

**CIRCUIT CONFLICTS
ADDRESSED BY COMMISSION AMENDMENT**

**Prepared by
the Office of General Counsel
U.S. Sentencing Commission**

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GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§1B1.2 (Applicable Guidelines)</p> <p>Does §1B1.2 (Applicable Guidelines) require that a stipulation to a more serious offense be contained in a formal plea agreement (<i>i.e.</i>, part of the <u>quid pro quo</u> in the agreement with the government) instead of merely being an oral admission before the sentencing court?</p>	<p>Yes. Second, Fifth, Eleventh</p> <p><u>United States v. McCall</u>, 915 F.2d 811, 816 n.4 (2d Cir. 1990) <u>United States v. Wartens</u>, 885 F.2d 1266, 1273 n.5 (5th Cir. 1989) <u>United States v. Day</u>, 943 F.2d 1306, 1309 (11th Cir. 1991), <i>cert. denied</i>, 502 U.S. 1104 (1992)</p> <p>No. Fourth</p> <p><u>United States v. Braxton</u>, 903 F.2d 292, 298 (4th Cir. 1990), <u>rev'd on other grounds</u>, <u>Braxton v. United States</u>, 500 U.S. 344 (1991)</p>	<p>Amendment 434 to §1B1.2 states that a stipulation to a more serious offense must be done in the context of a written plea agreement or an agreement between the parties on the record in a plea proceeding. (Effective November 1, 1991)</p>
<p>§1B1.3, comment. (n.2) (Prior Relevant Conduct of Conspirators)</p> <p>Whether defendant is accountable for conduct of other members of conspiracy that takes place prior to the defendant's joining the conspiracy.</p>	<p>Yes. Second, Seventh</p> <p>*<u>United States v. Miranda-Ortiz</u>, 926 F.2d 172, 178 (2d Cir.), <i>cert. denied</i>, 502 U.S. 928 (1991) (interpreting pre-1992 version of §1B1.3) (late-entering conspirator accountable for prior conduct only if he knew or reasonably should have known what past quantities were) <u>United States v. Phillips</u>, 37 F.3d 1210 (7th Cir. 1994) (holding defendant responsible for prior conduct of conspiracy because that conduct was reasonably foreseeable to defendant)</p> <p>No. First, Fifth, Ninth</p> <p><u>United States v. O'Campo</u>, 973 F.2d 1015, 1026 (1st Cir. 1992) (interpreting post-1992 version of §1B1.3) (do not count drug distributions made prior to defendant's entrance when he merely knew they took place) <u>United States v. Carreon</u>, 11 F.3d 1225 (5th Cir. 1994) (post-1992 amendment interpretation of pre-1992 amendment version of §1B1.3) (relevant conduct of others is prospective only) <u>United States v. Petty</u>, 982 F.2d 1374, 1377 (9th Cir. 1993) (interpreting pre-1992 version of §1B1.3) (previously distributed drugs not counted because not within scope of agreement)</p>	<p>Amendment 503 to application note 2 of the commentary of §1B1.3 (Relevant Conduct) clarifies that a defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy. (Effective November 1, 1994.)</p> <p>Amendment 439 to application note 2 of the commentary to §1B1.3 provided illustration (c)(3) clarifying that a defendant is not accountable for prior conduct of other members of a conspiracy because the conduct is not in furtherance of defendant's jointly undertaken criminal activity. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§1B1.3, comment. (n.17) (Sentencing Entrapment or Sentencing Manipulation)</p> <p>Whether defendant may successfully raise theory of sentencing entrapment (focus on defendant's disposition to commit offense) or sentencing manipulation (focus on outrageous government conduct) and preclude consideration of the associated relevant conduct.</p>	<p>Yes. First, Eighth</p> <p><u>United States v. Connell</u>, 960 F.2d 191 (1st Cir. 1992) (apparently recognizing potential application of both theories) <u>United States v. Shephard</u>, 4 F.3d 647, 649 (8th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1322 (1994) (same)</p> <p>No. Fourth, Seventh, Eleventh</p> <p><u>United States v. Jones</u>, 18 F.3d 1145 (4th Cir. 1994) (post-amendment interpretation of pre-amendment guideline; expresses skepticism that government conduct could be so outrageous as to require a downward departure but not warrant dismissal) <u>United States v. Cotts</u>, 14 F.3d 300, 306 n.2 (7th Cir. 1994) (same) <u>United States v. Williams</u>, 954 F.2d 668, 672-73 (11th Cir. 1992) (rejecting as matter of law defendant's sentencing entrapment or sentencing manipulation theory)</p>	<p>Amendment 486 to application note 17 of §2D1.1 provides for a downward departure in a reverse sting in which the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance thereby leading the defendant to purchase a significantly greater quantity than he might otherwise have been able to purchase. (Effective November 1, 1993)</p>
<p>§1B1.8 (Use of Certain Information)</p> <p>Is the sentencing court prevented from considering for purposes of determining the applicable guideline range any self-incriminating information that the defendant provides to a probation officer subsequent to the defendant entering into an agreement under §1B1.8 (Use of Certain Information)?</p>	<p>Yes. Fourth, Fifth</p> <p><u>United States v. Fant</u>, 974 F.2d 559, 562-64 (4th Cir. 1992) <u>United States v. Marsh</u>, 963 F.2d 72, 73-4 (5th Cir. 1992)</p> <p>No. Sixth</p> <p><u>United States v. Miller</u>, 910 F.2d 1321, 1325-26 (6th Cir. 1990), <i>cert. denied</i>, 498 U.S. 1094 (1991)</p>	<p>Amendment 390 to the commentary of §1B1.8 (Use of Certain Information) clarifies that such information provided to the probation officer is protected. (Effective November 1, 1991)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§1B1.11 ("One Book Rule")</p> <p>When sentencing a defendant should the sentencing court apply the entire manual instead of applying different versions for different counts?</p>	<p>Yes. Second, Fourth, Seventh, Eighth, Ninth</p> <p>Single-count cases:</p> <p><u>United States v. Stephenson</u>, 921 F.2d 438, 441 (2d Cir. 1990) <u>United States v. Boula</u>, 997 F.2d 263 (7th Cir. 1993) (after amendment 442) <u>United States v. Lenfesty</u>, 923 F.2d 1293, 1299 (8th Cir.), <i>cert. denied</i>, 499 U.S. 968 (1991) <u>United States v. Warren</u>, 980 F.2d 1300, 1305-06 (9th Cir. 1992), <i>cert. denied</i>, 114 S. Ct. 397 (1993) (after amendment 442)</p> <p>Multiple-count cases:</p> <p><u>United States v. Hartzog</u>, 983 F.2d 604, 608 (4th Cir. 1993)</p> <p>No. Third, Ninth</p> <p>Multiple-count cases:</p> <p><u>United States v. Seligsohn</u>, 981 F.2d 1418, 1424-26 (3d Cir. 1992) <u>United States v. Castro</u>, 972 F.2d 1107 (9th Cir. 1992), <i>cert. denied</i>, 113 S. Ct. 1350 (1993)</p>	<p>Amendment 442 adds §1B1.11 and commentary specifying that a single manual should be used in cases involving a single count. (Effective November 1, 1992)</p> <p>Amendment 474 amends §1B1.11 and its commentary to state that a single manual should be applied in cases involving multiple counts. (Effective November 1, 1993)</p>
<p>§2D1.1(b)(1) (Firearms Adjustment); §1B1.3 (Relevant Conduct)</p> <p>Must the sentencing court consider relevant conduct when determining whether the weapon adjustment at §2D1.1(b)(1) may be applied?</p>	<p>Yes. Second, Fifth, Ninth</p> <p><u>United States v. Quintero</u>, 937 F.2d 95, 97-98 (2d Cir. 1991) <u>United States v. Paulk</u>, 917 F.2d 879, 884 (5th Cir. 1990) <u>United States v. Willard</u>, 919 F.2d 606, 609-10 (9th Cir. 1990), <i>cert. denied</i>, 502 U.S. 872 (1991)</p> <p>No. Seventh</p> <p><u>United States v. Rodriguez-Nuez</u>, 919 F.2d 461, 466-67 (7th Cir. 1990)</p>	<p>Amendment 394 to §2D1.1(b)(1) and its commentary deleted the phrase "during commission of the offense" to provide that relevant conduct be considered when determining whether the enhancement applies. (Effective November 1, 1991)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§2D1.1 n.* (Cocaine Base)</p> <p>Is the term "cocaine base" as used in §2D1.1 synonymous with the term "crack"?</p>	<p>Yes. Ninth</p> <p><u>United States v. Shaw</u>, 936 F.2d 412 (9th Cir. 1991)</p> <p>No. First, Second, Fifth, Eleventh</p> <p><u>United States v. Lopez-Gil</u>, 965 F.2d 1124, 1135 (1st Cir. 1992), <u>amended</u>, No. 90-2059 (May 14, 1992) (<u>en banc</u>), <i>cert. denied</i>, 506 U.S. 981 (1992)</p> <p><u>United States v. Jackson</u>, 968 F.2d 158 (2d Cir.), <i>cert. denied</i>, 506 U.S. 1024 (1992)</p> <p><u>United States v. Butler</u>, 988 F.2d 537 (5th Cir.), <i>cert. denied</i>, 114 S. Ct. 414 (1993)</p> <p><u>United States v. Rodriguez</u>, 980 F.2d 1375 (11th Cir. 1992), <i>cert. denied</i>, 113 S. Ct. 3003 (1993)</p>	<p>Amendment 487 to the commentary of §2D1.1 states that "cocaine base" means "crack." (Effective November 1, 1993)</p>
<p>§2D1.1 n.* (Marihuana Plant Ratio)</p> <p>Does the Commission's treatment of fewer than 50 marihuana plants as the equivalent of 100 grams of marihuana for each plant exceed the Commission's statutory authority?</p>	<p>Yes. Fourth, Eighth</p> <p><u>United States v. Hash</u>, 956 F.2d 63, 64 (4th Cir. 1992)</p> <p><u>United States v. Streeter</u>, 907 F.2d 781 (8th Cir. 1990), <u>overruled on other grounds</u>, <u>United States v. Wise</u>, 976 F.2d 393 (8th Cir. 1992), <i>cert. denied</i>, 113 S. Ct. 1592 (1993)</p> <p>No. Seventh, Eleventh</p> <p><u>United States v. Webb</u>, 945 F.2d 967 (7th Cir. 1991), <i>cert. denied</i>, 502 U.S. 1116 (1992) act following the amendment not a circuit conflict resolved.</p>	<p>Amendment 396 to the background commentary to §2D1.1 sets forth the rationale (reasonable basis) for the Commission's treatment of fewer than 50 marihuana plants. (Effective November 1, 1991)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§2D1.1, comment. (n.1) (Mixture or Substance)</p> <p>Does the term "mixture or substance" for purposes of §2D1.1 include materials that must be separated from the controlled substance before the controlled substance can be used?</p>	<p>Yes. First, Fifth, Ninth, Tenth</p> <p><u>United States v. Mahecha-Onofre</u>, 936 F.2d 623 (1st Cir.), <i>cert. denied</i>, 506 U.S. 1009 (1991) (cocaine) <u>United States v. Sherrod</u>, 964 F.2d 1501 (5th Cir.), <i>cert. denied</i>, 506 U.S. 1041 (1992), (methamphetamine) <u>United States v. Innie</u>, 7 F.3d 840 (9th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1567 (1994) (methamphetamine) <u>United States v. Killion</u>, 7 F.3d 927 (10th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1106 (1994) (methamphetamine) (statutory and guideline interpretation)</p> <p>No. Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh</p> <p><u>United States v. Acosta</u>, 963 F.2d 551 (2d Cir. 1992) (cocaine) <u>United States v. Rodriguez</u>, 975 F.2d 999 (3d Cir. 1992) (cocaine) <u>United States v. Palacios-Molina</u>, 7 F.3d 49 (5th Cir. 1993) (cocaine) <u>United States v. Jennings</u>, 945 F.2d 129, 134 (6th Cir. 1991) (methamphetamine) <u>United States v. Johnson</u>, 999 F.2d 1192 (7th Cir. 1993) (cocaine) <u>United States v. Robins</u>, 967 F.2d 1387 (9th Cir. 1992) (cocaine) (statutory and guideline interpretation) <u>United States v. Rolande-Gabriel</u>, 938 F.2d 1231 (11th Cir. 1991) (cocaine) <u>United States v. Newsome</u>, 998 F.2d 1571 (11th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 734 (1994) (methamphetamine)</p>	<p>Amendment 484 to the commentary of §2D1.1 states that the term does not include materials that must be separated from the controlled substance before it may be used. (Effective November 1, 1993)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§2D1.1, comment. (n.12) (Drug Quantities Under Negotiation)</p> <p>Whether the government must prove both defendant's intent and reasonable capability to produce a quantity of controlled substance for that quantity to be counted under §2D1.1.</p>	<p>Yes. First, Third, Fourth, Seventh</p> <p><u>United States v. Bradley</u>, 917 F.2d 601 (1st Cir. 1990) (government burden to show uncharged amounts were properly included and to show both intent and capability)</p> <p><u>United States v. Rodriguez</u>, 975 F.2d 999 (3d Cir. 1992) (implicitly holding the same)</p> <p><u>United States v. Richardson</u>, 939 F.2d 135 (4th Cir.) <i>cert. denied</i>, 502 U.S. 987 (1991) (same)</p> <p><u>United States v. Ruiz</u>, 932 F.2d 1174 (7th Cir.) <i>cert. denied</i>, 502 U.S. 849 (1991) (government bears burden of showing both intent and capability)</p> <p>No. Sixth, Eighth, Ninth, Eleventh</p> <p><u>United States v. Christian</u>, 942 F.2d 363 (6th Cir. 1991) <i>cert. denied</i>, 502 U.S. 1045 (1992) (government must prove intent and defendant must prove incapability)</p> <p><u>United States v. Smiley</u>, 997 F.2d 475 (8th Cir. 1993) (purporting to align with <u>Christian</u> and <u>Barnes</u>, <i>infra</i>, and noting defendant bears burden of showing mitigating factor)</p> <p><u>United States v. Barnes</u>, 993 F.2d 680 9th Cir. 1993) <i>cert. denied</i>, 115 S. Ct. 96 (1994) (same)</p> <p><u>United States v. Tillman</u>, 8 F.3d 17 (11th Cir. 1993) (government must prove either intent or capability)</p>	<p>Amendment 518 to Application Note 12 to the commentary of §2D1.1 states that in an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. (Effective November 1, 1995)</p>

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<p>§2D1.11 (Listed Chemicals)</p> <p>Is §2D1.1 the appropriate guideline to apply for convictions under 21 U.S.C. § 841(d) (listed chemicals)?</p>	<p>Yes. Fifth, Sixth, Ninth</p> <p><u>United States v. Leed</u>, 981 F.2d 202, 207 (5th Cir.), <i>cert. denied</i>, 113 S. Ct. 2971 (1993) (post-amendment)</p> <p><u>United States v. Kingston</u>, 922 F.2d 1234 (6th Cir. 1990), <i>cert. denied</i>, 500 U.S. 933 (1991)</p> <p><u>United States v. Cook</u>, 938 F.2d 149 (9th Cir. 1991)</p> <p>No. Second, Tenth, Eleventh</p> <p><u>United States v. Perrone</u>, 936 F.2d 1403, 1419 (2d Cir. 1991) (apply §2D1.10)</p> <p><u>United States v. Voss</u>, 956 F.2d 1007, 1009-11 (10th Cir. 1992) (post-amendment; apply §2X5.1)</p> <p><u>United States v. Hyde</u>, 977 F.2d 1436, 1440 (11th Cir. 1992), <i>cert. denied</i>, 507 U.S. 1052 (1993) (apply §2X5.1)</p>	<p>Amendment 371 adds new guideline §2D1.11 to provide an appropriate guideline for offenses involving 21 U.S.C. § 841(d). (Effective November 1, 1991)</p>
<p>§2F1.1(b)(2) (More than Minimal Planning Adjustment); §3B1.1 (Aggravating Role)</p> <p>Can a sentencing court apply both the adjustment for §3B1.1 (Aggravating Role) and an adjustment for more than minimal planning (<i>e.g.</i>, under §2F1.1 (Fraud and Deceit))?</p>	<p>Yes. First, Third, Fourth, Seventh, Eighth, Ninth, Tenth</p> <p><u>United States v. Balogun</u>, 989 F.2d 20, 24 (1st Cir. 1993)</p> <p><u>United States v. Wong</u>, 3 F.3d 667 (3d Cir. 1993)</p> <p><u>United States v. Curtis</u>, 934 F.2d 553 (4th Cir. 1991)</p> <p><u>United States v. Boula</u>, 932 F.2d 651, 655 (7th Cir. 1991)</p> <p><u>United States v. Willis</u>, 997 F.2d 407 (8th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 704 (1994)</p> <p><u>United States v. Kelly</u>, 993 F.2d 702 (9th Cir. 1993)</p> <p><u>United States v. Smith</u>, 13 F.3d 1421 (10th Cir.), <i>cert. denied</i>, 115 S. Ct. 209 (1994)</p> <p>No. Sixth</p> <p><u>United States v. Romano</u>, 970 F.2d 164 (6th Cir. 1992) (§3B1.1(a))</p> <p><u>United States v. Chichy</u>, 1 F.3d 1501 (6th Cir.), <i>cert. denied</i>, 114 S. Ct. 620 (1993) (§3B1.1(c)) (superseded by guideline amendment, as stated in <u>United States v. Cobleigh</u>, No. 94-2219, 1996 WL 38990 (6th Cir. 1996))</p>	<p>Amendment 497 clarifies §1B1.1 (Application Instructions) to provide that adjustments from different guideline sections are applied cumulatively unless otherwise stated. (Effective November 1, 1993.)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§2F1.1, comment. (n.7) (Fraud Loss)</p> <p>In cases involving fraudulent loans, should the sentencing court determine the actual loss (<i>e.g.</i>, account for collateral and payments on the loan) instead of the face value of the loan in the absence of a greater intended loss?</p>	<p>Yes. Third, Fourth, Seventh, Tenth</p> <p><u>United States v. Kopp</u>, 951 F.2d 521, 531-32 (3d Cir. 1991) <u>United States v. Rothberg</u>, 954 F.2d 217, 218-19 (4th Cir. 1992) <u>United States v. Schneider</u>, 930 F.2d 555, 557-58 (7th Cir. 1991) <u>United States v. Smith</u>, 951 F.2d 1164, 1166 (10th Cir. 1991)</p> <p>No. Second, Fifth</p> <p><u>United States v. Brach</u>, 942 F.2d 141, 143 (2d Cir. 1991) <u>United States v. Cockerham</u>, 919 F.2d 286, 289 (5th Cir. 1990)</p>	<p>Amendment 393 to the commentary to §2F1.1 states that the actual loss (<i>e.g.</i>, the face value of the loan reduced by payments made before discovery of the offense and the value of pledged collateral) should be used. (Effective November 1, 1991)</p>
<p>§2J1.6 (Failure to Appear)</p> <p>Can the sentencing court apply the adjustments under §2J1.6 (Failure to Appear) based on the statutory maximum for the underlying offense after the defendant has been sentenced for that offense?</p>	<p>Yes. Fifth</p> <p><u>United States v. Harper</u>, 932 F.2d 1073 (5th Cir.), <i>cert. denied</i>, 502 U.S. 970 (1991)</p> <p>No. Eighth</p> <p><u>United States v. Lee</u>, 887 F.2d 888 (8th Cir. 1989)</p>	<p>Amendment 403 to the commentary to §2J1.6 clarifies the operation of the provision. (Effective November 1, 1991)</p>
<p>§2S1.1(b)(1) (Money Laundering)</p> <p>Do the adjustments under money laundering guidelines (<i>e.g.</i>, §2S1.1(b)(1)) apply in cases where defendant "believed" but could not objectively "know" that the funds were proceeds of illegal activity because the funds were provided as part of a sting operation?</p>	<p>Yes. Eleventh</p> <p><u>United States v. Perez</u>, 992 F.2d 295 (11th Cir. 1993) (after amendment)</p> <p>No. Fifth</p> <p><u>United States v. Breque</u>, 964 F.2d 381 (5th Cir. 1992), <i>cert. denied</i>, 507 U.S. 909 (1993) (after amendment)</p>	<p>Amendment 378 to §2S1.1(b)(1) adds the term "or believed" immediately following "knew." (Effective November 1, 1991)</p>

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<p>§3A1.1 (Targeting of Vulnerable Victims)</p> <p>Whether §3A1.1 requires that a defendant “target” vulnerable victims.</p>	<p>Yes. First, Sixth</p> <p><u>United States v. Rowe</u>, 999 F.2d 14 (1st Cir. 1993) (guideline commentary precludes enhancement unless special targeting of vulnerable victims)</p> <p><u>United States v. Smith</u>, 39 F.3d 119 (6th Cir. 1994) (same)</p> <p>No. Ninth</p> <p><u>United States v. O’Brien</u>, 50 F.3d 751 (9th Cir. 1995) (commentary requiring targeting not binding on courts because it is inconsistent with plain language of §3A1.1.</p>	<p>Amendment 521 to §3A1.1 revises the commentary to clarify that §3A1.1 does not require proof that the defendant targeted the victim on account of the victims vulnerability. (Effective November 1, 1995.)</p>
<p>§3B1.1(b) (Aggravating Role)</p> <p>Does §3B1.1(b) (Aggravating Role) permit an enhancement if the defendant manages or supervises only property or enterprises and not persons?</p>	<p>Yes. Fourth, Seventh</p> <p><u>United States v. Chambers</u>, 985 F.2d 1263 (4th Cir.), <i>cert. denied</i>, 114 S. Ct. 107 (1993)</p> <p><u>United States v. Morales</u>, 994 F.2d 386 (7th Cir. 1993)</p> <p>No. First, Third, Sixth, Ninth</p> <p><u>United States v. Fuller</u>, 897 F.2d 1217, 1220-21 (1st Cir. 1990)</p> <p><u>United States v. Fuentes</u>, 954 F.2d 151, 154 (3d Cir.), <i>cert. denied</i>, 504 U.S. 977 (1992)</p> <p><u>United States v. Carroll</u>, 893 F.2d 1502 (6th Cir. 1990)</p> <p><u>United States v. Mares-Molina</u>, 913 F.2d 770, 773-74 (9th Cir. 1990)</p>	<p>Amendment 500 to the commentary of §3B1.1 (Aggravating Role) specifies that the defendant must have managed one or more other participants but also suggests an upward departure when the defendant has management responsibility over the property, assets, or activities of a criminal organization, but not over other persons. (Effective November 1, 1993)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§§3B1.1, 3B1.2 (Role in the Offense); §1B1.3 (Relevant Conduct)</p> <p>Should the sentencing court apply a role adjustment based on the defendant's role in the relevant conduct instead of the defendant's role in the offense of conviction?</p>	<p>Yes. Fourth, Fifth, Ninth, Tenth</p> <p><u>United States v. Fells</u>, 920 F.2d 1179, 1184-85 (4th Cir. 1990), <i>cert. denied</i>, 501 U.S. 1219 (1991) <u>United States v. Mir</u>, 919 F.2d 940, 944-45 (5th Cir. 1990) <u>United States v. Martinez-Duran</u>, 927 F.2d 453, 458 (9th Cir. 1991) <u>United States v. Riles</u>, 928 F.2d 339, 343 (10th Cir. 1991) (mitigating role)</p> <p>No. D.C., Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh</p> <p><u>United States v. Williams</u>, 891 F.2d 921, 925-26 (D.C. Cir. 1989) <u>United States v. Murillo</u>, 933 F.2d 195, 199 (3d Cir. 1991) <u>United States v. Barbontin</u>, 907 F.2d 1494, 1498 (5th Cir. 1990) <u>United States v. Rodriguez-Nuez</u>, 919 F.2d 461, 465 (7th Cir. 1990) <u>United States v. Streeter</u>, 907 F.2d 781, 792 n.4 (8th Cir. 1990) (superseded by <u>United States v. Blumberg</u>, 961 F.2d 787 (8th Cir. 1992), overruled by <u>United States v. Wise</u>, 976 F.2d 393 (8th Cir. 1992)) <u>United States v. Zweber</u>, 913 F.2d 705, 708 (9th Cir. 1990) <u>United States v. Pettit</u>, 903 F.2d 1336, 1341 (10th Cir.), <i>cert. denied</i>, 498 U.S. 873 (1990) (aggravating role) <u>United States v. De La Rosa</u>, 922 F.2d 675, 680 (11th Cir. 1991)</p>	<p>Amendment 345 to the Introductory Commentary to Chapter Three, Part B clarified that role should be based on relevant conduct. (Effective November 1, 1990)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§3E1.1 (Acceptance of Responsibility)</p> <p>Does §3E1.1 (Acceptance of Responsibility) violate the Fifth Amendment when it requires the defendant to accept responsibility for uncharged relevant conduct?</p>	<p>Yes. First, Second, Third, Ninth</p> <p><u>United States v. Perez-Franco</u>, 873 F.2d 455 (1st Cir. 1989) <u>United States v. Oliveras</u>, 905 F.2d 623 (2d Cir. 1990) <u>United States v. Frierson</u>, 945 F.2d 650 (3d Cir. 1991), <i>cert. denied</i>, 503 U.S. 952 (1992) <u>United States v. Piper</u>, 918 F.2d 839, 840-41 (9th Cir. 1990)</p> <p>No. Fifth, Sixth, Seventh, Tenth, Eleventh</p> <p><u>United States v. Frazier</u>, 971 F.2d 1076, 1084 (4th Cir. 1992), <i>cert. denied</i>, 506 U.S. 1071 (1993) <u>United States v. Mourning</u>, 914 F.2d 699, 706-07 (5th Cir. 1990) <u>United States v. Clemons</u>, 999 F.2d 154 (6th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 704 (1994) <u>United States v. Ebbole</u>, 8 F.3d 530 (7th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1229 (1994) <u>United States v. Ross</u>, 920 F.2d 1530, 1537 (10th Cir. 1990) <u>United States v. Henry</u>, 883 F.2d 1010, 1011-12 (11th Cir. 1989)</p>	<p>Amendment 459 to §3E1.1 (Acceptance of Responsibility) provides for an adjustment where the defendant truthfully admits or does not falsely deny any additional relevant conduct for which the defendant is accountable. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§3E1.1 (Post-Offense Rehabilitation)</p> <p>Can the sentencing court depart downward on the basis of the defendant's post-offense rehabilitation?</p>	<p>Yes. D.C., First, Second, Sixth, Eleventh</p> <p><u>United States v. Holloway</u>, 990 F.2d 1377 (D.C. Cir. 1993) (unpublished) <u>United States v. Sklar</u>, 920 F.2d 107, 116-17 (1st Cir. 1990) <u>United States v. Maier</u>, 975 F.2d 944, 945-47 (2d Cir. 1992) <u>United States v. Maddalena</u>, 893 F.2d 815, 817-18 (6th Cir. 1989) <u>United States v. Williams</u>, 948 F.2d 706, 710-11 (11th Cir. 1991)</p> <p>No. Third, Fourth, Ninth, Tenth</p> <p><u>United States v. Pharr</u>, 916 F.2d 129, 132-33 (3d Cir. 1990), <i>cert. denied</i>, 500 U.S. 959 (1991) <u>United States v. Van Dyke</u>, 895 F.2d 984, 987 (4th Cir.), <i>cert. denied</i>, 498 U.S. 838 (1990) <u>United States v. Martin</u>, 938 F.2d 162, 163-64 (9th Cir. 1991), <i>cert. denied</i>, 503 U.S. 988 (1992) <u>United States v. Ziegler</u>, 1 F.3d 1044 (10th Cir. 1993) (post-amendment)</p>	<p>Amendment 459 permits a sentencing court to consider a defendant's post-offense rehabilitative efforts, including counseling or drug treatment, in determining whether a defendant qualifies for acceptance of responsibility -- by implication, a defendant's post-offense rehabilitation would have to be extraordinary in degree to warrant departure after this amendment. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§4A1.2, comment. (n.6) (Collateral Attack of Prior Convictions)</p> <p>Does note 5 of the commentary to §4A1.2 (Definitions and Instructions for Computing Criminal History) independently confer on sentencing courts the discretion to entertain defendant's initial challenges to prior convictions?</p>	<p>Yes. Second, Third, Fifth</p> <p><u>United States v. Jakobetz</u>, 955 F.2d 786, 805 (2d Cir.), <i>cert. denied</i>, 506 U.S. 834 (1992) <u>United States v. Brown</u>, 991 F.2d 1162 (3d Cir. 1993) <u>United States v. Canales</u>, 960 F.2d 1311, 1316 (5th Cir. 1992)</p> <p>No. First, Fourth, Sixth, Eighth, Ninth, Eleventh</p> <p><u>United States v. Isaacs</u>, 14 F.3d 106 (1st Cir. 1994) <u>United States v. Byrd</u>, 995 F.2d 536 (4th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 2140 (1994) <u>United States v. McGlocklin</u>, 8 F.3d 1037 (6th Cir. 1993) (<i>en banc</i>), <i>cert. denied</i>, 114 S. Ct. 1614 (1994) <u>United States v. Hewitt</u>, 942 F.2d 1270, 1276 (8th Cir. 1991) <u>United States v. Veal-Gonzales</u>, 986 F.2d 321, 327 (9th Cir. 1993) (regardless of whether guidelines confer such discretion, and they likely do not, Constitution requires that defendants be given the opportunity to collaterally attack prior convictions) (superseded by <u>United States v. Veal-Gonzales</u>, 999 F.2d (326 (9th Cir. 1993)) <u>United States v. Roman</u>, 989 F.2d 1117 (11th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 2139 (1994)</p>	<p>Amendment 493 to the commentary to §4A1.2 clarifies that the Commission does not intend the commentary to §4A1.2 to enlarge the defendant's right to attack collaterally a prior conviction beyond any right otherwise recognized by law. (Effective November 1, 1993)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§4A1.2, comment. (n.8); §4A1.3 (Prior Serious, Dissimilar Conduct)</p> <p>Can the sentencing court depart upward on the basis of prior dissimilar misconduct not otherwise counted under Chapter Four?</p>	<p>Yes. First, Second, Fourth, Fifth, Seventh, Eighth, Tenth</p> <p><u>United States v. Aymelek</u>, 926 F.2d 64 (1st Cir. 1991) <u>United States v. Diaz-Collado</u>, 981 F.2d 640 (2d Cir. 1992), <i>cert. denied</i>, 113 S. Ct. 2934 (1993) <u>United States v. Rusher</u>, 966 F.2d 868 (4th Cir.), <i>cert. denied</i>, 506 U.S. 926 (1992) <u>United States v. Lopez</u>, 871 F.2d 513, 515 (5th Cir. 1989) <u>United States v. Williams</u>, 910 F.2d 1574, 1578-79 (7th Cir. 1990), <i>vacated on other grounds</i>, 112 S. Ct. 1112 (1992) <u>United States v. Andrews</u>, 948 F.2d 448, 449 (8th Cir. 1991) (<i>per curiam</i>) (permitting without explicit discussion) <u>United States v. Russell</u>, 905 F.2d 1439, 1444 (10th Cir. 1990)</p> <p>No. D.C., Ninth</p> <p><u>United States v. Samuels</u>, 938 F.2d 210 (D.C. Cir. 1991) <u>United States v. Leake</u>, 908 F.2d 550, 554 (9th Cir. 1990)</p>	<p>Amendment 472 to note 8 of the commentary to §4A1.2 (Definitions and Instructions for Computing Criminal History) permits such a departure for serious, dissimilar prior offenses that are not otherwise counted. (Effective November 1, 1992)</p>
<p>§4A1.2; §4A1.3 (Upward Departure Based on Prior, Dissimilar Juvenile Convictions)</p> <p>Whether the court may depart based on juvenile convictions dissimilar to the instant offense, and thus not countable under §4A1.2(d).</p>	<p>Yes. Second, Seventh, Eighth, Tenth, Eleventh</p> <p><u>United States v. Nichols</u>, 912 F.2d 598, 604 (2d Cir. 1990) <u>United States v. Gammon</u>, 961 F.2d 103 (7th Cir. 1992) <u>United States v. Griess</u>, 971 F.2d 1368 (8th Cir. 1992) <u>United States v. Russell</u>, 905 F.2d 1439, 1444 (10th Cir. 1990) <u>United States v. Williams</u>, 989 F.2d 1137 (11th Cir. 1993) (post-amendment interpretation)</p> <p>No. Third, D.C.</p> <p><u>United States v. Thomas</u>, 961 F.2d 1110 (3d Cir. 1992) <u>United States v. Samuels</u>, 938 F.2d 210, 214 (D.C. 1991)</p>	<p>Amendment 472 to note 8 of the commentary to §4A1.2 (Definitions and Instructions for Computing Criminal History) permits such a departure for serious, dissimilar prior offenses, such as juvenile convictions, that are not otherwise counted. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§4A1.3 (Departure from Criminal History Category VI)</p> <p>Should the sentencing court determine the extent of a departure above criminal history category VI by creating hypothetical categories or by moving to higher (vertical) offense levels within category VI instead of merely selecting a "reasonable" sentence?</p>	<p>Yes. Fourth, Seventh, Ninth, Tenth</p> <p><u>United States v. Cash</u>, 983 F.2d 558, 561 (4th Cir. 1992), <i>cert. denied</i>, 113 S. Ct. 2380 (1993)</p> <p><u>United States v. Schmude</u>, 901 F.2d 555, 560 (7th Cir. 1990) (hypothetical)</p> <p><u>United States v. Ferra</u>, 900 F.2d 1057 (7th Cir. 1990) (vertical)</p> <p><u>United States v. Streit</u>, 962 F.2d 894, 905-06 (9th Cir.), <i>cert. denied</i>, 506 U.S. 962 (1992) (hypothetical)</p> <p><u>United States v. Jackson</u>, 921 F.2d 985 (10th Cir. 1990) (<i>en banc</i>)</p> <p>No. D.C., First, Second, Fifth, Eighth, Ninth</p> <p><u>United States v. Molina</u>, 952 F.2d 514, 522 (D.C. Cir. 1992)</p> <p><u>United States v. Ocasio</u>, 914 F.2d 330, 336-37 (1st Cir. 1990)</p> <p><u>United States v. Thomas</u>, 6 F.3d 960 (2d Cir. 1993) (post-amendment interpretation of pre-amendment guideline)</p> <p><u>United States v. Roberson</u>, 872 F.2d 597, 607 (5th Cir.), <i>cert. denied</i>, 493 U.S. 861 (1989)</p> <p><u>United States v. Day</u>, 998 F.2d 622 (8th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 2140 (1994) (post-amendment interpretation of pre-amendment guideline)</p> <p><u>United States v. Streit</u>, 962 F.2d 894, 905-06 (9th Cir.), <i>cert. denied</i>, 506 U.S. 962 (1992) (vertical)</p> <p><u>United States v. Brown</u>, 9 F.3d 907 (11th Cir. 1993), <i>cert. denied</i>, 115 S. Ct. 152 (1994)</p>	<p>Amendment 460 to §4A1.3 directs the use of a structured vertical departure. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§4B1.2 (Felon in Possession and Career Offender)</p> <p>Is a conviction under a statute prohibiting a felon from possessing a firearm <u>per se</u> a crime of violence for purposes of §4B1.1 (Career Offender) regardless of the underlying conduct?</p>	<p>Yes. Ninth, Eleventh</p> <p><u>United States v. O'Neal</u>, 937 F.2d 1369, 1375 (9th Cir. 1990) (pre-1989 guidelines) <u>United States v. Stinson</u>, 943 F.2d 1268, 1271-72 (11th Cir. 1991) (Stinson I); 957 F.2d 813 (11th Cir. 1992) (Stinson II), <i>rev'd</i>, <u>Stinson v. United States</u>, 113 S. Ct. 1913, 1920 (1993)</p> <p>No. D.C., Fourth, Fifth, Seventh, Ninth</p> <p><u>United States v. Caballero</u>, 936 F.2d 1292, 1299 (D.C. Cir. 1991), <i>cert. denied</i>, 502 U.S. 1061 (1992) <u>United States v. Johnson</u>, 953 F.2d 110, 113 (4th Cir. 1991) <u>United States v. Fitzhugh</u>, 954 F.2d 253, 254-55 (5th Cir. 1992) <u>United States v. Chapple</u>, 942 F.2d 439, 441-42 (7th Cir. 1991) <u>United States v. Sahakian</u>, 965 F.2d 740, 742 (9th Cir. 1992) (post-1989 guidelines)</p>	<p>Amendments 461 and 433 to the commentary of §4B1.2 state that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§4B1.2, comment. (n.1) (Career Offender Predicate Offenses)</p> <p>Whether §4B1.2 (Career Offender) permissibly includes conspiracy to commit a predicate offense as a predicate prior conviction under §4B1.1 (Career Offender) in light of the guideline's sole reference to 28 U.S.C. § 994(h) as the authority for the guideline.</p>	<p>Yes. First, Second, Third, Eighth, Ninth, Tenth</p> <p><u>United States v. Fiore</u>, 983 F.2d 1 (1st Cir. 1992), <i>cert. denied</i>, 507 U.S. 1024 (1993) (predicate state convictions for conspiracy to break and enter and conspiracy to violate controlled substance act)</p> <p><u>United States v. Whitaker</u>, 938 F.2d 1551 (2d Cir. 1991), <i>cert. denied</i>, 502 U.S. 1076 (1992) (instant federal 21 U.S.C. § 846 conspiracy accepted without comment)</p> <p><u>United States v. Preston</u>, 910 F.2d 1164 (8th Cir. 1990), <i>cert. denied</i>, 498 U.S. 1103 (1991) (<i>dicta</i>) (conspiracy to commit robbery)</p> <p><u>United States v. Smith</u>, 909 F.2d 1164 (8th Cir. 1990) (predicate federal 18 U.S.C. § 371 conspiracy to violate drug laws; instant federal 21 U.S.C. § 846 conspiracy)</p> <p><u>United States v. Kenyon</u>, 7 F.3d 783 (8th Cir. 1994) (same)</p> <p><u>United States v. Heim</u>, 15 F.3d 830 (9th Cir.), <i>cert. denied</i>, 115 S. Ct. 55 (1994) (instant federal 21 U.S.C. § 846 conspiracy)</p> <p><u>United States v. Jones</u>, 898 F.2d 1461 (10th Cir.), <i>cert. denied</i>, 498 U.S. 838 (1990) (instant federal 21 U.S.C. § 846 conspiracy accepted without comment)</p> <p>No. D.C., Fifth</p> <p><u>United States v. Price</u>, 990 F.2d 1367 (D.C. Cir. 1993) (rejecting 18 U.S.C. § 371 conspiracy to violate 21 U.S.C. § 841)</p> <p><u>United States v. Bellazerius</u>, 24 F.3d 698 (5th Cir.), <i>cert. denied</i>, 115 S. Ct. 375 (1994)</p>	<p>Amendment 528 to commentary to §4B1.1 captioned "Background" explains the Commission's rationale and authority for §4B1.1. The amendment explains that the Commission has defined "career offender" pursuant to its general promulgation authority under 28 U.S.C. § 994(a)-(f) and its amendment authority under 28 U.S.C. § 994(o) and (p). (Effective November 1, 1995)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§5G1.2 (Multiple Terms of Supervised Release)</p> <p>Whether statutes requiring imposition of mandatory consecutive terms of "imprisonment" and §5G1.2 (Sentencing on Multiple Counts of Convictions) require that all aspects of a "sentence" (including terms of supervised release) run consecutively instead of concurrently, as directed by 18 U.S.C. § 3624(e).</p>	<p>Yes. Ninth, Tenth</p> <p><u>United States v. Shorthouse</u>, 7 F.3d 149 (9th Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1838 (1994) (consecutive)</p> <p><u>United States v. Maxwell</u>, 966 F.2d 545, 551 (10th Cir.), <i>cert. denied</i>, 506 U.S. 1039 (1992) (consecutive)</p> <p>No. Eighth</p> <p><u>United States v. Gullickson</u>, 982 F.2d 1231, 1236 (8th Cir. 1993) (section 3624(e) unambiguously requires concurrent terms)</p>	<p>Amendment 507 to the commentary of §5G1.2 (Sentencing on Multiple Counts of Conviction) clarifies that terms of supervised release must be ordered to run concurrently. (Effective November 1, 1994)</p>
<p>§5G1.3 (Concurrent or Consecutive Sentences)</p> <p>Can the discretion granted a sentencing court under 18 U.S.C. § 3584(a) to impose a concurrent or consecutive sentence be constrained by §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment)?</p>	<p>Yes. First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh</p> <p><u>United States v. Flowers</u>, 995 F.2d 315 (1st Cir. 1993)</p> <p><u>United States v. Rogers</u>, 897 F.2d 134, 136-37 (4th Cir. 1990)</p> <p><u>United States v. Miller</u>, 903 F.2d 341, 349 (5th Cir. 1990)</p> <p><u>United States v. Stewart</u>, 917 F.2d 970, 972-73 (6th Cir. 1990)</p> <p><u>United States v. Gullickson</u>, 981 F.2d 344 (8th Cir. 1992)</p> <p><u>United States v. Pedrioli</u>, 931 F.2d 31, 32 (9th Cir. 1991)</p> <p><u>United States v. Shewmaker</u>, 936 F.2d 1124, 1127-28 (10th Cir. 1991), <i>cert. denied</i>, 502 U.S. 1037 (1992)</p> <p><u>United States v. Fossett</u>, 881 F.2d 976, 980 (11th Cir. 1989)</p> <p>No. Third, Ninth</p> <p><u>United States v. Nottingham</u>, 898 F.2d 390, 393-95 (3d Cir. 1990)</p> <p><u>United States v. Wills</u>, 881 F.2d 823, 826-27 (9th Cir. 1989) (overruled by <u>Pedrioli</u>)</p>	<p>Amendments 465, 385, and 289 to §5G1.3 and its commentary have expanded the circumstances under which concurrent sentences may be imposed and have identified §5G1.3(c) as a policy statement. (Effective November 1, 1989, 1991, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§5H1.12 (Lack of Youthful Guidance)</p> <p>Can the sentencing court depart downward on the basis of the defendant's lack of youthful guidance?</p>	<p>Yes. D.C., Ninth</p> <p><u>United States v. Clark</u>, 8 F.3d 839 (D.C. 1993) (post-amendment interpretation of pre-amendment guidelines)</p> <p><u>United States v. Floyd</u>, 945 F.2d 1096, 1099-1102 (9th Cir. 1991)</p> <p>No. Second</p> <p><u>United States v. Haynes</u>, 985 F.2d 65 (2d Cir. 1993) (post-amendment statement of pre-amendment law; argued pre-amendment)</p>	<p>Amendment 466 adds new policy statement §5H1.12 preventing departure on the basis of lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing. (Effective November 1, 1992)</p>
<p>§5K2.0 (Combination of Factors Warranting Departure)</p> <p>Whether a combination of factors or "totality" of circumstances, none of which factors or circumstances standing alone warrant a departure, may warrant a sentence outside the guideline range.</p>	<p>Yes. Eighth, Ninth, Tenth</p> <p><u>United States v. Whitehorse</u>, 909 F.2d 316, 320 (8th Cir. 1990)</p> <p><u>United States v. Cook</u>, 938 F.2d 149, 153 (9th Cir. 1991)</p> <p><u>United States v. Anders</u>, 956 F.2d 907, 914 (9th Cir. 1992), <i>cert. denied</i>, 507 U.S. 989 (1993) (narrowing <u>Cook</u> to factors authorized and not expressly prohibited by guidelines)</p> <p><u>United States v. Bowser</u>, 941 F.2d 1019, 1024-25 (10th Cir. 1991)</p> <p>No. First, Second, Third, Fourth, Sixth</p> <p><u>United States v. Pozzy</u>, 902 F.2d 133, 138 (1st Cir.), <i>cert. denied</i>, 498 U.S. 943 (1990)</p> <p><u>United States v. Minicone</u>, 26 F.3d 297 (2d Cir.), <i>cert. denied</i>, 115 S. Ct. 344 (1994) (cannot depart for combination of factors that each individually fail to warrant departure)</p> <p><u>United States v. Rosen</u>, 896 F.2d 789, 792 (3d Cir. 1990) (combination of typical factors not grounds)</p> <p><u>United States v. Goff</u>, 907 F.2d 1441 (4th Cir. 1990)</p> <p><u>United States v. Dalecke</u>, 29 F.3d 1044 (6th Cir. 1994)</p>	<p>Amendment 508 to the commentary of §5K2.0 (Grounds for Departure) specifies that the Commission does not foreclose the possibility of a departure in an extraordinary case that involves a combination of factors. (Effective November 1, 1994)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§6B1.2(a) (Dismissed Conduct)</p> <p>Can the sentencing court take into account, when determining the applicable guideline range, criminal conduct in counts that were dismissed as part of a plea bargain?</p>	<p>Yes. First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh</p> <p><u>United States v. Blanco</u>, 888 F.2d 907, 909-11 (1st Cir. 1989) <u>United States v. Quintero</u>, 937 F.2d 95, 97 (2d Cir. 1991) <u>United States v. Williams</u>, 917 F.2d 112, 114 (3d Cir. 1990), <i>cert. denied</i>, 498 U.S. 1102 (1991) <u>United States v. Williams</u>, 880 F.2d 804, 805 (4th Cir. 1989) <u>United States v. Taplette</u>, 872 F.2d 101 106-07 (5th Cir.), <i>cert. denied</i>, 493 U.S. 841 (1989) <u>United States v. Smith</u>, 887 F.2d 104, 106-07 (6th Cir. 1989) <u>United States v. Rodriguez-Nuez</u>, 919 F.2d 461, 464 (7th Cir. 1990) <u>United States v. Fine</u>, 975 F.2d 596, 601-04 (9th Cir. 1992) (<u>en banc</u>) <u>United States v. Rutter</u>, 897 F.2d 1558, 1562 (10th Cir.), <i>cert. denied</i>, 498 U.S. 829 (1990) <u>United States v. Alston</u>, 895 F.2d 1362, 1371-72 (11th Cir. 1990)</p> <p>No. Ninth</p> <p><u>United States v. Fine</u>, 946 F.2d 650 (9th Cir. 1991), <i>rev'd</i> 975 F.2d 596, 601-04 (9th Cir. 1992) (<u>en banc</u>)</p>	<p>Amendment 467 to §6B1.2(a) and its commentary provides that conduct from dismissed counts may be considered when determining the applicable guideline range, provided it is relevant to the convicted counts under §1B1.3. (Effective November 1, 1992)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§7B1.3 (Revocation of Probation or Supervised Release)</p> <p>Whether 18 U.S.C. § 3583(c) permits the imposition of a sentence of imprisonment <u>and</u> the reimposition of a term of supervised release following revocation of supervised release.</p>	<p>Yes. First, Eighth</p> <p><u>United States v. O’Neil</u>, 11 F.3d 292 (1st Cir. 1993) (to extent combined term does not exceed original term of release) <u>United States v. Schrader</u>, 973 F.2d 623 (8th Cir. 1992) (same)</p> <p>see also</p> <p><u>United States v. Boling</u>, 947 F.2d 1461 (10th Cir. 1991) (reversed by <u>Rockwell</u>) <u>United States v. Williams</u>, 2 F.3d 363, 365 (11th Cir. 1993) (panel strongly disagreeing with circuit precedent in <u>Tatum</u>)</p> <p>No. Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth Tenth, Eleventh</p> <p><u>United States v. Koehler</u>, 973 F.2d 132 (2d Cir. 1992) (“revoke” means cancel) <u>United States v. Malesic</u>, 18 F.3d 205 (3d Cir. 1994), (same) <u>United States v. Cooper</u>, 962 F.2d 339 (4th Cir. 1992) (disjunctive) <u>United States v. Holmes</u>, 954 F.2d 270 (5th Cir. 1992) (“revoke” means cancel) <u>United States v. Truss</u>, 4 F.3d 437 (6th Cir. 1993) (same) <u>United States v. McGee</u>, 981 F.2d 271 (7th Cir. 1992) (same) <u>United States v. Behnezhad</u>, 907 F.2d 896 (9th Cir. 1990) (disjunctive) <u>United States v. Rockwell</u>, 984 F.2d 1112 (10th Cir.), <i>cert. denied</i>, 113 S. Ct. 2945 (1993) (not identifying basis for holding) <u>United States v. Tatum</u>, 998 F.2d 893 (11th Cir. 1993) (“revoke” means cancel)</p>	<p>Amendment 533 to §7B1.3 implements section 110505 of the Violent Crime Control and Law Enforcement Act of 1994, which expressly authorizes the court to order an additional limited period of supervision following revocation of supervised release and imprisonment. (Effective November 1, 1995)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§2A6.1 (Threatening Communications)</p> <p>Whether conduct evidencing intent to carry out threat has to occur contemporaneously with threat.</p>	<p>Yes. Second</p> <p><u>United States v. Hornick</u>, 942 F.2d 105 (2d Cir. 1991), <i>cert. denied</i>, 502 U.S. 1061 (1992)</p> <p>No. Fourth, Seventh, Ninth, Eleventh</p> <p><u>United States v. Gary</u>, 18 F.3d 1123 (4th Cir. 1992), <i>cert. denied</i>, 115 S. Ct. 134 (1994)</p> <p><u>United States v. Fonner</u>, 920 F.2d 1330 (7th Cir. 1990) (defendant's killing of police officer 18 years before sending threatening letter to dead officer's partner may be considered)</p> <p><u>United States v. Sullivan</u>, No. 95-1336, 1996 WL 29448 (7th Cir. 1996)</p> <p><u>United States v. Hines</u>, 26 F.3d 1469 (9th Cir. 1994)</p> <p><u>United States v. Houser</u>, 929 F.2d 1369 (9th Cir. 1990) (evidence of prior crimes and other bad acts may be considered)</p> <p><u>United States v. Barbour</u>, 70 F.3d 580 (11th Cir. 1995)</p>	<p>Amendment 549 provides an application note in §§2A6.1 and 2A6.2 that instructs courts to consider, for enhancement purposes, conduct which occurred prior to the offense if substantially and directly connected to the offense. (Effective November 1, 1997).</p>
<p>§2B3.1(b)(2) (Robbery, Extortion, and Blackmail)</p> <p>Whether "an express threat of death" requires the defendant to make a direct, distinct, or explicit threat to kill.</p>	<p>Yes. Eleventh</p> <p><u>United States v. Tuck</u>, 964 F.2d 1079, 1080-81 (11th Cir. 1992) (enhancement does not apply if defendant's statement only implies physical harm or death)</p> <p>No. Seventh, Eighth, Ninth, Tenth</p> <p><u>United States v. Hunn</u>, 24 F.3d 994, 996-98 (7th Cir. 1994) (statements and other conduct can suffice to find an express threat of death in the absence of a robber's explicit threat to kill)</p> <p><u>United States v. Bell</u>, 12 F.3d 139, 140 (8th Cir. 1993)</p> <p><u>United States v. France</u>, 57 F.3d 865 (9th Cir. 1995)</p> <p><u>United States v. Lambert</u>, 995 F.2d 1006, 1008 (10th Cir.), <i>cert. denied</i>, 114 S. Ct. 333 (1993)</p>	<p>Amendment 552 provides that the enhancement at §2B3.1(b)(2)(F) applies when the combination of the defendant's actions and words instill in a reasonable, victimized person a fear of death. (Effective November 1, 1997)</p>

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<p>§3A1.1 (Vulnerable Victim and Scope of "the Offense")</p> <p>Whether "victim of the offense" refers only to victim of the offense of conviction and not to victim of any relevant conduct.</p>	<p>Yes. Sixth</p> <p><u>United States v. Wright</u>, 12 F.3d 70 (6th Cir. 1993), <i>cert. denied</i>, 116 S. Ct. 320 (1995) (interpreting 1989 commentary)</p> <p><u>United States v. Dixon</u>, 66 F.3d 133 (6th Cir. 1995)</p> <p>No. Second, Fifth, Ninth, Tenth, Eleventh</p> <p><u>United States v. Echevarria</u>, 33 F.3d 175 (2d Cir. 1994) (vulnerable victim need not be victim of the offense of conviction)</p> <p><u>United States v. Roberson</u>, 872 F.2d 597 (5th Cir.), <i>cert. denied</i>, 493 U.S. 861 (1989) (interpreting 1987 commentary)</p> <p><u>United States v. Haggard</u>, 41 F.3d 1320 (9th Cir. 1994) (interpreting §3A1.1 and §1B1.3(a)(3))</p> <p><u>United States v. Smith</u>, 930 F.2d 1450, 1455 (10th Cir.), <i>cert. denied</i>, 502 U.S. 879 (1991) (interpreting 1989 commentary)</p> <p><u>United States v. Yount</u>, 960 F.2d 955, 958 (11th Cir. 1992) (interpreting 1989 commentary)</p> <p><u>United States v. Cruz</u>, 106 F.3d 1134 (3rd Cir. 1997)</p>	<p>Amendment 564 provides that sentencing court should consider the defendant's relevant conduct when applying the vulnerable victim enhancement and clarifies that the sentencing court should consider on the victim of the defendant's offense of conviction when applying the hate crime motivation enhancement. (Effective November 1, 1997)</p>

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
<p>§3C1.1, comment. (n.1) (Obstruction of Justice based on Perjury and Standard of Proof)</p> <p>Whether the court in applying the adjustment based on perjury is to evaluate the defendant's testimony or statements using a heightened standard of proof.</p>	<p>Yes. Second, Eighth, D.C.</p> <p><u>United States v. Onumonu</u>, 999 F.2d 43 (2d Cir. 1993) <u>United States v. Willis</u>, 940 F.2d 1136 (8th Cir.), <i>cert. denied</i>, 507 U.S. 971 (1993) (applying "no-reasonable-fact-finder" standard) <u>United States v. Montague</u>, 40 F.3d 1251 (D.C. Cir. 1994) (applying clear and convincing standard) <u>United States v. Arnold</u>, 106 F.3d 37 (3rd Cir. 1997)</p> <p>No. First, Fifth, Sixth, Ninth</p> <p><u>United States v. Rojo-Alvarez</u>, 944 F.2d 959 (1st Cir. 1991) (holding that §3C1.1 comment. (n.1) "simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction") <u>United States v. Franco-Torres</u>, 869 F.2d 797 (5th Cir. 1989) <u>United States v. Zajac</u>, 62 F.3d 145 (6th Cir.), <i>cert. denied</i>, 116 S. Ct. 681 (1995) (applying preponderance of the evidence standard) <u>United States v. Barbosa</u>, 906 F.2d 1366 (9th Cir.), <i>cert. denied</i>, 498 U.S. 961 (1990)</p>	<p>Amendment 566 clarifies the language in Application Note 1 of §3C1.1 so that it no longer suggests the use of a heightened standard of proof when applying the adjustment based on the defendant's perjury. (Effective November 1, 1997)</p>

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<p>§5E1.2(I) (Additional Fine for Cost of Imprisonment)</p> <p>Whether required cost of imprisonment fine is authorized by the Sentencing Reform Act.</p>	<p>Yes. Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh</p> <p><u>United States v. Leonard</u>, 37 F.3d 32 (2d Cir. 1994) <u>United States v. Hagmann</u>, 950 F.2d 175 (5th Cir. 1991), <i>cert. denied</i>, 506 U.S.835 (1992) <u>United States v. Watroba</u>, 48 F.3d 933, <i>amended</i>, 56 F.3d 28 (6th Cir. 1995) <u>United States v. Turner</u>, 998 F.2d 534 (7th Cir.), <i>cert. denied</i>, 114 S. Ct. 639 (1993) <u>United States v. Zakhor</u>, 58 F.3d 464 (9th Cir. 1995) <u>United States v. May</u>, 52 F.3d 885 (10th Cir. 1995) <u>United States v. Price</u>, 65 F.3d 903 (11th Cir. 1995)</p> <p>No. Third</p> <p><u>United States v. Spiropoulos</u>, 976 F.2d 155 (3d Cir. 1992) (assessing the defendant's fine, based in part upon the cost of his sentence, was inconsistent with the Sentencing Reform Act and violated his Due Process)</p>	<p>Amendment 572 makes the costs of imprisonment and/or supervision a consideration in determining the overall fine amount. (Effective November 1, 1997)</p>
<p>§4B1.2(2) (Listed Chemicals Offense as Controlled Substance Offense)</p> <p>Whether a conviction under 21 U.S.C. § 841(d)(1) is a controlled substance offense for purposes of the career offender guideline.</p>	<p>Yes. Fifth</p> <p><u>United States v. Calverley</u>, 11 F.3d 505 (5th Cir. 1993), <i>aff'd</i>, 37 F.3d 160 (5th Cir. 1994), <i>cert. denied</i>, 115 S. Ct. 1267 (1995)</p> <p>No. Tenth</p> <p><u>United States v. Wagner</u>, 994 F.2d 1467, 1475 (10th Cir. 1993)</p>	<p>Amendment 568 specifies that convictions for possessing a listed chemical with intent to manufacture a controlled substance and possessing prohibited equipment with intent to manufacture a controlled substance constitute controlled offenses for career offender purposes. (Effective November 1, 1997)</p>