by the Commission." *Id*. at 94.

United States v. Cornielle, 171 F.3d 748 (2d Cir. 1999). The district court did not err in granting only a limited departure (one level) based on a combination of circumstances including pre-indictment delay and rehabilitation. The defendant was convicted of perjury based on testimony he gave in a civil lawsuit four years earlier. The defendant requested a downward departure based on five grounds, including: (1) pre-indictment delay, (2) post-offense rehabilitation, (3) mitigating role, (4) assistance to the prosecution, and (5) criminal history category's overstatement of seriousness of defendant's criminal history. The court found that based on the facts in the case, a departure was not warranted based on any of the grounds individually. The pre-indictment delay did not violate due process and the court did not find the post-conviction rehabilitation to be extraordinary enough to provide an independent basis for departure. A decision not to depart is only appealable if there is a violation of law, misapplication of the guidelines, or if the court mistakenly believes it lacks authority to depart. There is no violation of law, thus the court's decision was entirely appropriate.

United States v. Delmarle, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 519 U.S. 1156 (1997). The district court did not err in departing upward in calculating defendant's sentence for knowingly transporting pictures of minors engaged in sexually explicit conduct based upon the following factors: 1) use of a computer to transfer child pornography for the purpose of soliciting a minor to engage in sexual activity; and 2) under-representation of his criminal history, in that his prior convictions for similar activities were not counted under the guidelines. One conviction was older than the ten-year guideline limit, and one was a foreign conviction. Because the abuse of discretion standard is appropriate in evaluating a court's decision to depart, the circuit court affirmed the lower court's sentence. The lower court is in a better position to evaluate the underlying conduct and to determine whether it was outside the "heartland" considered by the guidelines. With respect to the departure for use of the computer, defendant argued that this activity was not outside of the "heartland" of cases contemplated under USSG §2G2.2 because that guideline is triggered by 18 U.S.C. § 2252, which makes it unlawful to transport a photograph of a minor engaging in sexually explicit conduct "by any means including the computer." The court rejected defendant's argument because the aspect of defendant's conduct that warranted departure was the use of the computer to solicit minors, as opposed to the mere transmission of photographs. The defendant's intent to solicit was evidenced by the messages he attached to the pictures. With respect to the criminal history departure, the defendant argued that the conduct underlying his 1970 misdemeanor conviction for unlawfully dealing with a minor and his Italian conviction for sexual misconduct with three young boys were not similar and the Italian conviction did not satisfy due process. The court rejected the defendant's argument with respect to the 1970 conviction because the presentence report indicated that the underlying conduct involved a 15 year old incapable of consent to sexual contact. That conduct was not identical to this case, but was sufficiently similar because it involved sexual contact with a minor. The court also rejected the defendant's argument with respect to the Italian conviction because any alleged constitutional infirmities associated with a foreign conviction do not preclude a departure if there exists reliable information about the underlying conduct from other sources. In this particular case, the sentencing court relied on an investigative report of the United States Military Police, undertaken when the defendant was working in Italy as a civilian employee for the United States military, which revealed that he had used his own children to lure neighborhood children into his home and had molested those children. The sentence was affirmed.

United States v. Fan, 36 F.3d 240 (2d Cir. 1994). The district court did not err in departing upward from the defendant's guideline range for his offense of illegally smuggling aliens into the United States. The district court's first justification for departing upward, the fact that the aliens would have likely spent years in involuntary servitude in the United States to pay for the smuggling fee, was appropriate. The aliens, prior to the voyage, paid sums ranging from $100 to $15,000. They agreed to pay an additional $25,000 to $30,000 after the voyage. "A contract to pay smuggling fees, unenforceable at law or equity, necessarily contemplates other enforcement mechanisms" which infers "years of labor under circumstances fairly characterized as involuntary servitude." *Id*. at 245. The second justification for an upward departure was the fact that "inhumane conditions" existed aboard the "fishing vessel" that transported the aliens. The aliens were forced to live in fish holds for 18 weeks,

there was only one bathroom, the life preservers and life rafts were inadequate and order was maintained by the captain brandishing a gun. These factors amply support the contention that "inhumane" conditions existed. Contrary to the defendant's argument, the sentencing judge did not depart upward based on his conclusion that the defendant violated other criminal statutes; the judge did mention the offense level for another crime, but only to determine how far to depart, not whether to depart. Therefore, the departure was affirmed.

United States v. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999). A district court has authority to depart downward based on a defendant's consent to deportation if the defendant presents a colorable, nonfrivolous defense to deportation. The Second Circuit also adopted the First Circuit's reasoning regarding the appropriateness of the grounds for departure. *See United States v. Clase-Espinal*, 115 F.3d 1054, 1058-59 (1st Cir.), *cert. denied*, 522 U.S. 957 (1997). Because the overwhelming majority of alien criminal defendants are deported voluntarily, consenting to the deportation is of "such limited value as to preclude a finding that the consent presents a 'mitigating circumstance of a kind not adequately considered by the Commission." *Galvez*, 174 F.3d t 259-60 (quoting *Clase*, 115 F.3d at 1059). Thus, the act of consenting to deportation is insufficient grounds for a downward departure unless the defendant presents a nonfrivolous defense to deportation that would substantially assist in the administration of justice. In the instant case, the district court denied the defendant's request for a downward departure, after the government opposed the departure based on the policy of the local United States Attorney's office. The court made comments about the "exclusion of judicial discretion." Because the record was at least ambiguous as to whether the court understood its authority to depart in the absence of the government's consent, the case was remanded.

United States v. Gigante, 94 F.3d 53 (2d Cir. 1996), *cert. denied*, 522 U.S. 868 (1997). Defendants Mangano and Aloi received substantial upward departures. They asserted that the amount of the departures was unreasonable, and that the proof of uncharged conduct by a preponderance of the evidence was not sufficient to support upward departures of such magnitude. The appellate court affirmed the upward departure, holding that the preponderance test continues to govern in "such situations." The appellate court added that "the preponderance standard is no more than a threshold basis for adjustments and departures, and that the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures." *Id*. at 56. The appellate court concluded that the evidence was "compelling" to grant an upward departure in this case.

United States v. Kaye, 23 F.3d 50 (2d Cir. 1994). The district court did not err in departing upward based on the extent of the victim's financial loss. The defendant's fraud depleted his aunt's liquid assets and left her financially dependant on the good will of others. He argued that the departure constituted double counting because his sentence had already been enhanced ten levels based on the amount of the monetary loss. USSG §2F1.1. Although the circuit court noted that the fraud guideline considered the kind of harm the victim suffered, the degree of harm caused was not reflected. Since the seriousness of the defendant's conduct was not captured by the offense level determination, the

upward departure did not constitute double counting. The defendant further argued that enhancement for abuse of a position of trust adequately reflected the harm caused to his aunt. The circuit court concluded that the departure was appropriate. Unlike USSG §3B1.3, which "is concerned with factors that make a crime more easy to commit," the district court's upward departure reflected the extent of the consequences of the defendant's conduct upon his victim. Finally, the defendant argued that the vulnerable victim enhancement adequately reflected the harm his aunt suffered. The circuit court disagreed. The "susceptible to the criminal conduct" language of USSG §3B1.1 has been interpreted to mean that the victim was less likely to thwart the crime. This focus does not completely reflect the concern with the actual impact of the fraudulent conduct on the victim. Thus, to the extent that USSG §3B1.1 did not adequately represent the degree of the victim's monetary suffering, the departure was appropriate.

United States v. Korman, 343 F.3d 628 (2d Cir. 2003). The district court erred in its decision to grant defendant a downward departure under §5K2.0 for defendant's testimony at a state grand jury proceeding. The defendant was found guilty after a jury trial of participating in two schemes to defraud an investment bank and to launder the proceeds of the fraud. At sentencing, defendant moved for a downward departure under §5K2.0 based on the assistance he provided to state law enforcement authorities in 1999 after he had been indicted for his involvement in the fraud against the bank. He testified before a state grand jury in connection with a 1972 killing. Defendant's testimony in the grand jury was essential in establishing the identification of the perpetrator. The district court determined that defendant's testimony before the grand jury merited a downward departure from level 26 to level 23 resulting in a range of 57 to 71 months' imprisonment. The government appealed. The Second Circuit stated that testifying before a grand jury was similar to civic, charitable, or public service, and therefore did not support a downward departure. In other words, the fact of providing grand jury testimony in a state prosecution does not remove a case from the heartland of the guidelines. The court noted that in the instant case there was nothing in the record to suggest that defendant's testimony was exceptional in any way such that it would support a departure. Defendant had a basic civic duty not only to testify before the grand jury but to testify truthfully; defendant's testimony fell among the basic civic duties for which no departure was warranted under the guidelines. Accordingly, the district court erred in granting defendant a three-level downward departure.

United States v. Londono, 76 F.3d 33 (2d Cir. 1996). The district court erred in granting a downward departure to allow the defendant and his wife to try to have a child during the wife's remaining childbearing years. The defendant pled guilty to conspiracy to distribute and possess cocaine. Because of extraordinary family circumstances, USSG §5H1.6, the district court departed from the applicable guideline range of 108 to 135 months to 37 months' imprisonment. The circuit court held that although family responsibilities may present such "extraordinary circumstances" as to warrant a downward departure, the departure sought by the defendant would benefit chiefly himself. *Id*. at 36. Incarceration inevitably impacts on family life and family members. Because "federal prison regulations do not provide for conjugal visits–a fact we assume is known to the Sentencing

Commission–the inability to conceive children is therefore incidental to imprisonment." *Id*. The court concluded that district courts should not depart based on purely personal issues of family planning.

United States v. Los Santos, 283 F.3d 422 (2d Cir. 2002). The district court erred in granting the defendant a downward departure from his sentence based on his alleged loss of opportunity to receive a concurrent sentence. The defendant was discovered by the INS during a routine screening of inmates in a New York state prison. Seven months after he was discovered, he pleaded guilty to his indictment for illegal reentry. The sentencing judge granted the defendant an downward departure to account for the period of incarceration from his initial arrest until his federal sentencing. The Second Circuit held that such a departure was inappropriate. The court held that a sentencing court may not depart under USSG §5K2.0 based on prosecutorial delay that resulted in a missed opportunity for concurrent sentencing unless the delay was "in bad faith or . . . longer than a reasonable amount of time for the government to have diligently investigated the crime." *Santos,* 283 F.3d at 428. The Second Circuit held that the amount of time between when the defendant was found in the country by the INS and the time of his sentencing was not long enough to show bad faith on the part of the government. Thus, when the district court granted the departure, it was in error.

United States v. Luna-Reynoso, 258 F.3d 111 (2d Cir. 2001). The district court did not err in failing to give the defendant a downward departure under USSG §5K2.0 to credit him for time already served in federal custody between the date of his transfer from state custody and the date of his sentencing. The Second Circuit stated that this claim was without merit because the district court had no authority to grant such a departure. Section 18 U.S.C. § 3585 governs the date on which a defendant's sentence commences and the credit he is given for time he has spent in custody. Under section 3585, the Bureau of Prisons administers the credit to be granted a defendant for time he has served in federal custody prior to sentencing, not the sentencing court.

United States v. Mapp, 170 F.3d 328 (2d Cir.), *cert. denied*, 528 U.S. 901 (1999). The district court did not err in departing upward from a guideline range of 262 to 327 months imprisonment by imposing a sentence of 450 months based on the three robberies for which the jury was unable to reach a verdict. The court found by clear and convincing evidence that the defendant had participated in the three robberies, one of which involved a shooting. In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court held that a sentencing court may rely on acquitted conduct proven by adequate evidence. Thus, it was within the court's discretion to consider conduct in counts for which the jury was unable to reach a verdict.

United States v. McCarthy, 271 F.3d 387 (2d Cir. 2001). The district court did not err in its refusal to grant a downward departure because it did not find that the nature of the offense conduct was "atypical." Because the record shows that the district court recognized its authority to depart and chose not to do so, the decision is not reviewable. *Id*. at 401; *see United States v. Piervinanzi*, 23 F.3d 670, 685 (2d Cir.), *cert. denied*, 513 U.S. 904 (1994). The court further mentioned that even if they were to review the decision, the lower court's decision was correct in its decision not to grant the

departure. The court also noted that money laundering guidelines are not limited to proceeds derived from drugs or organized crime. 271 F.3d 387 at 402; *see United States v. Kayode*, 254 F.3d 204, 215-17 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1147 (2002).

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court committed no error when it did not grant defendants a downward departure after using a preponderance of the evidence standard to prove the facts underlying the attribution of a murder. The court stated that the "preponderance standard applies to fact finding at sentencing even when the proposed enhancement would result in a life sentence [and] that the district court could consider a departure pursuant to USSG §5K2.0 where there is a 'combination of circumstances . . . including (i) an enormous upward adjustment, (ii) for uncharged conduct, (iii) not proved at trial, and (iv) found by only a preponderance of the evidence." Citing *United States v. Cordoba-Murgas*, 233 F.3d 704, 708-09 (2d Cir. 2000). The Second Circuit ruled that the district court appropriately considered the defendants' requests for a downward departure on this basis and found no error in the district court's analysis of the applicable burden of proof.

United States v. Puello, 21 F.3d 7 (2d Cir. 1994). The defendant pleaded guilty to illegally redeeming $43,000,000 worth of food stamp coupons and preparing more than 500 fraudulent certificates. The district court found that there had been no "loss" as defined by USSG §2F1.1 and departed upward because the fraud guideline inadequately considered the dollar amount of the fraud and the number of false statements made to perpetuate the crime. The circuit court upheld the district court's departure, which referred by analogy to the money laundering guideline, USSG §2S1.1, to add 11 levels. The circuit court rejected the defendant's argument that the court was required to find that his conduct violated the elements of the offense of money laundering before the court could apply that guideline in forming a departure. The court may affirm the sentence when it is satisfied the departure "is reasonable under section 3742(f)(1)." *Id*. at 10 (quoting *Williams v. United States*, 503 U.S. 193, 203 (1992)). Sentencing courts are encouraged to consider "analogous guideline[ ] provisions to determine the extent of departure." *United States v. Rodriguez*, 968 F.2d 130, 140 (2d Cir.), *cert. denied*, 506 U.S. 847 (1992).

United States v. Schmick, 21 F.3d 11 (2d Cir. 1994). The district court did not misperceive its authority to depart downward based on aberrant behavior. The defendant argued at his sentencing hearing that a downward departure was warranted based on his age and health and his aberrant criminal activity. The district court explicitly accepted the first two bases and granted a two-level downward departure, but did not address the third. The defendant challenged the failure to mention the additional ground as an indication of the court's perception that it lacked the authority to depart based on aberrant behavior. The court of appeals held that absent evidence in the record that the sentencing court was confused as to its authority to depart based on a particular ground, its acceptance of an alternate departure basis did not indicate that the court misunderstood its authority to depart on the unmentioned ground.

United States v. Sprei, 145 F.3d 528 (2d Cir. 1998). The district court erred in departing downward based on the unique responsibility defendant, as a Hasidic Jew, bore for his children's marriages. Prior to sentencing, the district court received letters from members of the defendant's religious community, attesting to the devastating impact a long period of incarceration would have on the defendant's children, for whom the defendant would not be available to find marriage partners. Marriages are arranged by the parents in this community. The district court departed based on the consequences to the children's marriage prospects due to the unusual customs of the defendant's community. The court of appeals, noting that departures for family ties are discouraged, held that the defendant's children's circumstances were not very different from the those of other defendants' children–the stigma of their parent's punishment has lessened their desirability as marriage partners. To the extent the circumstances are atypical because the practices of the Bobov Hasidic community place special emphasis on the role of the father, this is an improper basis for departure: treating adherents of one religious sect differently from another.

United States v. Tejeda, 146 F.3d 84 (2d Cir. 1998). The district court erred in departing downward on the basis that the defendant's status as a career offender significantly overstated the seriousness of his criminal history. The district court offered several reasons for the conclusion, all of which were rejected by the court of appeals: that the defendant received very light sentences for his career offender predicate offenses; that his codefendant received a much lower sentence; the relatively small quantity of drugs involved; and the defendant's eligibility for deportation after his release from custody. The court of appeals stated that a downward departure based on prior lenient sentences conflicts with USSG §4A1.3, which states that a prior lenient sentence for a serious offense may warrant an upward departure. Circuit precedent already forbids departures for codefendant disparity and quantity of drugs. Finally, the district court failed to note any extraordinary consequence of the defendant's alienage that would warrant a downward departure; the court of appeals had previously held that deportation alone does not constitute an extraordinary consequence that would justify departure.

United States v. Tropiano, 50 F.3d 157 (2d Cir. 1995). The district court erred in imposing an upward departure under USSG §5K2.0. The appropriate guideline for a departure based on the inadequacy of defendant's criminal history category is USSG §4A1.3. "[A] district court cannot avoid this step-by-step framework [of a §4A1.3 departure] `by classifying a departure based on criminal history as [an offense level departure] involving aggravating circumstances under USSG §5K2.0.' *United States v. Deutsch*, 987 F.2d 878, 887 (2d Cir. 1993)." The appellate court noted that other circuits "have not adopted so rigid a demarcation . . . and will affirm USSG §5K2.0 departures based on criminal history concerns." *See, e.g.*, *United States v. Schmeltzer*, 20 F.3d 610, 613 (5th Cir.) (§5K2.0 departure affirmed for prior convictions for similar offense), *cert. denied*, 513 U.S. 1041 (1994); *United States v. Nomeland*, 7 F.3d 744, 747-48 (8th Cir. 1993) (§5K2.0 departure affirmed based on extensive violent criminal activity); *United States v. Molina*, 952 F.2d 514, 518-19 (D.C. Cir. 1992) (§5K2.0 departure affirmed based on prior similar offenses). The appellate court stated that the "failure to follow the category-by-category horizontal departure procedure would not matter if the

district court had stated on the record an alternative reason other than recidivism for reaching the same result." The case was remanded for resentencing.

United States v. Williams, 65 F.3d 301 (2d Cir. 1995). The district court did not err in departing downward so that the defendant could enter a drug treatment program to which he had been admitted. The defendant was convicted of distributing and possessing with intent to distribute five grams and more of cocaine base. The defendant's guideline range was 130-162 months. At his initial sentencing, the district court departed downward *sua sponte* based on the defendant's desire to attend a drug treatment program, and sentenced the defendant to two concurrent five-year terms of imprisonment followed by two concurrent ten-year terms of supervised release. The government appealed and the circuit court vacated the sentence, ruling that although it recognized that a defendant's rehabilitative efforts in ending his drug dependence may be a permissible grounds for departure, the defendant's "genuine desire to seek rehabilitative treatment in the future" fell short of the "extraordinary" efforts at rehabilitation that justified a departure. *United States v. Williams*, 37 F.3d 82 (2d Cir. 1994). At resentencing, the district court imposed the same sentence, concluding that the Sentencing Commission could not have considered the particular circumstances of the case, namely that the defendant fit a narrow profile for a selectively available pilot drug treatment program, which in the absence of a downward departure would not be available to him for a significant number of years. The government appealed the sentence a second time. The circuit court ruled that the downward departure was permissible, noting its decision in *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992), which concluded that rehabilitative endeavors could serve as a basis for downward departure, as 18 U.S.C. § 3553(a)(2)(D) indicated that Congress did not abandon rehabilitation as a permissible goal of sentencing when it passed the Sentencing Reform Act. The circuit court further noted that there was no evidence that the Sentencing Commission had given adequate consideration to a defendant's efforts at drug rehabilitation in formulating the guidelines. The circuit court recognized that the district court's departure was not only based on the fact that the defendant had entered a drug treatment program, but because, on the facts of the case, there was no other sentence that would accord with the requirements of 18 U.S.C. § 3553(a)(2)(D). The circuit court ruled that the district court had the authority to depart downward to facilitate the defendant's rehabilitation given the atypical facts of the case, which placed it outside the "heartland" of usual cases involving defendants who may benefit from drug treatment. The circuit court limited its ruling, noting that its intent was not to imply that downward departures should be granted automatically to defendants in that situation, but to acknowledge that the district court's discretion remained a vital component of individualized sentencing under the sentencing guidelines. The circuit court ruled, however, that although the district court had the authority to depart, the departure was not reasonable because the term of supervised release lacked special conditions to guarantee that the defendant could not withdraw from the program and be released at the end of five years while similar defendants who committed similar crimes would serve another six to nine years, rendering the disparity "unwarranted." The circuit court held that the risk of unwarranted sentencing disparity would be allayed if the district court were to impose the following special conditions: that the defendant must present certification from a drug treatment program at his place of incarceration, that he enter and complete the program, that he remain drug free, submit to drug testing during supervised release, and

that the defendant continue to participate in a drug treatment program if directed by the United States probation office. The circuit court vacated the sentence to allow these special conditions to be added to the defendant's sentence to ensure that the defendant serves at least his guideline minimum sentence if he does not successfully complete the drug program.

United States v. Williams, 37 F.3d 82 (2d Cir. 1994). The district court erred in granting the defendant a downward departure based on his post-arrest rehabilitation efforts. The circuit court distinguished the defendant's rehabilitation efforts from those of the defendant in *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992), in which the Second Circuit affirmed the departure because of Maier's "extraordinary strides towards rehabilitation over an extended period of time." *Williams*, 37 F.3d at 86. The defendant in the instant case merely attended approximately half the required hours in a drug education program that was not designed to rehabilitate but rather inform prison inmates of the dangers of drug addiction. Thus, the defendant's efforts were not so extraordinary as to be of a kind or to a degree sufficient to warrant a downward departure.

United States v. Young, 143 F.3d 740 (2d Cir. 1998). The district court erred in granting a one-level downward departure for stipulated deportation were the defendant was a naturalized citizen not subject to deportation. The district court reasoned that similarly situated alien defendants routinely received a one-level departure if they stipulated to deportation. The district court concluded that American citizens were essentially penalized for their lawful status because they could not qualify for the reduction. Thus, the court granted the one-level departure even though the defendant was a citizen not subject to deportation. The court of appeals vacated, noting that the defendant was not similarly situated to alien defendants because he would not be deported for his criminal conviction. Thus, it was an improper basis for departure.

§5K2.2 Physical Injury

United States v. Jones, 30 F.3d 276 (2d Cir.), *cert. denied*, 513 U.S. 1028 (1994). The district court did not err in departing upward based on injury resulting from a drug conspiracy, where the defendant planned for days the shooting of an undercover police officer which resulted in massive internal injuries. The circuit court held that the district court was authorized to depart because the sentencing guidelines did not adequately take into consideration the intentional and indifferent nature of the defendant's acts.

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

United States v. Crispo, 306 F.3d 71 (2d Cir. 2002). The defendant was convicted of one count of attempted extortion and one count of attempted obstruction of justice. The defendant objected to an upward departure of two levels under USSG §§5K2.3 and 5K2.0 for extreme psychological injury and other aggravating circumstances. The defendant argued that he was not given sufficient notice of the district court’s intention to upwardly depart from the adjusted offense level due

to extreme psychological injury. The court stated that, although the defendant was correct that either the government or the sentencing court must give the defendant prior notice of the grounds that may be used to justify a departure from the guidelines, the defendant overlooked the fact that his presentence report specifically mentioned both the possibility of and the basis for an extreme psychological injury departure. The court concluded that no more notice than this was required. The case was remanded to the district court on other grounds.

United States v. Lasaga, 328 F.3d 61 (2d Cir. 2003). The defendant pled guilty to receipt of child pornography, and possession of child pornography. At the sentencing hearing, the district court departed upward one level under USSG §5K2.3, which allows for upward departure where a victim suffered psychological injury much more serious than that normally resulting from commission of the offense. First, the Second Circuit noted that §5K2.3 is comprised of two paragraphs. On appeal, the defendant argued that each of the paragraphs set forth a separate prong of the test for an upward departure under §5K2.3. The Second Circuit agreed, and stated that §5K2.3 should be applied as follows: if a district court finds that the factors in the second paragraph of §5K2.3 are met, then the basic standard set out in the first sentence of the first paragraph of this section must also be met. In other words, §5K2.3 requires a finding of comparatively greater harm, relative to a normal or typical injury of the type enumerated in the guideline. In the instant case, the district court did not find that the injury suffered by the victim was any more serious than that normally resulting from the crime, let alone much more serious as §5K2.3 explicitly required. The district court merely found that it had resulted in a substantial impairment. Accordingly, the district court erred in applying an upward adjustment under §5K2.3 without making the additional finding that the victim suffered much more serious harm than would normally be the case. The district court's sentence was vacated and remanded.

United States v. Morrison, 153 F.3d 34 (2d Cir. 1998). In sentencing the defendant for transmitting through interstate commerce threats to injure various persons and transmitting threats with intent to extort money, the district court properly departed upward by 14 levels for the defendant's extreme conduct and for extreme psychological injury to victims. The district court made specific findings regarding the extensive impact the defendant's threats had on the victims' lives, the duration of the threats, and the cruel and heinous nature of the threats. The court of appeals found no error in adding levels for each of the victims and adding levels for "secondary" victims, including the victims' family and friends, to whom the defendant made additional threats. The court of appeals rejected the defendant's argument that testimony from psychiatric experts was necessary for a departure based on psychological injury. The departure for extreme behavior was warranted by the nature of the establishments threatened, including a hospital emergency room, a police department, and a medical examining board, which was forced to cancel an exam that affected thousands of physicians.

§5K2.8 Extreme Conduct (Policy Statement)

See United States v. Morrison, 153 F.3d 34 (2d Cir. 1998), §5K2.3, p. 75.

§5K2.10 Victim's Conduct (Policy Statement)

United States v. Mussaleen, 35 F.3d 692 (2d Cir. 1994). The defendants were convicted of participating in a scheme to smuggle a Guyanan citizen in to the United States. The appellate court held that when a district court departs upward pursuant to USSG §5K2.4 (permitting an upward departure if a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense), the court is not required to also depart downward pursuant to USSG §5K2.10 (permitting a downward departure when the victim's wrongful conduct contributed significantly to provoking the offense), even though the victim "voluntarily entered a network of criminal operatives with the intention that they would transport her illegally." The district court, in its discretion, chose not to depart downward under USSG §5K2.10 and that ruling will not be disturbed.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Carrasco, 313 F.3d 750 (2d Cir. 2002). The defendant pled guilty to illegal reentry following deportation in violation of 8 U.S.C. § 1326. At his sentencing hearing, the defendant contended that he had reentered the United States with the intention of returning to his native country to care for his three children after visiting his ailing father. Based on the record, the district court stated that it was clear the defendant's reentry was not for the purposes of committing future crimes. The district court then granted defendant a downward departure pursuant to USSG §5K2.11 based on lesser harm. On appeal, the government challenged the district court's downward departure. The Second Circuit noted that the district court applied a lesser harm departure because it thought the defendant's conduct did not cause the harm sought to be prevented by the guidelines' 16-level enhancement applicable to reentering aliens who were deported for committing an aggravated felony. *See* USSG §2L1.2. According to the district court, the §2L1.2 enhancement imposed extra punishment in order to deter only those deported aliens who reentered for the purpose of committing further crimes. The Second Circuit stated that section 1326 makes a deported alien's unauthorized presence in the United States a crime in itself. In other words, being "found" in the United States is an independent basis for prosecution. The court noted that if the enhancement of §2L1.2 was provided because of a somewhat greater likelihood that the reentering alien, who had committed an aggravated felony, would commit another crime, the enhancement provision did not require any evidence that such a purpose existed, and the absence of such evidence did not provide a valid basis for a "lesser harm" departure. The court concluded that defendant was not entitled to a lesser harm departure because a deported alien reentering the country illegally, even without intent to commit a crime, has committed what the statute intended to prohibit.

§5K2.12 Coercion and Duress (Policy Statement)

United States v. Amor, 24 F.3d 432 (2d Cir. 1994). The district court did not err in granting a downward departure pursuant to USSG §5K2.12. The defendant was convicted of making, possessing and failing to register a sawed-off rifle, in violation of 18 U.S.C. § 5861(f),(c),(d), and of retaliation against a government informant, in violation of 18 U.S.C. § 1513(a)(2). The district court granted the defendant's motion for a downward departure based on duress, finding that the defendant would not have purchased and altered the firearm but for the threats he received and the shots fired at his vehicle. The government argued that "committed the offense because of" as it is used in USSG §5K2.12 referred to the offense that controlled the defendant's offense level for the entire group of offenses; since the retaliation count was the controlling offense, and the duress was related only to the firearms count, the departure was erroneous. The circuit court rejected this argument as representing an interpretation of "because of" that was too narrow. There was a clear nexus between the threats and the defendant's gun acquisition. Further, although in the chain of events that formed the basis of the defendant's conviction, the retaliation count was not wholly related to the duress, a sufficient causal nexus existed between the original duress and the subsequent retaliation.

United States v. Cotto, 347 F.3d 441 (2d Cir. 2003). The district court's grant of a downward departure under §5K2.12 was reversed; a defendant's generalized fear based solely on knowledge of an alleged coercing party's criminal background was insufficient to constitute serious coercion or duress under §5K2.12. Defendant pled guilty to one count of conspiracy to engage in witness tampering/obstruction of justice in violation of 18 U.S.C. §§ 371 and 1512(b)(3). The charging indictment detailed a larger criminal enterprise involving 21 other defendants, accusing them of multiple narcotics conspiracies, murder in furtherance of a racketeering enterprise, assault, firearms crimes, and bank fraud. At sentencing, pursuant to §5K2.12, the district court departed from the 60-month statutory maximum and imposed a sentence of 24-four months. On appeal, the government argued that the district court erred by interpreting "serious coercion" to include the defendant's perception, based solely on her knowledge of Soler's criminal history, that Soler might harm her or her family if she refused to participate in the conspiracy to obstruct the investigation of the murder. The Second Circuit noted that defendant conceded that Soler did not directly threaten her, her family or her property if she did not assist in obstructing the murder investigation. The court noted that defendant perceived a threat of harm because she was aware of Soler's criminal background, and she had witnessed Soler murdering someone. The court held that the coercion occasioned by a defendant's generalized fear of a third party, based solely on knowledge of that third party's violent conduct toward others rather than on any explicit or implicit threat, was insufficient to constitute the unusual or exceptional circumstances warranting a departure under §5K2.12. In other words, because defendant was never forced to do anything or threatened with harm if she did not comply with Soler's wishes, and was not in possession of information that suggested that merely refusing to associate with Soler would cause him to harm her, her understandable fear in dealing with someone capable of great violence did not amount to exceptional coercion. The judgement of the district court was vacated and the case was remanded for resentencing.

§5K2.13 Diminished Capacity (Policy Statement)[26]

United States v. Silleg, 311 F.3d 557 (2d Cir. 2002). The defendant pled guilty to receiving and possessing child pornography. The defendant moved for a downward departure pursuant to USSG §5K2.13, diminished capacity. The district court denied the defendant's motion. At the sentencing hearing, the district court noted that almost every child pornography defendant comes with documented psychological problems. The district court reasoned that such psychological problems were adequately considered by the Sentencing Commission when the Commission adopted the guidelines for child pornography offenses. On appeal, the defendant argued that the district court misapprehended its authority to depart on the basis of diminished capacity in child pornography cases and erred in denying him individualized consideration of his departure motion. The Second Circuit noted that, after reviewing §5K2.13 and §2G2.2, it found no textual support for the district court's reasoning that the Sentencing Commission had already implicitly considered diminished capacity in

[26]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement to add subdivision (4). *See* USSG, App. C, Amendment 649.

developing guidelines for child pornography offenses, thereby rendering departure on that basis impermissible except in extraordinary circumstances. Furthermore, although the court has not specifically addressed whether a diminished capacity departure was available in child pornography cases, other circuits have recognized that such departures are permissible. *See United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997); *United States v. Black*, 116 F.3d 198, 201-01 (7th Cir.), *cert. denied*, 522 U.S. 934 (1997); *United States v. Goossens*, 84 F.3d 697, 700-02 (4th Cir. 1996); *United States v. Soliman*, 954 F.2d 1012, 1014 (5th Cir. 1992). Accordingly, the court held that, based on the plain language of the guidelines and the views of most other circuits, the diminished capacity of a defendant in a child pornography case may form the basis for a downward departure where the requirements of §5K2.13 are satisfied.

§5K2.20 Aberrant Behavior (Policy Statement)[27]

United States v. Castellanos, 355 F.3d 56 (2d Cir. 2003). The district court's denial of a two-level downward departure for aberrant behavior under §5K2.20 was affirmed. After a four-day trial, a jury found defendant guilty of conspiring to distribute 100 grams or more of heroin. On appeal, defendant argued that the district court improperly considered the fact that her offense conduct was not spontaneous in denying an aberrant behavior departure under §5K2.20. The Second Circuit noted that a sentencing court may exercise its discretion to depart for aberrant behavior only where the offense is "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." The court stated that spontaneity was not determinative, but it was a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of §5K2.20 has been met. The court stated that the district court accorded appropriate weight to the factor of spontaneity. Defendant had a week's notice of the crime and therefore plenty of time to consider whether to participate. The district court did not rest its finding that defendant's crime was not aberrant behavior on the lack of spontaneity alone. The district court noted that defendant was carrying the money to purchase drugs at the time of arrest. The court stated that it was within the district court's discretion to find that these facts, in combination, suggested that defendant had done significant planning for the crime. Furthermore, the district court found that defendant's crime was not a marked departure from an otherwise law-abiding life. Accordingly, the aberrant behavior departure was permissibly rejected.

United States v. Gonzalez, 281 F.3d 38 (2d Cir. 2002). The district court erred in denying the defendant a downward departure based on aberrant behavior because the court misapplied the guidelines, used the wrong legal standard, and mistakenly believed it lacked the authority to depart. The district court specifically sought an element of spontaneity in the defendant's behavior in

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

determining whether his behavior was "of limited duration" as required by USSG §5K2.20. The district court was incorrect in this analysis. The Second Circuit noted that the Sentencing Commission expressly intended to relax the requirements for aberrant behavior. Therefore, the Second Circuit held that the sentencing court should not consider spontaneity in connection with aberrant behavior. Finally, the Second Circuit held that because the sentencing court recognized that the offense of conviction was a "marked deviation from an otherwise law-abiding life," a departure for aberrant behavior would be appropriate. *Gonzalez*, 281 F.3d at 47.

§5K2.22 Specific Offender Characteristics as Grounds for Downward Departures in Child Crimes and Sexual Offenses (Policy Statement)[28]

§5K2.23 Discharged Terms of Imprisonment (Policy Statement)[29]

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. Zapatka, 44 F.3d 112 (2d Cir. 1994). The district court erred in applying a guideline different from the one previously endorsed by the prosecution in a letter to the probation department without first giving the defendant reasonable notice of its intention to do so and an opportunity to be heard. The Second Circuit, relying on admonitions contained in USSG §§6A1.2 and 6A1.3, ruled that because the defendant's role in the offense was "reasonably in dispute," she was entitled to advance notice of the district court's choice of guideline used to calculate her sentence. The appellate court recognized that the First Circuit has held that the guidelines themselves give a defendant proper notice regarding any adjustments a district court contemplates imposing. *See United States v. Canada*, 960 F.2d 263, 266 (1st Cir. 1992). The Second Circuit however, citing *United States v. Jackson*, 32 F.3d 1101, 1112 (7th Cir. 1994) (Posner, C.J., concurring), concluded that the uncertainty exhibited by the court and the prosecutor concerning applicable guidelines and "the too-frequent inadequacy of criminal defense lawyers" makes the First Circuit's position "unrealistic."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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[28]Effective April 30, 2003, section 401(b)(2) of Pub. L. 108-21 (PROTECT Act) directly amended Chapter Five, Part K, to add this new policy statement. *See* USSG, App. C, Amendment 649.

[29]Effective November 1, 2003, the Commission added a new downward departure provision regarding effect of discharged terms of imprisonment.

United States v. Conte, 99 F.3d 60 (2d Cir. 1996). The district court did not err in imposing as a condition of probation the requirement that the defendant report to a probation officer and truthfully respond to questions, or in revoking the defendant's probation upon his refusal to answer the probation officer's questions and to allow the officer to enter his home. With respect to the conditions of probation, the Sentencing Reform Act provides a list of probation conditions to be imposed at the sentencing judge's discretion, including the requirement that the defendant "answer inquiries by a probation officer." 18 U.S.C. § 3563(b)(18). In addition, at the time of defendant's sentencing, the Sentencing Commission had promulgated a policy statement recommending truthful communication with a probation officer to be a condition of probation. USSG §5B1.5(a)(2) and (3) (policy statement). The court rejected the defendant's argument that his Fifth Amendment rights were violated by implementa-tion of these requirements. The court recognized that while a probationer is not entirely deprived of his Fifth Amendment rights, in asserting these rights he runs the risk that his actions will lead to a violation of probation. The argument fails in this particular case for two reasons: 1) a probation revocation proceeding is not itself part of the criminal proceeding and the right against self-incrimination does not attach; and 2) even if the right existed, the defendant waives this right by testifying in his own defense.

United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997). The defendant appealed his revocation of supervised release and sentence of 36 months in prison. The defendant argued that the district court erred by upwardly departing from the guidelines' policy statements without giving him reasonable notice of its intention to do so or its grounds for departing. The Second Circuit disagreed, noting that the district court specifically stated during the hearing that failure to complete a treatment program would result in a possible upward departure. The court, agreeing with the Fifth, Tenth, and Eleventh Circuits, held that the district court was not required to give notice to the defendant before imposing a sentence above the range suggested by Chapter Seven's non-binding policy statements. *See United States v. Mathena*, 23 F.3d 87, 93 (5th Cir. 1994); *United States v. Burdex*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997); *United States v. Hofierk*, 83 F.3d 357, 362 (11th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997). Because these policy statements are merely advisory, the sentencing court is not "departing" from any binding guideline when it imposes a sentence in excess of the range recommended by the Chapter Seven.

United States v. Whaley, 148 F.3d 205 (2d Cir. 1998). The district court lacked authority to deny the defendant credit for time the defendant had served on a vacated conviction against the sentence imposed on revocation of supervised release. The defendant had served a 77-month sentence for a narcotics conviction and 508 days on a conviction under 18 U.S.C. § 924(c). The section 924(c) conviction was subsequently vacated under *Bailey v. United States*, 516 U.S. 137 (1995). The defendant then violated the terms of his supervised release and was sentenced to six months' imprisonment. The Bureau of Prisons credited the defendant with the time already served and released him. The government moved to modify the sentence pursuant to USSG §7B1.3(e), which directs a court revoking supervised release to increase the term of imprisonment by the amount of time the defendant will be credited for official detention. The district court denied the motion but held that the

defendant was not entitled to the credit BOP had granted pursuant to 18 U.S.C. § 3585(b) and ordered the defendant to begin serving his sentence. The court of appeals vacated this order, holding that the district court lacked jurisdiction to determine credits under section 3585(b); only the Attorney General, through BOP, possesses the authority to grant or deny credits. The court of appeals noted that district courts need to be alerted to the existence of applicable prison credits and the need to comply with USSG §7B1.3(e) at revocation proceedings.

§7B1.4 Term of Imprisonment

United States v. Cohen, 99 F.3d 69 (2d Cir. 1996), *cert. denied*, 520 U.S. 1213 (1997). In this case of first impression, the Second Circuit joined with the majority of circuits in holding that the Sentencing Commission's policy statements regarding revocation of supervised release are not binding. *See United States v. Escamilla*, 70 F.3d 835 (5th Cir. 1995), *cert. denied*, 517 U.S. 1127 (1996); *United States v. West*, 59 F.3d 32 (6th Cir.), *cert. denied*, 516 U.S. 980 (1995); *United States v. Hofierka*, 83 F.3d 357 (11th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997). *But see United States v. Plunkett*, 94 F.3d 517 (9th Cir.), *cert. denied*, 519 U.S. 905 (1996). The court elected to follow the majority because the statutory language indicates that the policy statements are not binding and there is "no clear legislative intent to the contrary." *Cohen*, 99 F.3d at 70. Title 18, United States Code, § 3553(a) requires the court to consider the "applicable guidelines or policy statements" in sentencing a defendant for a violation of supervised release, while section 3553(b) requires a court to sentence within the "guidelines." Therefore, Congress's inclusion of "policy statements" among the sentencing factors to be considered and its omission of these statements with respect to mandatory sentencing practice, led the court to conclude that consideration of the policy statements is not required. Furthermore, Congress approved a Commission amendment which stated that its aim in issuing advisory policy statements was to give district courts greater flexibility.

United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996). The judgment of the district court imposing 18 months' imprisonment under USSG §7B1.4, revocation of supervised release, was vacated by the circuit court. The defendant was serving a term of supervised release when he pleaded guilty to sending obscene materials to a minor. This violation came as the culmination of the defendant's attempts to reduce the level of disturbance by his neighbors. After various acts of harassment, the defendant caused catalogs advertising adult films to be sent to the neighbors' nine-year-old son in hopes of the father punishing him and, thereby, restraining the noise caused by the boy. The defendant asserts that the 18-month prison sentence imposed for this violation is "plainly unreasonable." Before reaching the defendant's contentions, the circuit court noted that the Chapter Seven policy statements are "advisory" in nature and may be reviewed on the appellate level. First, the defendant pointed out that the New Jersey state court had imposed only a four-month sentence for the underlying offense involving the obscene material. The circuit court noted that comparison of the sentences is not necessarily dispositive and stated that imposition of imprisonment after revocation was for the "breach of trust" against the district court, rather than as a criminal sanction. The circuit court, however, indicated that the state sentence suggested merely a minimal breach of trust. The defendant also asserted that his actions were without any prurient motive, which the government has conceded, and that he acted to rehabilitate himself while he was on supervised release, as is supported by his probation officer's report.

Without reaching the merits of defendant's claim, the circuit court found that the record indicated that the district court may not have realized its authority to sentence the defendant to as little as zero months in prison. Consequently, the circuit court vacated the sentence and remanded the case for resentencing.

United States v. Wirth, 250 F.3d 165 (2d Cir. 2001). The defendant pled guilty to conspiracy to commit fraud in violation of 18 U.S.C. § 371 and was sentenced to 45 months' imprisonment and three years' supervised release. The defendant subsequently violated supervised release by testing positive for narcotics. The district court modified his supervised release to include a drug treatment program, but did not impose a term of imprisonment. The appellate court concluded that the district court was required to sentence the defendant to a term of imprisonment. The appellate court noted that the defendant's case was governed by the pre-1994 version of 18 U.S.C. § 3583(g) because of the Supreme Court's decision in *Johnson v. United States*, 529 U.S. 694 (2000). The pre-1994 version of section 3583(g) states that if a defendant is found by the court to be in possession of a controlled substance, the court must require the defendant to serve at least one-third the term of supervised release in prison. (The post-1994 version of section 3583(g) allows the court to put the defendant in a drug treatment program if available and appropriate instead of prison.) The defendant argued that section 3583(g) should not apply because he admitted only to using cocaine, not to possessing it. The appellate court, joining with seven other circuits, concluded that testing positive for drug use amounts to possession under section 3583(g). Therefore, as the defendant possessed a controlled substance, the appellate court remanded with instructions that the court must sentence the defendant to prison for the revocation.

ALL CHAPTERS: MISCELLANEOUS AMENDMENTS[30]

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

§1B1.1 (Application Instructions) – Clarification of application notes.

§§2A3.1 (Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) – Restructures the definitions of "prohibited sexual conduct."

§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) – Adds red phosphorus to the Chemical Quantity Table.

§§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) and 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) – Conforms departure provision in Application Note 6 of §2G2.1 with Note 12 of §2G1.1.

[30]Effective November 1, 2003, the Commission made several technical and conforming changes to various guideline provisions. *See* USSG App. C, Amendment 661.

§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) – Amends §2G2.2(B)(5) to include receipt and distribution in the enhancement for use of a computer.

Statutory Appendix A – Amendment responds to new legislation and makes other technical amendments referencing the following guidelines: §§2B1.1, 2C1.3, 2H2.1, 2K2.5, 2N2.1, and 2R1.1.

APPLICABLE GUIDELINES

Ex Post Facto

United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994). The district court erred in sentencing the defendant upon revocation of supervised release to a mandatory minimum term under 18 U.S.C. § 3583(g), where the defendant's original offense conduct predated the enactment of §3583(g), but the supervised release violation occurred after the effective date of that section. In addressing an issue of first impression, the circuit court reasoned that any punishment provision for a violation of supervised release is an increased penalty for the underlying offense. Thus, application of this statute to the defendant, whose underlying offense conduct was committed prior to the effective date of section 3583(g), and which resulted in an increased penalty for the original offense, constituted a violation of the ex post facto clause.

CONSTITUTIONAL CHALLENGES

Double Jeopardy

United States v. Bryce, 287 F.3d 249 (2d Cir.), *cert. denied*, 537 U.S. 884 (2002). The district court did not err in increasing the defendant's sentence after the initial sentencing because the defendant exposed himself to such an outcome. The Second Circuit held that although typically a sentencing court will be precluded from increasing a sentence once the defendant has reasonably relied on its finality, when the defendant appeals his sentence, the sentencing court may be able to increase the sentence. In *Bryce*, the defendant challenged his sentence up until the time he was resentenced. 287 F.3d at 255. The Second Circuit held that when defendant challenged his sentence he showed that he did not have any "settled expectation that his sentence would not be increased." *Bryce*, 287 F.3d at 255.

United States v. Mohammed, 27 F.3d 815 (2d Cir.), *cert. denied*, 513 U.S. 975 (1994). The district court did not violate the Double Jeopardy Clause when it imposed upon the defendant a sentence for the 18 U.S.C. § 924(c) violation consecutive with the sentence imposed for the predicate carjacking offense. The circuit court joined the Fifth Circuit in concluding that the multiple punishments are not unconstitutional. *See United States v. Singleton*, 16 F.3d 1419 (5th Cir. 1994); *but see*

United States v. Smith, 831 F. Supp. 549 (E.D. Va. 1993); *United States v. McHenry*, 830 F. Supp. 1025 (N.D. Ohio 1993). Although the carjacking statute and the use of a firearm in relation to a crime of violence statute both require the presence of a firearm during the offense, the statute does not fail the Blockburger test because the plain language of section 924(c) clearly manifests Congress's intent to impose consecutive sentences for violations of the statute. *Garrett v. United States*, 471 U.S. 773, 778-9 (1985). Congress intended that crimes of violence committed with a firearm carry a mandatory minimum sentence of five years. Had Congress "`intended to exclude the predictable use of section 924(c) in carjacking prosecutions, Congress could have incorporated the necessary limiting language when it wrote § 2119.'" *United States v. Harwood*, 834 F. Supp. 950, 952 (W.D. Ky 1993), *cert. denied*, 513 U.S. 901 (1994).

Due Process

United States v. Bryce, 287 F.3d 249 (2d Cir.), *cert. denied*, 537 U.S. 884 (2002). The district court did not violate the defendant's due process rights by increasing his sentence on remand. The Second Circuit stated that although there is a presumption of vindictiveness if a court increases a defendant's sentence on remand, this presumption is rebutted if the increase is based on new evidence or information. *Id*. at 256. In *Bryce*, between the first sentencing and the remand for resentencing, the government uncovered evidence that the defendant was involved in the murder of a key witness. 287 F.3d at 254. The Second Circuit held that even though the suspicion of his involvement in the murder existed at the time of his first sentence, "new evidence that clearly implicates a defendant in a crime can also be considered as the intervening circumstances that a judge must consider during resentencing." *Bryce*, 287 F.3d at 254. Clearly the increased sentence was based on the intervening events and not on vindictiveness. *Id*. at 257.

United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994). Defendant Kogut appealed his sentence on constitutional grounds, claiming that the district court violated his due process rights by improperly considering his national origin in determining his sentence. The circuit court affirmed, holding that references to national origin and naturalized status are permissible , so long as they are not the basis for determining the sentence. *United States v. Tarricone*, 996 F.2d 1414, 1424-25 (2d Cir. 1993); *see also United States v. Holguin*, 868 F.2d 201, 205 n.7 (7th Cir.) *cert. denied*, 493 U.S. 829 (1989). In this case, the record sufficiently demonstrated that the district court based the sentence on the defendant's intelligence and lack of remorse.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Couto, 311 F.3d 179 (2d Cir. 2002). The defendant, a Brazilian citizen, was charged with bribing an INS official with $9,500 to obtain a green card. One of the defendant's arguments on appeal was that, because the 1990 and 1996 amendments to the Immigration and Nationality Act made deportation a virtually certain consequence for an alien convicted of an aggravated felony, the district court's failure, before accepting her guilty plea, to inform her of that

consequence violated Fed. R. Crim. P. 11(c)(1). The Second Circuit first noted that years ago it concluded that the possibility of deportation based on a conviction was a "collateral consequence" of a guilty plea, and that a sentencing court was not required to inform the defendant of such a possible consequence. *See United States v. Parrino,* 212 F.2d 919, 921 (2d Cir. 1954); *United States v. Santelises,* 476 F.2d 787, 789 (2d Cir. 1973). However, as a result of recent amendments to the Immigration and Nationality Act, an alien convicted of an aggravated felony is now automatically subject to removal and no one–not the judge, the INS, nor even the United States Attorney General–has any discretion to stop the deportation. Accordingly, the defendant argued that the rationale behind the decisions in *Parrino* and *Santelises* no longer reflected the state of the law, because deportation today is essentially certain, automatic, and an unavoidable consequence of an alien's conviction for an aggravated felony. Therefore, the defendant asserted that Rule 11 must now be read to require that the court ascertain, before accepting a plea, that the defendant is aware of this virtually certain consequence of a guilty plea. The Second Circuit concluded that, although defendant's argument was persuasive and warranted careful consideration, the circumstances of this case allowed its resolution without addressing this difficult issue. The court also noted that three other circuits had declined to reconsider their prior holdings on this point. *See El-Nobani v. United States,* 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Amador-Leal,* 276 F.3d 511, 516-17 (9th Cir. 2002), *cert. denied,* 535 U.S. 1070 (2002); *United States v. Gonzalez,* 202 F.3d 20, 28 (1st Cir. 2000).

United States v. Harrington, 354 F.3d 178 (2d Cir. 2004). This case was remanded to the district court with instructions that defendant be allowed to withdraw his guilty plea. Defendant appealed from a judgment entered in district court following a plea of guilty, convicting defendant of mail fraud and conspiracy to distribute and to possess with intent to distribute various controlled substances, sentencing defendant to 324 months' imprisonment, and ordering restitution of $29,211.50. The district court denied defendant's motion to withdraw his guilty plea after finding that the plea was entered knowingly and voluntarily. The Second Circuit first noted that because of the significance of ensuring that guilty pleas are made voluntarily and with knowledge of the alternatives, it generally required strict adherence to Rule 11, which requires a sentencing court to inform the defendant of, and ensure that the defendant understands, the maximum possible penalty that he faces prior to accepting his guilty plea. However, the court stated that Rule 11 also provided that a variance from the requirements of the rule is harmless error if it did not affect substantial rights. The court noted that in *United States v. Westcott,* 159 F.3d 107 (2d Cir. 1998), it articulated the test to determine in what circumstances a variance from Rule 11 would call for a vacatur of a guilty plea and in what circumstances such a variance would constitute harmless error. The *Westcott* test focused on the effect that any misinformation given to a defendant would reasonably have had on his or her decision making. The court noted that in the instant case, defendant was informed in the superseding indictment and again in his plea colloquy that he faced a mandatory minimum sentence of 20 years and a maximum sentence of life imprisonment on the drug counts. In fact, since no quantities had been charged, under *Apprendi*, the actual sentence range on the two counts to which defendant pled guilty was 0-to-30 years' imprisonment. Therefore, the court noted that Rule 11 was violated, and the only issue was whether the error was harmless. The court noted that the district court informed defendant that a mandatory minimum sentence applied when it did not. Regarding the sentence itself, the difference between the

sentencing range that the court initially described to defendant, mandatory 20 years to life, and the actual range under *Apprendi*, 0-30 years, was substantial. Finally, the court noted that the district court had failed to advise defendant that his sentence could include an order of restitution; this was not harmless error. *See United States v. Showerman*, 68 F.3d 1524 (2d Cir. 1995). The court noted that the combined errors in the instant case casted doubt on whether defendant's guilty plea was knowing and voluntary. Accordingly, the court concluded that the district court abused its discretion in denying defendant's motion to withdraw his guilty plea.

See United States v. McLean, 287 F.3d 127 (2d Cir. 2002), Post-*Apprendi*, p. 92.

United States v. Mercedes, 287 F.3d 47 (2d Cir.), *cert. denied*, 537 U.S. 900 (2002). The district court did not err in its failure to advise the defendant that the government could substitute a different aggravated felony for the one alleged in the indictment. The defendant pled guilty to illegal reentry and issues arose over whether his illegal reentry was subsequent to a conviction for an aggravated felony. The government charged a state robbery offense as an aggravated felony although the court ultimately determined that it was not in fact an aggravated felony. The government therefore attempted to substitute a different felony for the one originally charged in the indictment. However, the district court did make certain that the defendant understood the implications of his guilty plea and he indicated that he understood the plea. Because the court advised him of "all the relevant elements" and was in fact "specifically told that the court would be required to take any criminal history of his into account at sentencing", the defendant cannot now claim that he didn't understand that other crimes could be substituted for those listed in the indictment. *Mercedes*, 287 F.3d at 57-58.

See United States v. Rodriguez, 288 F.3d 472 (2d Cir. 2002), Post-*Apprendi*, p. 94.

Rule 32

United States v. Goodman, 165 F.3d 169 (2d Cir.), *cert. denied*, 528 U.S. 874 (1999). Waiver in the plea agreement purporting to deny the defendant the right to appeal any upward departure from the range so long as the statutory maximum was not exceeded is unenforceable where the defendant obtained no substantial benefits, the sentence imposed greatly exceeded the top of the guideline range, and the court's statement to defendant during the plea colloquy left her understanding of the agreement in doubt. The Second Circuit declined to hold that such broad waivers are never enforceable.

United States v. Mercedes, 287 F.3d 47 (2d Cir.), *cert. denied*, 537 U.S. 900 (2002). The district court did not err in refusing to allow the defendant to withdraw his guilty plea based on a deficiency in the indictment. The indictment failed to allege an appropriate aggravating felony for an increase in sentence under USSG §2L2.1. The defendant claimed on appeal that because the indictment did not include an appropriate felony he should have been allowed to withdraw his guilty plea. However, the Second Circuit held that inasmuch as he had never made such an argument as a reason for withdrawal of his guilty plea at the district court level a failure to grant the withdrawal on that basis cannot possibly be error.

Rule 35

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The district court exceeded its limited authority to resentence the defendant pursuant to Fed. R. Crim. P. 35(c). The defendant pleaded guilty to illegally reentering the United States following deportation, and was sentenced to 57 months' imprisonment, 2 years' supervised release, and a $50 special assessment. Four days following sentencing, prior to the entry of judgment reflecting the orally imposed sentence, the district court issued an order stating that it "may not have been apprised of and considered all relevant factors" and wished to consider correcting the sentencing pursuant to Fed. R. Crim. P. 35(c). At a subsequent sentencing hearing, the district court departed downward pursuant to USSG §§4A1.3 and 5K2.0 and resentenced the defendant to 24 months' imprisonment, 2 years' supervised release, and a $50 special assessment. The government challenged the district court's ruling on appeal, contending that the district court lacked the authority under Rule 35(c) to resentence the defendant because the decision to depart downwardly does not constitute a correction of the type of arithmetical, technical, or other clear error envisioned by the Rule. The circuit court ruled that the district court clearly exceeded the scope of the rule in correcting the defendant's sentence. Fed. R. Crim. P. 35(c) permits corrections of "arithmetical, technical or other clear error" and is intended to be narrowly applied and extended only in those cases in which an obvious error or mistake has occurred—an error which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The district court's purported error was that it applied the 16-level increase called for by the guidelines due to the defendant's deportation after commission of an aggravated felony, in a fashion "so mechanical as to impose a draconian result." *Id*. at 72. The circuit court ruled that the failure to make a downward departure at the defendant's original sentencing did not constitute an obvious error or mistake that would have resulted in a remand. The original sentence was not illegal, unreasonable, or a result of an incorrect application of the guidelines. The circuit court characterized the district court's correction as a "change of heart," and not a correction authorized by Rule 35(c).

United States v. Doe, 93 F.3d 67 (2d Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). In this case of first impression, the Second Circuit joined with the Fourth, Ninth, and Eleventh Circuits in holding that an appeal from a Rule 35(b) motion is governed by 18 U.S.C. § 3742, which confers limited appellate jurisdiction over otherwise final sentences. *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1995); *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995); *United States v. Chavarria-Herrara*, 15 F.3d 1033 (11th Cir. 1994). This decision reflects a split with the First Circuit, which holds that an appeal of a Rule 35(b) motion is governed by 28 U.S.C. § 1291, which grants broad appellate jurisdiction over final decisions of the district court. *United States v. McAndrews*, 12 F.3d 273 (1st Cir. 1993) (holding that a Rule 35(b) motion is not a sentence because a sentence is already imposed before Rule 35 can be invoked). The Second Circuit's decision is premised upon the similarity between Rule 35(b) and §5K1.1. The only difference between the two is their timing. Section 5K1.1 is a reduction based on substantial assistance prior to sentencing and Rule 35(b) is a reduction based on substantial assistance after sentencing. Because section 5K1.1 orders are governed by 18 U.S.C. § 3742, the court found no reason to treat Rule 35(b) motions differently. In support of this conclusion, the court noted that applying the more lenient requirements of section 1291 "would

have the deleterious effect of encouraging defendants to postpone their assistance to the government to manipulate the timing of the motion in order to receive a more favorable standard of review."

United States v. Gangi, 45 F.3d 28 (2d Cir. 1995). The district court erred in denying the government's Fed. R. Crim. P. 35(b) motion for reduction of the defendant's sentence in light of his post-sentencing cooperation without first affording the defendant an opportunity to respond to or comment on the motion. The defendant argued that because Rule 35(b), which addresses post-sentencing cooperation, is similar in language and function to USSG §5K1.1, which addresses presentencing cooperation, the procedural requirements of Rule 35(b) should be interpreted consistently with those established for USSG §5K1.1. These requirements, the defendant claimed, provide that a defendant be served with the government's USSG §5K1.1 motion and be given an opportunity to respond. The circuit court agreed, joining with the Seventh and Tenth Circuits in finding that Rule 35(b) should be interpreted in light of USSG §5K1.1. *See United States v. Perez*, 955 F.2d 34, 35 (10th Cir. 1992); *United States v. Doe*, 940 F.2d 199, 203 n.7 (7th Cir.), *cert. denied*, 502 U.S. 869 (1991). Additionally, the circuit court cited to Supreme Court and Second Circuit precedent establishing that a defendant must be given the opportunity to respond to a USSG §5K1.1 motion, and to comment on the adequacy of the motion or even the government's refusal to file such a motion. *See Wade v. United States*, 504 U.S. 181, 184-86 (1992); *United States v. Agu*, 949 F.2d 63, 66 (2d Cir. 1991), *cert. denied*, 504 U.S. 942 (1992). Thus, the circuit court concluded that just as a defendant has a right to respond to the government's USSG §5K1.1 motion, so too should the defendant be afforded the opportunity to respond to the government's Rule 35(b) motion. The circuit court clarified that this holding does not establish that a defendant is entitled to a full evidentiary hearing, as opposed to a written submission. Whether any hearing is necessary is a determination left to the discretion of the district court judge.

United States v. Moran, 325 F.3d 790 (6th Cir. 2003). In a case of first impression, the Sixth Circuit held that the district court's reduction of the defendant's sentence under Rule 35(b) was a "sentence," such that 18 U.S.C. § 3742(a) applies.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3553

United States v. James, 280 F.3d 206 (2d Cir. 2002). The district court did not err because it fulfilled its responsibility to "state in court the reasons for its imposition of a particular sentence" as required by 18 U.S.C. § 3553. The defendant argued that the judge should have given a more detailed description of his reasoning. However, the Second Circuit held that the section 3553 requirements are fulfilled when the judge adopts the explanation in the PSR, the basis for the adjusted offense level, and the criminal history category that together make up the applicable sentencing range. *James*, 280 F.3d at 208. Furthermore, the Second Circuit notes that extended explanation is not implicated for sentences imposed within a range of 24 months or less.

18 U.S.C. § 3583

United States v. Anderson, 15 F.3d 278 (2d Cir. 1994). The district court revoked the defendant's supervised release, then departed up from a suggested range of 6-12 months, to a period of 17 months in prison, in part for the purpose of securing substance abuse treatment for her. The defendant argued that it is improper for the court to consider her need for medical care, including drug treatment/rehabilitation programs, in determining the length of time the defendant will be required to serve in prison following the revocation of supervised release. The circuit court upheld the post-revocation sentence, finding that because the court may consider the medical needs of the defendant in determining the length of the period of supervised release, and because the district court may require a person to serve in prison the period of supervised release, medical and correctional needs may be considered in determining the post-revocation term of imprisonment. Further, a district court's determination to depart from a Chapter Seven policy statement will be affirmed if "(1) the district court considered the applicable policy statements, (2) the sentence is within the statutory maximum, and (3) the sentence is reasonable." *Id*. at 284.

United States v. Eng, 14 F.3d 165 (2d Cir.), *cert. denied*, 513 U.S. 807 (1994). The circuit court addressed an issue of first impression in the circuit, holding that district court did not violate 18 U.S.C. § 3583(b) when it sentenced the defendant to a lifetime term of supervised release following his term of incarceration for extensive drug offenses. 18 U.S.C. § 3583(b)(1) sets a maximum supervised release term of five years "except as otherwise provided," yet 21 U.S.C. § 841(b)(1)(A), under which the defendant was convicted, subjects him to a term of supervised release that is "at least 5 years." The court found that the maximums set under 18 U.S.C. § 3583(b) apply unless other statutes provide otherwise. Based on Congress's intent to enhance drug penalties, if the maximum set by another statute is equal to the minimum set under 21 U.S.C. § 841(b)(1)(A), the court may follow 21 U.S.C. § 841 and sentence the defendant to more than five years of supervised release.

United States v. Mora, 22 F.3d 409 (2d Cir. 1994). The district court did not err in departing upward in imposing a term of supervised release, although the extent of the departure was unreasonable. The defendant pleaded guilty to possession of heroin with intent to distribute in violation of 18 U.S.C. § 841(a), (b) and was sentenced to 84 months imprisonment with a lifetime term of supervised release. She claimed the supervised release term violated 18 U.S.C. § 3583(b), the general statute which provides a five-year maximum period of supervised release for Class A and Class B felonies, "[e]xcept as otherwise provided." Focusing on the "otherwise provided" exception, the circuit court concluded that when 18 U.S.C. § 841(b) provides a minimum term of supervised release that is less than the maximum term of supervised release specified in section 3583(b), the sentencing judge may nonetheless impose a "term ranging from the minimum specified in the statute up to the life of the defendant." *See United States v. Eng*, 14 F.3d 165 (2d Cir.), *cert. denied*, 513 U.S. 807 (1994) ("otherwise provided" covers cases in which section 841(b) provides a minimum term of supervised release that is the same as the maximum specified in section 3583(b) as well as cases in which section 841(b) provides a minimum term that exceeds section 3583's stated maximum). The court stated that its holding furthered Congress's intent to enhance the penalties for drug offenses. However, since the district court did not provide findings to support a lifetime term of supervised release other than the defendant's recidivism, the circuit court concluded that the departure was unreasonable.

18 U.S.C. § 3583(d)

United States v. Balogun, 146 F.3d 141 (2d Cir. 1998). The district court erred in ordering the defendant's term of supervised release tolled while he remained outside the United States. In sentencing the defendant, a citizen of the United Kingdom, for importation of heroin, the district court imposed, *inter alia*, a three-year term of supervised release. Relying on 18 U.S.C. § 3583(d) and USSG §5D1.3(b), the district court ordered that the supervised release term would be tolled during the defendant's exclusion from the United States, and be resumed on the day he returned, if his return was within 20 years of the date of his offense. The court of appeals held that the district court lacked the authority to order the supervised release term tolled. None of the mandatory or discretionary conditions of supervised release address tolling. Virtually all of the conditions listed are requirements with which a defendant himself is ordered to comply. The order by the district court was not one that confined the conduct of the defendant. Moreover, the statute itself contains express provisions on the start of supervised release and its authorized suspension. Congress intended no hiatus between release from custody and commencement of supervision. The court of appeals expressly rejected the view of the Sixth Circuit, which permitted tolling of supervised release until such future time as the defendant might reenter the United States. *See United States v. Isong*, 111 F.3d 41 (6th Cir.), *cert. denied*, 522 U.S. 883 (1997), and *United States v. Isong*, 111 F.3d 428 (6th Cir.), *cert. denied*, 522 U.S. 883 (1997).

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

United States v. Blount, 291 F.3d 201 (2d Cir. 2002), cert. denied, 537 U.S. 1141 (2003). The district court did not err, based on *Apprendi*, in its calculation of the sentences for either defendant. Both defendants argued that their sentences were calculated using quantities of cocaine attributed to them by the district court and were also in excess of the statutory maximums, thus making their sentences illegal under *Apprendi*. Defendant Streater contended that he should not have received a sentence in excess of 240 months per count. The district court imposed sentences of 480 months for each sentence. However, the Second Circuit held that inasmuch as the district court imposed concurrent 480-month sentences rather than the appropriate consecutive 240-month sentences the error was harmless. Defendant Blount was actually subject to a sentence of 360 months and received a sentence below that maximum. Thus, the district court did not err.

Coleman v. United States, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003). The issue on appeal was whether *Apprendi*'s new rule applied retroactively on habeas review. First, the Second Circuit noted that to determine whether *Apprendi* applied retroactively to defendant's section 2255 motion, the court had to establish whether *Apprendi* announced a "substantive" or "procedural" rule. The court concluded that *Apprendi* is a procedural rule. *Apprendi* dictates only who must decide certain factual disputes and under what standard of proof they must be decided. *Apprendi* does not determine which facts are "elements" of a crime nor does it refer to any substantive norms. The rule announced in *Apprendi* did not effect a change in the meaning of a federal criminal statute. In other words, after *Apprendi*, the prosecution is not required to prove any facts that it was not required to prove before. The substance of the crime remains the same; only the trier of fact and the standard of

proof have changed. The court then noted that, under *Teague v. Lane,* 489 U.S. 288 (1989), new rules of constitutional criminal procedure do not apply retroactively on collateral review unless they fall into either two categories: 1) new rules that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense; or 2) new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding. The court concluded that *Apprendi* did not fall under either of the two *Teague* exceptions. The court held that *Apprendi* announced a rule that was both "new" and "procedural," but not "watershed"; therefore *Apprendi* did not apply retroactively to section 2255 motions for habeas relief.

United States v. Dennis, 271 F.3d 71 (2d Cir. 2001). Because the sentence issued was below the statutory maximum, the district court properly allowed the use of special interrogatories on drug quantities to be used for sentencing, as well as for enhancing the defendant's sentence under USSG §3B1.1(b) without the issue being submitted to the jury. The court has already upheld the use of special interrogatories on drug quantities to be used in sentencing. *See United States v. Jacobo*, 934 F.2d 411, 416-417 (2d Cir. 1991); *United States v. Campuzano*, 905 F.2d 677, 678 n.1 (2d Cir.), *cert. denied*, 498 U.S. 947 (1990). In addition, "his [Dennis'] sentence of 168 months was well below the sentence he could have received with no finding of drug quantity whatsoever." 271 F.3d 71 at 74. *See United States v. Breen*, 243 F.3d 591, 599 (2d Cir.), *cert. denied*, 534 U.S. 894 (2001). For this reason, the court also rejected the defendant's argument that his sentence was improperly enhanced under USSG §3B1.1. Thus, pursuant to prior decisions in the Second Circuit, the court found that *Apprendi* does not affect the district court's authority to determine facts for sentencing at or below the statutory maximum. 271 F.3d 71at 74. *See United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 533 U.S. 960 (2001).

United States v. Feola, 275 F.3d 216 (2d Cir. 2001). The district court did not violate *Apprendi* in calculating the relevant conduct for the tax offense when doing so resulted in a concurrent sentence on the fraud offense that exceeded the statutory maximum of one year on the tax count. The defendant claimed that the district court violated *Apprendi* because his 24-month sentence for bank fraud was enhanced by relevant conduct from the tax offense for which the statutory maximum is 12 months. Looking to the multi-count sentencing rules of USSG §5G1.2(b)-(c), the calculated range of 24-30 months could not have been imposed on the tax offense, because it was above the statutory maximum, but the 24 months could be imposed on the bank fraud count because the statutory maximum for that offense is 360 months. *Id*. at 219; *see* 18 U.S.C. §1344. The court also held that the defendant did not receive a sentence greater than the maximum sentence on either count, and because the consecutive sentences could have been imposed on the defendant to achieve the 24-month sentence, *Apprendi* was not violated. *Id*. at 220. The court had recently ruled on a similar issue in *United States v White*, 240 F.3d 127, 135-136 (2d Cir. 2001), which allows relevant conduct for one offense to enhance an aggregate sentence on multiple counts. Thus, because the defendant committed two offenses, the aggregate sentence was correctly imposed. *See* USSG §§2T1.1, 3B1.2-1.5, 5G1.2.

United States v. Luciano, 311 F.3d 146 (2d Cir. 2002). The government appealed the judgment of the district court granting a writ of habeas corpus to defendant and reducing his sentence from 240 months to 192 months of imprisonment. The district court believed the *Apprendi* rule had been violated for two reasons: first, by virtue of the sentencing judge's determination that the defendant's crime involved more than five kilos, he was exposed to the possibility of a life term, which is greater than the otherwise applicable statutory maximum of 30 years under section 841(b)(1)(C). Second, the application of the 20-year mandatory minimum resulted in a sentence that exceeded the maximum period of imprisonment in the range set by the sentencing guidelines. The Second Circuit reiterated the touchstone constitutional inquiry under *Apprendi* as whether the sentence actually imposed, on the basis of drug quantity not found by the jury, exceeded the statutory maximum that would have applied in the absence of such finding. In the instant case, the maximum penalty authorized by statute for the offense charged in the indictment and found by the jury was 30 years. This was because section 841(b)(1)(C) provided for a sentencing range of 0 to 30 years for offenders like defendant who were previously convicted of a drug felony. The district court sentenced defendant to 20 years' imprisonment under section 841(b)(1)(A), a sentence clearly not greater than the otherwise applicable maximum of 30 years. Violation of *Apprendi* arises when a defendant is sentenced on the basis of a triggering fact not found by the jury to a sentence that exceeds the maximum that would have been applicable but for the triggering fact. If the defendant's sentence is within the otherwise applicable maximum, no violation of *Apprendi* has occurred, even though the defendant was sentenced under a statute that allows for a sentence that exceeds that otherwise applicable maximum. The district court's second rationale for granting the petition was that defendant's sentence violated the *Apprendi* rule because the 20-year mandatory minimum required by section 841(b)(1)(A) exceeded the sentencing range indicated by the sentencing guidelines. The court noted that the range established by the guidelines was not the maximum sentence allowed by law. A sentencing court is free to depart to a more severe sentence within the limits established by the governing statutes so long as there exists an aggravating circumstance of a kind not adequately considered by Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. *See* USSG §5K2.0; *Koon v. United States*, 518 U.S. 81 (1996). The guidelines ranges are not statutory maximums for purposes of *Apprendi* analysis. Accordingly, the court reversed the district court's grant of habeas corpus.

United States v. McLean, 287 F.3d 127 (2d Cir. 2002). The district court erred in imposing sentences greater than the statutory maximum for each count, but because USSG §5G1.2 requires consecutive terms of imprisonment to the extent necessary to achieve the total guidelines punishment, the error was harmless. The defendant claimed that the sentencing court's findings with respect to quantity were clearly erroneous. The Second Circuit held that the district court can consider drug quantity as long as it does not increase the penalty beyond the maximum. The court further held that a sentencing court may need to estimate the amount of narcotics involved if there was no seizure, but there must be some basis for that estimate. Furthermore, the Second Circuit held that where a defendant pleads guilty but disputes the quantity the court can only sentence based on the lesser included offense of section 841 that involves an unspecified amount. The district court sentenced the defendant to 63 months for each charge to run concurrently. This sentence was 3 months beyond the maximum of 60 months. The Second Circuit joined the Sixth, Eighth, and Eleventh Circuits in holding

that the error is harmless where application of USSG §5G1.2 would have resulted in the same term of imprisonment, in this case, 63 months.

United States v. Mercedes, 287 F.3d 47 (2d Cir.), *cert. denied*, 537 U.S. 900 (2002). The district court did not err under *Apprendi* by allowing the government to substitute one aggravated felony for another in an indictment charged under 8 U.S.C. § 1326. The defendant pled guilty to illegal reentry and issues arose over whether his illegal reentry was subsequent to a conviction for an aggravated felony. The government charged a state robbery offense as an aggravated felony although the court ultimately determined that it was not in fact an aggravated felony. The government therefore attempted to substitute a different felony for the one originally charged in the indictment. The defendant claimed that the substituted felony should not be allowed to affect his sentence since it was not charged in his indictment and neither was it admitted in his plea. The defendant's argument was foreclosed, however, by the Supreme Court decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which withstood *Apprendi* and remains as a narrow exception. *Mercedes*, 287 F.3d at 58. The Second Circuit in *Mercedes* notes that under 8 U.S.C. § 1326(b), the penalty enhancement for a prior aggravated felony merely increases the penalty for recidivists; and therefore, the particular prior felony charged in the indictment is not important, merely that there is a prior aggravated felony conviction. 287 F.3d at 58.

United States v. Norris, 281 F.3d 357 (2d Cir.), *cert. denied*, 536 U.S. 949 (2002). The district court erred in holding that factors not proved beyond a reasonable doubt could not increase a guideline range. The government appealed arguing that *Apprendi* has no bearing on guidelines enhancements that do not increase the sentence beyond the statutory maximum. The defendant argues that *Apprendi* applies to any factors that raise the guideline range and that guideline ranges act like a statutory maximum. The Second Circuit held that the guidelines themselves are not statutory maximums for constitutional purposes.

United States v. Outen, 286 F.3d 622 (2d Cir. 2002). The district court did not err in sentencing the defendant under the default provision of 21 U.S.C. § 841(b)(1)(D). The Second Circuit held that 21 U.S.C. § 841 is not facially unconstitutional and that the default provision of section 841 is appropriate. The defendant claimed that section 841 is unconstitutional because it removes drug quantity findings from the jury and furthermore, even if it is constitutional the "default"maximum sentence for marijuana is one year under section 841(b)(4) rather than five years under section 841(b)(1)(D). The Second Circuit held that drug quantity is an "element of the offense" if the type or quantity involved can push the sentence above a statutory maximum. However, the Second Circuit followed its own precedent that says that section 841 is not facially unconstitutional even in light of *Apprendi*. The defendant also claimed that the district court sentenced him to greater than the statutory maximum for an indeterminate amount of marijuana. The Second Circuit held that the defendant's interpretation is incorrect because it would lead to a situation where the court could not lower a sentence without a jury finding and this would be contrary to the spirit of *Apprendi*. The Second Circuit stated that if a court does not increase the deprivation of the defendant's liberty or increase the stigma of the sentence than adjustments are appropriate even absent a jury finding. Ultimately, for this defendant, it does not matter

because under USSG §5G1.2(d) sentences will run concurrently or consecutively to achieve the total guideline punishment so individual sentences within a grouping will not matter.

United States v. Rodriguez, 288 F.3d 472 (2d Cir. 2002). The district court erred in the information it provided to the defendant regarding his sentence. However, the error was harmless. The defendant was sentenced prior to the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court erred in informing the defendant that the government would have to prove his involvement only with a detectable amount of heroin in order to expose him to a life sentence. Under the rule of *Apprendi*, and the later case of *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001), the government must prove a particular quantity of drugs in order to raise the defendant's sentence above the statutory maximum. In *Rodriguez*, the government would have had to prove that the defendant was responsible for at least one kilogram of heroin in order to trigger the life sentence that he received. 288 F.3d at 474. However, the Second Circuit held that despite this error, the defendant himself had "formally and voluntarily avowed a fact as true in proceedings that assure the accuracy of the admission" *Id.*, and therefore a misstatement as to the burden of proof for that statement does not necessitate a reversal in order to "achieve fairness for the defendant or to protect the integrity or reputation of judicial proceedings." *Id*. at 476.

Santana-Madera v. United States v., 260 F.3d 133 (2d Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002). The district court did not commit an *Apprendi* error when sentencing the defendant for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. The defendant claimed that his sentence violated *Apprendi* because the facts supporting an increase in his penalty beyond the statutory maximum were not submitted to a jury and proved beyond a reasonable doubt. Because the defendant's sentence was not greater than the statutory maximum, which was life imprisonment, there was no Apprendi error.

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001). The district court erred in sentencing the defendant to a sentence beyond the statutory maximum, based on the judge's findings under a preponderance standard as to the amount of drugs involved in the offense, a factor which was not mentioned in the indictment nor presented to the jury. In the instant case, the judge made a finding as to the amount of drugs involved, thus resulting in a sentencing range of ten years to life under 21 U.S.C. § 841(b)(1)(A). Had there been no such finding, the defendant would have been sentenced to a statutory maximum of 20 years, under 21 U.S.C. § 841(b)(1)(C) and USSG §2D1.1. Following *Apprendi*, the court held that because the type and quantity of drugs can raise the defendant's sentence above the statutory maximum of 21 U.S.C. § 841(b)(1)(C), they are therefore elements of the charged offense and must therefore be charged in the indictment and proved to a jury beyond a reasonable doubt. *Id*. at 663. The court held "following *Apprendi*'s teachings . . . if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury." *Id.* at 660. The court also held that the failure to charge drug type and quantity in the indictment or submit the question to the jury is subject to plain error review, thus overruling *United States v. Tran*, 234 F.3d 798, 806 (2d Cir. 2000).

United States v. Ubaldo-Hernandez, 271 F.3d 78 (2d Cir. 2001), *cert. denied* ,534 U.S. 1166 (2002). The district court did not violate *Apprendi* by enhancing his sentence based on his predeportation conviction for an aggravated felony, though it was not classified as such when that conviction was entered. The court held that such an argument lacks merit for the reasons stated in *United States v Luna-Reynoso*, 258 F.3d 111, 115-116 (2d Cir. 2001). In addition, the Supreme Court had previously held that such a conviction does not need to be alleged in an indictment or proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This court had also decided previously that *Apprendi* does not overrule *Almendarez-Torres*. *United States v. Latorre-Benavides*, 241 F.3d 262 (2d Cir.) (*per curiam*), *cert. denied*, 532 U.S. 1045 (2001).

United States v. White, 240 F.3d 127 (2d Cir. 2001). The defendant argued that the court should apply the provision of 21 U.S.C. § 841 with a 20-year maximum instead of the section requiring a 5-year mandatory minimum and 40-year maximum because the jury did not decide drug quantity as required by *Apprendi*. The appellate court chose not to reach this issue because the parties stipulated to a quantity greater than five grams at trial; because of the stipulation and defendant's failure to objection at trial, any error was harmless.

The defendant also argued that *Apprendi* was violated because the use of the consecutive sentencing "stacking" guidelines effectively subjected him to a life sentence. *See* USSG §5G1.2. The court held that *Apprendi* was not implicated, as the statutory maximum for each count was not exceeded. Further, there is no constitutional right to a concurrent sentence.

In addition, the defendant argued that the district court's relevant conduct determination violated *Apprendi* and that a higher standard of proof than preponderance should have been applied. The court said *Apprendi* has nothing to do with the guidelines and reaffirmed the preponderance standard.

United States v. Yu, 285 F.3d 192 (2d Cir. 2002). The district court did not err in sentencing the defendant based on his plea, however in light of *Apprendi*, the quantity of drugs should not be decided by the judge and, thus, the Second Circuit remanded the case to allow the defendant either to revise his plea or to have the jury decide the quantity of drugs involved.

See United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002), §2D1.1. p. 17.