

SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SEVENTH CIRCUIT



**Prepared by the
Office of General Counsel**

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U.S. Sentencing Commission Guidelines Manual

Case Annotations—Seventh Circuit

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Griffith, 85 F.3d 284 (7th Cir), *cert. denied*, 519 U.S. 909 (1996). The appellate court affirmed the defendant's conviction and sentence, and held that the sentencing guidelines were not unconstitutional as applied. The defendant asserted that the Commission's actions in promulgating the guidelines were invalid because they violated the separation of powers; the due process clause; the bicameral passage and presentment requirements; and were inconsistent with statutory mandates which dictate the powers of the Commission. The court rejected the separation of powers and presentment clause issues because the defendant failed to demonstrate that the Commission's exercise of legislative power was more extensive than already acknowledged by the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989). The court rejected the due process argument stating that Sentencing Reform Act did not require the Commission to adopt rules and regulations governing its procedure. The court also rejected the defendant's statutory mandate argument, concluding that he had not explained how he had been specifically injured by any of the alleged failings of the Commission. Furthermore, the court noted that the defendant's suggestion that the money laundering guideline violated 28 U.S.C. § 994(j) by not prescribing a sentence other than a term of imprisonment for cases such as his was contradicted by Congress's rejection of the Commission's prior attempts to provide lower sentences for that offense.

Part B General Application Principles

§1B1.1 Application Instruction

United States v. Cruz-Guevara, 209 F.3d 644 (7th Cir. 2000). The district court erred in failing to tie the defendant's downward departure to the structure of the guidelines. The defendant pled guilty to being found in the United States after having been removed after a conviction for an aggravated felony. The district court sentenced the defendant to 24 months' imprisonment, even though his criminal history category corresponded to a sentencing range of 70 to 87 months. The district court had concluded that the defendant's extraordinary family circumstances and his cultural ties to the United States removed the case from the heartland of the guidelines. The government appealed, stating the district court abused its discretion by failing to link the extent of the downward departure to the structure of the guidelines. The Seventh Circuit found that although the extent of the departure was not patently unreasonable, any departure from the guideline range requires that the extent be tied to the structure of the guidelines. The circuit court held the sentencing court violated this principle because it did not justify the extent of its departure. Therefore, its unsupported determination that a ten-level

departure was appropriate constituted an abuse of discretion. The circuit court vacated the sentence and remanded for resentencing.

United States v. Cruz-Velasco, 224 F.3d 654 (7th Cir. 2000). The district court did not err in failing to impose a downward departure in the defendants' sentences. The conduct for which the defendants were convicted stemmed from two separate drug transactions. After a jury trial, the defendants were convicted of conspiracy to possess with intent to distribute more than one kilogram of cocaine and possession of more than one kilogram of cocaine with intent to distribute. On appeal, one defendant argued that the district court erroneously failed to grant a downward departure based on his age, family circumstances, and the hardship faced by his family because of his status as an illegal alien. Although he did not request departures on these bases before the sentencing court, he claimed his failure to do so was the result of the ineffective assistance of his trial counsel. Thus, he argued the circuit court should consider his claims on appeal. The Seventh Circuit held that the defendant did not make the required showings through proof that his counsel failed to move for the applicable downward departures without any strategic justification. Without a showing that the trial counsel chose not to ask for the departure without any justification, the circuit court could not conclude his performance was objectively unreasonable.

United States v. Guzman, 236 F.3d 830 (7th Cir. 2001). The district court erred in finding that the defendant was entitled to a downward departure on the ground that his deportation was a form of punishment compelling a lesser sentence than would be imposed on a citizen. The defendant pled guilty to participating in a conspiracy to distribute methamphetamine, and the district court departed downward 25 levels based partly on the defendant's status as a deportable alien. The government appealed the downward departure. The defendant argued on appeal that deportation is a form of punishment and therefore any given sentence imposes a greater punishment on a deportable alien than on a citizen. The circuit court joined other circuits that have rejected this double-punishment argument. *See United States v. Tejada*, 146 F.3d 84, 88 (2d Cir. 1998) (*per curiam*); *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990); *United States v. Leandre*, 132 F.3d 796, 808 (D.C. Cir.), *cert. denied*, 523 U.S. 1131 (1998). Further, the defendant argued that the status of being a deportable alien affected the conditions of imprisonment by disentitling a deportable-alien defendant to serve any part of his sentence in a halfway house, minimum security prison, or an intensive confinement center, so that the same sentence is a more severe punishment than if the defendant were a citizen. The court agreed with the District of Columbia Circuit that the conditions of imprisonment were a permissible basis, in certain circumstances, for a downward departure. *See United States v. Smith*, 307 U.S. App. D.C. 199 (1994); *United States v. Farouli*, 124 F.3d 838, 845-47 (7th Cir. 1997); *United States v. Davoudi*, 172 F.3d 1130, 1133-34 (9th Cir. 1999). The court emphasized, however, that the defendant's status as a deportable alien "is relevant only insofar as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant's offense." *Farouli*, 124 F.3d

834. On remand, the circuit court directed the district court to consider this possibility, but stated that it would not justify a downward departure of 25 levels as the district court had originally imposed. *Id.*

United States v. Hargrove, 201 F.3d 966 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences for bodily injury. The defendants pled guilty to armed bank robbery, and their sentences were enhanced pursuant to §2B3.1(b)(3)(A) based on the victim-teller's neck injury sustained during the robbery. The circuit court found that sentencing courts have routinely held similar injuries and circumstances satisfy the requirements for enhancements under §2B3.1. See *United States v. Perkins*, 132 F.3d 1324, 1326 (10th Cir. 1997); *United States v. Hoelzer*, 183 F.3d 880, 882-83 (8th Cir. 1999); *United States v. Hamm*, 13 F.3d 1126, 1128 (7th Cir. 1994); *United States v. Fitzwater*, 896 F.2d 1009, 1012 (6th Cir. 1990); *United States v. Greene*, 964 F.2d 911, 912 (9th Cir. 1992). Further, the court stated the injury the victim-teller sustained required medical attention, and therefore the district court did not err in enhancing the defendants' base offense levels.

United States v. McMutuary, 217 F.3d 477 (7th Cir.1999), *cert. denied*, 531 U.S. 1001 (2000). The district court did not err when it refused to consider a disparity in the sentencing of three defendants involved in the same offense. The defendants jointly participated in a bank robbery, and one pled guilty and two went to trial. They were all convicted of conspiracy to commit armed bank robbery, armed bank robbery, and use of a firearm in connection with a crime of violence. The defendant who pled guilty was sentenced to a period of one year home confinement followed by probation, based on the sentencing judge's determination that a 14-level downward departure for both his substantial assistance and his family circumstances applied. The other two defendants were sentenced to 195 months' imprisonment and 138 months' imprisonment, respectively. On appeal, the two defendants sentenced after trial argued that the district court erred in refusing to consider a downward departure based on an unjustified disparity between their sentences and the sentence imposed on their co-conspirator. They further argued the district court erred in imposing a downward departure for the co-conspirator below the statutory mandatory minimum because the government did not request such a departure, and therefore the erroneous nature of his sentence resulted in part in the disparity. The Seventh Circuit found that the district court erred in departing below the statutory mandatory minimum, and that this departure did contribute in part to the disparity in the sentences imposed, creating an unjustified disparity. The circuit court then corrected dicta in its previous case which suggested that an unjustified disparity in co-conspirators' sentences should be considered as a factor in the decision to depart from the guidelines, as found in *United States v. Mesa*, 127 F.3d 545 (7th Cir. 1996), *cert. denied*, 522 U.S. 1139 (1998). Instead, the circuit court held that sentencing courts should "consider unjustified disparities in only those cases where the unjustified disparity between codefendants actually creates a disparity between the length of the appellant's sentence and all other similar sentences imposed nationwide." *Id.* at 490. Because both of the defendants were sentenced to a term of imprisonment consistent with all other defendants convicted of similar criminal conduct, even though there was an unjustified disparity relative to their codefendant, the district court did not err in refusing to depart downward based on a disparity among the defendants' sentences.

§1B1.3 Relevant Conduct

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000). The district court did not err in its calculation of the amount of drugs attributable to the defendant for sentencing purposes. After a jury trial, the defendant was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. At his sentencing, the district court attributed an amount of drugs found in a stash house to the defendant as relevant conduct. The defendant's arrest resulted in the search of an apartment to which he had a key. Two kilograms of methamphetamine and five kilograms of cocaine were found in the stash house, along with a number of the defendant's personal articles. On appeal, the defendant argued that even if he was involved in the drug delivery which led up to his arrest, the drugs found in the apartment were not within the scope of an alleged agreement to distribute the drugs. The circuit court found that the fact that the defendant had a key, had clothing and other items in the apartment, and admitted on the witness stand that he had seen a microwave on the bed in which the police had also found a wooden press used to form cocaine into bricks were all circumstantial evidence that he was not an unwitting participant, but was instead an active participant. Therefore, the Seventh Circuit held the district court did not commit clear error in including the quantity of drugs in the calculation of the defendant's sentence.

United States v. Booker, 248 F.3d 683 (7th Cir. 2001). The district court did not err in finding that a quantity of drugs belonging to the defendant's friend was attributable to the defendant because they were part of a joint criminal undertaking. The defendant pled guilty to possession of cocaine base with the intent to distribute it within 1,000 feet of a public housing facility, and was sentenced to 168 months. As the search warrant was being executed upon the house, the defendant's friend ran out the back, and the police subsequently located a bag containing 19 grams of crack just outside the back door. The defendant admitted he had been selling crack for this friend for five days before his arrest, and was present as his friend cut up four ounces of crack into smaller portions for resale. The circuit court found that the defendant must have expected some or all of the resale portions being prepared would end up in his possession for resale. Therefore, the 19 grams of crack found by the back door were attributable to the defendant for sentencing purposes as part of the joint undertaking.

United States v. Corral-Ibarra, 25 F.3d 430 (7th Cir. 1994). The district court did not err in attributing to defendant Herrera the entire amount of cocaine involved in the conspiracy. The defendant argued that he should only be accountable for the two kilograms of cocaine that he saw when he inspected the cocaine offered by the undercover agents. He proffered testimony which established that he was not aware of how much cocaine was involved in the shipment and that therefore, he could not have reasonably foreseen the entire 50 kilograms. The circuit court drew a distinction between direct and remote involvement in illegal activity and likened the defendant's role in the conspiracy to the off-loader in Example (a) of USSG §1B1.3, comment. (n.7). The defendant boarded the boat on which the cocaine was stored, sampled the cocaine and then verified its adequacy with his co-conspirators. The circuit court considered this as evidence of his "direct, personal role in furtherance of the attempt to obtain and distribute a large quantity of cocaine." "As explained in Application Note 1 to [section 1B1.3(a)(1)], reasonable foreseeability in the context of §1B1.3(a)(1) applies only to conduct `for

which the defendant would be otherwise accountable,' and not to the preceding clause relating to all acts or omissions committed or aided and abetted by the defendant."

United States v. Guerrero-Martinez, 240 F.3d 637 (7th Cir. 2001). The district court did not err in its determination of relevant conduct attributed to the defendant for sentencing purposes. The defendant pled guilty to possession with intent to distribute in excess of 100 kilograms of marijuana and aiding and abetting the possession of that marijuana. The district court held that the entire shipment could be attributed to the defendant as relevant conduct because he oversaw the delivery, even though he only purchased a portion of the shipment himself. On appeal, the defendant claimed because he only purchased a small amount and did not aid in the sales to anyone else nor had any idea how much marijuana was in the shipment, it was not reasonably foreseeable to him that the shipment contained 1,500 pounds of marijuana. The Seventh Circuit found the defendant's argument to be without merit because he met with other co-conspirators prior to the shipment and was aware that the drugs he agreed to buy were just a part of the shipment. Further, he watched over the unloading of not only the boxes with the drugs for his payment but also those boxes which were being unloaded into a van belonging to another buyer. Therefore, the circuit court found the defendant liable under the aiding and abetting provision of §1B1.3, and held that the district court properly determined the quantity of drugs attributable to the defendant.

United States v. Hall, 212 F.3d 1016 (7th Cir. 2000). The district court did not err in applying the guideline in effect at the time of sentencing rather than the one in effect when the defendant's alleged participation ended. The defendant was convicted of various drug offenses in 1997, and the sentencing judge sentenced him to 87 months' imprisonment, based on the guidelines in effect at the time of his sentencing. On appeal, the defendant claimed his sentence violated the *Ex Post Facto* Clause because he was not an active participant of the conspiracy after June of 1995 and; therefore, the less severe guidelines in effect at that time should have been applied, pursuant to §1B1.11(b)(1). The circuit court found that the defendant was charged and convicted of conspiring to distribute methamphetamine and marijuana from 1993 to 1996, and he did not raise any objections to the information contained in the PSR which also concluded that the conspiracy continued through 1996. The court further found that as a member of a conspiracy, the defendant's relevant conduct for sentencing purposes included all reasonably foreseeable acts of others in furtherance of the activity, and the court held the sentence imposed under the version of the guidelines in effect at the time of sentencing did not violate the *ex Post Facto* Clause.

United States v. Hatchett, 31 F.3d 1411 (7th Cir. 1994). The district court did not err in holding the defendant responsible for an amount of cocaine that was part of the same course of conduct or common scheme or plan. The defendant challenged the inclusion of 10.8 grams of cocaine base found in the toilet bowl during a search of her residence as relevant conduct. The circuit court considered "whether similar parties were involved in each transaction, the geographic relationship, the temporal relationship and any other relationship between the convicted offense and the relevant conduct." *United States v. Crawford*, 991 F.2d 1328 (7th Cir. 1993). The evidence established that the defendant participated in her daughter's drug selling activity, and the fact that the defendant was only

present during the second of three transactions was irrelevant to the determination that the challenged quantity was part of the same course of conduct.

United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences under §1B1.3. The defendants were convicted of conspiracy to commit mail fraud. The defendants were involved in committing arson for the insurance proceeds, and the district court included the arson as relevant conduct for purposes of enhancing each of their offense levels. On appeal, the defendants argued that the court erred when it found by a preponderance of the evidence that they had committed arson and that the arson could be used as relevant conduct. They argued that the clear and convincing evidence standard should have been applied instead. The circuit court found that the district court correctly used the acquitted offenses as relevant conduct to enhance the defendants' sentences even though they were acquitted at trial of the arson under a more stringent standard.

United States v. Schaefer, 291 F.3d 932 (7th Cir. 2002). The defendant was shown to have fraudulently sold art objects. The only issue raised on appeal was the amount of loss to the defrauded purchasers under §2F1.1(b)(1). The defendant claims that "relevant conduct" under §1B1.3 is necessarily limited to criminal conduct. The court noted that §1B1.3(a) explicates the fundamental rule that relevant conduct must be criminal in nature, though subsection (a)(4) indicates that each applicable guideline may also specify additional relevant factors. It stated that because §2F1.1 is in Chapter Two, this framework necessarily applies to a §2F1.1(b)(1) loss calculation. Therefore, in addition to crimes that were committed in connection with the offense of conviction, *see* §1B1.3(a)(1), or criminal acts or omissions that were part of the same course of conduct or common scheme as the offense of conviction, *see* §1B1.3(a)(2), a loss calculation under §2F1.1(b)(1) also involves "the value of the money, property, or services unlawfully taken." §2F1.1, comment. (n.8). The court explained that its holding, that relevant conduct under §1B1.3 of the guidelines is limited to criminal conduct, is amply supported by the case law in other circuits. *See, e.g., United States v. Dove*, 247 F.3d 152, 155 (4th Cir. 2001) (rejecting argument that "non-benign" rather than illegal conduct "may properly be considered as relevant conduct"); *United States v. Peterson*, 101 F.3d 375, 385 (5th Cir. 1996) ("For conduct to be considered 'relevant conduct' for the purpose of establishing one's offense level that conduct must be criminal."); *United States v. Dickler*, 64 F.3d 818, 830 (3d Cir. 1995) (agreeing with other circuits that relevant conduct must be criminal); *United States v. Sheahan*, 31 F.3d 595, 600 (8th Cir. 1994) (noting that government has burden of proving by a preponderance of evidence that defendant's conduct was criminal in nature before the district court can rely on it as relevant conduct). Accordingly, the court held that for all of the defendant's business receipts to be included in a §2F1.1(b)(1) loss calculation, the government must demonstrate, by a preponderance of evidence, that all of his business activities were unlawful. It remanded the case with instructions to require the government to identify the specific unlawful conduct relied upon to justify the §2F1.1(b)(1) loss calculation.

United States v. Span, 170 F.3d 798 (7th Cir.), *cert. denied*, 528 U.S. 862 (1999). The district court erred in attributing drugs to the defendant as the drug quantity lacked an adequate basis.

The court's calculation was based primarily on the defendant's drug transactions with two men. The trial court noted discrepancies existing between the trial testimony and initial statements the men made to police. The appellate court noted that when a sentencing court relies upon one of two contradictory statements, "it should directly address the contradiction and explain why it credits one statement rather than the other." In absence of an explanation or other evidence justifying the court's choice of one version over the other, the judge's calculation lacked an adequate basis.

United States v. Sumner, 265 F.3d 532 (7th Cir. 2001). The district court erred by not explaining the connection between the uncharged conduct used in determining the defendant's sentence and the offense of conviction. After the defendant, aged 76, pled guilty to three counts of distributing cocaine, he was sentenced to 132 months' imprisonment. The defendant was charged with distributing 9.4 grams of cocaine, but the district court sentenced him under §1B1.3 on an additional distribution of 57.6 grams of crack. His sentencing range rose from 8 to 14 months to 121 to 151 months. On appeal, the defendant claimed the district court did not adequately explain why it included the crack cocaine as relevant conduct, since the sale of the crack occurred more than two years prior to the offense of conviction and lasted for only two months. The Seventh Circuit found that the district court had not made any express finding on the record that the sales of crack were part of the same course of conduct or common scheme or plan as the offense of conviction. The circuit court stated "without temporal proximity, the government must make a stronger showing of the other factors, such as regularity and similarity of the acts." *Id.* at *7. The circuit court held the failure to explain the connection between the uncharged conduct and the offense of conviction was erroneous, and remanded the case for resentencing. *See also United States v. Payne*, 226 F.3d 792,796 (7th Cir. 2000) (district court did not err in finding that conduct after the time period listed in the indictment was relevant conduct for sentencing purposes; relevant conduct includes all acts or omissions that are part of the same course of conduct or common scheme or plan as the offense of conviction, and the conduct after the time period was properly found to be part of the same course of conduct).

United States v. Taylor, 272 F.3d 980 (7th Cir. 2001). The defendant was arrested on drug and weapon charges. While being processed, he escaped from custody and was arrested a second time a week later, and was charged with—but not convicted of—a shooting. His sentence was enhanced as if the penalty for attempted murder under §2A2.1 applied. The defendant appealed his sentence, focusing on the manner in which cross-references and "relevant conduct" provisions of the sentencing guidelines were applied to him. The government argued that the escape (to which the defendant pled guilty) is relevant conduct to the firearms charge because the escape was an attempt to avoid detection or responsibility for the firearms violation. Next, the government contends that the shooting one week later was relevant conduct to the escape. Finally, the government claimed the escape, which is relevant conduct to the firearms violation, brought with it the shooting, which is relevant conduct to the escape. This argument brought into play the cross-references in the firearms guideline. The court stated that it cannot conclude that every crime committed during the time a person is on escape status automatically becomes relevant conduct in regard to a crime committed before the escape. The court found that the shooting was not related to any attempt to avoid detection for the escape, and in fact may be said to have called attention to himself. The court concluded that even if the government could establish that

the shooting was relevant conduct to the escape, nothing would be gained because the guideline for escape does not include a cross-reference which would allow sentencing on the basis of attempted murder.

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in holding uncharged bulk purchases of methamphetamine were properly considered as relevant conduct in determining the defendant's sentence. Upon the defendant's guilty plea to distributing methamphetamine, charges relating to an earlier bulk purchase of the drug were dropped. The defendant was heavily involved in the purchase of methamphetamine from numerous suppliers, but only pled guilty to distribution of 4.25 grams. However, the sentencing court included as relevant conduct an estimated 90 ounces of methamphetamine from his bulk purchases. The circuit court found both a commonality of purpose; maintenance of a high-volume drug distributorship, and similarity of modus operandi; driving to his suppliers on a frequent, predictable schedule and paying in cash for small, fixed amounts. Therefore, his bulk purchases were properly considered as relevant conduct in determining his sentence.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. McGee, 60 F.3d 1266 (7th Cir. 1995). The district court did not commit plain error in failing to apply the amended guidelines. The defendant argued that the statute mandating imprisonment for his violation of supervised release terms violated the *Ex Post Facto* Clause. The violations included cocaine possession and failure to submit to urinalysis. The circuit court rejected the defendant's argument that the 1994 amendment to 18 U.S.C. § 3583 altered the punishment for cocaine possession to his detriment. The circuit court followed the reasoning in *California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995), and held that the defendant was not subject to increased punishment under the amended statute. In that case, the Supreme Court stated that the *Ex Post Facto* Clause does not forbid any legislative change that has any conceivable risk of affecting a prisoner's punishment; rather a court must determine whether the legislative change produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. In the case at bar, the circuit court used this reasoning to hold that the amendment does not produce a detriment to the defendant; rather, it narrows the range of punishment to his benefit. Thus, the circuit court affirmed the district court's sentence of 24 months.

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

United States v. Anderson, 61 F.3d 1290 (7th Cir.), *cert. denied*, 516 U.S. 1000 (1995). The district court did not err in applying the sentencing guidelines in effect at the time of the defendant's sentencing. The defendant was convicted for knowingly or intentionally possessing piperidine and knowing or having reasonable cause to believe it would be used to manufacture a controlled substance. The district court, using the 1992 version of the sentencing guidelines, enhanced the defendant's sentence for possessing a firearm pursuant to USSG §2D1.1 resulting in a sentence of 120 months imprisonment. On appeal, the defendant challenged the district court's use of the 1992 version of the

guidelines as violative of the *Ex Post Facto* Clause because the 1990 version, the guidelines manual in effect at the time the defendant committed his offense, contained a more lenient version of the weapon enhancement. The circuit court ruled that the district court did not err in applying the 1992 guidelines. The circuit court noted that "the Tenth Circuit has held on similar facts that there is no ex post facto problem when the *Guidelines Manual* in effect at sentencing, taken as a whole, cannot possibly generate a sentence more severe than the most lenient sentence available at the time the defendant committed his offense." See *United States v. Nelson*, 36 F.3d 1001, 1004 (10th Cir. 1994) (upholding use of 1992 Guidelines even though defendant would have received lower enhancement under 1988 Guidelines because defendant received equivalent reduction in sentence under different provision of 1992 Guidelines). The circuit court recognized that decisions on this issue clearly indicate that guidelines amendments will not raise ex post facto concerns if, "taken as a whole," they are "ameliorative." See *Miller v. Florida*, 482 U.S. 423 (1987) (concluding that an amendment to Florida's sentencing guidelines violated the ex post facto clause by increasing the petitioner's presumptive sentence after he had committed the offense of conviction).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994). The defendants were convicted of explosives and firearms violations in connection with a bombing/burglary scheme that resulted in a death. The defendants challenged the application of USSG §2A1.1, First Degree Murder, under the directive of USSG §2K1.4(c) as the most analogous guideline to the offense conduct. The circuit court held that the sentencing court need not search for an exact match between the conduct covered under USSG Chapter Two and the conduct under §2K1.4. Notwithstanding the absence of any fire, and the stipulation that the bomb was not detonated with the intention of killing someone, the circuit court found that the bombing was sufficiently similar to arson to apply the analogous first degree murder guideline.

United States v. Thompson, 286 F.3d 950 (7th Cir. 2002). The court of appeals reversed the sentences of two defendants, who were sentenced to life imprisonment on a drug conspiracy count pursuant to §2D1.1 after the district court concluded that the §2D1.1(d)(1) murder cross-reference was applicable. The defendants argued on appeal that the district court's findings were insufficient to support the application of the cross-reference. The court of appeals stated the district court inferred from the defendants' participation in the cover-up of the murder that they knew the victim had been murdered by someone as a result of his informant activities, which threatened to expose the conspiracy. The attempt to cover up the murder, the district court concluded, was done in furtherance of the goals of the conspiracy and in an attempt to avoid detection. Based on this logic the district court thought the §2D1.1(d)(1) murder cross-reference should be applied to each of these defendants. The court of appeals concluded that the fact that the defendants knew that the government informant had been murdered did not prove that the murder was reasonably foreseeable to them. And it certainly did not

prove that it was reasonably foreseeable to them that the murder would occur with malice aforethought. The court of appeals noted that it has been willing to assume that carrying of weapons is foreseeable to most drug conspiracy members, in light of the violent nature of the drug business; however, even with this presumption of violence, the government is still required to prove that the conspiracy's actions were foreseeable to each defendant to whom it seeks to impute relevant conduct. Accordingly, in this case the court had to find that it was reasonably foreseeable to each defendant that the government informant may be murdered with malice aforethought.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint¹

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 States²

§2B3.1 Robbery

United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994). The district court did not err in enhancing the defendant's sentence for bodily injury to the victim pursuant to §2B3.1(b)(3)(A), where the victim suffered bumps and bruises, had "the wind knocked out of him," and sustained a back injury requiring chiropractic treatment. The circuit court rejected the defendant's claim that "bodily injury" occurs only when the injury requires "medical treatment." Rather, the circuit court agreed with Fourth Circuit precedent that the degree of injury depends on a "myriad of factors" which the district court is best suited to assess. Here, the district court's determination that the injury was painful and obvious was supported by the facts and not clearly erroneous. Also, the district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1, where testimony given at trial was sufficient to show that, prior to the trial, the defendant attempted to convince a witness to give false testimony.

¹Effective May 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended §2A4.1 to reflect the seriousness of those offenses involving sexual exploitation.

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

United States v. Raszkiewicz, 169 F.3d 459 (7th Cir. 1999). The district court did not err in enhancing a bank robber's sentence for a threat of death when the robber pointed an unknown object at the teller and gestured with his hand in his jacket as if he had a gun. The Seventh Circuit found that a "reasonable" victim would fear death and, therefore, the (b)(2)(F) adjustment was proper.

United States v. Warren, 279 F.3d 561 (7th Cir. 2002). The defendant pled guilty to armed bank robbery. On appeal, the defendant argued that he should not have received a four-level upward adjustment under §2B3.1(b)(2)(D) for "otherwise using" a dangerous weapon. He contended that, at most, his conduct constituted mere "brandishing" of a dangerous weapon. The defendant described his conduct as "holding the gun in the vicinity of the teller's back." The court of appeals held that whether the defendant touched the teller's back with the gun or whether he simply came close to touching her was not an important distinction for purposes of determining the enhancement's applicability. It stated that physical contact between the weapon and the victim was not a prerequisite to finding that the defendant "otherwise used" a dangerous weapon.

United States v. Williams, 258 F.3d 669 (7th Cir.), *cert. denied*, 534 U.S. 981 (2001). The district court did not err when it enhanced the defendant's sentence for subjecting the victim to permanent or life-threatening bodily injury. The defendant pled guilty to kidnapping and carjacking, and was sentenced to 315 months' imprisonment. The victim, a 71-year-old woman, required over 300 stitches to close head wounds sustained in the carjacking, and suffered long-term after effects including dizziness and frequent, severe headaches. On appeal, the defendant argued that the evidence fell short of the standard as found in §2B3.1(b)(3) because the doctors testified that the victim's injuries "could have" been life-threatening. The circuit court held that the enhancement was properly applied because the evidence showed the victim was beaten over the head with a metal club resulting in a loss of over 25 percent of her total blood volume, and indicated that the beating she received permanently impaired her mental faculties.

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

United States v. Ramacci, 15 F.3d 75 (7th Cir. 1994). In sentencing the defendant for conspiracy to counterfeit over \$600,000 in United States currency, the district court did not err in including approximately \$260,000 in partially completed bills, printed on the back only, in its sentencing calculation. The circuit court reasoned that nothing in §2B5.1 requires that the counterfeit bills be complete to be included in sentencing at "face value." Application Note 2, which requires that a bill be "falsely made or manufactured in its entirety," does not require that the bill be complete, but only that it not be a genuine instrument which has been altered. The circuit court cited other circuit precedent, legislative history, the rejection of a proposed application note, and the language of §2B5.1(b)(1) and (2) to conclude that a counterfeit bill need not be complete to be included in sentencing calculations. The circuit court also held that the record supported the district court's enhancement of the defendant's sentence under §3B1.1(c) for his role as an "organizer, leader, manager or supervisor."

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

Ambriz v. United States, 14 F.3d 331 (7th Cir. 1994). The district court did not err in denying the defendant's petition for writ of habeas corpus on grounds that he could not show actual prejudice from the errors of which he complained. The defendant argued he had been prejudiced when the district court sentenced him on the basis of one kilogram of cocaine, where he believed he possessed one kilogram of cocaine but the government had substituted all but 22.5 grams of cocaine with dirt. The defendant claimed the dirt, like waste water, should not count for sentencing purposes because it did not serve as a dilutant, cutting agent or carrier medium and did not increase the amount of cocaine available at the retail level. The circuit court pointed out that in this case, unlike cases involving waste water, the defendant actually believed the material he possessed was cocaine. Accordingly, the circuit court, relying on Seventh Circuit precedent and §2D1.1 provisions, held that the drug quantity should be based on the amount of cocaine the defendant tried to possess, and not the amount he actually possessed.

United States v. Buchanan, 115 F.3d 445 (7th Cir. 1997). The district court properly adopted the defendant's version of the amount and type of drugs involved in the offense when calculating the defendant's total offense level. The defendant maintained that all his discussions with undercover agents concerned the sale of powder cocaine, not crack cocaine. The government argued that the defendant's sentence should be vacated because the district court failed to make the required factual findings to support its choice of offense level. The circuit court disagreed, holding that normally a case such as this would be remanded for findings by the district court regarding the amount and type of drugs attributable to the defendant. In some cases, however, the court can uphold a sentence where the district court's implicit findings seemed sufficient. *See United States v. McKinney*, 98 F.3d 974, 980-81 (7th Cir.), *cert denied*, 117 S. Ct. 1119 (1997) (affirming the sentence despite a lack of express findings where it was clear from the sentencing transcript that the district court adopted the drug quantities in the presentence report). The circuit court concluded that the government had failed to carry its burden of proof after reviewing the transcript of the sentencing hearing, the presentencing investigation report, and the testimony of the defendant. Thus, the court properly erred on the side of caution and adopted the defendant's version of the amount and type of drugs involved. *See United States v. Acosta*, 85 F.3d 275, 282 (7th Cir. 1996).

United States v. Noble, 246 F.3d 946 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for possession of a firearm in connection with a drug offense. The defendant was convicted of possession of controlled substances with the intent to distribute, and the court enhanced his sentence pursuant to §2D1.1(b)(1). The defendant moved in with his girlfriend and when the police searched her apartment, they found drug proceeds in the bedroom they shared and found a gun in the bedroom closet. The girlfriend testified that the defendant placed the gun in the closet. The Seventh Circuit held that the district court did not err in crediting the girlfriend's testimony. Given that the drug proceeds and the gun were found in the same room, the court was correct in enhancing the defendant's sentence. *See also United States v. Green*, 258 F.3d

683, 695 (7th Cir. 2001) (district court did not err in calculation of drug quantity attributable to defendant for sentencing purposes where the amount was supported by sufficiently reliable evidence, including the testimony of the defendant's customer).

United States v. Payne, 226 F.3d 792 (7th Cir. 2000). The district court did not err in calculating the weight of the drugs to include empty grow pots for sentencing purposes. The defendant was convicted of conspiracy to manufacture and distribute marijuana, and he appealed his sentence. On appeal, he claimed the district court erred by including in its drug weight calculations 2,000 grow pots found to have been intended for a warehouse grow operation. The Seventh Circuit found substantial additional facts which showed the defendant had intended to grow a significant amount of marijuana and had taken substantial steps towards that goal; construction had begun to transform a warehouse into a place suitable for growing marijuana, including the installation of light racks and a shelving system, and the defendant had purchased a chemical additive for paint that would reduce the penetration of heat through the walls. Further, the circuit court found the defendant had demonstrated his ability to coordinate a successful grow operation. The circuit court found that under §2X1.1, the sentencing court is to apply the base offense level to include any adjustments for any intended offense conduct that can be established with reasonable certainty, and §2X1.1 directs the court to use §2D1.1 for the calculation of the defendant's offense level. Under §2D1.1, the 2,000 intended marijuana plants were correctly converted to 200 kilograms of marijuana. Thus, the district court did not commit error in including 200 kilograms for the intended marijuana plants.

United States v. Zehm, 217 F.3d 506 (7th Cir. 2000). The district court did not err in enhancing the defendant's sentence two levels based on his possession of a firearm, pursuant to §2D1.1(b). The defendant pled guilty to two counts of distributing methamphetamine after police executed a search warrant on his car, finding cocaine, methamphetamine, and a loaded gun. The circuit court found the enhancement applied because under §2D1.1(b), a defendant need not possess the gun during the offense of conviction, but may also possess it during relevant conduct. When the defendant was found to be in possession of the gun, the relevant conduct period for the conspiracy charge which had been previously dismissed was still ongoing, and the defendant was retrieving drugs when police searched his car and found the gun. Therefore, the sentencing court did not err in finding that the defendant possessed the gun during conduct which was relevant to the offense of conviction. *See also United States v. Booker*, 248 F.3d 683, 689 (7th Cir. 2001) (district court did not err in finding that defendant had used a dangerous weapon in connection with the offense; an informant found a gun on the couch next to the defendant during two separate purchases of drugs and on a third purchase saw a gun near the defendant while he was cutting up large amounts of crack, giving rise to the presumption that the gun was used in connection with the drug offense).

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

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic³

United States v. Lovaas, 241 F.3d 900 (7th Cir. 2001). The district court did not err in using the defendant's decade-old sexual misconduct with juveniles as relevant conduct in enhancing his sentence five levels pursuant to §2G2.2(b)(4). The defendant pled guilty to transporting and possessing material which depicted minors engaging in sexually explicit conduct, and was sentenced to 87 months' imprisonment. On appeal, the defendant argued that two instances of sexual misconduct with a juvenile upon which the court relied in enhancing his sentence were not relevant conduct for the counts of conviction. The Seventh Circuit found that the commentary to §2G2.2 makes it clear that in a determination whether a pattern of activity involving the sexual abuse or exploitation of a minor is present, the district court must consider conduct that would not be considered relevant conduct in other circumstances. The circuit court held that it would give deference to the Commission which explicitly stated in Appendix C that "the conduct considered for purposes of the pattern of activity enhancement is broader than the scope of relevant conduct typically considered under §1B1.3." *Id.* at 904.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

United States v. Charles, 238 F.3d 916 (7th Cir. 2001). The district court did not err in increasing the defendant's sentence four levels for possession of a firearm in connection with another felony. The defendant was convicted of inducing a false and fictitious statement in connection with the purchase of a firearm and of being a felon in possession of a firearm, after he and a friend fired upon the residences of the mother and brother of his ex-girlfriend. The defendant testified at his sentencing hearing that after he received the gun, he sold it to the friend involved with him in the offense of conviction. The circuit court stated that pursuant to §2K2.1(b)(5), a four-level increase is appropriate for possessing a firearm in connection with another felony or transferring a firearm with knowledge, intent, or reason to believe that it would be used in connection with another felony. The circuit court found that although there was limited evidence presented by the government in support of the four-level enhancement, the gun was found in a car occupied by the defendant and his friend, there was bad blood between the defendant and his former girlfriend's family, and the defendant had testified that he purchased the gun that was used to shoot at the residences. Therefore, the court found the enhancement was appropriate.

³Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, provided enhancements to the sentencing guidelines for sexual conduct with a minor. *See* USSG App. C, Amendment 649.

United States v. Gresso, 24 F.3d 879 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's denial of a reduction for firearms that are possessed solely for lawful sporting purposes or collection. USSG §2K2.1(b)(2). The defendant argued that the court should not base its determination on a literal reading of the phrase "sporting purposes or collection"; rather, he asserted that the court should consider the circumstances surrounding his firearm possession, namely self-protection. The circuit court followed the First, Fifth, and Sixth Circuits in concluding that the reduction is warranted only when the firearm is acquired for sporting uses or for collection and is possessed or used solely for those purposes. See *United States v. Shell*, 972 F.2d 548 (5th Cir. 1992); *United States v. Cousens*, 942 F.2d 800 (1st Cir. 1991); *United States v. Wilson*, 878 F.2d 921 (6th Cir. 1989).

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996), *cert. denied*, 520 U.S. 1149 (1997). The district court properly enhanced the defendant's base offense level by four levels, pursuant to USSG §2K2.1, based on its determination that the defendant possessed firearms in connection with a drug offense. The defendant maintained that the district court erred by enhancing his base offense level because the government failed to establish that the firearms found in his home were possessed "in connection with" his marijuana dealing. The appellate court rejected this argument, holding that the phrase "in connection with" should be given its logical and common meaning. The court further noted that the phrase, at a minimum, should be interpreted broadly to mean that firearms involved must have some purpose or effect with respect to the drug trafficking crime and its presence or involvement cannot be the result of an accident or coincidence. Instead, the gun must facilitate, or have the potential of facilitating the drug trafficking offense. In the instant case, the defendant's firearms were concealed under the bed and in the closet, but there is no indication that the weapons were not readily accessible. Additionally, the court held that the seizure of the firearms in close proximity to illegal drugs was a powerful inference that the firearms were used in connection with the drug trafficking operation.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Perez-Ruiz, 169 F.3d 1075 (7th Cir. 1999). The district court did not err in deciding that the defendant had transported aliens "for profit" and thereby was not entitled to a three-level reduction under §2L1.1(b)(1). The defendant helped another man transport illegal aliens by driving a van from Arizona to Chicago. The defendant's compensation was the value of a trip to Chicago, as the defendant had lined up a job in Chicago and needed transportation. The Seventh Circuit agreed that the defendant had received "in-kind" compensation and he was not eligible for the other transfer profit reduction.

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

United States v. Chavez-Chavez, 213 F.3d 420 (7th Cir. 2000). The district court did not err when it made a discretionary decision not to depart downward further than it had already in sentencing the defendant on the ground that the criminal history category overstated the seriousness of his prior felony conviction. The defendant had pled guilty to unlawful re-entry after having been removed for aggravated criminal sexual abuse of an 11-year-old girl. The district court departed downward after concluding that the defendant's criminal history category overstated the seriousness of his prior offense. On appeal, the defendant contended that the district court should have departed even further, and requested an additional departure based on Application Note 5. The Seventh Circuit stated that had the district court found the defendant ineligible under the application note, the decision would be reviewable for error. However, the court held that the district court found the defendant eligible, but undeserving. Therefore, the decision was unreviewable, and the appeal was dismissed.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Stalbaum, 63 F.3d 537 (7th Cir. 1995). In considering an issue of first impression, the circuit court held that under USSG §2P1.1, "a federal prison camp is not similar to the community institutions referenced in USSG §2P1.1(b)(3)." That section requires a reduction in sentencing for escapes from non-secure "community corrections centers, community treatment centers or halfway houses" or "similar" facilities, but provides no examples of what is "similar." The circuit court joined with six other circuits to conclude that federal prison camps are not similar to "community corrections centers, community treatment centers or halfway houses." *United States v. McCullough*, 53 F.3d 164 (6th Cir. 1995); *United States v. Cisneros-Garcia*, 14 F.3d 41 (10th Cir. 1994); *United States v. Hillstrom*, 988 F.2d 448 (3d Cir. 1993), *cert. denied*, 514 U.S. 1028 (1995); *United States v. Tapia*, 981 F.2d 1194 (11th Cir.), *cert. denied*, 508 U.S. 979 (1993); *United States v. Shaw*, 979 F.2d 41 (5th Cir. 1992); *United States v. Brownlee*, 970 F.2d 764 (10th Cir. 1992); *United States v. McGann*, 960 F.2d 846 (9th Cir.), *cert. denied*, 506 U.S. 897 (1992).

Part R Antitrust Offenses

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

United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994). The appellate court addressed an issue of first impression in interpreting the term "bid rigging" as used in USSG §2R1.1 and the accompanying commentary, and in determining whether a "noncompetitive bid" under USSG §2R1.1(b)(1) encompasses price-fixing. The court determined that price-fixing, while technically a "noncompetitive bid," does not merit the one-level enhancement under USSG §2R1.1(b)(1). The appellate court found no specific definition in the guideline, but looked to past practice and the guideline commentary to determine that the enhancement applied to bid rigging, and not to price-fixing. The district court therefore erred in applying the one level enhancement for bid rigging where the defendants

had agreed to submit identical bids, which was merely price-fixing. The appellate court opined that the term "bid rigging" means conduct involving bid rotation agreements.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.3 Structuring Transactions to Evade Reporting Requirements

United States v. Suarez, 225 F.3d 777 (7th Cir. 2000). The district court did not err in applying a two level enhancement for the defendant's knowledge or belief that the funds involved in the offense were the proceeds of unlawful activity. The defendant was convicted of making false statements to the United States Customs Service and for failing to report currency that she was attempting to transport into Mexico. On appeal, the defendant claimed the sentencing court erred in applying an enhancement under §2S1.3(b)(1) because it found that she "knew or believed that the funds were proceeds of, or intended to promote unlawful activity." *Id.* at 778. The Seventh Circuit found that the defendant lied about the source of the money, by falsely claiming that it came from the sale of her home, and found that the defendant had packed the money in her suitcase in such a way as to avoid detection by wrapping it between two pieces of plywood bound with cellophane tape. These facts supported the district court's conclusion that it was more likely than not that she knew or believed the funds were the proceeds of some unlawful activity or were intended to promote such activity, and the enhancement was properly applied.

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. Chavin, 316 F.3d 666 (7th Cir. 2002). The defendant was convicted for tax and bankruptcy fraud. The defendant contended that the district court should have reduced the tax-loss figure by the amount of legitimate but unclaimed deductions on the tax return. The court of appeals affirmed the district court's calculation of tax loss under §2T1.1. It stated that it interprets the phrase "the object of the offense" in §2T1.1 to mean that the attempted or intended loss, rather than the actual loss to the government, is the proper basis of the tax-loss figure. Here, the court found that the object of the offense was the amount by which the defendant underreported and fraudulently stated his tax liability on his return. It found that reference to other unrelated mistakes on the return such as unclaimed deductions says nothing about the amount of loss to the government that the defendant's scheme intended to create.

United States v. Twieg, 238 F.3d 930 (7th Cir. 2001). The district court did not err in holding that unpaid self-employment taxes were properly included in the calculation of "tax loss" under §2T1.1. The defendants pled guilty to three counts of filing false federal income tax returns, underreporting the receipts from their business by more than 1.3 million dollars. On appeal, the defendants contended the district court erred in increasing their base offense level by one level by

including self-employment taxes under the definition of “loss” under §2T1.1. The circuit court found that the Application Note to §2T1.1 states that all violations of the tax laws should be considered in calculating the tax loss, and that the failure to pay self-employment taxes constituted conduct violating those laws. Therefore, by the plain language of the guideline, the amount of self-employment taxes were properly included in the calculation of tax loss.

Part X Other Offenses

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

United States v. Lamb, 207 F.3d 1006 (7th Cir. 2000). The district court erred in not reducing the defendant’s sentence three levels for an uncompleted offense, under §2X1.1. The defendant broke into a bank to commit burglary, but the tools he used only succeeded in damaging the vault’s handle and locking mechanism, making entry into the vault impossible. He was only able to get \$350 from two coin vaults before the police answered the alarm. The district court increased the defendant’s sentence because it found the value of loss to include the sum of the contents in the main vault and a storage compartment near the main vault, a total of \$215,000, and concluded that the defendant intended to steal what he could. The Seventh Circuit found that Application Note 2 to §2B1.1 directs the sentencing judge to apply §2X1.1 for partially completed offenses. The court held that although under §2X1.1, any intended offense conduct that can be established with reasonable certainty counts as loss for purposes of §2B1.1, the Commission has recognized that inchoate offenses are less serious than completed ones, as found in §2X1.1. Because the judge added extra levels under §2X1.1(a), he was required to subtract levels under §2X1.1(b)(1) unless the defendant completed all of the acts he thought necessary for his success, or he was about to complete them when he was caught. The circuit court remanded the case for a determination as to how much money was in the coin vaults and whether the defendant was about to open the storage compartment.

CHAPTER THREE: Adjustments

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Grimes, 173 F.3d 634 (7th Cir. 1999). The district court did not err in applying a vulnerable victim adjustment when the defendant defrauded individuals with bad credit who were seeking unsecured loans. Victims were told over the telephone to submit an application fee of approximately \$200. The defendant merely kept the application fees without assisting the victims. The ads placed in newspapers were targeted at people who were financially desperate and only a desperate individual would pay a fee of \$200 merely for the right to apply for a loan and, therefore, the adjustment was proper.

United States v. Kahn, 175 F.3d 518 (7th Cir. 1999). The district court did not err by departing upward an additional offense level as the defendant's criminal actions preyed upon multiple vulnerable victims. As part of the defendant's relevant conduct, he provided marijuana at a party he hosted for ten boys and girls aged 14 to 17. The defendant's count of conviction concerned another similar act on a different occasion, and, therefore, the one-level departure in addition to the two-level adjustment under §3A1.1 was proper.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on the vulnerability of the victims. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over an 11-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. On appeal, the defendant contended that the district court erred in determining that he deliberately targeted the women whom he defrauded because of their vulnerability, and therefore in applying §3A1.1. The circuit court found that the guideline was amended in 1995 and that the vulnerable victim enhancement no longer required a showing of targeting by the defendant. Even though some of the defendant's conduct took place prior to November of 1995, the defendant was properly sentenced under the amended version because most of his offenses occurred subsequent to the effective date of the amendment. *See also United States v. Bragg*, 207 F.3d 394, 400 (7th Cir. 2000) (superseded by regulation on other grounds) (district court did not err in adjusting the defendant's sentence upward based on the victim's vulnerability regardless of whether vulnerable victims were targeted); *United States v. Williams*, 258 F.3d 669, 672-73 (7th Cir.) (district court did not err in enhancing the defendant's sentence based on §3A1.1 where the victim was 71 years of age, even though she was not particularly susceptible; Application Note 2 defines vulnerable victim as a victim of the offense who is vulnerable due to age or physical or mental condition), *cert. denied*, 534 U.S. 981 (2001).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Bragg, 207 F.3d 394 (7th Cir. 2000). The district court did not err by impermissibly double-counting the defendants' aggravating role in the offense. The defendant pled guilty to engaging in conspiring to knowingly remove asbestos and fraudulently using social security numbers to obtain false identification cards for asbestos workers. The defendant recruited workers from homeless shelters in another state to work on an asbestos removal project. The district court enhanced one of the defendants' sentences four levels for his leadership role in a conspiracy as an organizer or leader of a criminal activity involving five or more persons, and enhanced two defendants' sentences three levels because they were determined to be merely managers or supervisors of a

criminal activity. On appeal, the defendants argued their aggravating criminal conduct was double counted when it was used to justify an adjustment and to attach liability in the underlying conspiracy involving a violation of the Clean Air Act. The circuit court stated that the bar on double-counting “comes into play only if the [underlying] offense itself necessarily includes the same conduct as the [adjustment].” *Id.* at 400. Liability attaches under the Act to an owner or operator of pollution, defined as any person who owns, leases, operates or controls or supervises the facilities or any person who owns, leases, operates, controls or supervises the operation. The court found, however, that in order for one to be classified as a leader or supervisor for purposes of §3B1.1, a defendant must have been the organizer, leader, manager or supervisor of one or more other participants. Because an owner or operator’s criminal liability under the Act would not necessarily result in a sentencing adjustment for his aggravating role, the circuit court rejected the defendants’ double-counting argument. Thus, the circuit court held the sentencing court properly enhanced the defendants’ sentences under §3B1.1.”

United States v. D'Ambrosia, 313 F.3d 987 (7th Cir. 2002). The defendants used a scheme to operate an illegal sports book-making operation and concealed income from the Internal Revenue Service. The defendants challenged the district court’s application of a four-level enhancement to each defendant’s sentences for being leaders or organizers of a tax conspiracy. The appellate court affirmed the district court’s application of the enhancement, holding that the defendants were subject to the four-level “organizer-leader” enhancement regardless of whether the wagering offense and tax conspiracy offenses were analyzed separately or grouped together under §3D1.2. The defendants contend that their participation in the tax conspiracy was limited to their role as clients of a third party. The court concluded that the defendants’ argument fails to recognize that the determination of whether a defendant is an “organizer or leader” under §3B1.1 “is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct). The court stated that there is no question that the defendants’ operation of a multi-jurisdictional offshore sports bookmaking empire is clearly relevant in assessing their role in the tax conspiracy. It agreed with the district court that “it is not determinative whether the defendants exercised a leadership role over a third party in the tax conspiracy because they exercised a leadership role over the entire scheme, a part of which was to hide assets and income through an illegal tax shelter.

United States v. Noble, 246 F.3d 946 (7th Cir. 2001). The district court did not err when it enhanced the defendant’s sentence four levels for his leadership role in the offense. After a jury trial, the defendant was convicted of conspiracy to distribute crack cocaine and distribution of crack cocaine, and he was sentenced to a term of life imprisonment and 240 months’ imprisonment. The district court found that the defendant had more than a buyer-seller relationship with five other participants. Instead, he provided the drugs for the whole distribution scheme, controlled the drug price and delivery, and fronted the drugs for one of the participants. Further, the court found that the defendant stored the drugs in one of the participant’s trailers and in another’s car, and retained a key to the trailer so he could access the drugs any time. Importantly, the district court found that the defendant exercised such psychological control over one of the participants that the person was willing to go to jail for the defendant. On appeal, the defendant asserted he was merely a distributor and noted that

being a distributor does not justify application of the enhancement. The Seventh Circuit agreed with the sentencing court, and held that the defendant exercised the requisite control over the five participants to support the organizer or leader enhancement. *See also United States v. Carrera*, 259 F.3d 818, 826 (7th Cir. 2001) (district court did not err in imposing an upward departure for defendant's leadership role where defendant obtained the drugs, set up the time and place for the delivery, recruited his brother as an accomplice, and claimed rights to over 80 percent of the proceeds).

United States v. Payne, 226 F.3d 792 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on the defendant's supervisory and leadership role in the conspiracy. The defendant was convicted of conspiracy to manufacture and distribute marijuana, and he appealed his sentence. On appeal, the defendant argued that the district court erred in increasing his offense level by four levels pursuant to §3B1.1(a) based upon its determination that he maintained a supervisory and leadership role in the conspiracy. The Seventh Circuit found that consistent testimony was that the defendant directed the actions of others in the acquisition and distribution of drugs and in the collection of the drug proceeds, and held that the sentencing court's finding was well supported by the testimony.

§3B1.2 Mitigating Role

United States v. Brumfield, 301 F.3d 724 (7th Cir. 2002). The district court did not err by denying a downward adjustment for a minor or minimal role under §3B1.2, where the defendant was held accountable only for the drugs that he personally handled. The court of appeals found that it would be incongruous to find that the defendant functioned as a minimal or minor participant with regard to conduct in which he personally was involved.

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

United States v. Anderson, 259 F.3d 853 (7th Cir. 2001). The district court did not err when it enhanced the defendant's sentence for abuse of a position of trust. The defendant pled guilty to embezzling and willfully misapplying money which belonged to customers of the bank for which he worked, and he was sentenced to 41 months imprisonment. The district court found that as an assistant branch manager, the defendant had access to and control over all customers' accounts, and found that he withdrew money from customers' accounts. The district court further found he hid the money by opening an account in the name of his brother and by depositing a portion of the money into a CD account established in a friend's name. On appeal, the defendant argued that he did not occupy a position of trust because his illegal conduct involved his actions as merely a bank teller. The circuit court held that the district court properly applied the enhancement because the defendant was not employed as a bank teller, but as an assistant manager. In that position, he had the authority to withdraw funds from bank accounts over \$1,000.00 without obtaining a supervisor's permission. The circuit court found that the transactions at issue were all over that amount. Further, as a supervisor, the defendant had knowledge of the codes to access the customers' accounts, information bank tellers did

not have. Therefore, his position was correctly considered a position of trust for application of the enhancement.

United States v. Bhagavan, 116 F.3d 189 (7th Cir. 1997). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust under USSG §3B1.3. The defendant's challenge to the enhancement focuses on the nature of the victims of his scheme. The defendant relied primarily on the Seventh Circuit's opinion in *United States v. Hathcoat*, 30 F.3d 913 (7th Cir. 1994), and *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995), which both held that this enhancement could only be used when the victim had placed the defendant in a position of trust. The defendant claims that the victim in this case was the government. Additionally, the minority shareholders could not have placed him in a position of trust because he had full power to run the company without them. The circuit court rejected these arguments and held that the defendant's position as majority shareholder and president of the company brought with it fiduciary duties to act in the interests of the minority shareholders. Thus, in that sense he did occupy a position of trust vis a vis the minority shareholders. It was enough that identifiable victims of the defendant's overall scheme to evade his taxes put him in a position of trust and that his position "contributed in some significant way to facilitating the commission or concealment of the offense." The circuit court distinguished the other circuit opinions on several grounds by pointing to USSG §3B1.3, comment. (n.1), which draws a clear distinction between one who has "professional or managerial discretion (*i.e.* substantial discretionary judgment that is ordinarily given considerable deference)" and those subject to significant supervision. In this case, unlike the other two, the defendant was found to possess both extensive managerial control and discretionary executive powers, making the actual abuse not a necessary element of the offense.

United States v. Ford, 21 F.3d 759 (7th Cir. 1994). In addressing an issue of first impression, the circuit court affirmed the district court's application of USSG §3B1.3 to the defendants' RICO offenses. The defendants essentially challenged that the enhancement amounted to double-counting because the public bribery offenses which underlay their RICO counts necessarily involved abuse of a position of public trust. USSG §2C1.1, comment. (n.3). The defendants' argument centered on the application of §2E1.1, which instructs the sentencing court to apply the base offense level of the conduct underlying the racketeering activity if it is more than 19, the base offense level for all RICO offenses. USSG §2E1.1(a). Here, application of USSG §2E1.1(a) yielded a higher offense level which was subsequently enhanced pursuant to §3B1.3. However, had the defendants been sentenced under subsection (b), Application Note 3 of §2C1.1 would have precluded the enhancement for abuse of a position of trust. The circuit court concluded that unlike public bribery, not all RICO activity includes an abuse of trust "so that the minimum base offense level of 19 . . . does not already incorporate that element." The defendants' particular crimes are distinguished from other RICO offenses precisely because their activity did involve abuse of trust. Whether the defendants would have received the enhancement if they were sentenced under §2C1.1 is irrelevant.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000). The district court did not err when it enhanced the defendant's sentence based on abuse of a position of trust. The defendant was convicted of mail fraud, engaging in a prohibited financial transaction, wire fraud, and failing to file an

income tax return. The defendant worked for a struggling start-up company, and falsely told distributorship candidates that it was successful and was closely affiliated with a large and wealthy middle eastern oil company. He further converted some funds paid to the company for his personal use. Additionally, the defendant entered into a series of relationships with six women over an 11-year period, frequently misrepresenting himself as a wealthy businessman, and requesting various advances of both cash and property from these women. The district court enhanced the defendant's sentence two levels for his abuse of trust, pursuant to §3B1.3. The circuit court found that the defendant had represented himself as a licensed money manager and had offered to invest money for one of the women he dated, stating he was knowledgeable about investments and that he regularly invested money for other people. The circuit court found these representations were sufficient to convince the woman to entrust the defendant with her money, thereby placing him in a position of trust. Because the defendant's abuse of this position of trust facilitated his commission of the fraud, the district court properly increased the defendant's sentence.

§3B1.4 Use of a Minor To Commit a Crime

United States v. Anderson, 259 F.3d 853 (7th Cir. 2001). The district court did not err in applying an enhancement for the use of a minor to commit the crime. The defendant pled guilty to embezzling and willfully misapplying money which belonged to customers of the bank for which he worked and was sentenced to 41 months' imprisonment. The district court found that as an assistant branch manager, the defendant used a 17-year-old bank teller to conduct the withdrawals at issue. On appeal, the defendant argued that there was insufficient evidence to suggest that the bank teller made the withdrawals for him. The circuit court found that this teller's identification number accompanied each of the withdrawals. Further, the court found that even though the teller did not remember making these specific withdrawals for the defendant, she testified she often made such withdrawals for him in her role as a teller. Since there was sufficient evidence suggesting that the defendant was responsible for directing tellers to make these unauthorized withdrawals, the district court did not err in finding that the teller made these withdrawals for the defendant.

United States v. Hodges, 315 F.3d 794 (7th Cir. 2003). The defendant was convicted of being a felon in possession of firearms and of receiving stolen firearms. The defendant appealed his sentence enhancement under §3B1.4, contending that the district court erred by concluding that he "used" a minor to commit a crime. He argued that he could not have "used" the minor because he did not know that the minor was coming to his home to deliver the stolen guns on the day of the robbery. The court of appeals affirmed the application of the enhancement under §3B1.4, stating that it made no difference whether the defendant knew the minor was coming that day. The defendant's criminal activity began, and essentially was completed, once the minor and the others arrived at the defendant's home with the guns and the defendant took possession of them. The court concluded that because the defendant knew the guns were stolen when he took possession of them, he was guilty at that moment. And, because he took possession of them with the minor's assistance, he was subject to the §3B1.4 enhancement for "using" a minor to commit a crime.

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Arambula, 238 F.3d 865 (7th Cir. 2001). The district court erred in finding that the defendant's false testimony at a co-conspirator's trial warranted an enhancement for obstruction of justice. The defendant pled guilty to conspiracy to distribute cocaine and possession with intent to distribute cocaine, agreeing to provide complete and truthful information regarding his involvement and the involvement of others in the distribution of the controlled substances. The district court judge expressed his belief that the defendant's testimony at one of the co-conspirator's trials was not complete and truthful, thereby minimizing the scope of the conspiracy. The judge conceded that the defendant's false testimony actually hurt the co-conspirator, but nonetheless applied the obstruction of justice enhancement. The circuit court found the record to be void of reasons why the sentencing judge found the testimony to be material for purposes of the enhancement. The Seventh Circuit held that the obstruction of justice enhancement was erroneous because the defendant's false testimony did not constitute perjury, as perjury is false testimony of a material matter. There was no indication that the defendant's lies impeded or obstructed the investigation, sentencing, or prosecution of the co-conspirator, and the circuit court vacated and remanded the defendant's sentence. *See also United States v. Green*, 258 F.3d 683, 695 (7th Cir. 2001) (district court did not err in enhancing the defendant's sentence pursuant to §3C1.1 where the court disbelieved the defendant's trial testimony which was contrary to his admissions to law enforcement officers and to the testimony of other witnesses).

United States v. Cotts, 14 F.3d 300 (7th Cir. 1994). The district court did not wrongly enhance defendant Fernandez's sentence for obstruction of justice. A government agent, posing as a large scale drug trafficker, negotiated several reverse buys with the defendants. During the course of his dealings with the conspirators, the agent told a codefendant of a fictitious person whom he believed was an informant. Subsequent to this conversation, the defendant plotted to kill the fictitious informant. He challenged the obstruction of justice enhancement on the grounds that conspiring to kill a person who does not exist does not obstruct anything. He further stated that he did not intend to obstruct the investigation or prosecution but only to take revenge for the informant's betrayal. The appellate court rejected this argument and relied on the language of USSG §3C1.1, which explicitly provides for an enhancement for "attempts to obstruct or impede." The district court based its enhancement on the defendant's attempt to obstruct justice "and by definition, attempt requires that one act with the purpose of effectuating the proscribed result." Further, although the district court was somewhat ambiguous in discussing the defendant's intent, the district court did expressly mention his retaliatory motive. Since Application Note 3(j) specifically refers to statutes encompassing retaliation against an informant, the court of appeals upheld the obstruction of justice enhancement.

See United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994), p. 10.

United States v. Jefferson, 252 F.3d 937 (7th Cir. 2001). The district court did not err in enhancing the defendant's sentence two levels for his obstruction of justice. The defendant was convicted following a jury trial of five counts relating to the distribution of crack cocaine. On appeal, the defendant contended the district court erred in increasing his base offense level pursuant to §3C1.1, based on a finding that he had committed perjury when he testified at trial, without first making specific findings of perjury. The circuit court found that the district court cited to several portions of the record in which the defendant denied selling crack cocaine and further found that denial was a falsehood which amounted to perjury. Thus, the circuit court stated that the defendant's contention that the district court did not find he willfully intended to provide false testimony failed, and it held that the enhancement properly applied. *See also United States v. Noble*, 246 F.3d 946, 955 (7th Cir. 2001) (district court did not err in enhancing defendant's sentence where defendant committed perjury during his testimony by lying and by coaching and orchestrating another's false confession); *United States v. Carrera*, 259 F.3d 818, 831 (7th Cir. 2001) (district court did not err when it failed to identify the perjurious statements and finding that the statements did not preclude an obstruction of justice enhancement where the court specifically pointed to testimony that conflicted with the agent's account of the defendant's post arrest statements); *United States v. Anderson*, 259 F.3d 853, 860 (7th Cir. 2001) (district court did not err in finding uncharged relevant conduct established enhancement for obstruction of justice based on perjurious statements where the defendant lied and claimed he never intended to keep the funds he was charged with embezzling).

United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000). The district court did not err in enhancing the defendants' sentences for obstruction of justice. The defendants were convicted of conspiracy to commit mail fraud. The defendants were involved in committing arson for the insurance proceeds, and the district court found that each had obstructed justice by providing false testimony and lying to federal investigators about their role in the conspiracy. The circuit court found that two of the defendants obstructed justice by testifying falsely to exculpate other family members, and this evidence was sufficient to form the basis for a finding of obstruction of justice. The circuit court found that a third defendant provided a false alibi for the other two defendants. On appeal, that third defendant argued that any misstatements he made to the investigators were made early in the investigation and were therefore immaterial. The circuit court found that Application Note 6 defines materiality as "evidence, that, if believed, would tend to influence or affect the issue under determination" and that pretrial statements that significantly obstruct or impede an investigation are material and may serve as the basis for an enhancement. *Id.* at 907. The Seventh Circuit held that this third defendant's pretrial statements were made willfully in an attempt to obstruct justice, and therefore the enhancement was properly applied. Finally, a fourth defendant's sentence was enhanced because she attempted to influence the testimony of a witness. The circuit court found that the defendant concocted a false set of facts that led investigators toward a witness whom she had attempted to influence. Thus, her behavior was material for the purpose of the obstruction of justice enhancement.

United States v. Menting, 166 F.3d 923 (7th Cir. 1999). The district court did not err in applying an obstruction of justice enhancement as the defendant committed perjury at trial. The defendant argued that the "two-witness rule" of the perjury statute, 18 U.S.C. § 1621, applied and

prevented application of the enhancement. To prove a violation of section 1621, the government must provide testimony from two witnesses or one witness and “sufficient corrolative evidence.” The Seventh Circuit rejected the two-witness rule at sentencing, finding the sentencing court is permitted to consider a wide range of information, as long as the information is found to be reliable.

United States v. Tankersley, 296 F.3d 62 (7th Cir. 2002). The district court erroneously enhanced the defendant’s sentence for obstructing the administration of justice under §3C1.1. The defendant was convicted of criminal contempt of court. The district court applied the enhancement based on its finding that the defendant continued to violate an injunction issued in a related civil suit. The court of appeals held that the conduct upon which the district court enhanced the defendant’s sentence did not obstruct the investigation or prosecution of the instant offense, rather it obstructed the administration of justice with respect to the civil proceedings. Therefore, the court of appeals vacated the sentence.

United States v. Wright, 37 F.3d 358 (7th Cir. 1994). The district court did not err in enhancing the defendant's base offense level for obstruction of justice pursuant to USSG §3C1.1. The defendant, who pleaded guilty to armed bank robbery and to being a felon in possession, argued that his telephone messages to a co-conspirator did not constitute an obstruction of justice because he did not threaten physical harm. The circuit court disagreed. An attempt to influence a witness is an obstruction of justice even if the defendant did not threaten the witness as long as the influence is improper (*i.e.*, "that is has a natural tendency to suppress or [to] interfere with the discovery of truth"). The defendant's message that "I also know that you turned state's on me but I'll make sure you go down too Ba-by," implied that the defendant would testify against the co-conspirator if she provided testimony at his trial but would not testify against her if she remained silent. The circuit court found that this was a "clear invitation to participate in a criminal conspiracy to obstruct justice."

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Bahena-Guifarro, 324 F.3d 560 (7th Cir. 2003). The defendant pled guilty to two counts of illegal reentry following a conviction for an aggravated felony, in violation of 18 U.S.C. § 1326(a) and (b). In this case of first impression, the defendant appealed the district court's refusal to group the two counts under §3D1.2. The Seventh Circuit affirmed. The defendant was born in Mexico but came to the United States in 1979 as an infant and lived in Illinois most of his life. He became a lawful permanent resident in 1989. In 1996, he was convicted in Lake County, Illinois of burglary, robbery and aggravated battery and sentenced to concurrent six-year terms of imprisonment. After serving part of his sentence, he was placed on supervised release and transferred to INS custody. In 1997 an immigration judge ordered the defendant deported to Mexico, and he was removed from the United States in 1998. The defendant illegally reentered the U.S. in 1999. A few months later, he was convicted of burglary in Lake County, Illinois and sentenced to three years of incarceration. After serving part of his term, he was again placed on supervised release and transferred to INS custody. An

immigration judge held another hearing and ordered him deported in April 2000. He was again removed from the United States and returned to Mexico. Once again, the defendant illegally reentered the United States. In June 2001, he was arrested in Lake County, Illinois for driving under the influence of alcohol. After his conviction (he was sentenced to time served), he was again transferred to INS custody. This time he was charged with two counts of illegal reentry of an alien who has previously been removed from the United States subsequent to a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b). The defendant pled guilty to both counts. In the PSR, the probation officer concluded that the two counts should be grouped under §3D1.2(b) because they involved the same type of offense and the same victim, and because the two acts were connected by a common scheme or plan. The government disagreed and analogized the defendant's offenses to two bank robberies committed a year apart, or two assaults against the same victim committed a year apart, which would not be grouped. The district court agreed with the government, finding that "these previous convictions do not lend themselves to . . . grouping." Because there was no evidence in support of the defendant's position, the court rejected his argument that he had returned to the United States for the same purpose each time, to be back with his family. On appeal, the defendant maintained that although his illegal reentries were separated in time, both crimes involved identical harm to societal interests and a common criminal objective. The court of appeals noted the commentary to the guideline provides that, for offenses in which there is no identifiable victim (such as drug or immigration offenses), the victim is the societal interest that is harmed. The appellate court also noted that no other court of appeals had addressed the question presented in this case. The circuit court was persuaded that the district court did not err in declining to group the two counts of illegal reentry for two reasons. First, the court held that the defendant's offenses did not constitute a single, composite harm. *See United States v. Cueto*, 151 F.3d 620, 638 (7th Cir.), *cert. denied*, 526 U.S. 1016 (1998) (section 3D1.2 does not authorize the grouping of offenses that do not represent essentially one composite harm). Second, the court found that the defendant did not provide the court with any evidence that the crimes were committed as part of a common scheme or plan even though it was his burden to do so. On the question of one composite harm, the appellate court noted each time the defendant illegally reentered the United States, the government incurred the cost of processing and deporting him. Moreover, each time he reentered the United States, the court considered that he committed a crime in addition to the illegal reentry. In addition to the separate instances of harm incurred in the cost of processing and deporting the defendant each time, the court of appeals found that the community was subjected to separate instances of risk of harm from his continued criminal activities. The appellate court held that the defendant's two illegal reentries were akin to two counts of escape from prison—although the defendant who escapes engages in the same type of conduct each time and harms the same societal interest each time, each escape is a separate and distinct offense that may not be grouped. The defendant bore the burden of demonstrating that the two illegal reentries were part of a common scheme or plan. The court found that he proffered no evidence regarding his reasons for returning to the United States each time, and the court found that it was not obliged to accept counsel's characterization of the defendant's motives at face value. *See United States v. Pitts*, 176 F.3d 239, 245 (4th Cir.), *cert. denied* 528 U.S. 911 (1999) ("[A] defendant cannot merely define his scheme in broad fashion and argue that all of his conduct was undertaken to satisfy that broad goal. Rather, a more particularized definition of the defendant's intent is required."). The defendant, the court

held, had not demonstrated anything more than conduct that “constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal.” *Pitts*, 176 F.3d at 245. Therefore, the appellate court held that the district court was correct not to group the offenses.

United States v. Sherman, 268 F.3d 539 (7th Cir 2001), *cert. denied*, 536 U.S. 963 (2002). The district court did not err in refusing to group counts for receiving, shipping and possessing child pornography. On appeal, the defendant challenged the district court’s refusal to group the counts together arguing that they all involved the same victim–society at large. The court determined that the “possession, receipt, and distribution of child pornography does directly victimize the children portrayed by violating their right to privacy, in particular their individual interest in avoiding the disclosure of personal matters.” The Seventh Circuit ruled that the children exploited in the pornography were the primary victims of the crimes of possessing, receiving and distributing those materials. *See also United States v. Shutic*, 274 F.3d 1123 (7th Cir. 2001) (adopted holding in *Sherman* and held that the victim in child pornography is the child in the image, who suffers a direct harm through the invasion of his or her privacy).

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). The district court erred in failing to group the defendant's money laundering and mail fraud convictions pursuant to USSG §3D1.2. The circuit court held that the defendant's convictions for mail fraud and money laundering in connection with a Ponzi scheme were "closely related counts" and clearly meet the criterion to be considered part of the same continuing common criminal endeavor. The money that the defendant laundered was money defrauded from investors, therefore, absent the fraud, there would have been no funds to launder. Moreover, the money laundering took place in an effort to conceal the fraud and keep the entire scheme afloat. The circuit court rejected the government's contention that the grouping of offenses was inappropriate because they involved different victims and different harms. Relying on similar decisions in the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the court held that money laundering served to perpetuate the very scheme that produced the laundered funds and was not an "ancillary" offense.

§3D1.4 Determining the Combined Offense Level

United States v. Brown, 14 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994). The district court did not err in failing to group under §3D1.4 counts III and IV of the defendant's indictment with counts I, II and V, where the former related to kidnaping the victim and the latter to the arrest and detention of the victim's children while pretending to be a federal officer. The defendant argued that because he arrested and detained the victim's children for the purpose of facilitating the kidnaping, the victim, not her children, should be considered the "victim" of those offenses for grouping purposes. Furthermore, the defendant claims that all counts should have been grouped together because the victim in each count was the same person. The circuit court rejected this argument, holding that an offense that is committed for the purposes of facilitating another offense can still have its own separate victim. Thus, the district court correctly grouped offenses relating to the victim separately from offenses relating to her children. The circuit court declined to review the defendant's claim that his sentence violated the principles of proportionality and uniformity on grounds that the court's jurisdiction does not extend to

questions of whether a particular sentence effectuates the general goals of the guidelines. The district court's decision not to depart downward for the defendant's history of community service was unreviewable, where the district court believed it had authority to depart and did not rest its decision on an erroneous legal conclusion. The district court's decision not to depart downward to reflect the lack of uniformity and proportionality of the his sentence was unreviewable, where the district court believed it had authority to depart and did not rest its decision on an erroneous legal conclusion.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility⁴

United States v. Bean, 18 F.3d 1367 (7th Cir. 1994). The district court erred in awarding a six-level downward departure under §5K2.0 for "extraordinary acceptance of responsibility," based on the defendant's repayment of an unauthorized bank loan. The trial court chose not to reduce the defendant's offense level for acceptance of responsibility under §3E1.1 because the defendant went to trial and contested his guilt. Any reduction greater than that which would have been available under §3E1.1 must depend on a "strong reason to believe, not only that the victims were not at substantial risk, but also that repetition is unlikely." This was the defendant's third conviction for defrauding a financial institution . . . "a far cry from acceptance of responsibility."

United States v. Booker, 248 F.3d 683 (7th Cir. 2001). The district court did not err when it denied the defendant's request for a reduction based on his acceptance of responsibility. The defendant pled guilty to possession of cocaine base with the intent to distribute it within 1,000 feet of a public housing facility, and was sentenced to 168 months. On appeal, the defendant maintained he should have received a reduction for his acceptance of responsibility because he voluntarily gave a statement to the police shortly after his arrest, quickly informed the government that he was going to plead guilty, provided information as to his cohort's whereabouts, and admitted his guilt from the time of his arrest until he was sentenced. The district court denied a downward departure because the defendant also objected to an inclusion of 19 grams of cocaine which was found to belong to his cohort as relevant conduct for sentencing purposes and because the defendant objected to the imposition of a weapon enhancement pursuant to §2D1.1. The circuit court agreed, stating that a defendant must admit, or not falsely deny or contest, any relevant conduct as it relates to the offense of conviction to be eligible for a departure based on his acceptance of responsibility. Further, the defendant denied that the firearms inside the house were there to protect the drugs. Therefore, the circuit court held that the district court did not err in denying the defendant a downward departure for his alleged acceptance of responsibility. *See also United States v. Zehm*, 217 F.3d 506 (7th Cir. 2000) (district court did not err in denying downward departure for acceptance of responsibility where defendant pled guilty but

⁴Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

contested judge's application of aggregation rule which allows consideration of uncharged offenses as relevant conduct, and denied responsibility for the full extent of his involvement in the conspiracy).

United States v. Larkin, 171 F.3d 556 (7th Cir.), *cert. denied*, 528 U.S. 883 (1999). The district court did not err in denying the defendant an acceptance of responsibility reduction where the defendant refused to identify his drug supplier. The defendant was incarcerated in a federal prison when caught possessing marijuana. The defendant was charged and convicted of possessing the narcotic in a federal prison. The Seventh Circuit found that it was clearly permissible for the sentencing court to condition the reduction for acceptance of responsibility on the defendant's willingness to provide full information regarding his crime and, therefore, his drug source. Where the defendant refused to tell the probation officer a "candid and full unraveling of the circumstances surrounding the offense of conviction, including information about the methods used by the defendant to commit his crime and the source of the contraband he possessed at the time of arrest."

United States v. Martinson, 37 F.3d 353 (7th Cir. 1994), *cert. denied*, 513 U.S. 1192 (1995). The district court clearly erred when it found that the defendant had accepted responsibility pursuant to §3E1.1. The district court based its finding on the defendant's statements acknowledging that he took money from the distributors he defrauded, and that he still owed them the money. On cross-appeal, the government argued that the reduction was unwarranted because the defendant refused to plead guilty and because he continued to deny criminal intent. The circuit court agreed, and reversed the district court's decision. Although the circuit court acknowledged that a conviction by trial does not automatically preclude a defendant from receiving a reduction for acceptance of responsibility, this was not a case in which the defendant deserved the reduction even though he put the government to its proof at trial. Rather, the defendant's continuous denials of criminal intent and his blaming of other individuals was evidence sufficient to show that he did not accept responsibility for his criminal conduct.

United States v. McDonald, 22 F.3d 139 (7th Cir. 1994). In assessing an issue of first impression, the circuit court affirmed the district court's denial of an acceptance of responsibility adjustment based on the defendant's use of cocaine while awaiting sentencing. The defendant pleaded guilty to aiding and abetting the counterfeiting of obligations in violation of 18 U.S.C. §§ 471, 472. He argued that the sentencing court's denial was in error because it was based on uncharged conduct that was unrelated to the offense of conviction. Noting a split among several circuit courts, the Seventh Circuit joined the First, Fifth and Eleventh Circuits in holding that unrelated criminal conduct may be considered in determining whether a defendant has accepted responsibility. *See United States v. O'Neil*, 936 F.2d 599 (1st Cir. 1991); *United States v. Watkins*, 911 F.2d 983 (5th Cir. 1990); *United States v. Scroggins*, 880 F.2d 1204 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); *but see United States v. Morrison*, 983 F.2d 730 (6th Cir. 1993) (court should not have considered conduct unrelated to the offense of conviction). Application Note 1(b)'s broad language "indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally." It is reasonable for the sentencing court to view continued criminal activity, such as the use of a controlled substance, as being inconsistent with an acceptance of responsibility.

United States v. Miller, 2003 U.S. App. LEXIS 18490 (7th Cir. Sept. 8, 2003). The defendant appealed his sentence for possession of child pornography on the ground that the court, *inter alia*, erred by failing to award him a three-level reduction under §3E1.1. The defendant was convicted of possession of child pornography after his wife discovered images on a computer. A search of the computer revealed 700 to 750 images of child pornography. The defendant admitted his guilt and sought a downward adjustment for acceptance of responsibility. The trial court denied a downward adjustment, finding that the defendant was minimizing or rationalizing his behavior to get a favorable change in the conditions of his release. Specifically, the court found that the defendant was trying to convince the court that he was not a danger to the community to enable him to leave the halfway house and live with family members. On appeal, the defendant argued that he was entitled to a downward adjustment under §3E1.1 because he promptly admitted to possessing the unlawful images, expressed remorse and contrition for his acts, and entered a timely guilty plea. The court of appeals agreed with the Sixth Circuit rather than the Ninth Circuit in evaluating acceptance of responsibility. The court held that just because the defendant admitted to the elements of the offense did not mean that he is necessarily entitled to a downward adjustment—the court requires defendants to honestly acknowledge the wrongfulness of their conduct and not minimize it. *See United States v. Lopinski*, 240 F.3d 574, 575 (7th Cir. 2001) (recognizing that the purpose of §3E1.1 is not only to induce guilty pleas, but also to reduce recidivism by having defendants face up to the wrongfulness of their conduct); *see also United States v. Travis*, 294 F.3d 837, 840-41 (7th Cir. 2002); *United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999); *United States v. Grimm*, 170 F.3d 760, 766 (7th Cir. 1999); *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997). The court held that the Seventh Circuit requires that a defendant do more than merely plead guilty, an approach consistent with that endorsed by the Sixth Circuit in *Greene*. The appeals court concluded that this approach also makes sense—otherwise, §3E1.1 would have been written to say that merely pleading guilty earns the reduction.

United States v. Nielson, 232 F.3d 581 (7th Cir. 2000). The district court did not err in denying the defendant's request for an additional downward adjustment based on an acceptance of responsibility. On the day before his scheduled trial date, the defendant pled guilty to conspiracy to collect extensions of credit by extortionate means, and the district court sentenced him to 96 months imprisonment. Nine days before his trial was scheduled to begin, the defendant's counsel notified the government that the defendant intended to plead guilty, but he did not actually execute a plea agreement or plead guilty until the day before trial. The Seventh Circuit stated that by the time the defendant gave notice of his intention to plead guilty, the government had already invested substantial resources in trial preparation, brought in witnesses, issued subpoenas and made travel arrangements, and found the government could not stop preparing for trial even after the defendant gave notice of his intention to plead because of the possibility that his plea would not go through. The circuit court held that the district court did not err in its determination that the defendant did not plead guilty in a sufficiently timely manner to warrant an additional reduction under §3E1.1(b)(2).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Gajdik, 292 F.3d 555 (7th Cir. 2002). In 1997, the defendant was convicted of burglary in Illinois and sentenced to five years in the state penitentiary. Instead of serving five years, he completed boot camp and was released after just 121 days. In June 2000, however, the defendant pleaded guilty in federal court to seventeen counts of mail and wire fraud, money laundering, and interstate transportation of stolen currency relating to his fraud scheme between January and July 2000 over the Internet site eBay. Because the Illinois court had sentenced the defendant to a term of five years, the district court determined that his prior sentence exceeded 13 months, warranting three criminal history points under §4A1.1(a). The district court sentenced the defendant to concurrent 57-month prison terms, the maximum under the guideline range. The defendant argued that his successful completion of boot camp and subsequent early release operated to "suspend" the remainder of his prior sentence, so that the district court should have assigned two, not three, points under §§4A1.1(b) and 4A1.2(b)(2), and sentenced him to no more than 46 months. The court of appeals concluded that the district court correctly calculated the defendant's criminal history and affirmed. The appellate court held that the defendant's successful participation in the Illinois Impact Incarceration program did not operate to "suspend" the remainder of his five-year sentence for burglary. Rather, the court held that the procedure more closely resembled a pardon or commutation by the executive. The court noted that the commentary to the sentencing guidelines instructs that pardons for reasons unrelated to innocence or errors of law are counted towards criminal history. The Seventh Circuit concluded that the Illinois program operated as a pardon or commutation rather than a suspension, and that this conclusion was consistent with the purpose underlying the criminal history calculation of the sentencing guidelines—to assess a defendant's likelihood of recidivism by taking into account the seriousness of the defendant's past criminal conduct. The court concluded that since the defendant's early release was not based on innocence or mistake of law, the district court correctly determined that his 1997 Illinois sentence was a prior sentence of imprisonment exceeding one year and one month, and assigned three criminal history points.

United States v. Hopson, 18 F.3d 465 (7th Cir.), *cert. denied*, 512 U.S. 1243 (1994). The district court did not violate the defendant's due process rights by increasing the defendant's Criminal History Category from I to II after determining that his prior state misdemeanor conviction (possession of cocaine) was not related to the conspiracy charge (distribution of cocaine) for which he was being sentenced. Key factors the court considered in determining whether the offenses were connected included: the geographic and temporal proximity of the two offenses; the fact that the prior offense was not listed in the indictment; whether a common victim was involved; and whether the defendant was given the opportunity to demonstrate a relationship between the two offenses.

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

United States v. Coleman, 1 Fed. Appx. 489 (7th Cir.), *cert. denied*, 532 U.S. 935 (2001). The district court did not err in finding the defendant's prior armed robbery convictions were not related, and therefore counting them separately in determining whether the defendant was a career offender as defined in §4A1.2. The defendant pled guilty to possession of heroin with intent to distribute, and was sentenced as a career offender under §4B1.1 to 151 months' imprisonment. The defendant had six prior convictions for armed robbery, and on appeal he claimed the convictions should have been treated as one offense because they were part of a single common scheme or plan. The district court found the defendant and others had gone on a crime spree, committing six robberies in about 12 to 15 hours by stealing a car and using it to commit five more robberies, intending to use the money to purchase drugs. At the sentencing hearing and on appeal, the defendant argued the prior convictions should be considered related under §4A1.2 because they were part of a common scheme or plan, were committed in close geographical proximity, and had a common modus operandi. The district court found that because the defendant testified he was not there when the car was stolen but was only there when the five subsequent robberies occurred, there was "no agreement concerning the latter robberies when the car was first highjacked" and therefore the convictions did not result from a single common scheme or plan. *Id.* at 490. Relying on its precedent in *United States v. Brown*, 209 F.3d 1020, 1023 (7th Cir. 2000), the circuit court stated that crimes are related as part of a common scheme or plan if they were "jointly planned from the outset or if commission of one crime would necessarily entail commission of the other." *Id.* at 491. If the defendant did not participate in the first crime, he could not have intended to commit all six crimes from the outset. Therefore, the Seventh Circuit held that the district court correctly found the defendant's six convictions did not result from a single common scheme or plan and were properly counted separately.

United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997). The district court properly assigned a criminal history point for the defendant's one year sentence of "conditional discharge" for careless or reckless driving. The defendant asserted that he should not have been assessed a point under USSG §4A1.2(c)(1)(A), because the sentence was not for a term of probation of at least one year or a term of imprisonment of at least 30 days. The district court concluded that an Illinois sentence of conditional discharge is the equivalent to a sentence of probation for purposes of that guideline; the defendant maintained that the two are distinct and that his reckless driving sentence did not qualify as a "term of probation". The appellate court relied on *United States v. Caputo*, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is "unsupervised probation" and that the Sentencing Commission equates "unsupervised probation" with supervised probation. Conditional discharge is the same as probation, but without a probation officer, and that is a distinction without a difference so far as the purposes of the guideline exception are concerned.

United States v. Joseph, 50 F.3d 401 (7th Cir.), *cert. denied*, 516 U.S. 847 (1995). The district court's refusal to decide whether the defendant's prior offenses were "consolidated" for the purpose of determining whether the cases were related for sentencing purposes was harmless error. The defendant had been sentenced on the same day for different crimes committed in different months. In concluding that the prior offenses were unrelated, the district court erred by not first determining

whether the cases were consolidated and if so, whether they were separated by an intervening arrest. The district court erroneously thought it need not make this determination because the crimes themselves were unrelated. The defendant asserted that the cases should be treated as consolidated and therefore "related" because he was sentenced for both on the same day. The government responded that a formal order of consolidation is necessary before the cases can be considered consolidated. The appellate court noted that the circuit courts are split on this issue, and joined the majority of the circuits in ruling that a formal consolidation order is probative, but not conclusive in determining whether cases are consolidated. See *United States v. Russell*, 2 F.3d 200, 204 (7th Cir. 1993); *United States v. Coleman*, 964 F.2d 564, 566-67 (6th Cir. 1992); *United States v. Garcia*, 962 F.2d 479, 482-83 (5th Cir.), *cert. denied*, 506 U.S. 902 (1992). On the other hand, the First Circuit has held that the sine qua non of consolidated sentencing is a formal order of consolidation, *United States v. Elwell*, 984 F.2d 1289, 1296 (1st Cir.), *cert. denied*, 508 U.S. 945 (1993), and the Eighth Circuit has held that a formal order of consolidation is required. *United States v. Klein*, 13 F.3d 1182 (8th Cir.), *cert. denied*, 512 U.S. 1226 (1994); *United States v. McComber*, 996 F.2d 946, 947 (8th Cir. 1993). The appellate court ruled that the district court's error was harmless in this case because the defendant would not have been able to show that the prior cases were consolidated.

United States v. Mitchell, 18 F.3d 1355 (7th Cir.), *cert. denied*, 513 U.S. 1045 (1994). The district court properly refused to entertain the defendant's collateral attack of a prior sentence used to determine his criminal history category. The defendant claimed that his prior state conviction was invalid because his plea was not entered knowingly and voluntarily and lacked sufficient factual basis. The Seventh Circuit followed the First, Fourth, Sixth, Eighth, and Eleventh Circuits in holding that "a defendant may not collaterally attack his prior state conviction at his federal sentencing unless the conviction is presumptively void." The court of appeals reasoned that a sentencing hearing is not the proper forum in which to challenge the validity of a prior conviction because such a challenge requires a fact-intensive inquiry. Such inquiries are more appropriately handled in a state collateral proceeding or by federal habeas corpus. Since a review of the record from the defendant's state court conviction did not reveal a presumptively void plea, the defendant's collateral challenge must fail.

§4A1.3 Adequacy of Criminal History

United States v. Croom, 50 F.3d 433 (7th Cir. 1995). Pursuant to USSG §4A1.3, the district court judge departed upward from Criminal History Category IV to Category VI, but did not explain why Category V was not sufficient. In making the departure, the district judge stated that the guidelines did not adequately reflect the seriousness of the defendant's past crimes, some of which were juvenile offenses not counted for criminal history purposes, the fact that he committed his first federal gun offense shortly after release from state imprisonment, and his propensity to commit more crimes in the future. The appellate court stated under 18 U.S.C. § 3553(b), "[a] district judge may give a sentence exceeding the range specified by the Sentencing Guidelines only on account of circumstances 'not adequately taken into consideration' by the Sentencing Commission." Two of the reasons given for the upward departure had been considered by the Commission, and therefore the appellate court remanded the case for resentencing under USSG §4A1.3.

United States v. Morris, 204 F.3d 776 (7th Cir. 2000). The district court erred in finding that the presentence report gave the defendant sufficient notice of its intent to depart from the guidelines based on prior similar adult criminal conduct which did not result in a criminal conviction. The defendant pled guilty to two counts of traveling across state lines for the purpose of engaging in a sexual act with a juvenile. The district court departed upward five levels resulting in a sentence of 36 months instead of the 15- to 21-month range the defendant thought he would receive based on the plea agreement. On appeal, the defendant contended he was taken by surprise by the departure, and that he was thus entitled to a new hearing. The Seventh Circuit found that neither the prosecutor nor the district judge suggested an upward departure was under contemplation, as required under *Burns v. United States*, 501 U.S. 129 (1991). The circuit court found that the boilerplate language in the plea agreement stating that the court may impose a sentence outside the range if it finds aggravating or mitigating circumstances pursuant to §5K2.0 did not satisfy the requirement in *Burns* that “notice must specifically identify the grounds on which the district court is contemplating an upward departure.” *Id.* at 778. Because the defendant did not receive notice from any source that an upward departure would be considered, the circuit court held he must be resentenced.

United States v. Peterson, 256 F.3d 612 (7th Cir. 2001). The district court did not err in departing upward two levels pursuant to §4A1.3 because the departure was reasonable and sufficiently linked to the structure of the guidelines. The defendant pled guilty to bank fraud. On appeal, he argued that the district court relied solely on his criminal history points when it decided to impose an upward departure, which was not an adequate ground upon which to base a departure. The Seventh Circuit stated if a defendant has been convicted for the same offense more than once, there is a need for greater sanctions for future deterrence. Seven of the defendant’s eight convictions in the previous ten year period were for check deception, forgery, theft and identity theft. Therefore, the district court was correct in observing that the defendant had made a career of defrauding people and financial institutions and concluding there was a substantial amount of reliable information to indicate the criminal history category did not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that he would commit future crimes. *See also United States v. Gallagher*, 223 F.3d 511, 517 (7th Cir.) (district court did not err in departing upward where the defendant was convicted for arson and his criminal history category did not adequately reflect his commission of an uncharged murder which occurred during the course of the arson; he had multiple motives for murdering the victim, he was the only suspect with opportunity to commit the murder, and the physical evidence linked the defendant to the murder), *cert. denied*, 531 U.S. 951 (2000).

United States v. Turchen, 187 F.3d 735 (7th Cir. 1999). The district court permissibly departed upward on the basis of the defendant’s previous acquittal “by reason of mental defect.” The district court appropriately concluded that the defendant’s mental instability constituted a higher likelihood of recidivism, thus justifying longer commitment to protect the public.

United States v. Walker, 98 F.3d 944 (7th Cir. 1996), *cert. denied*, 519 U.S. 1139 (1997). The appellate court affirmed the district court's decision to depart upward based on the defendant's history of convictions which, while placing him in the highest criminal history category, understated his

true criminal history. The defendant argued that the court, in departing upward, relied on not only permissible factors, but impermissible factors, such as the defendant's many arrests that did not result in convictions, and prior convictions which occurred too long ago to be included in the computation of criminal history points. The appellate court held that the outdated convictions for serious offenses were usable for purposes of making an upward departure pursuant to Application Note 8 to USSG §4A1.3. The court reasoned that the previous offenses were pieces of a lifelong pattern of criminality and could be considered for the limited purpose of establishing the incorrigible character of the defendant's criminal propensities. The appellate court also held that the sentencing court's consideration of the defendant's 23 other arrests which didn't resulting in conviction was harmless error, in light of the sentencing judge's comments that the 37-month sentence was light for someone who qualified as a career criminal on the basis of his convicted offenses. The appellate court found that the sentence would not have been lighter had the presentence report left out the arrests.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Best, 250 F.3d 1084 (7th Cir.), *cert. denied*, 534 U.S. 924 (2001). The district court did not err when it counted the defendant's prior state felony convictions separately for purposes of the career offender provision of §4B1.1. The defendant was convicted of conspiracy to possess with intent to distribute in excess of five grams of crack cocaine. The district court determined the defendant was a career offender because he had two qualifying prior convictions, one for battery with a deadly weapon and one for dealing a sawed-off shotgun. The district court sentenced him to 360 months' imprisonment. On appeal, the defendant argued that the convictions should not have been counted separately because they were consolidated on the state level for sentencing. The Seventh Circuit found that the counts occurred on separate days, and were disposed of by means of one plea agreement at a single sentencing for administrative convenience only. Therefore, the district court did not err in finding the prior convictions should be counted separately.

United States v. Bissonnette, 281 F.3d 645 (7th Cir. 2002). The district court did not err in determining that defendant's two prior state battery convictions constituted violent felony convictions for career offender purposes. The defendant, convicted of assault with intent to do bodily harm without just cause or excuse, had two prior battery convictions. The batteries of which he had been convicted were labeled misdemeanors under Wisconsin law and carried a term less than one year. On both batteries, defendant was given an enhanced sentence under Wisconsin's habitual criminality statute, which raised the maximum sentence on each battery to three years. The defendant was sentenced to two years on each offense. On appeal, the defendant argued that since his prior state convictions were misdemeanors with a statutory maximum of one year, they were not felony convictions for career offender purposes. The Seventh Circuit, citing *United States v. LaBonte*, 520 U.S. 751 (1997), determined that the "offense statutory maximum" was the base sentence plus enhancers. The court also noted that this decision overruled its earlier decision, *United States v. Lee*, 78 F.3d 1236, 1241 (7th Cir. 1996) in which it previously concluded that the conduct a court may consider in determining the

grade of a violation of supervised release under §7B1.1 “does not include sentence enhancements for habitual or recidivist offenders.” *See also United States v. Trotter*, 270 F.3d 1150, 1156 (7th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002) (held that the Supreme Court in *Labonte* concluded that the term of punishment to which a person is exposed on violating a statute includes all enhancements—for quantity of drugs, for use of firearms, for violence during the offense, and for prior convictions).

United States v. Damerville, 27 F.3d 254 (7th Cir.), *cert. denied*, 513 U.S. 972 (1994). The district court did not err in using a conviction for conspiracy to commit a controlled substance offense to classify the defendant as a career offender. The circuit court rejected the defendant's argument that the Sentencing Commission exceeded the mandate of 18 U.S.C. § 944(h) by including "conspiracy" to commit a controlled substance offense among offenses that qualify for the career offender enhancement. The circuit court, citing the Eighth and Ninth Circuits' opinions in *United States v. Baker*, 16 F.3d 854, 857 (8th Cir. 1994); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir.), *cert. denied*, 513 U.S. 808 (1994), ruled that even if the Sentencing Commission could not rely on §994(h) to subject conspiracy convictions to career offender provisions, it could rely instead on its general authority under §994(a) to specify terms for defendants not covered under §994(h). *But cf.*, *United States v. Bellazerius*, 24 F.3d 698 (5th Cir.), *cert. denied*, 513 U.S. 954 (1994); *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993).

United States v. Killion, 30 F.3d 844 (7th Cir. 1994), *cert. denied*, 513 U.S. 1135 (1995). The district court did not err in determining that the defendant was a career offender under USSG §4B1.1. On appeal, the defendant argued that the district court erred when it relied upon a state court conviction that was wrought by a plea agreement which, the defendant claimed, violated the *Ex Post Facto* Clause. The appellate court affirmed the judgment of the district court, holding that the *Ex Post Facto* Clause does not apply to judicial constructions of statutes. Rather, the ex post facto clause is merely a "limitation upon the powers of the Legislature" and "does not apply upon its own force to the Judicial Branch of government." Thus, because the district court could constitutionally rely upon the defendant's state court conviction, the defendant could therefore be properly sentenced under §4B1.1.

United States v. Maro, 272 F.3d 817 (7th Cir. 2001), *cert. denied*, 535 U.S. 1029 (2002). The district court erred in determining that the defendant's federal conviction and state conviction based on the 1989 robberies were related, pursuant to §4A1.2, Application Note 3, subsection (C), and did not qualify as separate convictions for purposes of the career offender guideline. The defendant committed eight robberies in 1989, six in Illinois and two in Wisconsin, and was charged in both states. The defendant pled guilty to two counts from both indictments totaling four counts in all. In his plea agreement, defendant stipulated to the other robberies, and the others were listed in the presentence report. The Seventh Circuit examined whether the fact that the prior state robbery acknowledged in the plea agreement and the presentence report in the federal case is enough to prevent it from being counted as a prior offense after the robberies that took place in 1999. Citing *United States v. Brown*, 962 F.2d 560 (7th Cir. 1992), the court concluded that “concurrent sentences do not necessarily make crimes related.” The court ruled that the prior state conviction retained sufficient independence to be

considered a separate conviction for the purposes of the sentencing guidelines, enough to qualify the defendant as a career offender.

§4B1.2 Definitions for Career Offender

United States v. Best, 250 F.3d 1084 (7th Cir.), *cert. denied*, 534 U.S. 924 (2001). The district court did not err in finding that possession of a sawed-off shotgun is a crime of violence for purposes of §4B1.2. On appeal, the defendant argued that a conviction for dealing in a sawed-off shotgun in violation of a state law was not a “crime of violence” within the meaning of §4B1.2. The Seventh Circuit stated it had recently rejected this argument and had joined with other circuits in holding that possession of a sawed-off shotgun is an offense which “‘involves conduct that presents a serious potential risk of physical injury to another,’ thereby rendering it a ‘crime of violence’” under the guideline. *Id.* at 1096, citing *United States v. Brazeau*, 237 F.3d 842, 844-45 (7th Cir. 2001). *See also United States v. Allegree*, 175 F.3d 648, 651 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999); *United States v. Fortes*, 141 F.3d 1, 7-8 (1st Cir.), *cert. denied*, 524 U.S. 961 (1998).

United States v. Brazeau, 237 F.3d 842 (7th Cir. 2001). The district court did not err in finding that possession of a short-barreled shotgun constituted a crime of violence for purposes of the guidelines. After police found the defendant in possession of a handgun and ammunition while searching for drugs, the defendant pled guilty to being a felon in possession of a firearm because of a previous state conviction for selling a short-barreled shotgun. The district court assessed his base offense level at 20 after concluding that possession of the short-barreled shotgun constituted a “crime of violence” because it “involves conduct that presents a serious potential risk of physical injury to another.” *Id.* at 844. On appeal, the defendant argued that his prior state conviction was not a crime of violence, stating that Application Note 1 to §4B1.2 provides that the offense of being a felon in possession of a firearm is not a crime of violence. The circuit court found that the defendant’s previous conviction was not for being a felon in possession of a firearm, but for possession of a sawed-off shotgun, and therefore Application Note 1 was inapplicable. Further, the Seventh Circuit found that three other circuits have held possession of a short-barreled shotgun constitutes a crime of violence, finding that possession of this type of gun always creates a serious potential risk of physical injury to another, under the guidelines. The circuit court held that the district court did not commit error. *See United States v. Fortes*, 141 F.3d 1 (1st Cir.), *cert. denied*, 524 U.S. 961 (1998); *United States v. Allegree*, 175 F.3d 648 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999); *United States v. Hayes*, 7 F.3d 144 (9th Cir. 1993), *cert. denied*, 511 U.S. 1020 (1994).

United States v. Coleman, 38 F.3d 856 (7th Cir. 1994), *cert. denied*, 513 U.S. 1197 (1995). The defendant was sentenced as a career offender following his plea of guilty to burglary of a residence on federal land. Among other issues, he contended that his two prior convictions for drug offenses should not be counted for purposes of sentencing under the career offender guideline because he was only 17 years old at the time of the convictions, and received sentences to probation. The defendant argued that only the “most serious” crimes committed prior to age 18 should count for purposes of status as a career offender, and in support, cited a case where the government had

conceded the point, the Ninth Circuit's opinion in *United States v. Carrillo*, 991 F.2d 590, 592 (9th Cir.), *cert. denied*, 510 U.S. 883 (1993). This appellate court found that opinion to be "unpersuasive and in clear conflict with the Guidelines." The appellate court cited §§4B1.2 and 4A1.2, and the accompanying commentary, and held that a prior felony conviction is an offense punishable by a term of imprisonment exceeding one year, regardless of the sentence imposed, and is an "adult conviction" if it is so classified "under the laws of the jurisdiction in which the defendant was convicted." Section 4A1.2 contains no indication that only some of those offenses committed prior to age 18 may be counted. The district court properly used the defendant's prior drug convictions as predicate offenses for purposes of the career offender provision.

United States v. Houltz, 240 F.3d 647 (7th Cir. 2001). The district court erred in finding that a prior state conviction for burglary qualified as a crime of violence which could qualify the defendant for treatment as a career offender. Following a jury trial, the defendant was convicted of distributing cocaine base and was sentenced as a career offender pursuant to §4B1.2. On appeal, the defendant claimed the district court should not have characterized one of his prior felony convictions as a crime of violence. The district court had decided that the defendant's prior conviction for burglary of a building qualified as a crime of violence under §4B1.2 because the defendant had originally been charged with a residential burglary, even though the amended information charged only the offense of burglary of a building. The Seventh Circuit stated it was firmly established in the circuit that the sentencing court was required to confine its inquiry to the face of the charging instrument. The statutory definition of the state statute with which the defendant was charged stated that the term "building" specifically excluded a dwelling. Because the defendant was convicted of burglary which excluded a dwelling, the defendant was not convicted of a burglary that fit the definition of a crime of violence within the meaning of §4B1.2.

United States v. Mueller, 112 F.3d 277 (7th Cir. 1997). In an issue of first impression, the Seventh Circuit held that using a telephone to facilitate a drug offense, 21 U.S.C. § 843(b), constitutes a "controlled substance offense" under USSG §4B1.1. The defendant appealed the sentencing judge's determination that the defendant be treated as a career offender based on a prior conviction under 18 U.S.C. § 843(b). The defendant asserted that because the Sentencing Commission deleted from USSG §4B1.2 the specific list of statutory "controlled substance offenses" (which did not include §843(b)) and deleted language indicating that the definition included "substantially similar" offenses, the Commission did not intend §843(b) violations to be treated as controlled substance offenses. The circuit court found this argument conclusory and examined the language of §4B1.2(2), which presents a two-part inquiry: First, the sentencing court must determine if the statute prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession with intent to do so. If it does, it is a controlled substance offense. If not, the offense will be deemed a controlled substance offense if the statute involves "aiding and abetting, conspiring, [or] attempting to commit such an offense." "Unlawful use of a telephone" offenses fall into the latter category because one cannot be convicted under §843(b) unless he also aids or abets, or attempts to commit, the drug offense itself. Two circuits have held that §843(b) effectively prohibits the same conduct as a controlled substance offense and, therefore, is a controlled substance offense. *See United States v. Vea-Gonzales*, 999

F.2d 1326 (9th Cir. 1993) (stating that 843(b) requires that in the course of using a communications facility the defendant must either commit an independent drug crime, or cause or facilitate such a crime); *United States v. Walton*, 56 F.3d 551 (4th Cir. 1995). The court also noted the language in Application Note 1 to §4B1.2 which specifically denotes aiding and abetting as a controlled substance offense. Noting that the defendant did use a telephone to facilitate the manufacture and distribution of marijuana, as the plea hearing established, the court stated that such activity could occur only if the defendant had in fact manufactured or distributed marijuana. Consequently, a violation of 21 U.S.C. § 843(b) does qualify as a "controlled substance offense" under USSG §4B1.2(2) for purposes of determining career offender status.

United States v. Rutherford, 54 F.3d 370 (7th Cir.), cert. denied, 516 U.S. 924 (1995). The district court did not err in ruling that the defendant's prior state conviction for first degree assault resulting from a drunk driving charge was a crime of violence under USSG §4B1.1, the Career Offender guideline. On appeal, the defendant argued that the definition of a crime of violence did not encompass vehicular assault. A crime of violence under the Career Offender guideline, USSG §4B1.1, is defined as any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. In a matter of first impression, the circuit court determined that drunk driving presents a serious risk of physical injury under the "otherwise" clause, and therefore constitutes a crime of violence. The court noted that the otherwise clause focuses on the conduct that created the risk of injury, e.g., the drunk driving. The circuit court ruled that the defendant, by driving intoxicated, presented a serious potential risk of physical injury to another. The circuit court noted that the dangers of drunk driving are well-known and documented, therefore making the defendant's act sufficient to satisfy the "serious risk" standard of the "otherwise" clause.

§4B1.4 Armed Career Criminal

United States v. Fuller, 15 F.3d 646 (7th Cir.), cert. denied, 512 U.S. 1211 (1994). The defendant claimed that the district court abused its discretion by using his prior arrest record to depart upward under §4A1.3. Under §4A1.3(d) the district court may depart upward based on the seriousness of the defendant's past criminal conduct or the likelihood that he will commit future criminal conduct. The district court must rely on the facts underlying the defendant's prior arrests rather than the arrest record itself. In this case, the circuit court affirmed the departure because the district court relied on information contained in the presentence report, not the arrest record.

United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994). The defendant was convicted for trafficking cocaine and possession of a firearm. He was sentenced to 295 months under USSG §4B1.4 as an armed career criminal, plus an additional mandatory 60 months, to be served consecutively. The additional mandatory sentence was imposed under 18 U.S.C. § 924(c) because he was carrying a firearm in connection with a drug-trafficking crime. The defendant argued that the additional 60 months

should not have been consecutive because possession of a firearm was a factor that had already been taken into account in his sentence under USSG §4B1.4, thus violating the double jeopardy clause of the Fifth Amendment. The circuit court affirmed his sentence, citing the explicit language of 18 U.S.C. § 924(c) which requires a cumulative sentence in these circumstances.

United States v. Wright, 48 F.3d 254 (7th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on prior felony convictions which were over 15 years old. The defendant claimed that convictions more than 15 years old were stale and should not be considered for ACCA purposes, much like the 15-year limit on the use of felonies for sentencing purposes under USSG §4A1.2(e). In considering an issue of first impression, the Seventh Circuit joined with the Third, Fourth, Fifth, Eighth, and Eleventh Circuits in finding that no time limit exists on prior felony convictions for purposes of the ACCA. The appellate court examined the statute and concluded that if Congress intended a time restriction on the use of felonies under the ACCA it would have attached a time restriction.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Arrington, 73 F.3d 144 (7th Cir. 1996). The district court did not err in refusing to apply the safety valve to the defendant. The defendant received a three-level reduction for acceptance of responsibility under §3E1.1, but the district court determined that the defendant had not truthfully provided all the information concerning the offense under §3553(f)(5). The circuit court concluded that the admission of responsibility to obtain a reduction under §3E1.1(a) is not necessarily sufficient to satisfy section 3553(f)(5) because section 3553 requires more cooperation than §3E1.1. To satisfy section 3553(f)(5), the defendant must provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan; whereas, §3E1.1(a) requires that the defendant only admit the conduct comprising the offense(s) of conviction—there is no duty to volunteer any information aside from the conduct comprising the elements of the offense. Additionally, section 3553 states that a defendant must disclose "all information" concerning the course of conduct—not simply the facts that form the basis for the criminal charge.

United States v. Brack, 188 F.3d 748 (7th Cir. 1999). The Government may not frustrate the defendant's attempt to qualify for "safety valve" status by rebuffing and refusing to meet with the defendant who had affirmatively offered to meet with the Government and to provide all information in his possession concerning the offense in question.

United States v. Crickon, 240 F.3d 652 (7th Cir. 2001). The district court did not err in finding that the defendant was not eligible for a departure based on the safety valve provision. The

defendant was convicted of possession with intent to distribute methamphetamine, and his sentencing range was 151 to 181 months' imprisonment, with a statutory minimum of 120 months. The district court sentenced him to 151 months. During his sentencing, the defendant had argued that he was entitled to a sentence of approximately 60 months, based on his age and ill health. The district court determined that it could not go below the statutory minimum unless the government made a motion based on his substantial cooperation or if he qualified for the safety valve provision pursuant to §5C1.2. The district court found that neither option was available to the defendant, and therefore refused to depart below the 120-month minimum. On appeal, the defendant argued that the sentencing court should have departed not just below the guideline range, but also below the statutory minimum. The Seventh Circuit agreed with the district court, and held that a departure below the statutory minimum is only permitted under §5C1.2 or §5K1.1, and neither option was available to the defendant. Thus, the district court did not err by refusing to depart downward.

United States v. Vega-Montano, 341 F.3d 615 (7th Cir. 2003). The defendant argued on appeal that the district court, inter alia, improperly denied a "safety valve" departure based upon an overstated criminal history. He argued that the district court erroneously assessed two criminal history points when it took into account the fact that the offense on appeal occurred while he was on supervision for a prior state court conviction for driving under the influence. Specifically, the defendant asserted that the attorney who represented him on the prior state court charge sought numerous continuances and failed to provide him with an opportunity to plead guilty in a timely fashion. As a result, his conviction for the offenses that are on appeal here occurred while he was on supervision for his previous driving under the influence conviction. The district court, while acknowledging that the four-year delay in accepting his guilty plea was questionable, concluded that it did not have the authority to re-examine the state court proceedings and determine who was at fault for the delay. The district court noted that "[I] do not think I have any discretion to revisit the state hearing and find some condemnation for the failure . . . of the state to move more promptly especially if he tested that high [for blood alcohol content]. I mean they probably should have," but that the defendant's "criminal history category is what it is and . . . accurately reflects his circumstance." The court of appeals held that the district court properly understood that it did not have authority to sentence the defendant below the statutory minimum because he was not eligible for the "safety valve" departure due to his three criminal history points. The appellate court noted that the district court could apply the safety valve only if it adjusted the defendant's criminal history points, but it had no authority to revisit the state court proceeding. The appellate court further noted that district courts cannot change the calculations that form the basis of a sentencing range in order to evade the statutory minimum sentences. The court of appeals noted that many other courts of appeal have agreed that district courts lack discretion to alter a defendant's criminal history points so as to render him eligible for a "safety valve" departure. *See, e.g., United States v. Boddie*, 318 F.3d 491, 495 (3d Cir. 2003); *United States v. Penn*, 282 F.3d 879, 882 (6th Cir. 2002); *United States v. Webb*, 218 F.3d 877, 881 (8th Cir. 2000); *United States v. Owensby*, 188 F.3d 1244, 1247 (10th Cir. 1999); *United States v. Valencia-Andrade*, 72 F.3d 770, 774 (9th Cir. 1995). The Circuit Court concluded that the district court correctly concluded that it had no discretion to re-examine the validity of the defendant's prior criminal conviction and permit a downward departure.

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Schechter, 13 F.3d 1117 (7th Cir. 1994). The district court did not err in ordering as a condition of the defendant's supervised release that he notify his employers of his past criminal conduct and current status on supervised release. The defendant, who pleaded guilty to income tax evasion and failure to file an income tax return, argued that his occupation as a computer consultant would suffer once word of his criminal history spread to all those in what he describes as the small community of computer consultant employers. He claimed the effect the district court's order would have on his ability to obtain employment was a violation of his due process rights under the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. The circuit court rejected this argument, holding the district court's order was justified because the defendant had stolen a total of almost \$100,000 from his last three employers and the district court did not want the defendant to be "in a position of either affirmatively or passively deceiving anybody." The circuit court concluded that 18 U.S.C. §§ 3553(a), 3563(b)(6) and 3583(d) authorized the district court to impose such a condition where justified, and the order did not result in a violation of the Fifth or Eighth Amendments. Also, the circuit court dismissed for lack of appellate jurisdiction the defendant's claim that the district court erred in denying him a downward departure under §5K2.13 for reduced mental capacity.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Lampien, 89 F.3d 1316 (7th Cir. 1996). The appellant challenged the district court's order directing her to execute a quitclaim deed to her homestead. Appellant pleaded guilty to a one-count information charging her with embezzling funds from an insurance company and was sentenced to 24 months in prison to be followed by a three year term of supervised release, and was ordered to pay full restitution. The circuit court agreed that the Wisconsin homestead exemption does not limit the government's power under the VWPA to enforce a lien against the full value of the home for the purposes of ensuring compliance with a valid restitution order. They also concluded that the enforcement provisions of the VWPA do not authorize the district court to direct *Lampien* to quitclaim her homestead in favor of Wausau. The authority to collect an unpaid fine and to initiate collection of an unsatisfied order of restitution as provided is delegated to the Attorney General under section 3612(c). Yet in cases where a defendant fails to satisfy a restitution order, the sentencing court also retains certain powers to enforce compliance, which include revocation of the defendant's term of supervised release and holding the defendant in contempt of court.

§5E1.2 Fines for Individual Defendants

United States v. Monem, 104 F.3d 905 (7th Cir. 1997). In reviewing the imposition of a fine for plain error, the appellate court remanded the case for the district court to make factual findings in support of the fine assessed against the defendant with respect to his conviction for using interstate facilities to carry on a prostitution business and laundering the proceeds. Sentencing judges have an affirmative duty to make specific findings with respect to seven factors before imposing fines. Among these factors, the court must consider evidence presented concerning the defendant's ability to pay and the burden a fine would place on the defendant's dependents. USSG §5E1.2(d)(1)-(7). The sentencing court may "discharge its duty to make factual findings" by accepting the findings set forth in the presentence report. However, in this particular case, the presentence report indicated that the defendant was unable to pay a fine due to his lack of assets or monthly cash flow, but might be able to pay a fine in installments upon release from prison. Despite the probation officer's skepticism about the defendant's ability to pay, the sentencing court stated that it was adopting the findings of the presentence report and imposing a fine of \$15,000. The circuit court rejected the lower court's blanket statement of adoption of the PSR because there was an unexplained contradiction between the findings of the PSR and the fine assessed. The circuit court remanded the case to the district court to allow the court to "clarify its reasons for imposing the fine in the amount of \$15,000."

United States v. Sanchez-Estrada, 62 F.3d 981 (7th Cir. 1995). The district court did not err in its decision to garnish the defendants' prison wages to satisfy their fine obligations. *See* §5E1.2. The appellants argued that the imposition of fines on indigent inmates violates one of the fundamental tenets of the Sentencing Reform Act, that of reducing disparity in sentences for conduct similar in nature. The circuit court stated that "this circuit has upheld the authority of the trial court to order that fines imposed may be satisfied by withdrawing sums of money from the inmate's prison earnings." *See United States v. Gomez*, 24 F.3d 924, 926-27 (7th Cir.), *cert. denied*, 513 U.S. 909 (1994); *United States v. House*, 808 F.2d 508, 510 (7th Cir. 1986).

Part G Implementing the Total Sentence of Imprisonment

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

United States v. Bell, 28 F.3d 615 (7th Cir. 1994). The district court erred in enhancing the defendant's offense level for reckless endangerment during flight, USSG §3C1.2 because it failed to consider USSG §5G1.3(b). The defendant fired a shot at a police officer during the course of his flight from arrest and served a state sentence for this offense. He argued, and the government conceded, that USSG §5G1.3(b) required the district court to give the defendant credit for time served in the state prison for the same offense. The circuit court agreed and remanded with instructions to the district court to consider §5G1.3.

United States v. Johnson, 324 F.3d 875 (7th Cir. 2003). The defendant pled guilty to distributing more than five grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1). The district court sentenced him to 70 months in prison, with 35 months of the federal sentence to run consecutive to his state sentence for a prior conviction. The PSR prepared in this case concluded that, under the

federal sentencing guidelines, the defendant should be sentenced according to a base offense level of 25 and a criminal history category of III, meaning a sentence range of 70 to 87 months' imprisonment. In calculating the criminal history category, the PSR included as a "prior sentence" the defendant's June 2001 conviction on the Illinois State law drug conspiracy charge; this conviction added three points to his criminal history score, leading to a total score of five. Had the PSR instead concluded that the state drug conviction was conduct relevant to the federal charge, that state conviction would not have been included in the criminal history calculation, resulting in a score of two rather than five. If, however, the state drug offense had been found relevant to the federal offense (*i.e.*, as part of one overall scheme or plan), the quantity of drugs involved in the state offense would then be considered in setting the base offense level, leading to an increased base offense level of 27 rather than 25. Had the PSR characterized the state offense as relevant conduct rather than as a prior sentence, the corresponding sentence range the defendant faced would have increased to 78 to 97 months imprisonment. But, the defendant was willing to accept the increased sentence range, however, because it would have meant that the sentencing court was precluded from imposing his federal sentence to run consecutively to the state sentence, resulting in an overall shorter term of imprisonment. The issue raised by the defendant on appeal was whether the sentencing court should have concluded that the defendant's prior state-law drug conviction was relevant conduct for purposes of sentencing him on the federal charge, meaning that the state offense had been "fully taken into account" in formulating the federal sentence and triggering §5G1.3(b)'s concurrent sentencing provision. The court of appeals agreed with the district court that there were sufficient differences between the defendant's state law drug conviction and the federal offense at issue in this appeal to preclude the state offense conduct from being considered relevant to the federal offense. The appellate court first noted that the district court found that the two criminal episodes lacked temporal proximity. The state law drug conspiracy activities took place in mid- to late 1999, while the defendant's sale of crack cocaine to a confidential source at issue in the federal offense occurred in October 2000—a span of more than one year between the offenses. The court also noted that the district court found the nature of the two offenses was different: the sentencing judge observed that the state law drug conspiracy involved powder cocaine, while the federal charge involved an ounce of crack cocaine. Finally, the court of appeals considered that the sentencing court noted that the two offenses were conducted through differing *modus operandi*. The state-law drug conspiracy involved the defendant's participation, in cooperation with his coconspirators, in a scheme to distribute large amounts of the drug to numerous individuals, while the federal offense involved his apparently acting alone to make an individual drug sale. The appellate court concluded that there was nothing to suggest that the district court's determination was erroneous.

United States v. Plantan, 102 F.3d 953 (7th Cir. 1996). The district court properly imposed a 24-month consecutive sentence upon the defendant based on his criminal history. The defendant argued that the district court erred in refusing to impose his sentence concurrently to the sentence he already was serving for a 1992 offense, in conformity with Application Note 3 of USSG §5G1.3(c), such that he would only need to serve an additional eight months in jail. The court rejected this argument, holding that the sentencing guidelines applied to the defendant provide a formula for determining the sentence of a defendant who is already incarcerated. This formula was constructed to avoid sentencing disparity by ensuring that the total sentence for two offenses is the same regardless of

whether the defendant was charged and convicted of the offenses at the same or different times. Offenses are often grouped for sentencing purposes when a defendant is charged for all offenses at the same time. A defendant charged separately for each offense ordinarily would serve significantly more time for the same acts. The guidelines avoid this result by providing a methodology to approximate the sentencing result if the offenses had been grouped as they would be if the defendant were charged for all offenses at once. The Application Note provides that, in some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In the instant case, the judge imposed the entire sentence consecutively to the first sentence after determining that the former would not provide for a sufficient incremental penalty in light of the fact that the crime occurred three years after the one for which he was already incarcerated, and because of the extent of the defendant's ten-year criminal history.

United States v. Shaefer, 107 F.3d 1280 (7th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998). The district court properly held that USSG §5G1.3(a) applied where the defendant's prior offense and the instant offense were related. The court determined that, because nothing in subsection (a) states that subsection (a) was inapplicable when the offenses were related, it applied, notwithstanding the fact that the offenses were related. Prior to the defendant's sentencing, the government objected to a recommendation in the PSR that the defendant's sentence run concurrent with the state sentence he was then serving. This recommendation was based on the fact that the state conviction and sentence had been imposed for the same drug conspiracy for which the defendant was being sentenced in the federal case. The government maintained that §5G1.3(b), not (a), applied which required consecutive sentences because while in prison the defendant had directed co-conspirator to act in furtherance of the conspiracy.

United States v. Yahne, 64 F.3d 1091 (7th Cir. 1995). The district court did not err in refusing to group or consolidate the defendant's cases for sentencing purposes. The defendant pleaded guilty to charges of theft of interstate property in Illinois and Indiana. The defendant's Rule 11(e)(1)(c) plea agreement included a downward departure for substantial assistance for the Illinois charges. The district court sentenced the defendant to 18 ½ months of incarceration, three years supervised release, a fine of \$4000 and \$580,000 in restitution. The defendant had already served his sentence for the Indiana theft and claimed on appeal that there was a sufficient nexus between the two cases to be consolidated under the guidelines. The defendant argued on appeal that the district court's refusal to group or consolidate the Indiana and Illinois cases resulted in an erroneous guideline range therefore resulting in an incorrect starting point for calculation of the downward departure. The circuit court ruled that USSG §5G1.3(b) does not apply to a defendant who has completely served his sentence prior to his second sentencing. *See United States v. Blackwell*, 49 F.3d 1232,1241 (7th Cir. 1995); *see also United States v. Ogg*, 992 F.2d 265, 267 (10th Cir. 1993) (interpreting 1991 USSG §5G1.3); *United States v. Adeniyi*, 912 F.2d 615, 618 (2d Cir. 1990) (explaining in dictum that §5G1.3 did not apply because the defendant had completed his state sentence before his federal sentence was imposed).

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Crickon, 240 F.3d 652 (7th Cir. 2001). The district court did not err when it denied the defendant a downward departure because of his age. The defendant, a 60-year-old man, was convicted of possession with intent to distribute methamphetamine, and was sentenced to 151 months of imprisonment. The district court found that the defendant's age was not so advanced as to warrant a downward departure. On appeal, the defendant argued that the district court misunderstood its discretion to depart from the guideline range, and that his age warranted a downward departure. The circuit court found that the defendant's contention for a departure rested on his attorney's statement at sentencing that he looked older than his 60 years due to his history of drug abuse, but stated that drug dependence or abuse is not a reason for imposing a sentence below the guidelines, pursuant to §5H1.4. Further, the circuit court found that the defendant's contention that he would die in prison if his sentence were not shortened would only be an important factor if buttressed by medical evidence, which was lacking in this case.

United States v. Kellum, 42 F.3d 1087 (7th Cir. 1994). The defendant urged, among other issues, that a downward departure should have been granted based upon his age. The appellate court noted that USSG §5H1.1 (p.s.) states that age is "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," and that there is "nothing about defendant's age (56 years old) or health that justifies a downward departure." Furthermore, the appellate court stated that because the defendant did not move for the downward departure at sentencing, any claim concerning that issue is waived on appeal.

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000). The district court erred when it departed downward from the guidelines on the ground that the defendant suffered from an extraordinary physical impairment. After a jury trial, the defendant was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. At his sentencing, the defendant argued that he was suffering from an extraordinary physical impairment, based on the testimony of a doctor that he suffered from cardiomyopathy and an enlarged heart. The district court noted that at no point did the defendant present any evidence regarding why his physical condition would preclude him from being incarcerated and cared for properly by the prison, and therefore it would have been inappropriate for the district court to grant a departure on that basis.

United States v. Krilich, 257 F.3d 689 (7th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002). The district court erred when it departed downward from the guidelines based on the defendant's medical condition. The defendant, a 69 year old with age-related medical problems, was convicted of fraud and conspiracy to violate the RICO Act, and he was sentenced to 87 months' imprisonment. The district court departed downward five levels based on the defendant's health, finding that on the basis

of a psychiatrist's testimony, the defendant suffered from chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain. The sentencing judge stated that the defendant's medical profile was outside the heartland of people remanded to the custody of the Bureau of Prisons. The government appealed, contending that an "unusual medical profile" is not a valid ground for departure. *Id.* at 692. The Seventh Circuit agreed, finding that "older criminals do not receive sentencing discounts" unless the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it. *Id.* Because it found that the prison could provide the defendant with the medical regimen that his doctors believed to be appropriate, the district court erred in departing downward.

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

United States v. Canoy, 38 F.3d 893 (7th Cir. 1994). The district court erred in refusing to consider a downward departure based on the defendant's extraordinary family circumstances. The district court had refused to depart because the Seventh Circuit's decision in *United States v. Thomas*, 930 F.2d 526 (7th Cir.), *cert. denied*, 502 U.S. 852 (1991) prohibited departures based on family circumstances, even in extraordinary cases. The circuit court rejected the holding in *Thomas*, and followed other circuits' unanimous holdings that §5H1.6 permits departures from a guideline imprisonment range to account for family circumstances that may be characterized as extraordinary. (citations omitted).

United States v. Green, 258 F.3d 683 (7th Cir. 2001). The district court did not err in refusing to depart downward in the defendant's sentence. Following a jury trial, the defendant was convicted of distributing crack cocaine, conspiracy to distribute crack cocaine, and using a communication device in connection with a conspiracy and distribution. The district court increased the defendant's sentence level based on its determination that the defendant had committed perjury during the trial, and it refused to depart downward based on the defendant's employment and family circumstances. The Seventh Circuit held that because the district court recognized it had discretion to depart downward based on the defendant's family relationships and employment even though those factors are not ordinarily relevant, the court's decision was unreviewable on appeal.

United States v. Guy, 174 F.3d 859 (7th Cir. 1999). The Seventh Circuit will not review a district court's refusal to depart downward due to family circumstances when it is clear the district court knew it had the authority to depart if the facts warranted the departure. The district court found that sentencing the defendant to prison would impose hardship on her family due to her responsibilities, but also found that a person should not expect to avoid prison because they come from a large family. Because the defendant had no legal challenge to the district court's guideline interpretation, there was nothing to review.

⁵Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this departure factor by adding language that prohibits this departure in child crimes and sexual offenses.

§5H1.10 Race, Sex, National Origin

United States v. Guzman, 236 F.3d 830 (7th Cir. 2001). The district court erred in departing downward in the defendant's sentence based on his cultural heritage. The defendant pled guilty to participating in a conspiracy to distribute methamphetamine, and the district court departed downward 25 levels, based partly on the defendant's ethnicity or cultural heritage. The government appealed the downward departure. The Seventh Circuit held that the district court abused its discretion in departing downward based on its finding that the defendant was more likely to participate in her boyfriend's criminal activities because as a Mexican woman, she was expected to submit to her boyfriend's will. The circuit court found that what the district court regarded as a "matter of cultural heritage" was actually the joinder of gender and national origin, and both factors are expressly forbidden considerations in sentencing.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (and 18 U.S.C. § 3553(e))

United States v. Atkinson, 15 F.3d 715 (7th Cir. 1994). The defendant pleaded guilty to marijuana and financial structuring charges. The district court originally sentenced him to 25 years in prison based on a sentencing range of 30 years to life, less a five-year reduction under USSG §5K1.1 for substantial assistance. The defendant successfully appealed this sentence based on the district court's incorrect determination of his criminal history category. At resentencing, the district court determined his correct guideline range to be 235-293 months then departed downward under §5K1.1 to 210 months, resulting in a total departure of two years and one month. The defendant appealed again, arguing that the district court abused its discretion by granting him a smaller departure at the second sentencing. The circuit court affirmed the sentence and departure holding that the district court was not bound give the same downward departure upon resentencing. Vacating a sentence nullifies the previously imposed sentence, allowing the sentencing court to begin with "a clean slate." Furthermore, the suggestion made in *United States v. Thomas*, 930 F.2d 526 (7th Cir.), *cert. denied*, 502 U.S. 857 (1991), and *cert. denied*, 513 U.S. 960 (1994), that a two-point reduction be given for each factor the defendant satisfies under USSG §5K1.1 merely provides discretionary guidance and was not part of the holding of that case.

United States v. DeMaio, 28 F.3d 588 (7th Cir. 1994). The district court did not err in refusing to depart downward from the statutory mandatory minimum sentence based on the time the defendant spent at a Volunteers of America Residential Work Release Center (VOA). The defendant unsuccessfully argued that his transfer to the VOA for medical treatment benefitted the government because he was testifying for them and if, because of worsening medical problems, he were either dead or too ill to do so the government would suffer harm. However, he failed to raise this as part of his §5K1.1 "substantial assistance" argument at sentencing, and thus it was waived.

United States v. Eppinger, 49 F.3d 1244 (7th Cir. 1995). The district court did not abuse its discretion by denying the defendant's request to present evidence *in camera* in support of her motion for a downward departure under USSG §5K1.1. The defendant pleaded guilty to one count of conspiracy to distribute cocaine and was granted a downward departure of ten percent from the mandatory minimum sentence of ten years. The defendant claimed to be afraid to speak in open court about the circumstances surrounding her involvement in the drug trade because she had received a number of threats prior to the sentencing, and contended that the court may have granted a greater downward departure if it had allowed her to testify *in camera*. The circuit court ruled that the defendant failed to demonstrate compelling reasons requiring *in camera* testimony, and that the district court's decision did not constitute plain error.

United States v. Kelly, 14 F.3d 1169 (7th Cir. 1994). The district court did not err in failing to provide a downward departure for substantial assistance under §5K1.1, where the defendant failed to raise this issue before the sentencing court, the prosecution did not make a motion for a substantial assistance downward departure, and the defendant did not provide specific information regarding his cooperation. The circuit court concluded that the defendant's "vague references to current cooperation and speculation about future cooperation" were not probative, and the defendant otherwise failed to show that either prosecution or the court acted unconstitutionally or unreasonably in discounting his assistance to the government.

United States v. Kelly, 337 F.3d 897 (7th Cir. 2003). The defendant was charged with conspiracy to import cocaine and heroin into the United States after customs agents apprehended a woman he hired to transport drugs. The defendant entered a plea agreement and agreed to cooperate with the government in exchange for the government's promise to recommend a downward departure from applicable sentencing guidelines, but the government refused to move for a downward departure in sentence, claiming that the defendant breached his agreement when he refused to accompany authorities on a trip to identify the residence of a possible co-conspirator. When the government refused to recommend a downward departure, the trial court allowed the defendant to withdraw his guilty plea, and the defendant entered a second guilty plea which the court accepted. Defendant appealed, seeking specific performance of the original plea agreement, challenging both the district court's failure to make a formal determination of the materiality of his alleged breach of the first agreement and to ascertain the voluntariness of his second plea. The appellate court held that (1) although the trial court erred when it failed to hold a hearing to determine if defendant breached his plea agreement and by failing to enter a finding on that issue, the error was harmless; and (2) although the trial court erred by telling the defendant that all statements he made when he entered his first plea agreement could be used against him if he pled not guilty, that statement did not affect the defendant's substantial rights, and the defendant's second plea was not the product of plain error.

United States v. Lezine, 166 F.3d 895 (7th Cir. 1999). The district court erred in refusing to review the defendant's claim that he had provided substantial assistance, finding that the government's refusal to move for a downward departure was within its discretion. The Seventh Circuit ruled that since the government entered into a plea agreement that stated "if the defendant provided full and

truthful cooperation, a downward departure would be made—the government had limited its discretion. The government cannot unilaterally decide that a defendant has breached a plea agreement to an evidentiary hearing on the matter.

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997). The district court erred in granting only a one-level downward departure pursuant to USSG §5K1.1 for substantial assistance to authorities. The defendant argued that USSG §5K1.1, comment. (n.2), provided in part that the sentencing reduction for assistance to authorities should be considered independently of any reduction for acceptance of responsibility. The government conceded that deducting credit for substantial assistance on the ground that the defendant had already been sufficiently rewarded for acceptance of responsibility was in error, but maintained that the error was harmless because the district court had articulated "some valid reasons" for the extent of its departure relating to the nature and extent of the defendant's assistance. The circuit court disagreed, holding that the district court's own summary of its reasoning explicitly tied the choice of a one-level reduction to the "tremendous break" it believed the defendant had received for acceptance of responsibility. This did not appear to have been an idle or redundant observation, and thus, the appellate court concluded that it could not be confident that the district court considered the two provisions independently. Accordingly, the court vacated the defendant's sentence and remanded for resentencing.

§5K1.2 Refusal to Assist (Policy Statement)

United States v. Menzer, 29 F.3d 1223 (7th Cir.), *cert. denied*, 513 U.S. 1002 (1994). The district court did not err in departing upward on grounds that the defendant's base offense level for arson did not take into consideration the combination of the deaths of his two children and the extreme violence perpetrated on his wife and only surviving child. The circuit court noted that while loss of life does not automatically suggest a sentence above the authorized guideline range, the dangerousness and heinous nature of the defendant's conduct was not reflected in the offense of conviction base offense level.

§5K2.0 Grounds for Departure (Policy Statement)⁶

See United States v. Bean, 18 F.3d 1367 (7th Cir. 1994), §3E1.1, p. 29.

United States v. Betts, 16 F.3d 748 (7th Cir. 1994). The district court properly refused to grant the defendant a downward departure based on codefendant sentencing disparity. Although the defendant was only a courier in the drug conspiracy, he received a substantially longer sentence than either of his two codefendants, one of whom was the admitted kingpin. Although the Seventh Circuit agreed with the district court that the sentencing disparity seemed harshly unfair, the defendant's lengthy

⁶Effective April 30, 2003, the Commission, in response to a congressional directive under the Child Protect Act, Pub. L. 108-21, added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. *See* USSG App. C, Amendment 649.

sentence was compelled by his career criminal status. If the defendant were not sentenced under the career offender guidelines, his sentence would have been consistent with that imposed upon his codefendants; however, application of the career offender guideline resulted in a 13-level upward enhancement of the defendant's sentence. See *United States v. Brown*, 14 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 857 (1994), §3D1.4, p. 28.

United States v. Hendrickson, 22 F.3d 170 (7th Cir.), *cert. denied*, 513 U.S. 878 (1994). The district court erred in granting the defendant a downward departure for extraordinary acceptance of responsibility. The defendant pleaded guilty to money laundering and several counts of criminal forfeiture. Prior to his sentencing, he voluntarily paid the amount of forfeiture agreed to in his plea agreement. The district court considered this act to be evidence of the defendant's extraordinary acceptance of responsibility. The circuit court reversed, holding that unlike the voluntary payment of restitution, which several courts have held may be a proper departure basis, forfeiture payments are statutorily mandated and cannot, as a matter of law, be a ground for a downward departure based on extraordinary acceptance of responsibility.

United States v. Jones, 278 F.3d 711 (7th Cir.), *cert. denied*, 536 U.S. 912 (2002). The district court did not err in applying an upward departure pursuant to §5K2.0 for the defendant's refusal to testify in compliance with a plea agreement. Prior to sentencing for drug convictions, the defendant entered into a cooperation agreement with the government in which the defendant agreed to "provide complete and truthful testimony to any grand jury, trial jury, judge, or magistrate in any proceeding in which he may be called to testify by the government." The government agreed to recommend, in exchange for defendant's cooperation, that the district court apply a downward departure which was later granted after defendant testified before the grand jury in the investigation of a codefendant's drug activities. On three occasions, after the defendant's initial cooperation, the defendant refused to testify before the grand jury. The defendant was charged in a superseding indictment with three counts of criminal contempt, for which he was subject to a sentencing range of 4 to 10 months' imprisonment as calculated under §2J1.5. The government then moved for a 17-level upward departure if Jones's refusal to testify distinguished his case from the heartland cases covered by §2J1.5. The district court granted the 17-level upward departure as the amount necessary to take away the benefit conferred upon the defendant as a result of entering the plea agreement.

United States v. Pullen, 89 F.3d 368 (7th Cir. 1996), *cert. denied*, 519 U.S. 1066 (1997). The district court did not err in refusing to grant the defendant a downward departure on the basis of extreme physical and sexual abuse suffered as a child. The government responded that the guidelines consider the effect of a childhood history of abuse if it results in diminished capacity to comply with the law. In support of this argument, the government cited the following United States sentencing guidelines provisions: 1) §5H1.3 (policy statement) provides that "mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range" except as set forth in §5K2.0; 2) §5H1.12 (policy statement) provides that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range"; and 3) §5K2.13 allows diminished mental capacity as

the basis for a departure only in the case of a non-violent offense. Because diminished capacity is a discouraged factor, as opposed to a prohibited factor, it may be used as a basis for departure "if the factor is present to an exceptional degree." *Koon v. United States*, 518 U.S. 81 (1996).⁷ Limiting the application of this departure to the most extreme situations is important for the continued efficiency and consistency of the guidelines. The circuit court noted that the determination of whether a particular case is extraordinary is committed to the discretion of the trial judge. Given the evidence presented by the defendant, it would have been an abuse of discretion for the district court to have granted a departure in this case.

See United States v. Miller, 2003 U.S. App. LEXIS 18490 (7th Cir. Sept. 8, 2003), §3E1.1, p. 31.

United States v. Rainone, 32 F.3d 1203 (7th Cir. 1994), *cert. denied*, 515 U.S. 1102 (1995). The district court did not err in departing upwards based on the defendants' threats against the families of their extortion victims. The defendants claimed that the upward departure was unwarranted because the threats were not communicated to the family members. Relying on a subsequent amendment authorizing upward departures for threats of bodily injury and death, see USSG §2B3.2(b)(1), the circuit court concluded that failure to communicate the threats to the family members did not affect the appropriateness of the upward departure. The appellate court also affirmed the district court's decision to depart upward because the defendants were engaged in organized crime. The defendants were part of the "Chicago Outfit" syndicate once led by Al Capone. The defendants argued that the high base offense level assigned to RICO convictions already reflected the seriousness of participation in a criminal syndicate and that an upward departure based on involvement in such criminal activity was impermissible double-counting. The circuit court rejected this argument because such an extensive, durable, and notorious criminal syndicate as the Chicago Outfit is outside the heartland of RICO enterprises contemplated by the guidelines.

§5K2.1 Death

United States v. Purchess, 107 F.3d 1261 (7th Cir. 1997). The district court properly departed upward to account for conduct which resulted in death. The defendant argued that the death of a co-conspirator should not be used as a basis for an upward departure because the death resulted from relevant conduct and not from the offense of conviction. The defendant further maintained that he was not the cause of the co-conspirator's death, but that the co-conspirator's own voluntary actions were the cause of his death. The issue of applying a USSG §5K2.1 departure based on harm resulting from relevant conduct was one of first impression. The appellate court relied on the First, Second, and Ninth Circuits which had considered the issue and had all ruled that a court may depart upward based on harm resulting from relevant conduct. The defendant relied on two Seventh Circuit cases which held that departures should be based only on the offense of conviction. The appellate court disagreed, and

⁷The appellate standard of review has been amended effective April 30, 2003, by the PROTECT Act, 18 U.S.C. § 3472(e).

held that both the prior decisions were distinguishable based on the facts of the cases. Similarly, the court looked to the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), and the amount of deference a district court enjoys in deciding whether to depart when the particular facts of a case fall outside the "heartland" of guideline cases. In addition, the court also rejected the defendant's argument that he should not be held accountable for his co-conspirator's death. Relying on *United States v. White*, 979 F.2d 539 (7th Cir. 1992), the court held that when a defendant knowingly risks a victim's life or puts into motion a chain of events that makes it foreseeable that death would result, a court can depart upward for the ensuing death pursuant to USSG §5K2.1. In the instant case, the court reasoned that the defendant put into motion a series of events that resulted in the taking of a human life by setting up a drug importation business and that he was aware of the dangers of swallowing drug-filled pellets. In addition, the court found that the co-conspirator was powerless to do anything once the drugs leaked into his body and that the defendant should, therefore, be held accountable.

§5K2.7 Disruption of Governmental Function

United States v. Horton, 98 F.3d 313 (7th Cir. 1996). The district court erred in enhancing the defendant's applicable guideline range eight levels for significantly disrupting a governmental function pursuant to USSG §5K2.7. One day after a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, the defendant tried to enter a federal building in Springfield, Illinois and then called in a bomb threat. The defendant argued that the district court's decision to depart upward significantly from the applicable guideline range was inappropriate. Although the defendant agreed that a departure was warranted under the guidelines if his conduct "resulted in a significant disruption of governmental function," he maintained that a departure of two levels would have been more appropriate. The circuit court agreed, holding that a court should determine the extent of an upward departure by comparing the seriousness of the aggravating factors that motivate the departure with the adjustments in the base offense level prescribed by the guideline provisions that apply to conduct most closely analogous to the defendant's offense conduct. See *United States v. Ferra*, 900 F.2d 1057, 1061-62 (7th Cir. 1990), *cert. denied*, 504 U.S. 910 (1992). The circuit court reasoned that by linking the extent of the departure to the structure of the guidelines in this way, a district court could avoid the type of disparity in sentencing that the guidelines were originally designed to prevent. The circuit court concluded that the defendant in this case had not intended on carrying out the "threat" and all parties agreed that the defendant had not demonstrated an "intent" to plant an explosive device in the federal building. Given the difficulty inherent in comparing offense conduct that is aimed at creating a risk of actual injury to victims with the disruption resulting from a threat that is entirely empty, the court held that the upward departure was inappropriate and remanded for resentencing.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Bohanon, 290 F.3d 869 (7th Cir. 2002). The defendant was charged with multiple counts of mailing threatening communications. He entered a plea of guilty to one count of mailing threatening communications and was sentenced to 48 months imprisonment. Defendant met the victims of his letter-writing frenzy when he contracted to landscape the lawn of their home. The victims

were naturalized citizens of the United States, who emigrated from Jamaica. Thinking defendant to be down on his luck, the victims befriended him and introduced him to their friends. When the victims expressed disapproval of the romantic interest the defendant showed in their niece, they started to receive letters that were threatening and vile. The defendant also sent letters to at least two of the victims' neighbors and accused the victims of child molestation. The letters caused the victims fear and embarrassment. The victims estimated that the defendant sent between 100 and 300 letters. The appellate court found that the details in the letters supported an inference that the defendant intended to carry out his threats. The government argued at sentencing, *inter alia*, that an upward departure was appropriate under §5K2.8, which provides that "if the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct." The district court judge noted that there was enough evidence to "take the case to the maximum, which would be 60 months' imprisonment." He said, however, he did not intend to impose the maximum sentence. Taking all the factors into consideration, the district court judge settled on an upward departure of 11 months, imposing a sentence of 48 months. Defendant appealed the enhancements and the upward departures, based on §§2A6.1, 5K2.3, and 5K2.8. He argued that the judge made findings which contradicted the imposition of the enhancement, failed to explain clearly the reasons for the upward departure, and failed to link the extent of the departure to the structure of the guidelines—basically, that the district judge was not sufficiently explicit. Defendant argued that §5K2.8 should be limited to instances in which there was actual physical or sexual assault on the victims. But, the court of appeals noted that the guideline itself contemplates humiliation as a basis for the departure. In upholding the district court judge's decision, the appellate court noted that the judge explicitly accepted the factual findings of the presentence report which described the embarrassment the victims felt and found that the letters themselves supported the inferences required for the departure. Both of the victims testified to their humiliation. The humiliation was increased because of the messages on the outside of the envelopes and the letters sent to the neighbors. Therefore, the Seventh Circuit held there was no clear error.

United States v. Matchopatow, 259 F.3d 847 (7th Cir. 2001). The government did not breach a plea agreement with the defendant by stating that it supported the district court's upward departure. The defendant pled guilty to second-degree murder and the district court imposed a nine level upward departure due to the brutality and heinous nature of the defendant's crime, pursuant to §5K2.8. On appeal, the defendant argued that the government breached the plea agreement because it had recommended only a five-level enhancement, but supported the court's decision to depart even higher. The circuit court found not even a "scintilla of support" for the defendant's argument, stating that he even admitted he could not point to any language in the plea agreement that the government failed to perform. *Id.* at 851. The government fulfilled its promise and the sentencing court's decision to disagree with the recommendation was not a breach of the agreement.

§5K2.12 Coercion and Duress

United States v. Steels, 38 F.3d 350 (7th Cir. 1994). The district court did not err in refusing to grant the defendant a downward departure based on coercion and duress, where the defendant

claimed that, in order to boost her sentence, an undercover drug agent had coerced her into purchasing more cocaine than she intended. The circuit court concluded that the district court had not erroneously believed that it lacked the authority to depart on the basis of coercion and duress. Rather, the district court's refusal to depart was the result of its judgment that the facts did not support a finding of coercion or duress. As such, the district court's refusal to grant a downward departure was unreviewable on appeal.

United States v. Wright, 37 F.3d 358 (7th Cir. 1994). The district court did not err in denying the defendant's motion for a downward departure pursuant to §5K2.12. The defendant pleaded guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He claimed that his criminal conduct was the result of duress caused by drug dealers' demand of the value of cocaine he destroyed because he believed the cocaine was tainted. The circuit court concluded that the district court was aware of its authority to depart and that the defendant's duress was completely unrelated to the bank robbery.

§5K2.13 Diminished Capacity (Policy Statement)⁸

§5K2.16 Voluntary Disclosure of Offense

United States v. Besler, 86 F.3d 745 (7th Cir. 1996). The district court erred in granting a downward departure under USSG §5K2.16 without making findings as to the likelihood that the offense of conviction would have been discovered absent defendant's disclosure. Departure under USSG §5K2.16 requires the following: 1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to its discovery; and 2) the offense was unlikely to have been discovered otherwise. The court considered whether USSG §5K2.16 allows downward departure in situations in which discovery is unlikely, regardless of whether the defendant is motivated by guilt or by fear of discovery. The court rejected defendant's argument that the relevant consideration is the defendant's subjective state of mind in disclosing details of the offense and found that the last sentence of the guideline clarifies that departure does not apply to a situation in which the defendant is motivated by fear. The court held that departure is justified only where the defendant's motivation is guilt and discovery is unlikely. This reflected the court's belief that the drafters of §5K2.16 intended to focus on both the defendant's state of mind and the benefit derived by the government in receiving information otherwise undiscoverable. In order to apply this departure, a court must make "particularized findings" with respect to the objective likelihood of discovery. The sentence was vacated and remanded to the district court for findings as to the objective likelihood of discovery.

United States v. Lovaas, 241 F.3d 900 (7th Cir. 2001). The district court did not err in refusing to depart downward based on the defendant's voluntary confession about prior sexual conduct

⁸Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, added language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. See USSG App. C, Amendment 649.

with a juvenile. The defendant pled guilty to transporting and possessing material which depicted minors engaging in sexually explicit conduct, and the district court sentenced him to 87 months' imprisonment. On appeal, the defendant argued that he should have received a downward departure based on his admission during the search that he had engaged in sexual conduct with minor males in the past. The circuit court found that the defendant was motivated to disclose this information not out of a sense of guilt but instead based on his belief that the conduct would be discovered inevitably in the course of the investigation. Because a departure under §5K2.16 only applies when a defendant is motivated by guilt and discovery is unlikely, the district court was correct in denying the defendant's motion for a downward departure.

§5K2.20 Aberrant Behavior⁹

§5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)¹⁰

CHAPTER SIX: Sentencing Procedures and Plea Agreements

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. DeAngelo, 167 F.3d 1167 (7th Cir. 1999). The Seventh Circuit ruled that the presentence report provided the defendant with adequate notice by noting that a departure might be warranted under §4A1.3. The mention of the departure under a specific guideline provision comported with established sentencing procedures.

United States v. Ewers, 54 F.3d 419 (7th Cir. 1995). The district court did not err in finding factors justifying an upward departure by a preponderance of the evidence instead of the higher standard of clear and convincing evidence discussed in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990). The defendant, an attorney, was convicted of maintaining his law office as a place for the distribution of cocaine and sentenced under the 1989 version of §2D1.8. Because the 1989 version of that guideline did not consider quantity in determining the offense level, the district court departed upward from the defendant's guideline range of 21-27 months to a sentence of 60 months based on the involvement of 3.5 to 5 kilograms of cocaine in the offense. The Seventh Circuit held that the 33-month

⁹Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, added language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. See USSG App. C, Amendment 649.

¹⁰Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, added this downward departure factor limited to child crimes and sexual offenses. See USSG App. C, Amendment 649.

departure was not so extreme as to invoke the *Kikumura* scrutiny, relying, in part, on the fact that the current guidelines would have resulted in a guideline range of 70-87 months.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations

United States v. Trotter, 270 F.3d 1150 (7th Cir. 2001). Defendant was convicted of using unauthorized access devices, and received a sentence of five months' imprisonment and 36 months' supervised release (five months of which were to be spent in home confinement). He repeatedly violated the terms of home confinement by leaving without authorization, and he broke the rules of supervised release by lying to the probation office about his employment (and failing to notify the office about changes) and using marijuana. He tested positive for marijuana at least three times and skipped seven scheduled drug tests. Defendant also paid only \$ 3,800 of the \$18,300 restitution that was part of his sentence—and only \$80 of that sum voluntarily (the rest came from garnishing his salary). Eventually the district judge revoked his supervised release. The appellate court first noted the distinctions for violations of supervised release under the guidelines. A crime of violence, a firearms offense, or a "controlled substance offense" is a Grade A violation; any other conduct "constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year" is a Grade B offense (§ 7B1.1(a)(2)); any remaining infraction falls into Grade C. Use of marijuana is not punishable by more than a year in prison under either state or federal law, making it a Grade C violation. Possession of personal-use quantities is a civil offense punishable by a fine, 21 U.S.C. § 844a, but this dispensation is not available to persons with a drug conviction, see § 844a(c). Defendant had such a conviction, which moved him to the domain of 21 U.S.C. § 844(a): Simple possession by a repeat offender, which is punishable by up to two years' imprisonment. This led the district judge to conclude that the defendant committed a Grade B violation. Because the defendant's criminal history category was II, the table at §7B1.4 gave a range of 6-12 months' imprisonment. The judge selected 6 months, plus an additional 30 months' supervised release. The range for a Grade C violation is 4-10 months, so the defendant could have received the same sentence no matter what. But the judge did not state on the record that the classification was irrelevant, and therefore the court of appeals found that it had to "tackle the merits, perhaps the judge would have chosen 4 months had he believed that Trotter's misconduct is Grade C rather than Grade B." The court of appeals determined that it had to decide whether the defendant's possession of marijuana was conduct "constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year" within the meaning of §7B1.1(a)(2). The answer is yes if the district court may consider the defendant's prior drug conviction, and no otherwise. The Seventh Circuit noted that many provisions of the guidelines other than §7B1.1(a)(2) make something turn on whether conduct is punishable as a felony, by a sentence exceeding one year, or something similar. The court noted that it routinely holds that when making these decisions the court must determine whether the conduct is a felony, etc., after prior convictions are taken into account. See *United States v. Young*, 41 F.3d 1184 (7th Cir. 1994). The court, however, noted that in *United States v. Lee*, 78 F.3d 1236 (7th Cir. 1996), the court contradicted Young and that it had to decide which case had to be overruled. The appellate court found that Lee gave two principal reasons for holding that prior convictions should be disregarded when determining

the grade of a violation: first that Application Note 1 to §7B1.1 supports this approach, and second that because the table in §7B1.4 includes a criminal history category, use of criminal history to influence the grade level would be double-counting. The court of appeals also found that *Lee* relied on the last sentence: "the grade of the violation is to be based on the defendant's actual conduct." The court held that this seemed to mean that the court should put to one side earlier offenses, which were not part of the "actual conduct" that occurs while on supervised release. The court decided that putting this sentence back into context, however, gave it a different meaning. It held that Application Note 1 tells the district judge to consider what the person on supervised release *did*, rather than what crimes he has been charged with. The court concluded that revocation of supervised release proceeds on real offense rather than charge-offense principles, and that a judge engaged in real-offense sentencing does not ignore prior offenses that affect the maximum punishment, because recidivist enhancements are part of real-offense sentencing. The court then considered the double-counting concern: If the Guidelines' use of criminal history to influence the final sentence blocks recidivist enhancements under §7B1.1, the court held that it logically does so for any offense and not just for revocation of supervised release, "for the use of criminal history is ubiquitous in the Guidelines." The court noted that this was never before thought to be incompatible with using prior convictions to determine maximum permissible punishments. The court also considered that one year after *Lee*, the Supreme Court rejected this element of its reasoning in *United States v. LaBonte*, 520 U.S. 751 (1997). The court noted that career criminals must be sentenced at or near the maximum term for their crimes (28 U.S.C. § 994(h)) and questioned whether "maximum term" for this purpose meant the maximum with or without recidivist enhancements? The first circuit concluded in *LaBonte* that the maximum must be determined without recidivist enhancements, because the effect of prior convictions is taken into account in the career-criminal enhancement (as well as the criminal history category system). But the Supreme Court held otherwise, concluding that the term of punishment to which a person is exposed on violating a statute includes all enhancements—for quantity of drugs, for use of firearms, for violence during the offense, and for prior convictions. The Seventh Circuit thus held that a similar approach applied to §7B1.1(a)(2) would support *Young* rather than *Lee*, which the court therefore overruled. The court noted that this will restore harmony within the circuit and eliminate a conflict among the circuits. The court concluded that the defendant's prior drug conviction exposed him to a maximum of two years in prison for possessing marijuana. The district judge did not commit a clear error in concluding that the defendant possessed marijuana in the course of using it, therefore, he committed a Grade B violation.

§7B1.3 Revocation of Probation or Supervised Release

United States v. Fischer, 34 F.3d 566 (7th Cir. 1994). The district court did not err in determining that the defendant's failure to avoid contact with his ex-girlfriend was a violation of his terms of supervised release. The defendant's probation officer had instructed the defendant to avoid contact with his ex-girlfriend. The defendant argued that failure to follow these instructions could not be a legitimate violation because the instruction was a nonministerial command properly the subject of a court-approved condition of release and not a condition that could be left to the discretion of a probation officer. The circuit court, while agreeing that the sentencing court and not the probation officer is responsible for setting the terms of supervised release, concluded that the district court's

revocation of supervised release was not actually based on the defendant's failure to follow his probation officer's instructions, but rather on the independent grounds of the dangerous and anti-social nature of the defendant's contact with his ex-girlfriend.

United States v. Hill, 48 F.3d 228 (7th Cir. 1995). The Seventh Circuit held that the policy statements in Chapter Seven are non-binding on district judges. The circuit court reversed its decision in *United States v. Lewis*, 998 F.2d 497 (7th Cir. 1993), which had held that all policy statements in the *Guidelines Manual* are binding on the sentencing judge unless inconsistent with a guideline or with a federal statute. The policy statement in §7B1.3(f) provides that the judge shall order any term of imprisonment imposed upon the revocation of supervised release to run consecutively to any prison sentence the defendant is serving. The district court judge, following the holding in *Lewis*, sentenced the defendant to 21 months and ordered that the sentence be served consecutively to his state sentence. The circuit court reversed and remanded, basing the decision on two factors: 1) that at least six circuits had rejected the holding in *Lewis* and held that policy statements are non-binding, and 2) the Solicitor General believed that *Lewis* was decided erroneously and the government recommended that the case be remanded for resentencing. In overruling *Lewis*, the Seventh Circuit joined the First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits in holding that policy statements which do not interpret guidelines, including Chapter Seven statements, are non-binding. *United States v. Mathena*, 23 F.3d 87, 93 (5th Cir. 1994); *United States v. Sparks*, 19 F.3d 1099, 1101 (6th Cir. 1994); *United States v. Anderson*, 15 F.3d 278, 283-84 (2d Cir. 1994); *United States v. O'Neill*, 11 F.3d 292, 302 (1st Cir. 1993); *United States v. Levi*, 2 F.3d 842, 845 (8th Cir. 1993); *United States v. Hooker*, 993 F.2d 898, 901 (D.C. Cir. 1993). The circuit court reasoned that *Lewis* misapplied *Stinson v. United States*, 508 U.S. 36, 39 (1993), *cert. denied*, 519 U.S. 1137 (1997), by incorrectly assuming that *Stinson* made policy statements binding. *Stinson* held that commentary labeled "policy statement" is not robbed of its authoritative character if it interprets a guideline. The circuit court stated that Chapter Seven policy statements are entitled to great weight because the Sentencing Commission is the expert body on federal sentencing, but they do not bind the sentencing judge.

United States v. Young, 41 F.3d 1184 (7th Cir. 1994). The defendant's supervised release was revoked and he was sentenced to 22 months imprisonment based on four urine samples that tested positive for cocaine and the defendant's admitted use of cocaine. However, the defendant asserted that use of cocaine does not necessarily constitute possession. Possession may be actual or constructive. In the revocation of supervision context, "'use' is subsumed within 'possession' where the defendant knowingly and voluntarily consumes the controlled substance." The district court gave the defendant the opportunity to show why use was not proof of possession and he failed to do so. The appellate court affirmed the revocation and sentence.

§7B1.4 Term of Imprisonment

United States v. Doss, 79 F.3d 76 (7th Cir. 1996). The district court did not err in making an upward departure upon revocation of appellant's supervised release. Based on a Grade B violation of supervised release and a Criminal History Category of III, the table in USSG §7B1.4 recommended a

sentencing range of 8-14 months. The district judge, however, departed upward to a two-year sentence. Appellant argued that the judge was required to sentence within the guideline framework because the judge "talked in the language of Sentencing Guidelines" by using terms such as "depart upward". The circuit court found, however, that USSG §7B1.4 is entitled weight, but, is not binding and the judge has discretion to depart outside of the recommended range. The appellant also argued that the judge abused his discretion in setting the sentence. The circuit court held that the appropriate standard for reviewing a sentence that has no sentencing guideline is the "plainly unreasonable" standard. To determine whether the sentence was "plainly unreasonable," the circuit court questioned whether 18 U.S.C. § 3583 was complied with. Finding that the sentence was the maximum allowed under 18 U.S.C. § 3583(e)(3), and that the judge took the policy statements into account and noted his reasons for the sentence on the record, the sentence was affirmed.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Morgano, 39 F.3d 1358 (7th Cir. 1994), *cert. denied*, 515 U.S. 1133 (1995). The defendants asserted that the consecutive sentences they received for the RICO violation, 18 U.S.C. § 1962, charged in Count 1, and the separately charged extortion, interstate travel, and gambling violations in Counts 3 through 30 violated the double jeopardy clause of the fifth amendment. The defendants argued that the separate offenses were the predicate acts supporting the RICO conviction, and served to both enhance the RICO sentence and support separate consecutive sentences for the separate charges. Some of the substantive criminal acts were committed before November 1, 1987, and were sentenced under preguidelines law. None of the defendants received the 20 years of imprisonment authorized by statute as the maximum sentence. "[N]o double jeopardy problem arises when a sentencing court considers other charged and sentenced conduct in deriving the length of a consecutive sentence imposed for violation of a separate criminal statute." The district court did not subject the defendants to double jeopardy by relying on the predicate acts in calculating the RICO sentence, even though those acts supported separate sentences. "Consonant with the circumscribed protection afforded by the double jeopardy clause in sentencing matters, `calculation under the Federal Sentencing Guidelines of the proper sentence within the statutory range established by Congress . . . does not constitute multiple punishment.' *United States v. Alvarez*, 914 F.2d 915, 920 (7th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991)."

Fifth Amendment—Due Process

United States v. Samaniego-Rodriguez, 32 F.3d 242 (7th Cir. 1994), *cert. denied*, 514 U.S. 1052 (1995). The district court did not err in sentencing the defendant to 41 months imprisonment for unlawfully reentering the United States even though the Immigration and Naturalization form the defendant signed at the time of his deportation inaccurately stated that this offense was subject to a penalty of not more than two years imprisonment. The Seventh Circuit, citing the Supreme Court's decision in *United States v. Batchelder*, 442 U.S. 114 (1979), ruled that the defendant's sentence did

not violate his due process rights because the fair notice requirement of the due process clause is satisfied if the criminal statute under which the defendant was convicted clearly defines the conduct prohibited and the punishments authorized. Here, 8 U.S.C. § 1326 clearly provided penalties of up to 15 years imprisonment. Regardless of the inaccuracy of the INS form, the court reasoned, section 1326 provided adequate notice to satisfy the requirements of due process. The Seventh Circuit also ruled that the district court was not "equitably estopped" from sentencing the defendant under section 1326(b) because of the INS form's inaccuracies. The circuit court noted Supreme Court precedent has established that "errors by the Executive Branch cannot prevent application of the law unless the person asserting estoppel establishes all of the requirements of this doctrine at common law—including a detrimental change in position in reasonable reliance on the erroneous advice." Here, because the record contained no evidence that the defendant relied on any advice in the INS form, the district court was not "equitably estopped" from sentencing him.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Padilla, 23 F.3d 1220 (7th Cir. 1994). Although the district court's violation of Fed. R. Crim. P. 11(c) was not harmless error, the circuit court affirmed the defendant's sentence. The defendant pleaded guilty to participation in a drug conspiracy in violation of 18 U.S.C. § 846. The plea agreement not only contained misleading and incomplete information concerning the maximum penalties the defendant faced, but also the contract failed to mention the applicable statutory minimums. Further, the district court failed to advise the defendant of the mandatory minimums at his allocution. The circuit court followed *United States v. Herndon*, 7 F.3d 55 (5th Cir. 1993) (*per curiam*) (prosecution should request the trial judge to advise the defendant as to the statutory minimums and maximums), and *United States v. Watch*, 7 F.3d 422 (5th Cir. 1993) (district judge should explain to the defendant that "a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged") and held that the focus of the inquiry is on what the defendant was aware of when his plea agreement was entered. Since the defendant was never informed about the mandatory minimum term he faced and the absence of this knowledge likely influenced his decision to plead guilty, the error was not harmless. Fed. R. Crim. P. 11(c). However, since the defendant at oral argument disclaimed his desire to seek vacatur, which the circuit court concluded was the only remedy for the error, the sentence was affirmed.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 34

United States v. Martin, 63 F.3d 1422 (7th Cir. 1995). The district court abused its discretion in sentencing the defendant to a 50-year sentence, given the knowledge that the time span would extend beyond the defendant's life expectancy. The defendant was convicted of arson (which

resulted in the deaths of two firefighters) and was sentenced to fifty years imprisonment. The defendant argued on appeal that the district court abused its discretion because the jury had determined that he was not to be subjected to life imprisonment. 18 U.S.C. § 34 provides that a person convicted of arson where a death results shall be subject to the death penalty or to life imprisonment, "if the jury shall in its discretion so direct." The jury refused to subject the defendant to life imprisonment. The defendant's base offense level was calculated to be 43 which required an imposition of a life sentence. The district court reduced the defendant's base offense level to 42, yielding a sentencing range of 360 months to life and sentenced the defendant to 50 years imprisonment. The circuit court ruled that the district court abused its discretion in imposing such a sentence. The circuit court noted that although the judge and not the jury ultimately sentences the defendant, under this statute, the judge may only impose life imprisonment if the jury so directs. If the jury does not so direct, the circuit court ruled, the sentence is limited to a term of years which must be less than life. The circuit court recognized that sentencing a 45-year-old individual to 50 years in prison (of which at least 42.5 must be served) is equivalent to a life sentence and therefore beyond the power of the judge to impose. The circuit court noted that USSG §2A1.1 authorizes a downward departure where the defendant "did not cause the death intentionally or knowingly." The district court did not appear to have considered defendant's mental state or other appropriate grounds for departure, and may re-examine these issues on remand.

21 U.S.C. § 841

United States v. Garcia, 32 F.3d 1017 (7th Cir. 1994). The district court did not err in imposing upon the defendant the mandatory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(A). The defendant argued that his state conviction for possession of cocaine was not a "prior conviction" because it was related to the instant conspiracy to distribute cocaine. He relied on *United States v. Blackwood*, 913 F.2d 139 (4th Cir. 1990), in which the Fourth Circuit held that, for sentencing enhancement purposes, prior convictions means separate criminal episodes that occur on occasions "distinct in time." *Id.* at 147. The circuit court distinguished the defendant's case from *Blackwood*. Unlike the defendant in *Blackwood*, the defendant in the instant case had an opportunity to cease his criminal activity after his state conviction became final. This conclusion is consistent with the goal of mandatory minimum penalties to reduce recidivism.

18 U.S.C. § 924

United States v. Brown, 273 F.3d 747 (7th Cir. 2001). On the government's cross-appeal, the court of appeals found that the district judge's conclusion that a conviction for compelled pandering did not qualify as a third violent felony under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) was improper, as it ignored the compelled, nonconsensual nature of the prostitute's acts under the compelling prong of the Illinois pandering law, 720 Ill. Comp. Stat. 5/11-16. The court held that forced nonconsensual sex with strangers was conduct that presented a serious potential risk of physical injury to another as proscribed under the "otherwise" clause of the ACCA.

United States v. Franklin, 302 F.3d 722 (7th Cir. 2002). In a case of first impression, the court addressed whether "escape" constituted a violent felony for purposes of 18 U.S.C. § 924(e). The appellate court affirmed the district court's determination that it did. The court noted that the important issue for violent felony analysis was always the potential for injury, not whether injury actually occurred. It concluded that because escape, under Mississippi law, involved a serious potential risk of physical injury to another, defendant's prior conviction for escape qualified as a "violent felony" under 18 U.S.C. § 924(e).

United States v. Hudspeth, 42 F.3d 1015 (7th Cir. 1994) (*en banc*), *cert. denied*, 515 U.S. 1105 (1995). The defendant asserted that the government improperly requested an enhanced sentence under 18 U.S.C. § 924(e) at his resentencing hearing based on a different version of the defendant's criminal convictions than the government used at the original sentencing hearing, and that the district court's recalculation of his sentence after his resentencing hearing placed him in jeopardy twice for the same offense. The Seventh Circuit held, *en banc*, that sentencing enhancements based on valid prior convictions that are within the appropriate sentencing range result in no double jeopardy violations.

United States v. Patterson, 23 F.3d 1239 (7th Cir.), *cert. denied*, 513 U.S. 1007 (1994). The appellate court correctly applied the Armed Career Criminal Act to the defendant. 18 U.S.C. § 924(e). The defendant argued that two of his prior felonies that were used as predicate offenses should be considered one offense. The circuit court disagreed, stating "[c]riminal convictions will be considered separate offenses for purposes of the Armed Career Criminal Act if they are `separate and distinct criminal episodes.'" *United States v. Schieman*, 894 F.2d 909, 913 (7th Cir.) ("separate crimes against separate victims in separate locations" counted as separate crimes for purposes of this statute), *cert. denied*, 498 U.S. 856 (1990).

18 U.S.C. § 3583

United States v. Schechter, 13 F.3d 1117 (7th Cir. 1994). The circuit court upheld the district court's order that the defendant, as a condition of supervised release, notify any employer of his status on supervised release and his past criminal conduct, where the defendant, a computer consultant, repeatedly took money from his various employers. The court's order was authorized by 18 U.S.C. §§ 3553(a), 3563(b)(6), and 3583(d), and did not violate the fifth or eighth amendments.

18 U.S.C. § 3583

United States v. Russell, 340 F.3d 450 (7th Cir. 2003). The defendant was originally sentenced to 70 months' imprisonment and a 60-month term of supervised release following his bank fraud conviction. The defendant violated his supervised release by committing domestic battery on his wife. The court reversed the judgment, finding that the district court exceeded its authority under section 3583(e)(3) by sentencing defendant to a combined term of re-incarceration and additional supervised release 22 months over his original term of supervised release. The court concluded that the combined

term of re-imprisonment and additional supervised release could not exceed the original term of supervised release. The court rejected the government's assertion that the district court was authorized to impose the 82-month combined sentence pursuant to its general sentencing authority under section 3583(a).