SELECTED GUIDELINE APPLICATION DECISIONS FOR THE THIRD CIRCUIT

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Third Circuit Case Law Highlights

§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact)–*U.S. v. Hayward*, 359 F.3d 631 (3d Cir. 2004) (held defendant was improperly sentenced under guideline dealing with sexual abuse, rather than guideline dealing with sexual contact), p. 4.

§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)–*U.S. v. Himler*, 355 F.3d 735 (3d Cir. 2004) (sentencing court's finding that defendant who purchased condominium by tendering counterfeit cashier's checks had intended to cause loss in around amount of face value of checks did not rise to level of clear error), p. 5.

§2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States)–*U.S. v. Gregory*, 345 F.3d 225 (3d Cir. 2003) (remand was required for clarification as to whether sentencing court applied enhancement for possession of gun in connection with counterfeiting due to circumstances of case or due to erroneous conclusion that enhancement automatically attached to possession), p. 7.

§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic)–*U.S. v. Harrison*, 357 F.3d 314 (3d Cir. 2004) (held that two- level enhancement of base offense level if "computer was used for the transmission of" child pornography applied, even though someone else used computer to transmit pornography to defendant), p. 11.

§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)–*U.S. v. Lloyd*, 361 F.3d 197 (3d Cir. 2004) (where defendant is convicted for possession of firearms resulting from theft of those same firearms, that theft cannot be used to enhance sentence for possession based on possession being "in connection with another felony offense"; also held that defendant's possession of homemade bomb warranted enhancement of possession offense), p. 14.

§3E1.1 (Acceptance of Responsibility)–*U.S. v. Williams*, 344 F.3d 365 (3d Cir. 2003) (court held that, when sentencing defendant for robbery and for carrying a firearm during and in relation to a crime of violence, defendant's act of denying he carried a loaded gun in the getaway car did not preclude granting him a reduction for acceptance of responsibility on the bank robbery charge to which defendant pled guilty), p. 26.

18 U.S.C. § 3553– *U.S. v. Kellum*, 356 F.3d 285 (3d Cir. 2004) (held that sentencing court lacked authority to impose sentence below the statutory minimum sentence), p. 48.

Rule 32–*U.S. v. Plotts*, 359 F.3d 247 (3d Cir. 2004) (as matter of first impression, right of allocution extended to revocation hearing; and, denial of right of allocution was plain error), p. 47.

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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Diaz, 245 F.3d 294 (3d Cir. 2001). The district court erred in retroactively applying an amendment to USSG §§1B1.1 and 1B1.2, which overturned case law that had permitted courts to use multiple count cases to select a guideline based on factors other than conduct charged in the offense of conviction which carries the highest offense level. Although the Commission had characterized the amendment as "clarifying," its characterization was not binding on the court, nor was it entitled to substantial weight. The Third Circuit found the amendment effected a substantive change in the law and could not be retroactively applied.

United States v. Orr, 312 F.3d 141 (3d Cir. 2002). The district court did not err in applying the four-level enhancement in §2B3.1(b)(2)(D) based on the defendant having "otherwise used" a "dangerous weapon" during the robbery of a credit union. The defendant contended on appeal that the dismantled pellet gun he had used was not a "dangerous weapon" and that he had not "otherwise used" the pellet gun, but had simply brandished it. The Third Circuit disagreed, finding that Application Note 1(d) of §1B1.1 clearly indicates that objects that appear to be dangerous weapons are to be considered dangerous weapons for purposes of the §2B3.1 enhancement. The appellate court further held that the defendant's actions in pointing the gun at the head of a credit union employee and demanding money constituted more than brandishing and satisfied the "otherwise used" requirement of the enhancement.

§1B1.2 Applicable Guidelines

See United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 519 U.S. 823 (1996), §2B3.2, p. 6.

United States v. Conley, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, 520 U.S. 1115 (1997). The district court's determination of the objectives of the defendant's conspiracy did not violate the defendant's Sixth Amendment right to a jury, nor impinge upon his due process rights. The jury convicted the defendant of a single count of conspiracy under 18 U.S.C. § 371. The defendant asserted that because the jury did not specify the object of the conspiracy for which he was convicted, it was unconstitutional to sentence him under the money laundering guideline because those provisions were more severe than the gambling guidelines. The appellate court held that because the maximum sentence for general conspiracy did not depend upon the penalties authorized for the underlying

substantive offenses, the defendant's statutory maximum sentence on the count, as distinguished from the maximum sentence under the guidelines, did not depend upon whether the jury found the defendant guilty of either or both objects of the conspiracy. Furthermore, the court relied on the decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), in holding that the Sixth Amendment did not guarantee a right to jury sentencing, even where the sentence turned on specific findings of fact. The court maintained that because the guidelines did not alter the maximum sentence for the offense for which the defendant was convicted, but merely limited the sentencing court's discretion in selecting a penalty within the permissible range, there was no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor convicted. In conclusion, the court noted that by determining the objects of the conspiracy beyond a reasonable doubt, the sentencing court met whatever procedural standard might have been required.

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

Watterson v. United States, 219 F.3d 232 (3d Cir. 2000). The district court erred when it considered relevant conduct in determining that the applicable guideline was §2D1.2, instead of §2D1.1, for a defendant who pled guilty to conspiracy to distribute cocaine and marijuana, but who did not stipulate to and was not convicted of distribution in or near schools. Although the conspiracy operated within 1,000 feet of a school zone, the defendant was not charged with or convicted of conspiracy to distribute controlled substances in or near a school zone. The Court found the district court erred in considering relevant conduct in determining which offense guideline section should be applied. According to USSG §1B1.1(a), the district court should first select the applicable guideline section to the offense of conviction, and should only then apply relevant conduct factors.

§1B1.4 Information to be Used in Imposing Sentence

United States v. Baird, 109 F.3d 856 (3d Cir.), *cert. denied*, 522 U.S. 898 (1997). The district court did not err in departing upward and in considering in connection with the upward departure the conduct underlying counts dismissed as part of a plea agreement. The defendant contended that such consideration was improper. The appellate court disagreed, and held that the guidelines offer sentencing courts considerable leeway as to the information they may consider when deciding whether to depart from the guideline range. Section 1B1.4 specifically states that in determining whether a departure is warranted, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant . . . ." Moreover, with respect to conduct underlying dismissed counts, commentary to §1B1.4, when read in conjunction with the commentary to §1B1.3, indicates that considering such conduct is appropriate. Therefore, conduct not formally charged or not an element of the offense can be considered at sentencing. If such information can be considered in determining the applicable guideline range under §1B1.3, then such information can be considered in determining whether to depart from that sentencing range under §1B1.4. In addition, the Supreme Court recently held that a sentencing court is permitted to consider conduct of which a jury acquitted a defendant. *See United States v. Watts*, 519 U.S. 148 (1997).

§1B1.8 Use of Certain Information

United States v. Baird, 218 F.3d 221 (3d Cir. 2000). The district court erred in considering self-incriminating material in calculating the defendant's sentence when the government had agreed that the information would not be used against him if he pled guilty. The defendant, a former police officer, pled guilty to a Hobbs Act robbery, conspiracy to violate civil rights, and obstruction of justice. The defendant and the government agreed that information furnished by him would be admitted against him "if [he] failed to plead guilty." Although he fabricated evidence to exculpate a co-conspirator, he later aided the government in obtaining incriminating evidence against him and also pled guilty to obstruction of justice. The district court concluded the defendant's attempts to shield the co-conspirator caused the agreement to "self destruct," and therefore, USSG §1B1.8 was never triggered. The district court departed upward because of the defendant's "extraordinary disruption" of the system. The Third Circuit found that Application Note 1 states self-incriminating information "shall not be used to increase the defendant's sentence above the applicable guideline range" if there is an agreement pursuant to §1B1.8. The Court disagreed with the district court and found an agreement existed that incriminating information would not be used against the defendant, even in his sentencing, if he pled guilty. The Court further found although the defendant did breach the agreement by providing inaccurate information, it was cured when the government accepted a guilty plea for obstruction of justice. The Court reversed and remanded for resentencing.

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

United States v. Corrado, 53 F.3d 620 (3d Cir. 1995). The district court did not err in sentencing the defendant pursuant to the entire guideline manual in effect at the time he committed his offense without reference to the additional one-level reduction for acceptance of responsibility available in the manual in effect at the time of sentencing. The Third Circuit held that in adopting §1B1.11(b)(2), the Commission "effectively overruled" *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992), and *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), insofar as those opinions conflict with the codification of the one-book rule.

United States v. Griswold, 57 F.3d 291 (3d Cir.), *cert. denied*, 516 U.S. 969 (1995). The district court did not err by using the "one book rule" of USSG §1B1.11(b)(2) to sentence the defendant. The circuit court held that USSG §1B1.11(b)(2) was binding on the court, and that the district court was correct to refuse to mix and match provisions from different versions of the guidelines. The defendant argued that the district court violated the mandate of USSG §1B1.11(a) which requires application of the guidelines in effect on the date that the defendant is sentenced (1993 version). However, because the use of the amended version of USSG §2K2.1 would violate the *ex post facto* clause, the district court, under USSG §1B1.11(b)(2), applied the guidelines in effect at the time the offense was committed (1990 version). The Third Circuit, in affirming the district court's application of the "one book rule," held that this case was directly on point with the holding in *United States v. Corrado*, 53 F.3d 620 (3d Cir. 1995). In *Corrado*, the Third Circuit joined the majority of the courts

of appeals in holding that district courts may not mix and match provisions from different versions of the guidelines in order to tailor a more favorable sentence.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.4 Involuntary Manslaughter[1]

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

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). The district court did not err in finding that the Presentence Report (PSR) provided the defendant with the required notice of an upward departure pursuant to USSG §5K2.8 and Application Note 5 of USSG §2A3.1. The defendant and codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming that although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the PSR, located underneath the heading "Factors that May Warrant Departure" that stated, "According to USSG §2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice.

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

United States v. Hayward, 359 F.3d 631 (3d Cir. 2004). Defendant's conviction was affirmed, but his sentence was remanded to the district court for re-sentencing. Defendant was convicted of violating 18 U.S.C. § 2423(a), transportation of a minor with intent to engage in criminal sexual activity. On appeal, defendant argued that he should have been sentenced for criminal sexual contact under USSG §2A3.4, instead of for attempted criminal sexual abuse under USSG §2A3.1. More specifically, defendant claimed that the evidence supported only a sentence under §2A3.4 for criminal sexual contact. The Third Circuit noted that the corresponding guideline for a violation of 18 U.S.C. § 2423(a) is §2G1.1, under which the sentencing judge may select among USSG §2A3.1 (Criminal Sexual Abuse), §2A3.2 (Statutory Rape), or §2A3.4 (Abusive Sexual Contact); the sexual abuse offenses are treated more seriously than the sexual contact offenses. In the instant case, the court noted that there was no evidence of skin-to-skin contact between the defendant and the victim,

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

consequently defendant should have been sentenced to sexual contact, and not sexual abuse. The court noted that the facts supported a sentence for abusive sexual contact under §2A3.4. Accordingly, the court reversed and remanded for re-sentencing pursuant to the sexual contact provisions of 18 U.S.C. § 2423(a) and USSG §2A3.4.

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

§2A6.1 Threatening or Harassing Communications

United States v. Cothran, 286 F.3d 173 (3d Cir. 2002). The district court was correct in finding that §2A6.1, the guideline applicable to threatening or harassing communications, was "most analogous" to the defendant's crime of conveying a false threat about explosives on an airplane. The circuit court rejected the defendant's argument that §2K1.5, the guideline applicable to possessing dangerous weapons on an aircraft, should have applied.

Part B Offenses Involving Property

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

United States v. Himler, 355 F.3d 735 (3d Cir. 2004). Defendant pled guilty to passing fraudulent checks, a violation of 18 U.S.C. § 513(a). Defendant fraudulently bought a condominium in Greensburg, Pennsylvania, by tendering false checks in the amount of $195,000. At sentencing, the district court found that defendant intended to cause a loss of between $120,000 and $200,000 pursuant to USSG §2B1.1 (b)(1)(F), and ordered restitution to the victim in the amount of $193,833, the amount paid for the condominium, to be offset by the amount of the future sale of the condominium. On appeal, the defendant argued that the District Court erred in finding that he intended to cause a loss of between $120,000 and $200,000 when he tendered the counterfeit checks and thereby erred in applying a ten-level enhancement under the USSG; and that the district court was not entitled to order the restitution that it did. The Third Circuit upheld the district court's decision and concluded that there was ample evidence for the district court to find that defendant intended a loss between $120,000 and

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

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

$200,000: first, while not dispositive, there was the face value of the checks themselves, equaling $195,000. Second, there was defendant's continued silence and even affirmative acts to perpetuate the fraud in the face of mounting questions about the authenticity of those checks.

§2B3.1 Robbery

See United States v. Orr, 312 F.3d 141 (3d Cir. 2002), §1B1.1, p. 1.

United Stated v. Thomas, 327 F.3d 253 (3d Cir.), *cert. denied*, 124 S. Ct. 451 (2003). The district court correctly applied a two-level enhancement for making a "threat of death" in connection with a robbery. Defendant pleaded guilty to two counts of bank robbery. It was uncontested that during the course of one of the robberies, defendant handed a bank teller a note reading: "Do exactly what this says, fill the bag with $100s, $50s and $20s, a dye pack will bring me back for your ass, do it quick now. Truely yours." At the sentencing, the district court applied a two-level enhancement pursuant to §2B3.1(b)(2)(F), which applies "if a threat of death was made" in connection with the robbery. Before 1997, the guideline at issue required an "express threat of death." In 1997, the Sentencing Commission modified the guideline by omitting the word "express." The Third Circuit noted that the amendment broadened the guideline rather than narrowed it. *See United States v. Day*, 272 F.3d 216 (3d Cir. 2001). Consequently, the fact that defendant's note did not expressly mention death did not alone imply that he was not subject to the enhancement. The court noted that in determining whether a threat was a "threat of death,' the focus was on the reasonable response of the victim to the threat. The court held that in the instant case the district court did not err in finding that defendant's statement, "a dye pack will bring me back for your ass," amounted to a threat of death.

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

United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 519 U.S. 823 (1996). Upon the Government's appeal, the appellate court remanded the case for the district court to resentence the defendant using guideline §2B3.2 instead of USSG §2C1.1. The appellate court agreed that the district court erred in applying USSG §2C1.1 to determine the base offense level of the extortion counts. The district court applied USSG §2C1.1 to these offenses over the government's objection that USSG §2B3.2 should ordinarily be applied to a threat to cause labor problems. In agreeing with the government's position, the appellate court noted that section 2B3.2's commentary states that the guideline applies to situations in which the "threat . . . to injure a person or physically damage property, or any comparably serious threat" may be inferred from the circumstances or the reputation of the person making the threat. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. Based upon these distinctions, the appellate court found that it was error for the district court to apply USSG §2C1.1. In remanding for resentencing, the appellate court instructed the district court to "make the necessary factual findings to determine" the type of harm involved in this case. Application of USSG §2B3.2 requires either a physical threat or an economic threat so severe as to threaten the existence of

the victim. If the district court finds that the threat in this case did not rise to the level required under USSG §2B3.2, application of §2B3.3 is appropriate.

United States v. Mussayek, 338 F.3d 245 (3d Cir.), *cert. denied*, 124 S. Ct. 943 (2003). Defendant was found guilty of conspiracy to commit extortion and interstate travel in aid of racketeering. On appeal, defendant raised an issue of first impression, namely whether, in order for the base offense level for conspiracy to commit extortion to be enhanced because it "involved an express or implied threat of death, bodily injury, or kidnapping," §2B3.2(b)(1), the threat must have been communicated to the victim. More specifically, defendant argued that the purpose of the guideline was to punish more severely those who placed their victims in fear of, for instance, death or serious bodily injury, and accordingly urged that an enhancement for the content of a threat made little sense if the threat was not communicated. The Third Circuit affirmed the district court's application of the enhancement. Having reviewed the various application notes of §2B3.2, the court noted that whether the particular intended victims were aware of the threat was immaterial to the determination of whether a particular threat may be the basis for enhancing a sentence under the guideline. The court found no reason to limit the meaning of the term "threat" as used in §2B3.2(b)(1) to contemplate only statements communicated to their intended victims. In the instant case, defendant's offense clearly involved an express or implied threat of death, bodily injury, or kidnapping, §2B3.2(b)(1), and accordingly the district court did not err in applying the threat enhancement.

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

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred in interpreting the meaning of "improper benefit conferred" in USSG §2B4.1(b)(1), which refers to the "net value accruing to the entity on whose behalf the individual paid the bribe," rather than the value received by the defendant. The defendant was convicted of 25 counts of mail fraud for kickbacks he paid to meat managers to induce them to buy their meat from the company where defendant was a meat salesman. The defendant paid $111,548.21 in kickbacks, and received $500 cash per week from his employer. The district court used the dollar amount of the kickbacks instead of the net value the company gained as a result of the kickbacks. Under USSG §2B4.1, comment. (n.2), the "improper benefit" is "the value of the action to be taken or effected in return for the bribe." The government presented evidence that the defendant's kickbacks induced a grocery store to buy $10,000,000 worth of meat, which gave the meat company a profit of $700,000. If the government proves by a preponderance of evidence that $700,000 was the resulting profit, that figure should be used to as the "improper benefit" to determine the defendant's offense level under USSG §2B4.1(b)(1).

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

United States v. Gregory, 345 F.3d 225 (3d Cir. 2003). Defendant pled guilty to passing or attempting to pass counterfeit currency in violation of 18 U.S.C. § 472. Defendant passed counterfeit currency at a casino in Atlantic City and, while questioned by the state trooper, admitted to having a gun in the pocket of his jacket for his protection. During the sentencing hearing, the district court applied the two-level enhancement under §2B5.1(b)(4) for possessing a dangerous weapon in

connection with the offense. On appeal, defendant argued that the enhancement was incorrectly applied because the district court believed that *United States v.*

Loney, 219 F.3d 281 (3d Cir. 2000), mandated the §2B5.1 increase whenever a defendant possessed a gun during an "in-person transaction." The Third Circuit agreed and remanded the case for clarification as to whether sentencing court applied enhancement for possession of gun in connection with counterfeiting due to circumstances of case or due to erroneous conclusion that enhancement automatically attached to possession.

Part C Offenses Involving Public Officials

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

See United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 519 U.S. 823 (1996), §2B3.2, p. 6.

§2C1.8 Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property[4]

Part D Offenses Involving Drugs

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

United States v. Alton, 60 F.3d 1065 (3d Cir.), *cert. denied*, 516 U.S. 1015 (1995). The district court erred in departing downwards from the applicable guideline sentencing range on the basis that the Sentencing Commission did not adequately consider as a mitigating factor the disparate impact that its policies would have on African-American males when it developed the guideline ranges for crack cocaine convictions. The defendant was convicted for conspiracy to possess and distribute cocaine and cocaine base and possession with intent to distribute in excess of five grams of cocaine base and sentenced to a ten-year term of imprisonment followed by a five-year term of supervised release, a downward departure from the guideline range of 168 to 210 months. On appeal, the government challenged the downward departure as arbitrary and capricious. The circuit court ruled

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

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

that the Commission's reliance on the federal drug statutes, 21 U.S.C. §§ 841(b)(1) and 846 as the primary basis for the guideline sentences meets the test set forth by the Supreme Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), wherein the Supreme Court held that an agency adopting a rule pursuant to the informal rulemaking procedures "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*. at 43. The circuit court noted that it had explicitly rejected an equal protection challenge to the relevant statutory and guideline procedures. *See United States v. Frazier*, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993). The circuit court also recognized, in response to the government's challenge to the district court's downward departure under USSG §5K2.0, that every circuit court considering the matter has held that the impact of the guideline treatment of crack cocaine is not a proper ground for downward departure. The circuit court held that the defendant failed to establish facts or circumstances peculiar to himself or his offense that would justify a downward departure. The disparate impact of the severe penalties for crack cocaine offenses for African Americans is not a valid ground for departure from the guideline ranges for crack cocaine offenses.

United States v. Drozdowski, 313 F.3d 819 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1766 (2003). The Third Circuit affirmed the district court's finding that the enhancement in §2D1.1(b)(1) for possession of a dangerous weapon applied to the defendant. On appeal, the defendant argued that the enhancement was inappropriate because the guns in question had been found unloaded and inaccessible, buried beneath boxes in his father's house. The court, relying on Application Note 3 to §2D1.1, found that it was not "clearly improbable" that the weapons were connected to the defendant's drug offense. In so finding, the court noted that the guns would have been accessible to one who knew where they were, had been located near a desk in which other evidence–including money and records–of the drug conspiracy had been found, and were in a house with other drug paraphernalia. The court noted that the conspiracy had continued for several years and that given this context, it was not "clearly improbable" that at some point during those years the guns found near drug money and records had been used in connection with the drug activity.

United States v. Goggins, 99 F.3d 116 (3d Cir. 1996), *cert. denied*, 520 U.S. 1161 (1997). The district court did not err when it imposed a two-level enhancement under USSG §2D1.1(b)(1) for possession of a firearm, even though the defendant's 18 U.S.C. § 924(c) conviction for use of a firearm was vacated in light of *Bailey v. United States*, 516 U.S. 137 (1995). The defendant had been convicted of possession with intent to distribute cocaine base (21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)), and of using and carrying a firearm during a drug offense (18 U.S.C. § 924(c)). The district court vacated the defendant's section 924(c) conviction, but imposed the two-level increase under §2D1.1, concluding that the weapon clearly was present in the bedroom when the police arrested the defendant. The defendant argued that his acquittal on the 18 U.S.C. § 924(c) count should bar the USSG §2D1.1 enhancement. The Third Circuit, joining with the First, Fourth, Sixth, Seventh, and Tenth Circuits, held that "a weapons enhancement under §2D1.1(b)(1) is permissible after an acquittal under section 924(c)(1)." *See United States v. Ovalle-Marquez*, 36 F.3d 212 (1st Cir. 1994), *cert. denied*, 514 U.S. 1007 (1995); *United States v. Romulus*, 949 F.2d 713 (4th Cir. 1991), *cert. denied*, 503 U.S.

992 (1992); *United States v. Barnes*, 49 F.3d 1144 (6th Cir. 1995); *United States v. Pollard*, 72 F.3d 66 (7th Cir. 1995); *United States v. Coleman*, 947 F.2d 1424 (10th Cir. 1991), *cert. denied*, 503 U.S. 972 (1992). The Third Circuit followed the reasoning of *Pollard*, 72 F.3d at 68, which stated that guideline section 2D1.1(b)(1) is broader than 18 U.S.C. § 924(c)(1) and encompasses conduct not within section 924(c)(1). Furthermore, the court noted that the standard of proof for the guideline enhancement is less than the burden for a conviction under the statute. The circuit court concluded that the weapon was present in the bedroom when the police arrested the defendant, and it was not improbable that the weapon was connected with the offense, and thus the guideline enhancement was properly applied. *See* USSG §2D1.1, comment. (n.3).

United States v. Waters, 313 F.3d 151 (3d Cir. 2002). The Third Circuit upheld the district court's finding that for purposes of the sentencing guidelines, the defendant was responsible for the distribution of 165 grams of crack. The defendant contended on appeal that of this amount, 27.2 grams should not have been counted as crack because the substance did not contain sodium bicarbonate, the common cutting agent for crack, but instead contained niacinamide (commonly known as Vitamin B). The court noted that Note (D) to §2D1.1(c) (the drug quantity table) states that crack is "usually prepared" with sodium bicarbonate. This note does not mean that for a substance to be considered crack it must be prepared with sodium bicarbonate. Accordingly, "it is not necessary for the government to show that a substance contains sodium bicarbonate in order to demonstrate by a preponderance of the evidence that the drugs in question are crack cocaine."

See Watterson v. United States, 219 F.3d 232 (3d Cir. 2000), §1B1.3, p. 2.

United States v. Yeung, 241 F.3d 321 (3d Cir. 2001). The district court erred in finding the proper amount of drugs attributable to the defendant was the larger amount that his co-conspirator had negotiated to sell instead of the one ounce of heroin that was actually delivered. The defendant met with an informant who had been instructed by a DEA agent to see if he could buy an ounce of heroin, but the defendant refused to sell only an ounce. After many discussions in which other amounts were discussed, the defendant agreed to sell a single ounce. The district court found the other discussions amounted to an agreement for a larger sale and sentenced the defendant based on that larger amount. The Third Circuit found that an amendment to §2D1.1 at Application Note 12 specified the actual weight delivered rather than the weight under negotiation should be the amount used for calculating a sentence and for sentencing purposes; if a defendant is to be sentenced for a larger quantity than actually delivered, the quantity must have been agreed upon prior to delivery.

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

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

United States v. Galo, 239 F.3d 572 (3d Cir. 2001). The district court erred in enhancing the defendant's sentence based upon his prior state court convictions. The defendant pled guilty to production of material depicting the sexual exploitation of children and possession of material depicting the sexual exploitation of a minor. The district court had applied the mandatory minimum sentence found in 18 U.S.C. § 2251(d), finding that the defendant's prior state court convictions were "relating to the sexual exploitation of children" and therefore sentenced him to 15 years' imprisonment. The defendant previously had pled guilty in state court to corruption of minors, endangering the welfare of children, and indecent assault. The Third Circuit found that because the state crimes of which the defendant previously had been convicted did not specifically refer to the sexual exploitation of children, the district court could not impose an enhancement based on conduct that resulted in a conviction for those crimes. It is the elements of a given state statute, not the conduct that violates it, that determine if a statute relates to the sexual exploitation of children. In this case, the statutory elements in the state statute were aimed at conduct of *any* nature that tends to corrupt children, not just sexual conduct.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[6]

United States v. Crandon, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999). The district court erred in applying the cross-reference in USSG §2G2.2(c)(1) without considering whether the defendant's purpose for taking a sexually explicit photograph was to create porno-graphic pictures. The government had argued that the defendant's intent in taking the photographs was irrelevant, even though such a view results in a form of strict liability. The defendant argued that his purpose in taking the pictures was "the memorialization of his love for the girl, which had progressed to sexual intimacy, rather than the photographing of sexually explicit conduct." The record showed that the defendant took approximately 48 pictures of the girl–two of which were sexual in nature. A court must consider the defendant's state of mind in determining whether to apply the cross-reference in USSG §2G2.2(c)(1) "to ensure that the defendant acted 'for the purpose of producing a visual depiction of [sexually explicit] conduct.'"

United States v. Harrison, 357 F.3d 314 (3d Cir. 2004). The appellate court affirmed the district court's application of §2G2.2(b)(5). The issue on appeal was whether the sentencing enhancement under §2G2.2(b)(5), for when "a computer was used for the transmission of the material or a notice or advertisement of material," was properly applied. The Third Circuit noted that the §2G2.2(b)(5) enhancement applied whether the defendant used a computer to transmit "the material" to someone else, or someone else used a computer to transmit "the material" to the defendant. In other words, the language of §2G2.2(b)(5) covered both the sending and the receiving of pornographic

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

material, so that if the defendant received child pornography by means of a computer, the enhancement was applicable. The court noted that all circuits which have addressed this issue found that §2G2.2(b)(5) applied to receiving as well as sending. *See United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001); *United States v. Dotson*, 324 F.3d 256 (4th Cir. 2003); *United States v. Stulock*, 308 F.3d 922 (8th Cir. 2002); and *United States v. Boyd*, 312 F.3d 213 (6th Cir. 2002). In the instant case, defendant admitted that he downloaded pornographic images onto his computer, copied them onto disks, and later mailed them to the undercover agent. Based on these facts, it was clear that "a computer was used for the transmission of the material" and the district court properly applied §2G2.2(b)(5).

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[7]

United States v. Parmelee, 319 F.3d 583 (3d Cir. 2003). The district court erred by not applying the cross-reference to the child pornography trafficking guideline, §2G2.2. Defendant was charged with four counts of possession of child pornography using media that traveled in interstate commerce. The district court stated that it could find, by a preponderance of the evidence, that the requisites for the §2G2.4(c)(2) cross-reference had been established. However, the court concluded that, based on *Apprendi*, those factual findings had to be made by a jury, based on proof beyond a reasonable doubt. The government appealed the sentence imposed by the district court. The issue on appeal was whether a sentencing court could apply the trafficking cross-reference of §2G2.4(c)(2) to enhance a defendant's sentence for possession of child pornography, when the court found by a preponderance of the evidence that the requisites for the trafficking cross-reference had been established, even though the defendant was convicted only for possession of materials depicting a minor engaged in sexually explicit conduct. The Third Circuit noted that the district court did not have the benefit of its precedent opinions addressing the effect of *Apprendi* on sentencing proceedings. The Third Circuit noted that it held the position that the limitations of *Apprendi* did not apply unless the sentence imposed exceeded the statutorily prescribed maximum. Because *Apprendi* did not prohibit application of the §2G2.4(c)(2) cross-reference in the instant case, the district court erred by declining to apply it. Accordingly, the district court's sentence was reversed and the case was remanded for resentencing.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in enhancing the defendant's sentence for his substantial interference with the administration of justice. The defendant, a state legislator, was convicted of perjury before a grand jury, and he appealed his sentence, claiming the district court had no basis for a three-level enhancement under USSG §2J1.3 (now redesignated as USSG §2J1.2(b)(2)). The district court found that the defendant's perjured testimony

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

caused an unnecessary expenditure of substantial governmental resources (*see* §2J1.2, comment. (n.1)), including the interviewing and grand jury testimony of witnesses. The Third Circuit agreed the enhancement was warranted, and the district court's reasoning was sufficient to hold there was substantial governmental expense due to the defendant's perjury.

§2J1.7 Commission of Offense While on Release

United States v. Hecht, 212 F.3d 847 (3d Cir.), *cert. denied*, 530 U.S. 1249 (2000). The district court did not err in enhancing the defendant's sentence for committing a crime while he was on pretrial release. In 1994, the defendant pled guilty to criminal conspiracy to commit wire fraud and mail fraud and began serving his sentence. The defendant ran a second unrelated fraudulent scheme from 1993 to 1995, and in 1998 he pled guilty to criminal conspiracy to commit wire fraud and mail fraud for his involvement in that scheme. At his sentencing in the second case, the district court applied the three-level enhancement in USSG §2J1.7 because the defendant had committed this offense while on pretrial release for the first scheme. The defendant contended the enhancement could not be applied because he was not given notice at the beginning of his pretrial release in the first case that the commission of a new offense during his release would subject him to an enhanced sentence in the second case. The Third Circuit found that USSG §2J1.7, comment. (backg'd), which states that an enhancement "may be imposed only after sufficient notice to the defendant by the government or the court," simply mandates presentencing notice in the second case, not a prerelease notice in the first case.

Part K Offenses Involving Public Safety

§2K1.5 Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

See United States v. Cothran, 286 F.3d 173 (3d Cir. 2002), §2A6.1, p. 5.

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

United States v. Cicirello, 301 F.3d 135 (3d Cir. 2002). The district court's upward departure based on Application Note 16 to §2K2.1 was reversed. The application note states that an upward departure may be warranted, *inter alia*, for an offense that "posed a substantial risk of death or bodily injury to multiple individuals." The district court had found that such a risk was inherent in the defendant's sale of 22 stolen firearms, which the court characterized as the sale of "a score of lethal concealable firearms on the streets." In reversing, the Third Circuit found that the number of firearms was specifically considered in the guideline, as was the fact that such weapons are generally concealable, and that the offense was within the heartland of §2K2.1 cases.

United States v. Fenton, 309 F.3d 825 (3d Cir. 2002). The district court erred in applying the enhancement in §2K2.1(b)(5) for having used or possessed a firearm in connection with "another felony offense." The defendant was convicted of a felon-in-possession charge based on his burglary of a sporting goods store in which he stole and thereby possessed firearms. The district court applied the §2K2.1(b)(5) enhancement after finding that the firearms had been possessed in connection with "another felony offense," the burglary. In vacating and remanding this case for resentencing, the Third Circuit held that a state law felony crime "identical and

coterminous with the federal crime" cannot be considered "another federal offense" within the meaning of the guideline. In other words, "another felony offense" means "a felony or act other than the one the sentencing court used to calculate the base offense level." Circuits are divided on the appropriateness of this enhancement in this context.

United States v. Lloyd, 361 F.3d 197 (3d Cir. 2004). Defendant pled guilty to two counts: possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d), and conspiracy to violate that provision, in violation of 18 U.S.C. § 371. Defendant was alleged to be part of a drug ring headed by Armando Spataro. Spataro was involved in a dispute with a man named Thomas Learn (victim), whom he accused of "hitting on" a woman whom Spataro had been dating. Several days later, Spataro and defendant, along with other members of the drug ring decided that a bomb should be built and placed under the fuel tank of Learn's truck. Contrary to the wishes of Spataro and friends, the scheme did not succeed because his dog alerted him to the presence of the undetonated device under the vehicle. Learn contacted the authorities, who, after disassembling and examining the bomb, concluded that the bomb was "capable of exploding" and would have exploded had it not been for the "malfunction of the cigarette." At sentencing, the district court applied the enhancement at §2K2.1(b)(5) for use or possession of a firearm in the commission of another felony offense. On appeal, defendant argued that the allegedly felonious conduct on which the proposed adjustment was based was essentially the same conduct that formed the basis for the underlying counts to which he had pled guilty. This, he argued, was contrary to the Third Circuit's decision in *United States v. Fenton*, 309 F.3d 825 (3d Cir.2002), which held that §2K2.1(b)(5) requires "another felony offense," separate and apart from the base offense. Consistent with *Fenton*, the court affirmed the district court's decision to apply §2K2.1(b)(5) in determining defendant's sentence.

United States v. Loney, 219 F.3d 281 (3d Cir. 2000). The district court did not err in applying a four-level enhancement under USSG §2K2.1 to the defendant's sentence when the defendant had admitted he possessed heroin for purposes of sale, and possessed or used a pistol "in connection with" that felony drug offense. The defendant was convicted of felony drug trafficking, and the district court applied the enhancement based on the defendant's possession of a semi-automatic pistol at the time of his arrest. He maintained he had the gun for personal protection and the government had no evidence tying the gun to his drug trafficking. The Third Circuit held that the phrase "in connection with" should be interpreted expansively. Agreeing with its sister circuits, the Third Circuit stated that USSG §2K2.1 required some relationship between the gun and the felony. It further held that when a defendant has a loaded gun on his person while caught in the middle of a crime that involves drug transactions, a district judge can reasonably infer there is a relationship between the gun and the offense. *See United States v. Thompson*, 32 F.3d 1 (1st Cir.1994); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir.1996); *United States v. Spurgeon*, 117 F.3d 641, 643-44 (2d Cir. 1997); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996), *cert. denied*, 520 U.S. 1149 (1997); *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994). *But see United States v. Young*, 115 F.3d 834 (11th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998).

United States v. Miller, 224 F.3d 247 (3d Cir. 2000), *cert. denied*, 531 U.S. 1173 (2001). The Third Circuit upheld the district court's denial of a "lawful sporting purpose" downward adjustment. The defendant pled guilty to selling firearms without a license. The district court rejected the defendant's argument that he possessed the guns for a lawful sporting purpose, finding that when he had sold the firearms, he engaged in "unlawful use" and was therefore barred from receiving the sporting purposes reduction. While not reaching the question of "unlawful use," the Third Circuit agreed a downward departure adjustment was not appropriate because when the defendant sold the firearms, he did not possess them "solely for a lawful sporting purpose or collection." Agreeing with other circuits, the Court held by authorizing the courts to inquire into the "actual use" to which the defendant put the firearms, the Commission showed its intent to extend the relevant inquiry to the conduct giving rise to the conviction. *See United States v. Gresso*, 24 F.3d 879, 881 (7th Cir. 1994).

United States v. Luster, 305 F.3d 199 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1773 (2003). The district court correctly applied the enhancement in §2K2.1(a)(2) based on a finding that the defendant had committed the offense after sustaining two prior felony convictions for either a crime of violence or a controlled substance offense. On appeal, the defendant contended that his prior state conviction for escape was not a crime of violence and that the enhancement was therefore inappropriate. The Third Circuit disagreed, finding that escape is a "continuing crime" that can result in violence at any time until the absconder is caught and in custody.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States[8]

Part Q Offenses Involving the Environment

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

United States v. Chau, 293 F.3d 96 (3d Cir. 2002). The district court erred in applying a four-level enhancement in §2Q1.2(b)(4) to a defendant convicted of knowingly violating the Clean Air Act. The specific offense characteristic in §2Q1.2(b)(4) provides for a four-level increase if the "offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Although the defendant's activities may have been in violation of a city permit requirement, the Third Circuit found that under the enforcement procedures of the Clean Air Act there are no penalties for violating a permit. Thus "[b]ecause the Clean Air Act does not contemplate a permit violation as a basis of enforcement, the §2B1.2(b)(4) enhancement is not available."

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

§2Q1.4 Tampering or Attempted Tampering with a Public Water System[9]

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments[10]

United States v. Bockius, 228 F.3d 305 (3d Cir. 2000). The district court erred in declining to apply the money laundering guideline on the ground that the defendant's misconduct was not connected with extensive drug trafficking or another serious crime, and further failed to consider whether the guideline should be applied on an alternative basis. The defendant, a former president of an insurance brokerage firm, pled guilty to wire fraud, foreign transportation of stolen funds, money laundering, and forfeiture, after stealing $600,000 from the firm, wiring it to various places, and fleeing to the Cayman Islands. The district court sentenced him under the fraud guideline, not the money laundering guideline, because it believed the heartland of cases under USSG §2S1.1 includes only money laundering associated with extensive drug trafficking and serious crimes. The government appealed. Agreeing with other circuit courts, the Court found the district court's conclusion was incorrect, and held USSG §2S1.1 is also intended to apply in typical money laundering cases in which the defendant knowingly conducted a financial transaction to conceal tainted funds or funnel them into additional criminal conduct. *See United States v. Hemmingson*, 157 F.3d 347, 363 (5th Cir. 1998); *United States v. Prince*, 214 F.3d 740, 768 (6th Cir.), *cert. denied*, 531 U.S. 974 (2000); *United States v. Ross*, 210 F.3d 916, 928 (8th Cir.), *cert. denied*, 531 U.S. 969 (2000).

§2S1.2 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying the money laundering guideline rather than the fraud guideline to the defendant's sentence. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in proceeds of specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. He engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders to show an inaccurate default rate because a high default rate would cause the federal funding to discontinue. Citing the guideline introduction to the appendix, he argued his case was an atypical one "in which the guideline section indicated for the statute of conviction is inappropriate," and that his conduct as a whole was little more than routine fraud to which money laundering was incidental. However, the Third Circuit found it clear that the defendant used the proceeds of his mail fraud to promote further acts of fraud, and therefore concluded the district court did not err in sentencing him under the money laundering guideline.

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

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

Part X Other Offenses

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

United States v. Geevers, 226 F.3d 186 (3d Cir. 2000). The district court did not err in refusing to apply a three-level reduction in the guideline calculation for a defendant who had not completed his attempt to withdraw money in a bank fraud scheme, even though the amount of loss used in calculating his guideline level was based on intended loss. The defendant maintained that because he did not complete the acts necessary to effect the intended loss, he was entitled to the reduction under the attempt guideline. The Court found no error in the district court's consideration that the defendant was only prevented from drawing on his worthless check because the bank closed his account after another bank notified it the check was not backed by sufficient funds. Therefore, the defendant was prevented from even attempting to draw on his worthless check, and it was not error for the court to consider that he would have completed his intended fraud but for the intervention of a third party.

United States v. Torres, 209 F.3d 308 (3d Cir.), *cert. denied*, 531 U.S. 864 (2000). The district court did not err when it found the defendant did not qualify for a three-level reduction for an incomplete attempt. The defendant opened a money market account in a false company name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third party check. He attempted to withdraw $24,900 but was unsuccessful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The defendant argued that because his actions to defraud the bank were thwarted by the bank, he was eligible for a three-level reduction for an attempted offense. The Third Circuit noted that he pled guilty to the substantive, completed offense and not to a mere attempt. Further, the Court found with respect to the $24,900 attempted withdrawal that the defendant had "completed all the acts [he] believed necessary," and with respect to the balance of the fraudulently deposited funds, he was "about to complete all such acts" and was unsuccessful only because the bank was fortunate enough to be suspect. Therefore, the district court did not err in rejecting his request for a reduction.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997). The district court properly applied the vulnerable victim enhancement to the defendant's sentence pursuant to USSG §3A1.1(b). The appellate court found that the enhancement was appropriate regardless of the fact that the victim was only a passenger in a carjacked vehicle and the crime was not committed with a view to her vulnerability. The defendant, relying on the Sixth Circuit minority position, argued that in order to apply the enhancement properly, the victim must be the actual victim of the offense of the conviction. The appellate court, relying on the majority of circuits, rejected this reasoning and held that the courts should not interpret

USSG §3A1.1(b) narrowly but should look to the defendant's underlying conduct to determine whether the enhancement may be applicable.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying an upward adjustment for the defendant's leadership role in the offense. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in property derived from specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. He engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders to show an inaccurate default rate because a high default rate would cause the federal funding to discontinue. The defendant disputed that he was a leader in the fraud and claimed that even if he was a leader in the fraud, he was not a leader in the subsequent money laundering activities. However, the district court found, and the Third Circuit agreed, the defendant specifically admitted he exercised a managerial function with respect to the secretarial staff, and the record showed he instructed two staff members to submit fraudulent deferment and forbearance forms and to mail checks on behalf of student borrowers nearing default. The court found his leadership with respect to the fraudulent acts of his employees was relevant conduct as to the money laundering count, and the adjustment was therefore proper.

United States v. DeGovanni, 104 F.3d 43 (3d Cir. 1997). The district court erred in enhancing the defendant's sentence as a "supervisor" for purposes of USSG §3B1.1(c) based on his *de jure* position as a squad sergeant in the police department, without any evidence that he actually supervised the illegal activity of the other police involved in the offenses. The defendant pleaded guilty to interference with interstate commerce by robbery and obstruction of justice but asserted that the meaning of "supervisor" as defined by the guidelines was beyond the scope of his activity. He characterized his role as no more than a secondary passive one in the offense. The circuit court agreed and held that, in the context of USSG §3B1.1(c), the two-level enhancement applies only when the "supervisor" is a supervisor in the criminal activity. The defendant was not such a supervisor simply because of his position as a workplace supervisor in the police department hierarchy. The case was remanded for resentencing.

§3B1.2 Mitigating Role

United States v. Haut, 107 F.3d 213 (3d Cir.), *cert. denied*, 521 U.S. 1127 (1997). The district court did not err in finding that the defendants were minimal participants under §3B1.2(a). At the defendants' sentencing for conspiracy to commit malicious destruction of property by means of fire, in violation of 18 U.S.C. § 371, the district court decreased the defendants' offense levels by four levels based on minimal participation in the offense. The government challenged this finding. The commentary to USSG §3B1.2 states that minimal participants are "among the least culpable of those involved in the

conduct of a group." The district court found that the defendants did not have a financial interest in the bar they had burned and did not financially benefit from the arson. The circuit court stated that it was correct to examine the economic gain and physical participation of the defendants, as well as to assess "the demeanor of the defendants and all the relevant information to ascertain [their] culpability in the crime."

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The district court did not err in finding that the defendant qualified for a mitigating role adjustment. The defendant pled guilty to possession with intent to distribute cocaine. The total amount of cocaine attributed to the conspiracy was 50 kilograms, and the defendant admitted being a distributor and that 10 kilograms were attributable to him. The district court did not clearly err in finding that a distributor in a conspiracy to distribute ten kilograms is not entitled to a mitigating role adjustment.

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The district court erred in granting the defendant a three-level downward departure based on his mitigating role in an offense of possession of child pornography, 18 U.S.C. § 2252(a)(4). The defendant pleaded guilty to possession of child pornography and the government recommended a 12-month sentence, the bottom of the 12- to 18-month sentencing range. Although a mitigating role reduction was not available to the defendant under USSG §3B1.2 because the offense of possession is a "single person" act that does not involve concerted action with others, the district court departed down from the guidelines by analogy to that guideline. The district court sentenced the defendant to three years' probation, six months of which would be served in home confinement, and a $5,000 fine, citing the Third Circuit's opinion in *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990). The *Bierley* court had permitted a departure based on an analogy to the mitigating role reductions where the defendant, convicted of receipt of child pornography, would have qualified for such a reduction had the other participants in the offense not been undercover agents. The government argued that the district court improperly departed under the holding in *Bierley* because to qualify for a mitigating role reduction, or an analogous departure, the offense must involve more than one participant. The defendant asserted that his act of possession was a minimal part of a larger distribution ring that was directed and controlled by other persons. He reasoned that had the other people involved in the scheme not been undercover agents, he would have been entitled to a sentence reduction. The circuit court rejected this argument and declined to extend *Bierley* to single actor offenses, agreeing with the government's position. The circuit court further noted that the defendant already received the benefit of a lower offense level because his charge and conviction of simple possession, with a five-year statutory maximum and a guideline level of 13, was significantly less serious than that warranted by his actual conduct. In overturning the departure, the appellate court noted that the commentary to USSG §3B1.2 provides that a reduction for a mitigating role "ordinarily is not warranted" where a defendant is convicted of an offense significantly less serious than that warranted by his actual conduct.

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

United States v. Cianci, 154 F.3d 106 (3d Cir. 1998). The district court did not err in considering uncharged conduct in applying an enhancement for abuse of a position of trust. The defendant was convicted of tax evasion after he used his position as an executive in an electronics firm to devise a scheme involving a shell corporation and falsified documents to embezzle and sell the company's products. He then concealed income from these sales from the IRS. The district court applied the abuse of trust enhancement based on the trust relationship the defendant had with his employer. The court of appeals held that, even though the defendant's employer was not the victim of the tax evasion, the offense of conviction, the defendant's uncharged criminal conduct toward the company was relevant for purposes of the enhancement. No language in the applicable guideline requires that the victim in the trust relationship be the victim of the offense of conviction. *But see, e.g.*, *United States v. Guidry*, 199 F.3d 1150 (10th Cir. 1999).

United States v. Thomas, 315 F.3d 190 (3d Cir. 2002). The district court did not err in applying the §3B1.3 enhancement for abuse of a position of trust to the defendant, who was a home aid to her elderly victim. The defendant held a position of trust vis-á-vis her employer in that she was trusted to open the victim's mail and had authority to pay the victim's bills. These tasks demonstrated that the victim had counted upon the judgment and integrity of the defendant, who defrauded the victim by inducing the victim to sign and vouch for checks that the defendant cashed for her own benefit.

United States v. Urban, 140 F.3d 229 (3d Cir.), *cert. denied*, 525 U.S. 850 (1998). The district court did not err in enhancing the defendant's sentence for use of a special skill. The defendant, who was convicted of possession of an unregistered destructive device (components of a canister grenade) argued that he had received no special training or education. The court of appeals held that it was sufficient that the defendant was self-taught in the construction of the destructive device, using his mechanical background and training and his own research and experimentation.

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

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000), *cert. denied*, 531 U.S. 1098 (2001). The district court did not err in applying a two-level upward adjustment for the defendant's use of a minor in committing the offense. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute crack cocaine. He conceded that an individual involved in the conspiracy was not over 18 years of age throughout the course of the conspiracy. However, he argued the district court erred in raising the applicability of the enhancement *sua sponte*, and that it erred in imposing the adjustment, claiming the record lacked "a factual basis for determining that [the juvenile] became part of the conspiracy while still a minor." The Third Circuit found the district court did not err by raising the issue because the parties had been notified and given an opportunity to brief the issues prior to sentencing. Further, the court held the defendant's contention that the record was not clear contradicted his concession before the district court that "[the juvenile] was not over 18 years of age throughout the course of the conspiracy."

United States v. Thornton, 306 F.3d 1355 (3d Cir. 2002). The district court did not err in applying the §3B1.4 enhancement for using a minor to commit the offense. The defendant, who was convicted of conspiring to distribute crack cocaine, argued that the enhancement should not apply because he had not known that one of his distributors was a minor. The Third Circuit upheld the use of the enhancement, joining two other circuits in holding that §3B1.4 does not include a scienter requirement.

§3B1.5 Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence[11]

Part C Obstruction

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

United States v. Clark, 316 F.3d 210 (3d Cir. 2003). The district court erred in applying the §3C1.1 obstruction of justice enhancement to the defendant because the conduct upon which the enhancement was based was conterminous with the conduct for which he was convicted. The defendant had been convicted of falsely representing himself to be a citizen of the United States by claiming that he had been born in the U.S. Virgin Islands instead of Jamaica. On several different occasions, the defendant made such false representations to representatives of the INS and other federal officials. He then tried to buttress his claim with a bogus birth certificate from the Virgin Islands. At sentencing, the district court applied the §3C1.1 enhancement based on the defendant's use of the birth certificate. The Third Circuit held that this conduct was encompassed within the offense of conviction and that accordingly the enhancement was not proper.

United States v. Imenec, 193 F.3d 206 (3d Cir. 1999). The Third Circuit held that §3C1.1 requires a two-level enhancement for obstruction of justice when a defendant fails to appear at a judicial proceeding, state or federal, relating to the conduct underlying the federal criminal charge. The defendant was arrested after selling crack cocaine to undercover Philadelphia police officers and charged in state court. He was ordered to appear in state court for a preliminary hearing. Before the hearing, the court issued a federal arrest warrant for federal drug offenses based on the same events. Federal authorities intended to arrest the defendant when he attended the preliminary hearing but he never appeared in state court. The following year, a federal grand jury returned an indictment against the defendant. After his arrest a few years later, the defendant pled guilty to conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846, and the court sentenced him to 151 months' imprisonment. In rejecting the defendant's argument that §3C1.1 was inapplicable, the appellate court held that the term "instant offense" in USSG §3C1.1 refers to the criminal conduct underlying the specific offense of

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

conviction and that the term was not limited to the specific offense of conviction itself. The appellate court reasoned that the rationale underlying the obstruction of justice enhancement (*i.e.*, that "'a defendant who commits a crime and then . . . [makes] an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy' the criminal justice process") applies with equal force whether the investigation is being conducted by state or federal authorities. *Id*. at 208 (internal quotations and citations omitted).

United States v. Jenkins, 275 F.3d 283 (3d Cir. 2001). The district court erred in applying the obstruction of justice enhancement in §3C1.1 because the defendant's failure to appear in state court in a case that was related to the federal investigation did not compromise the federal investigation in any way. According to the Third Circuit, the defendant need not be aware of the federal investigation at the time of the obstructive conduct in order for the enhancement to apply. However, "there must be a nexus between the defendant's conduct and the investigation, prosecution, or sentencing of the federal offense," that is, "the federal proceedings must be obstructed or impeded by the defendant's conduct." In this case, that requirement was not met.

United States v. Kim, 27 F.3d 947 (3d Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995). The district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to USSG §3C1.1. The defendant was originally indicted for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841. He argued that his false cooperation related only to the conspiracy count of which he was acquitted; thus the obstruction of justice could not relate to the "instant offense." *See* USSG §3C1.1. Although the circuit court acknowledged that the defendant's false cooperation related to the conspiracy count, that fact alone did not preclude the obstruction of justice from also relating to the possession count. The facts as a whole supported the conclusion that the defendant's conduct affected the "investigation, prosecution, or sentencing" of the possession offense even though the defendant's possession was complete when the government took the drugs.

United States v. Williamson, 154 F.3d 504 (3d Cir. 1998). The district court did not err in concluding that an upward adjustment for obstruction of justice was mandatory once the court had determined that obstruction had occurred. The defendant argued that the failure of §3C1.1 to include words such as "must" or "shall" renders the guideline ambiguous as to whether the adjustment must follow a determination that the defendant has engaged in obstructive conduct. Under the rule of lenity, this ambiguity must be interpreted in a defendant's favor, the defendant argued. The court of appeals rejected this contention, finding that the logical structure of the guideline clearly commands that the increase be applied following a finding that the defendant willfully obstructed the administration of justice. This holding is consistent with that of all other circuits which have considered the question.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts[12]

United States v. Cordo, 324 F.3d 223 (3d Cir.), *cert. denied*, 124 S. Ct. 588 (2003). Defendant was convicted of mail fraud and money laundering. The Third Circuit reversed a decision by the district court where defendant's mail fraud and money laundering convictions should have been grouped under §3D1.2. The Third Circuit noted that the circumstances under which money laundering charges should be grouped with charges for other related conduct was an issue that was frequently confronted by the district courts, but had been only rarely addressed by the Third Circuit. At issue here was subsection (b) to §3D1.2, which provides that counts involve substantially the same harm when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." Defendant urged that the individual investors and funeral homes were the identifiable victims of both his acts of fraud and his acts of money laundering. The court noted that if the charges had been grouped, defendant would not have received a two-level increase in offense level under §3D1.4. His base level would therefore have been lowered to 27 from 29, resulting in a sentencing range of 70-87 months instead of 87-108 months. Accordingly, defendant's sentence of 96 months would have been reduced by at least 9, and up to 16, months. The government asserted that there were different victims involved. Whereas the mail fraud offenses obviously to victimized the investors themselves, the government argued, the money laundering offenses effected only a societal harm. The court found precedent in *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991). *Cusumano* involved a kickback scheme concerning an employee benefit plan, for which the defendant was convicted on a number of counts of conspiracy, embezzlement from an employee benefit plan, receipt of kickbacks relating to an employee benefit plan, laundering the proceeds of unlawful activity, and foreign travel in aid of racketeering. The Third Circuit agreed with the district court's determination that the money laundering was not "ancillary" to the scheme and, therefore, held that grouping was appropriate. The *Cusumano* court indicated that, under §3D1.2(b), money laundering charges should be grouped with the charges that generated the funds unless the money laundering was somehow a separate operation, distinct from the scheme itself. In addition, the court noted that money laundering offenses did not necessarily have society at large as their victim, and that, at least in some circumstances, money laundering had an identifiable victim or victims for sentencing purposes. And, where the money laundering's identifiable victims were identical to the victims of the related offenses, such as the targets of a fraudulent scheme–the employee benefit fund and its beneficiaries in *Cusumano*–subsection (b) called for the counts to be grouped. The Third Circuit thus concluded that it could not agree with the district court that the money laundering in the instant case had no identifiable victim. The court held that in this case the acts of money laundering and mail fraud were all "in furtherance of a single fraudulent scheme" to defraud identifiable victims–unsuspecting investors and funeral homes. The court noted that "the evidence demonstrated that" the mail fraud and money

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

laundering were "part of one overall scheme to obtain money from [the investors] and to convert it to the use of" defendant and his codefendants. *Cusumano*, 943 F.2d at 313.

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). The appellate court reversed and remanded the defendant's sentence for offenses involving the transportation and distribution of child pornography in interstate commerce in violation of 18 U.S.C. §§ 2252(a)(1), (a)(2), and (a)(4)(B). The district court correctly refused to group the defendant's offenses pursuant to USSG §3D1.2(b) because each count involved different victims. The appellate court held that the primary victims that Congress sought to protect in the various sections of the Protection of Children Against Sexual Exploitation Act were the children, and not just society at large. Section 2252, by proscribing the subsequent transportation, distribution, and possession of child pornography, discourages its production by depriving would-be producers of a market. Therefore, since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted in the pornographic materials, and because the defendant's four counts of conviction involved different children, the district court correctly concluded that grouping the defendant's offenses pursuant to USSG §3D1.2(6) was inappropriate. Nevertheless, the appellate court reversed the defendant's sentence because it found that the court's application of the five-level increase under USSG §2G2.2(b)(4) for engaging in "a pattern of activity involving the sexual abuse or exploitation of a minor" was inappropriate. The court explained that "sexual exploitation" is a term of art, and that "a defendant who possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed `involve' such sexual exploitation by the producer." "Section 2G2.2(b)(4) of the guidelines singles out for more severe punishment those defendants who are more dangerous because they have been involved first hand in the exploitation of children."

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). The appellate court held that defendant was not entitled to have his wire fraud and tax evasion offenses grouped for sentencing purposes. The defendant embezzled approximately $12 million from his employer, and pled guilty to one count of wire fraud and one count of tax evasion. The district court refused to group the counts, and used the multi-count rules under USSG §3D1.4 to increase defendant's base offense level two levels, based on the number of units. The defendant argued that the wire fraud and tax evasion counts should be grouped under USSG §3D1.2(c) because the wire fraud embodies conduct that is treated as a specific offense characteristic of the tax evasion count. The appellate court upheld the district court's decision not to group the offenses, relying on its decision in *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 1991). The appellate court noted that if the counts are to be grouped "there would be no accounting in the sentence for the fact that Vitale had evaded taxes, and in effect his conviction on that count would be washed away." *Vitale* at 814. The court added that the two-level enhancement to the tax evasion count (raising it from level 21 to 23) cannot affect the offense level of the higher wire fraud charge (level 25). The court stated: "[b]ecause the two-point adjustment to the tax evasion offense level has no significance to and does not in fact adjust the overall sentence, it does not cause the kind of adjustment referred to in §3D1.2(c)." The court concluded that evading taxes on $12 million is patently "significant additional criminal conduct" which would not be punished if the counts were grouped. The appellate court rejected the defendant's argument that *Astorri* should not be controlling, and that the court should

follow the reasoning in *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992), and the reasoning of the Sentencing Commission. In *Lieberman*, the Third Circuit observed that there might be situations where embezzlement and tax evasion should be grouped. The appellate court in *Vitale*, distinguished *Lieberman*, stating that *Vitale* was charged with wire fraud and tax evasion, not embezzlement. The court also rejected the reasoning of the Fifth Circuit in *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997) (mail fraud and tax evasion counts involving the proceeds of the mail fraud are to be grouped under USSG §3D1.2(c)). Additionally, the appellate court did not give weight to language in the Sentencing Commission's *Most Frequently Asked Questions About the Sentencing Guidelines*, Volume VII, Question No. 45, suggesting that tax evasion and the conduct generating the income should "always" be grouped, regardless of whether the enhancement under USSG §2T1.1(b)(1) was applied. The appellate court stated: "[t]he response fails to address circumstances where an intended penalty is transformed into a sentence reduction." The court added that the disclaimer listed by the Sentencing Commission's Training Staff states that the information is not binding by the courts. Therefore, the district court was correct in refusing to group the wire fraud and tax evasion counts.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[13]

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996), *cert. denied*, 519 U.S. 1155 (1997). In this case of first impression, the Third Circuit joined with the First, Fifth, Seventh, Eighth and Eleventh Circuits in holding that a sentencing judge may consider unlawful conduct committed by the defendant while on pretrial release awaiting sentencing, as well as any violations of the conditions of this pretrial release, in determining whether to grant a reduction in the offense level for acceptance of responsibility under USSG §3E1.1. *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. McDonald*, 22 F.3d 139 (7th Cir. 1994); *United States v. Byrd*, 76 F.3d 194 (8th Cir. 1996); *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) (holding that acceptance of responsibility considers only conduct related to the charged offense). In this particular case, the sentencing court denied the defendant's request for an acceptance of responsibility adjustment after considering several factors, including that the defendant tested positive for drug use on five different occasions during his pretrial release period in violation of the written conditions of his release. The appellate court noted that USSG §3E1.1, comment. (n.1), sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts under USSG §3E1.1, comment. (n.1(g)). The appellate court based its determination upon the notion that the

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

defendant's post-offense conduct, although unrelated to the offense conduct, sheds light on the genuineness of the defendant's claimed remorse. A plea or confession does not necessarily evince a genuine sense of remorse or an intent to pursue lawful activity. Finally, because courts consider a defendant's post-offense rehabilitative efforts in granting an acceptance of responsibility adjustment, it is consistent to consider the absence of such efforts in denying an adjustment.

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred in interpreting USSG §3E1.1 when it awarded the defendant a two-level reduction for acceptance of responsibility, after the defendant was convicted at trial on some charges and then pled guilty to the remaining charges. The government argued that the defendant should not have received the reduction because he went to trial on some of the counts. Under USSG §3E1.1, comment. (n.2), subject to rare exceptions, the adjustment for acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential elements of guilt, is convicted, and only then admits guilt and expresses remorse." The application note does not violate a defendant's right to trial but creates a constitutional incentive for a defendant to plead guilty. The guidelines require the court to group the multiple counts of conviction before determining whether to apply the adjustment for acceptance of responsibility. The determination requires the court to make a "totality" assessment as to whether credit for acceptance of responsibility is appropriate, given the defendant's decision to plead guilty to some of the counts only after being convicted of the other counts.

United States v. Sally, 116 F.3d 76 (3d Cir. 1997). As an issue of first impression for the Third Circuit, the court held that "post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." The circuit court, adopting the Fourth Circuit's decision in *United States v. Brock*, 108 F.3d 31, 32 (4th Cir. 1997), and its analysis of *Koon v. United States*, 518 U.S. 81 (1996),[14] held that the factor of "post-offense rehabilitation" had not been forbidden by the Sentencing Commission as a basis for departure under the "appropriate" circumstances. The case was remanded for the district court to determine whether the defendant's post-conviction rehabilitation efforts were so extraordinary or exceptional to qualify him for a downward departure.

United States v. Williams, 344 F.3d 365 (3d Cir.), *cert. denied*, 124 S. Ct. 1184 (2003). Defendant appealed his conviction for carrying a firearm. The government cross-appealed the decision to grant defendant an offense-level reduction under §3E1.1 as to a separate count for bank robbery. Defendant received the acceptance of responsibility reduction for pleading guilty to the bank robbery charge, in spite of the fact that he contested the section 924(c) charge. The government argued that the district court failed to take into account that defendant denied "relevant conduct" as defined in Application Note 1(a) to §3E1.1, which provides in pertinent part that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The government claimed that the relevant conduct

[14] *See* Note 17, p. 38.

defendant denied was that he carried a loaded gun in the getaway car. The Third Circuit held that the government wrongly treated the quoted language of Application Note 1(a) as establishing a *per se* bar to the grant of a reduction for acceptance of responsibility. The court found that even if defendant "falsely" denied, or frivolously "contested, relevant conduct" as the guidelines required, the guidelines made clear that this is an "appropriate consideration[ ]" for a court to take into account "in determining whether a defendant qualifies" for the reduction, but not the only consideration. *See* USSG §3E1.1, comment.(n.1(a)) (stating that a court is "not limited to" the listed considerations). The court also explained that it could be argued that the gun activity on which defendant proceeded to trial was not "relevant conduct" as that term is defined under the guidelines. The court noted that in *United States v. Cohen*, 171 F.3d 796, 806 (3d Cir. 1999), it discussed a situation similar to that presented here, calling it an "unusual situation" where "the defendant has pleaded guilty to some of the charges against him . . . while going to trial on others." Id. at 806. The court stated that in such a case, "the trial judge 'has the obligation to assess the totality of the situation in determining whether the defendant accepted responsibility.' " Id. at 806. The court therefore concluded that, because defendant pled guilty to the bank robbery charge, the reduction in his sentence for acceptance of responsibility with regard to that count was not improper, and deferred to the district court.

United States v. Zwick, 199 F.3d 672 (3d Cir. 1999). The district court erred in not considering an additional one-level reduction in the offense level for acceptance of responsibility. The defendant pled guilty to bank fraud and mail fraud. After trial, the defendant was convicted of theft or bribery concerning programs receiving federal funds. At sentencing, the district court awarded the defendant a two-level reduction for his acceptance of responsibility, but rejected the additional one-level reduction, stating he was not entitled because the government was required to prepare for trial on one count. The Third Circuit held USSG §3E1.1(b) requires that the defendant timely provide complete information or notice of an intention to plead guilty but did not require, either expressly or impliedly, that the defendant actually forego a trial. The Court further stated if the Commission intended to "limit the award of the point to situations in which a plea was entered, or resources were actually conserved, they could have crafted the language to reflect this intention."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000), *cert. denied*, 531 U.S. 1098 (2001). The district court did not err in holding a prior sentence imposed as a result of an *Alford* plea qualified as a “prior sentence” for purposes of computing the defendant’s criminal history category. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute crack cocaine, and argued there would only be an adjudication of guilt usable in calculating his criminal history if he had acknowledged factual guilt as a result of a guilty plea in his previous conviction, had been found to be factually guilty as a result of a trial, or had acknowledged that the government had sufficient evidence

which, if found credible, would support a finding of guilty. Because there must always exist some factual basis for a conclusion of guilt before a court can accept an *Alford* plea, the Third Circuit concluded that the *Alford* plea was an adjudication of guilt and is no different than any other guilty plea for purposes of USSG §4A1.1.

§4A1.2 Definitions and Instruction for Criminal History

United States v. Elmore, 108 F.3d 23 (3d Cir. 1996), *cert. denied*, 522 U.S. 837 (1997). The district court did not err in calculating the defendant's criminal history by assessing criminal history points for prior offenses involving harassment and assault and assigning two criminal history points on the basis of an outstanding warrant. The defendant first contends that his prior convictions for harassment and assault should be excluded from his criminal history because the conduct underlying these offenses is similar to disorderly conduct, an offense excluded under USSG §4A1.2(c)(1). The court rejected this argument because the statutory definitions of the
offenses at issue are not similar to that of disorderly conduct. With respect to the harassment conviction under Pennsylvania law, the Pennsylvania statute defines harassment as "violent, unruly or offensive behavior directed at an individual" whereas disorderly conduct covers similar types of behavior directed at the public at large. The defendant's conviction for assault involved conviction for a specific statutory offense which the court concluded could not be similar to disorderly conduct. While all criminal activity may justifiably be said to cause public inconvenience, annoyance or alarm, a conviction for a specific crime other than disorderly conduct demonstrates that a defendant has done more than disrupt the peace. The court concluded that comparison of the statutory elements of the two offenses, without an inquiry into the underlying factual similarities, is sufficient to ensure that an offense which is similar to disorderly conduct does not give rise to criminal history points merely because it is designated differently in another jurisdiction. The defendant next argued that he should not have been assigned criminal history points despite the fact that he had a violation warrant outstanding because the Florida law enforcement officials never tried to execute the warrant. The court rejected this argument. The plain language of the guidelines indicates that two points are to be added whenever an outstanding warrant is in existence, regardless of whether it is stale at the time of sentencing.

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

United States v. Fordham, 187 F.3d 344 (3d Cir. 1999), *cert, denied*, 528 U.S. 1175 (2000). The district court had authority to depart upward pursuant to USSG §4A1.3 based on the defendant's foreign conviction. The defendant pled guilty to conspiracy to commit money laundering. The defendant's sentence was based on Criminal History Category I. In 1990, the defendant was arrested by Mexican police while carrying 3.7 kilograms of marijuana, which he had intended to transport to the United States. He was convicted and sentenced in Mexico, but his conviction was not counted for purposes of criminal history points, pursuant to USSG §4A1.2(h). The district court found that Criminal History Category I significantly under-represented the seriousness of his criminal history, and departed to Criminal History Category II. The defendant appealed, arguing that the district court erred when it adjusted upward his criminal history category because not only did it lack reliable

information concerning the foreign conviction, but the information that it possessed pertained solely to a single offense that was not serious in nature. The appellate court held that although the district court acknowledged that it was not certain whether the Mexican authorities adhered to due process in sentencing the defendant, the district court was within its discretion to hold that the conviction was fair. The court noted that the defendant would have occupied the higher category had the foreign conviction been counted in computing his criminal history category before departure. Therefore, the upward departure was not an abuse of discretion.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Dorsey, 174 F.3d 331 (3d Cir.), *cert. denied*, 528 U.S. 885 (1999). The district court properly counted as a "crime of violence" the defendant's Pennsylvania conviction for simple assault. The offense was a prior felony conviction because under Pennsylvania law, even though classified as a misdemeanor, it was punishable by more than one year. Simple assault, as defined in Pennsylvania, is a crime of violence because the offense involves "conduct that presents a serious potential risk of physical injury."

United States v. Johnson, 155 F.3d 682 (3d Cir. 1998). The district court properly concluded that it lacked authority to allow a downward adjustment for the defendant's minor role in the offense when the career offender provision applied. The defendant argued that he was entitled to the role adjustment based on the fact of the case and the government's stipulation. The court of appeals noted that the sequence of the guideline application instructions in §1B1.1 indicates that downward adjustments are allowed only for acceptance of responsibility after career status is imposed. Section 4B1.1 presupposes that the court has previously calculated the "offense level otherwise applicable," which would incorporate any adjustment for role in the offense. It provides that the court should apply that offense level or the one in the table, whichever is greater. The only exception to the offense level in the table is an adjustment for acceptance of responsibility. Other adjustments are effectively overwritten by the magnitude of the career offender upward adjustment.

United States v. Kenney, 310 F.3d 135 (3d Cir. 2002). The Third Circuit upheld the defendant's designation as a career offender under §4B1.1, finding that his conviction for possession of contraband in prison was a "crime of violence" within §4B1.2(a)(2). In reaching this conclusion, the court, citing Application Note 1 to §4B1.2, found that the crime of possessing a weapon in prison "by its nature" presented "a serious potential risk of physical injury" to others in the prison.

United States v. Shabazz, 233 F.3d 730 (3d Cir. 2000). The district court did not err in finding a prior state conviction for employing a minor in the distribution of a controlled substance qualified as a predicate controlled substance offense under the career offender provision. The defendant pled guilty to conspiracy to possess heroin with intent to distribute and possessing counterfeit securities with intent to deceive. The Presentence Report determined the defendant had two prior felony convictions that were classified as either crimes of violence or controlled substance offenses under USSG §4B1.1. One of those convictions was for a state offense of employing a juvenile in a drug distribution scheme. The defendant claimed this state crime was akin to a solicitation offense as defined in the guidelines and should not be used as a predicate offense for application of the career offender provision. The Third Circuit stated that to classify a prior conviction as a predicate controlled substance offense, it must be established that the defendant committed, caused, or facilitated one of the acts specified in USSG §4B1.2(2). Although the record is unclear for which act the defendant was formally charged, and the state statute criminalizes different acts that may or may not be controlled substance

offenses for purposes of USSG §4B1.1, the court stated his actual conduct controls. Because the defendant acknowledged he used a 17-year-old juvenile as a lookout while preparing to sell a large quantity of cocaine, the court found sufficient evidence that he was actually using others, including a juvenile, to facilitate the distribution of the drug.

§4B1.2 Definitions for Career Offender

See United States v. Kenney, 310 F.3d 135 (3d Cir. 2002), §4B1.1.

United States v. Taylor, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997). The district court did not err in designating the defendant as a career offender pursuant to §4B1.1. After a guilty plea, the defendant was sentenced as a career offender based on a previous aggravated assault and two convictions for statutory rape. A 1980 statutory rape conviction was at issue on appeal. With regard to the 1980 conviction, Count One of the indictment charged the defendant with statutory rape, and Count Three, charging the defendant with indecent exposure, alleged that the defendant "forced [the victim] onto her bed and while holding her down . . . ." The district court noted the decisions of several circuit courts of appeals addressing whether sex offense convictions constitute crimes of violence, *see United States v. Bauer*, 990 F.2d 373 (8th Cir. 1993) (holding sexual intercourse with child under 16 constitutes a crime of violence); *United States v. Wood*, 52 F.3d 272 (9th Cir.) (holding indecent liberties with a minor crime of violence), *cert. denied*, 516 U.S. 881 (1995); *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993) (finding sexual abuse a crime of violence under 18 U.S.C. § 16(b)). However, the appellate court did not need to determine whether statutory rape was a crime of violence *per se*, because the counts of conviction specifically alleged conduct creating a "potential risk of physical harm" were sufficient to satisfy the guideline. The defendant asserted that the district court erroneously relied on the indecent exposure count to find a crime of violence in the 1980 offense. First, he alleged the district court inappropriately relied on the indecent exposure count because it was not cited as one of the three prior crimes of violence. Second, he contended that in using the statutory rape conviction as the predicate offense, the court could only look to the charging language for that count, and not to the indecent exposure count. The appellate court found that despite the original reference to statutory rape, the district court was clear in its consideration of the three separate 1980 counts of conviction, in sum, for purposes of assessing criminal history. Finding that the facts alleged in the indecent exposure count clearly demonstrated a potential for serious injury to the victim, the appellate court held that the district court's determination that the defendant was a career offender was correct.

§4B1.4 Armed Career Criminal

United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996). The district court did not err in determining that the defendant's three Pennsylvania burglary convictions qualified as predicate offenses for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The defendant pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g), and was sentenced under section 924(e) for violating section 922(g) having previously been convicted of three "violent felonies" or "serious drug offenses." The defendant asserted that the Pennsylvania burglary statute was broader than

the generic burglary definition in section 924(e) and, therefore, the government had the burden of showing that the trier of fact found all of the elements of generic burglary. For purposes of section 924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining if the elements of generic burglary were found in defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions." Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution." The circuit court found the elements of general burglary to be included in the three state burglary convictions and, therefore, enhancement under section 924(e) was proper.

United States v. Cornish, 103 F.3d 302 (3d Cir.), *cert. denied*, 520 U.S. 1219 (1997). The government appealed the district court's determination that the defendant's prior third degree robbery conviction was not a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). At sentencing, the district court held that the defendant's prior conviction for third degree robbery in Pennsylvania was not a "violent felony" and, therefore, the defendant did not have the third prior violent offense necessary for the application of section 924(e)'s enhanced penalty provisions. The appellate court held that the appropriate method for determining whether a particular offense qualifies as a "violent felony" is the categorical approach, which allows the court to look only to the statutory definition of the prior offense, or when necessary, the indictment or information and the jury instructions. The appellate court noted that in *Taylor v. United States*, 495 U.S. 575, 577 (1990), the Supreme Court considered the application of 18 U.S.C. § 924(e), where the issue was whether second-degree burglary under Missouri law qualified as a "violent felony," and held that the meaning of burglary for purposes of section 924(e)(2)(B)(ii) was not dependent on the state's definition of burglary. Rather, the offense will be deemed to qualify as a violent felony if "its statutory definition substantially corresponds to `generic' burglary, or the charging papers and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." The appellate court noted two prior Third Circuit cases in which the court found robbery offenses to constitute a violent felony: *United States v. Preston*, 910 F.2d 81 (3d Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991) (finding criminal conspiracy to commit robbery a violent felony after finding its elements to incorporate the elements of robbery); and *United States v. Watkins*, 54 F.3d 163 (3d Cir. 1995) (finding Pennsylvania robbery conviction a violent felony as it necessarily involved the use or threat of physical force). The appellate court examined the Pennsylvania Supreme Court's interpretation of the Pennsylvania robbery statute, wherein it held that "[A]ny amount of force applied to a person while committing a theft brings the act within the scope of robbery under [the Pennsylvania statute] . . . so long as [the force] is sufficient to separate the victim from his property . . . ." *Commonwealth v. Brown*, 484 A.2d 738, 741 (Pa. 1984). The offense at issue was a third degree robbery, which requires "physically tak[ing] or remov[ing] property from the person of another by force however slight." 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v). Based on a literal reading of the statute and the noted case law, the Third Circuit held that, regardless of degree, any conviction under the Pennsylvania robbery statute constitutes a "violent felony." The case was remanded for resentencing to apply 18 U.S.C. § 924(e).

United States v. Mack, 229 F.3d 226 (3d Cir. 2000), *cert. denied*, 532 U.S. 1045 (2001). The district court did not err in finding the defendant received adequate notice, for due process purposes, of the government's intent to seek sentencing under the Armed Career Criminal Act, nor did it err in holding the preponderance of the evidence standard governed the applicability of the firearm enhancement at USSG §4B1.4(3)(A). The defendant was convicted of being a felon in possession of a firearm after shooting someone outside a bar. With the application of the armed career criminal enhancement, the defendant received a criminal history of VI, and a total offense level of 34, and was sentenced to 262 months. Without application of the enhancement, his criminal history category would have been IV. After receiving the Presentence Report (PSR) stating he was subject to sentencing under the ACCA, he claimed he did not receive *pretrial* notice that the government intended to seek an enhanced sentence, stating the importance of pretrial knowledge of the government's intent to request its application in deciding whether to plead guilty or go to trial. Agreeing with its sister circuits, the Third Circuit held pretrial notice was not required under the ACCA, and further found that the defendant received adequate notice for due process concerns. He received actual notice prior to trial by verbal communications with the government, he received notice from the PSR, and he received formal notice ten days before trial. *See United States v. O'Neal*, 180 F.3d 115, 125 (4th Cir.), *cert. denied*, 528 U.S. 980 (1999); *United States v. Mauldin*, 109 F.3d 1159, 1163 (6th Cir. 1997); *United States v. Hardy*, 52 F.3d 147, 150 (7th Cir.), *cert. denied*, 516 U.S. 877 (1995); *United States v. Bates*, 77 F.3d 1101, 1105 (8th Cir.), *cert. denied*, 519 U.S. 884 (1996); *United States v. Gibson*, 64 F.3d 617, 625 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996). The defendant further argued that before he could properly be subjected to an increased offense level and a higher criminal history category under USSG §§4B1.4(b)(3)(A) and 4B1.4(c)(2), the district court was required to find by clear and convincing evidence that he used or possessed the firearm in connection with a crime of violence. However, the court found that the sentence increase in this case was not comparable to the extreme upward departures in other cases that required the use of the clear and convincing standard. *See United States v. Paster*, 173 F.3d 206, 216 (3d Cir. 1999) (applying the clear and convincing standard when reviewing a nine-level upward departure that increased the guideline range from 108 to 135 months to 292 to 365 months).

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in recommending to the Bureau of Prisons that the imprisonment portion of the defendant's sentence be served in a residential program. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed a portion of the sentence in which the court stated it "recommends that the Bureau of Prisons designate . . . [a] Residential Program . . . as the place for service of this sentence." The Third Circuit stated that had the court imposed community confinement, it would have violated the guidelines. However, because it only recommended community confinement, it was not a final order imposed by the court, and therefore the court had no jurisdiction to review the district court's recommendation.

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

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The Third Circuit rejected the defendant's claim that he would have been entitled to relief under the safety valve. The defendant faced a mandatory minimum sentence of 120 months under 21 U.S.C. § 841(a)(1). The district court determined the applicable guideline range to be 108-135 months. Because the record indicated that the court determined the sentence without regard to the statutory minium, the defendant would have received no benefit from application of the safety valve.

United States v. Warren, 338 F.3d 258 (3d Cir. 2003). The issue for decision was one of first impression in the court: whether a defendant may rely on the Fifth Amendment in refusing to disclose all information and evidence concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan as required in §5C1.2(a)(5). The Third Circuit stated that contrary to defendant's concern that he was compelled to provide incriminating information to earn a reduction in his or her sentence, the choice confronting the defendant gave rise to no more compulsion than that present in a typical plea bargain. The court concluded that the Safety Valve provision furthered a legitimate government goal and did not impose an unconstitutional condition on defendants seeking its advantages. In this case the defendant voluntarily and intelligently accepted a plea bargain. In order to qualify for the sentencing benefits of the safety valve, §5C1.2, he was required to disclose the names of the individuals involved in the same course of his criminal conduct. Because he failed to do so, the district court's decision to deny application of §5C1.2 was proper. The safety valve is not a right; it is a privilege. The Fifth Amendment is not implicated by a defendant's choice between seeking its benefits or embracing silence.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

See United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997), 18 U.S.C. § 3583, p. 45.

See United States v. Evans, 155 F.3d 245 (3d Cir. 1998), 18 U.S.C. § 3583, p. 49.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution, Fines, Assessments, Forfeitures

United States v. Copple, 74 F.3d 479 (3d Cir. 1996). The district court erred in assessing a restitution order in the amount of $4,257,940 without making a finding with respect to the defendant's ability to pay. Before ordering restitution, a court must consider the following factors: 1) the amount of loss, 2) the defendant's ability to pay and the financial need of the defendant and the defendant's dependents, and 3) the relationship between the restitution imposed and the loss caused by the defendant's conduct. *United States v. Logar*, 975 F.2d 958, 961 (3d Cir. 1992). The circuit court rejected the

district court's conclusion that the defendant could pay because he was a college graduate who had been financially successful in the past. Such a finding does not reflect that the availability of financial resources with which to pay restitution depends not only on one's earning potential, but also on one's financial obligations. The district court also failed to make specific findings about the defendant's financial needs despite observing that "the family is in dire straits at this time," a statement which the appellate court did not find to be supportive of the large restitution amount ordered. The sentencing judge needed to explain how the defendant could meet his restitution obligations given his family obligations. Further, the circuit court noted that if the restitution order was an attempt to capture holdings which the defendant had not volunteered, such findings would need to be explicitly noted.

United States v. Kones, 77 F.3d 66 (3d Cir.), *cert. denied*, 519 U.S. 864 (1996). The district court did not err in concluding that appellant could not be awarded restitution under 18 U.S.C. §§ 3663-3664, the Victim and Witness Protection Act of 1982 (VWPA). The VWPA was amended to allow restitution where a scheme, conspiracy, or pattern of criminal activity was an element of the offense of conviction. Under this provision, a victim is entitled restitution if they are harmed directly by the criminal conduct; "directly" is interpreted to require the harm to be closely related to the underlying scheme. The defendant pleaded guilty to mail fraud counts related to insurance claims for never performed medical services. The appellant, who was one of the patients for whom non-existent medical services were claimed, asserts that she is a "victim" due to malpractice by the defendant in proscribing excessive amounts of drugs to her to further his underlying scheme. Since the conduct alleged by appellant is not proscribed by the mail fraud statute of which the defendant was convicted, the circuit court held that appellant could not be considered a "victim" under the VWPA.

§5E1.2 Fines for Individual Defendants

United States v. Torres, 209 F.3d 308 (3d Cir.), *cert. denied*, 531 U.S. 864 (2000). The district court did not err in imposing a fine without making specific findings on the record. The defendant opened a money market account in a false name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third-party check. The defendant attempted to withdraw $24,900 but was not successful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The district court imposed a $5,000 fine under §5E1.2, within the permissible guideline range of $2,000 to $1,000,000, to be paid in equal monthly installments over his five year period of supervised release. The Third Circuit found that while the district court did not make an explicit finding of the defendant's ability to pay, it implicitly did so when it stated it could impose a fine within the guideline range only if the defendant had the ability to pay that fine, and then imposed a fine within the range. Further, the facts at the district court's disposal in determining the defendant's ability to pay included his young age, his receipt of a high school and associates degree, his ability to speak four languages, and the fact he has held several short-term positions and had served in the Army Reserves. These facts were unchallenged by the defendant, and supported the imposition of the $5,000 fine.

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Cordero, 313 F.3d 161 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1809 (2003). The Third Circuit upheld the district court's decision to base its starting point for a §5K1.1 departure on the statutory mandatory minimum sentence the defendant would have faced absent a §5K1.1 motion. The defendant had been convicted of a narcotics offense that carried a ten year mandatory minimum term of imprisonment. Absent the statutory minimum, the defendant would have faced a guideline range of 63 to 78 months' imprisonment. Based on the government's §5K1.1 motion, the district court downwardly departed from the ten year term and sentenced the defendant to a 86 month term. The defendant appealed, arguing that the court should have departed downward from the otherwise applicable guideline range of 63 to 73 months. The Third Circuit rejected this argument, finding that pursuant to §5G1.1(b), the statutorily mandated minimum sentence of ten years "subsumes and displaces the otherwise applicable guideline range and thus becomes the starting point for any departure . . . ."

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Chorin, 322 F.3d 274 (3d Cir. 2003). Defendants were convicted under 21 U.S.C. §§ 841 and 846 and given consecutive sentences. Defendants appealed, arguing the aggregate sentences exceeded the statutory maximum, violating *Apprendi* and the Double Jeopardy Clause. The Third Circuit affirmed the imposition of consecutive sentences, pointing out that the Supreme Court's concern in *Apprendi* was with whether the sentencing court exceeded the statutory maximum sentence authorized for a particular count; it ignores the effect of consecutive sentencing. The court concluded based on *Apprendi* that the district court's application of §5G1.2(d) did not result in a sentence on any one count above the maximum available on that count. Thus, the district court did not violate *Apprendi*. The court also held that the district court did not violate the Double Jeopardy Clause because defendant possessed a precursor not only in an attempt to manufacture methamphetamine himself, but also to sell the methylamine to others. *See United States v. Forester*, 836 F.2d 856, 859 (5th Cir. 1988) (stating that its holding is limited to the "specific, limited, and sharply defined facts of this case" where a petitioner possessed a precursor as a step in the process of manufacturing a controlled substance, and noting that its holding does not extend to cases where a petitioner also uses the precursor for resale).

United States v. Velasquez, 304 F.3d 237 (3d Cir. 2002), *cert. denied*, 538 U.S. 939 (2003). The district court did not abuse its discretion in imposing concurrent rather than consecutive sentences on the defendant's convictions for narcotics conspiracy and using a communications facility. Under the guidelines, the range applicable to the defendant was 292 to 365 months. The primary count of conviction, the narcotics conspiracy, carried a statutory maximum term of imprisonment of 240 months, and the district court sentenced the defendant to that term. On appeal, the government argued that the district court should have sentenced the defendant to a term of 288 months by imposing a consecutive sentence on the communications facility count. The Third Circuit upheld the district court's sentence, holding that the concurrent sentences were authorized by the discretion vested in sentencing courts under 18 U.S.C. § 3584. The court found that §5G1.2, which would seem to require consecutive sentences in

such instances, should be read in light of this discretion, particularly where, as in this case, the lesser offense was based on conduct subsumed within the primary offense.

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment[15]

United States v. Dorsey, 166 F.3d 558 (3d Cir. 1999). The district court erred in deciding that only the Bureau of Prisons has authority to grant custody credits. The defendant received a five-year sentence in state prison for a firearms offense. Ten months later, he was sentenced to 115 months in federal court for offenses arising from the same firearms offense. The district court rejected the defendant's argument that he was eligible for credit for the time he had served in state prison. Application Note 2 to USSG §5G1.3(b) (earlier version) authorizes the court to credit the defendant for the ten months he served between the state sentencing and the federal sentencing, which the BOP did not credit toward the federal sentence.

United States v. Saintville, 218 F.3d 246 (3d Cir.), *cert. denied*, 513 U.S. 974 (2000). The district court did not err in applying USSG §5G1.3 when it sentenced a defendant who was subject to an undischarged term of imprisonment for a separate offense. The defendant pled guilty to illegal entry into the United States following deportation for an aggravated felony. After an indictment was returned for his reentry violation, he was convicted in state court for possession of cocaine with intent to distribute and conspiracy to deliver cocaine. He requested the district court run his sentence for the illegal reentry concurrently with his state sentence. The district court, however, sentenced him to 46 months' imprisonment, the lowest available sentence in the guideline range, with ten months to run concurrently and the remainder to run consecutively to his state sentence. The defendant contends the district court erred because it failed to consider the hypothetical combined sentencing range which would have applied if the United States had prosecuted both the unrelated state charge and the illegal reentry offense in the district court. The Third Circuit agreed with other circuit courts, and found that after USSG §5G1.3 and its commentary were amended in 1995, a sentencing court no longer must make the hypothetical calculation. Because a previous requirement in USSG §5G1.3 that the court run a sentence consecutively, to the extent necessary to achieve a reasonable "incremental" punishment for the instant offense, was deleted in the amendment, the Court found the guideline section no longer ties the newly imposed sentence closely to any undischarged term of imprisonment. *See United States v. Velasquez*, 136 F.3d 921, 923-25 (2d Cir. 1998); *United States v. Mosley*, 200 F.3d 218, 222-25 (4th Cir. 1999); *United States v. Luna-Madellaga*, 133 F.3d 1293, 1294-96 (9th Cir.), *cert. denied*, 524 U.S. 910 (1998).

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

Part H Specific Offense Characteristics

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[16]

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

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in applying a three-level downward departure based on the defendant's charitable activities. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed, claiming the district court abused its discretion in awarding the downward departure. The district court was presented with numerous character witnesses and over 150 letters on behalf of the defendant. The Third Circuit stated that, while the letters that merely reflected the defendant's political duties ordinarily performed by public servants could not form the basis for the departure, the other letters which portrayed other community and charitable activities, and which involved not just the giving of money, but instead involved the giving of time and of one's self, made those activities exceptional. Therefore, a downward departure was warranted.

Part K Departures

§5K1.1 Substantial Assistance to Authorities

See United States v. Cordero, 313 F.3d 161 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1809 (2003), §5G1.1, p. 35.

United States v. Khalil, 132 F.3d 897 (3d Cir. 1997). The defendant appealed the extent of the district court's downward departure pursuant to the government's USSG §5K1.1 motion. The court of appeals held that it lacked jurisdiction to consider the appeal. Prior to the enactment of the guidelines, a sentence by a federal court within statutory limits was effectively not reviewable on appeal. The Sentencing Reform Act of 1984 allowed a defendant, under limited circumstances, to appeal his sentence. Among other things, it allows a defendant to appeal an upward departure and the government to appeal a downward departure. *See* 18 U.S.C. § 3742. However, the Act does not allow a defendant to appeal from a discretionary downward departure.

United States v. King, 53 F.3d 589 (3d Cir. 1995). The district court erred in basing the extent of its departure pursuant to the government's USSG §5K1.1 substantial assistance motion on its "practice" of granting cooperating defendants a standard three-level departure. The sentencing court must instead make an "individualized qualitative examination" of the defendant's cooperation. The case was remanded for resentencing.

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

§5K2.0 Grounds for Departure (Policy Statement)[17]

United States Supreme Court

Koon v. United States, 518 U.S. 81 (1996).[18] The Supreme Court unanimously held that an "appellate court should not review the [district court's] departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." In applying this standard, the court noted that "[l]ittle turns, however, on whether we label review of this particular question [of whether a factor is a permissible basis for departure] abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The court divided, however, in its determination of whether the district court abused its discretion in relying on the particular factors in this case. The majority of the court held that the Ninth Circuit erroneously rejected three of the five downward departure factors relied upon by the district court. The district court properly based its downward departure on (1) the victim's misconduct in provoking the defendants' excessive force, USSG §5K2.10; (2) the defendants' susceptibility to abuse in prison; and (3) the "significant burden" of a federal conviction following a lengthy state trial which had ended in acquittal based on the same underlying conduct. However, the district court abused its discretion in relying upon the remaining two factors, low likelihood of recidivism, and the defendants' loss of their law enforcement careers, because these were already adequately considered by the Commission in USSG §§2H1.4 and 4A1.3. The judgment of the Court of Appeals for the Ninth Circuit was affirmed in part and reversed in part, and the case was remanded for further proceedings.

United States v. Evans, 49 F.3d 109 (3d Cir. 1995). During the presentence investigation the defendant voluntarily revealed his true identity to the probation officer which, because of his criminal history, increased his sentence. The probation officer conceded that he would not have discovered the defendant's true identity if not for the defendant's own admission. Accordingly, the defendant argued that the district court should have departed downward based on his extraordinary acceptance of responsibility, and that the court did not so depart because it mistakenly believed it did not have the authority to do so. The appellate court found the district court's discussion of the departure ambiguous. Therefore, the court considered the issue of whether or not this factor is an appropriate basis for departure. The court held that the disclosure of identity could constitute a "mitigating circumstance" within the meaning of guideline §5K2.0. The appellate court based its holding on the recent amendment to USSG §5K2.0, which allows a judge to use a broad range of factors to depart as long as those factors promote the statutory purposes

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

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

of sentencing. The case was remanded for resentencing for the district court determine whether a downward departure was appropriate.

United States v. Haut, 107 F.3d 213 (3d Cir.), *cert. denied*, 521 U.S. 1127 (1997). The district court erred in departing downward to mitigate the impact of a jury verdict the judge believed to be incorrect. At sentencing, the district court judge departed six levels down based on the incredibility of the prosecution witnesses and his belief that the defendants should have been found not guilty. Noting that *Koon v. United States*, 518 U.S. 81 (1996), states that a departure factor not mentioned in the guidelines must be examined to determine if it is "sufficient to take the case out of the Guideline's heartland," the Circuit court stated that this departure was "categorically inappropriate." The district court stated that certain prosecution witnesses were biased, and had the case been a bench trial, he would have found the defendants not guilty. The district court asserted that for sentencing determinations, it was appropriate to make credibility determinations. The cases cited for this authority by the district court, however, are inapposite. One stands for the proposition that credibility may be taken into account with respect to "matters of degree concerning underlying issues," not the issue of guilt. *United States v. Miele*, 989 F.2d 659 (3d Cir. 1993) (stating court may take witness credibility into account when determining amount of drugs involved in the offense). The other two merely dictate how departures "ameliorate the rigidity" of the guidelines. *See United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993) (informing district court that departure for defendant responsible for care of his mentally ill wife could be permissible if circumstances warrant "to bring a fair and reasonable sentence"); *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992) (allowing departure for extraordinary acceptance of responsibility; based on defendant's conduct rather than witness credibility). The circuit court noted that the district court may enter a judgment of acquittal if the circumstances of the case make the verdict unsupportable. Fed. R. Crim. P. 29. In this case, however, the district court found that a judgment of acquittal was not appropriate because the evidence, if believed, did support the verdict. The circuit court stated that to affirm the departure taken by the district court would "sap the integrity of both the Guidelines and the jury system."

United States v. Holmes, 193 F.3d 200 (3d Cir. 1999), *cert. denied*, 529 U.S. 1136 (2000). The Third Circuit affirmed the district court's upward departure under USSG §5K2.0 for "extraordinary" abuse of trust. The defendant, a disbarred attorney and accountant, pled guilty to an extensive fraud and forgery scheme and was sentenced to 96 months in prison, restitution of approximately $1.9 million, and a special assessment. The nature of the defendant's fraud was extensive: (1) in representing a client in a protracted business dispute, he fabricated a settlement agreement for a non-existent lawsuit, forged the signatures of opposing parties and judges, and embezzled the client's money, which had been deposited in an escrow account; (2) he forged the signature of a dying neighbor to redeem over $150,000 in bonds; (3) he created a fraudulent low income housing investment venture and spent the investors' money; (4) he embezzled money that clients had given him to pay off their taxes; (5) he prepared a false will and forged the signature of the deceased testator; and (6) he engaged in money laundering. Although the defendant had received enhancements for the amount of loss, USSG §2F1.1(b)(1)(M); more than minimal planning, USSG §2F1.1(b)(2)(A), vulnerable victim, USSG §3A1.1, aggravating role, USSG §3B1.1(a), and abuse of position of trust or use of a special skill, USSG §3B1.3, the district court departed upwards two additional levels pursuant to USSG §5K2.0 based upon Holmes' extraordinary abuse of position of trust because the court believed that two-level enhancement for abuse of trust was insufficient. The Third

Circuit affirmed, holding that the district court's decision to depart upward was "not made on a legally impermissible basis" and was "reasonable." It rejected the defendant's argument that USSG §3B1.3 adequately covers abuse of position of trust because nothing in the guidelines suggests that the Sentencing Commission "envisioned multiple acts of abuse of trust to the degree that was present in this case." The Third Circuit also rejected the defendant's argument that his abuse of trust was sufficiently accounted for by the other enhancements he received.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). The district court did not err in granting a two-level upward departure based on a combination of factors. The defendant pled guilty to eight counts of fraud arising out of a scheme in which the defendant defrauded people by encouraging them to invest in oil and gas drilling ventures, but then used the investors' money for his personal expenses rather than for the promised purposes. The district court imposed a two-level upward departure, pursuant to USSG §5K2.0 based on a combination of factors that took the case out of the "heartland" of the fraud guideline. The district court identified the following five factors: 1) the defendant's masquerade as a decorated Vietnam combat veteran, a person in the witness protection program, and a government agent on a secret mission; 2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; 3) his attempt to conceal his fraud by faking his own death; 4) his fabricated story about his family having been killed by a drunk driver; 5) the severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case very unusual and justified a two-level departure. The appellate court classified the factors as "unmentioned" by the guidelines, and that the court must therefore consider the structure and theory of both relevant individual guidelines and the guidelines taken as a whole and decide whether the factors are sufficient to take the case out of the guidelines' heartland. The appellate court examined each of the five factors and concluded that this combination of five unmentioned factors was sufficient to take the case out of the guidelines' heartland. The appellate court noted that USSG §2F1.1, comment. (n.10) states that upward departures may be warranted in cases in which the loss does not fully capture the harmfulness and seriousness of the conduct. Furthermore, the appellate court concluded that the defendant's misrepresentations were similar to the two-level adjustment of USSG §2F1.1(b)(3)(A), which provides a two-level increase in offense level, where the offense involved a "misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency." In addition, the appellate court concluded that USSG §5K2.3 provides for an upward departure based on conduct similar to the defendant's. Section 5K2.3 specifically encourages courts to depart upward if the defendant's conduct caused his victim extreme psychological injury. While the district court did not find that the defendant's victims had suffered psychological injury, it did find that they had suffered a psychological injury more severe than that occurring in a typical fraud case and included this as a reason for a departure. The appellate court concluded that these two analogies further supported the district court's finding that a USSG §5K2.0 departure was appropriate.

United States v. Marin-Castaneda, 134 F.3d 551 (3d Cir.), *cert. denied*, 523 U.S. 1144 (1998). The district court did not err when it decided it did not have authority to depart based on (1) the defendant's willingness to consent to deportation; (2) his age; and (3) the deterrent effect of having been hospitalized after trying to smuggle heroin in his stomach. The court of appeals noted that the defendant

was a Columbian national with no colorable basis for contesting deportation. The court held, as a matter of first impression, that a defendant without a nonfrivolous defense to deportation presents no basis for downward departure under §5K2.0 by simply consenting to deportation. The court also held that, due to the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the government. The defendant's age, 67 at the time of sentencing, without more, did not justify a downward departure. Finally, the physical ordeal of being hospitalized after ingesting 90 heroin pellets is inherent in smuggling drugs in this manner, and so could not be considered an unusual characteristic sufficient to take this case out of the heartland.

United States v. Nathan, 188 F.3d 190 (3d Cir. 1999). The Third Circuit reversed the district court's upward departure pursuant to USSG §5K2.0 and Application Note 2 to §2T3.1. The defendants were Electrodyne Systems Corporation (ESC), its president, and marketing director. Notwithstanding their six contracts with the government to manufacture electronic component parts in the United States, and not to use foreign parts or manufacturing sites, they contracted with countries in Russia and the Ukraine to build the parts. ESC pled guilty to exporting defense-related items in violation of the Arms Export Control Act (AECA), and making false statements. The president of ESC pled to illegally importing goods into the United States based on his failure to mark the items with the country of origin. ESC's marketing director pled to unlawful introduction of merchandise into United States commerce. The district court departed upwards nine levels in the sentences of the two individual defendants because it determined that the duties evaded by the defendants did not adequately measure the harm they caused. Specifically, the district court found that four aspects of the defendants' conduct rendered this an "atypical" smuggling case: (1) the defendants defrauded the government for their own financial gain; (2) the defendants' actions compromised and may in the future compromise national security; (3) they violated AECA; and (4) they violated the Buy American Act (BAA), which permitted them to gain an unfair financial advantage. The Third Circuit held that (1) the district court incorrectly used the presence of fraud to find the case atypical because smuggling, under 18 U.S.C. §§ 542 and 545, involves some element of fraud; (2) the record indicated that the government agreed that no sensitive information had been revealed and that the defendants' actions did not pose a threat to national security or the safety of the military; (3) AECA is a smuggling offense because its terms specifically refer to the import and export of defense articles and services, *see* 22 U.S.C. § 2778(b)(2); and (4) while a violation of the BAA (a civil statute) could be considered to determine whether the defendants caused harm to "society or protected industries" to an extent not captured by the smuggling guidelines, it alone is insufficient to justify the magnitude of the departure in this case. Therefore, the appellate court reversed the departure.

United States v. Nolan-Cooper, 155 F.3d 221 (3d Cir. 1998). The court of appeals vacated and remanded for the district court to determine whether an undercover agent's sexual misconduct with the defendant during the investigation was sufficient to take the case outside the heartland so as to justify a downward departure. It was not clear from the record whether the district court declined to depart because it lacked authority to do so on this basis or because it did not believe departure was warranted. The court of appeals stated that, under *Koon v. United States*, 518 U.S. 81 (1996), government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration. On remand, the

district court was to follow the dictates of *Koon* and USSG §5K2.0 in determining whether departure was warranted.

United States v. Santiago, 201 F.3d 185 (3d Cir. 1999). The district court did not err in finding that the guideline provision authorizing a sentence outside the otherwise applicable guideline range did not authorize a downward departure from a mandated minimum statutory sentence. The defendant, who had a prior drug felony conviction, pled guilty to possession of a controlled substance with intent to distribute, and he was sentenced to the required mandatory minimum ten years' imprisonment. However, he contended the district court erred in denying his motion for a downward departure pursuant to USSG §5K2.0 based on his argument that he had been the victim of a shooting accident that initially left him paralyzed. The Third Circuit found that although the guidelines provided for a sentencing range of between 70 to 87 months incarceration, his prior federal conviction subjected him to the mandatory minimum sentence. The Third Circuit found that USSG §5K2.0 did not apply stating it consistently speaks in terms of a departure from the guidelines, not from a statute, and found that the district court is not authorized to effectuate a downward departure from the minimum statutory sentence. Instead, the Court agreed with other circuits and found any deviation from the statutory minimum could only be had through the specific procedures established through 18 U.S.C. § 3553(e) or (f). *See United States v. Daniels*, 182 F.3d 910 (4th Cir. 1999); *United States v. Brigham*, 977 F.2d 317, 320 (7th Cir. 1992); *United States v. Polanco*, 53 F.3d 893 (8th Cir. 1995), *cert. denied*, 518 U.S. 1021 (1996); *United States v. Valente*, 961 F.2d 133 (9th Cir. 1992).

United States v. Warren, 186 F.3d 358 (3d Cir. 1999). The Third Circuit reversed a district court's upward departure based upon USSG §5K2.0 and Application Note 1 of §2D2.1. The district court departed upward because the drugs were not for personal consumption and because the extraordinary amount of drugs took the case out of the "heartland" of possession cases. The defendant in this case contacted the DEA in Belgium and informed them that he had been offered $15,000 to act as a drug courier. Although federal authorities initially attempted to set up a controlled delivery, they could not do it on the scheduled date of delivery. The defendant was unwilling to postpone the delivery date because he believed it would put him in danger. Upon arriving in the United States, the defendant admitted his drug possession to the Customs inspector, and federal authorities seized over 21,000 tablets of ecstasy. After pleading guilty, the district court departed upward to sentence him to five years of probation instead of the one-year probation term he otherwise would have received. In reversing, the Third Circuit recognized that large quantities of drugs can clearly take a routine possession case out of the heartland of possession cases to justify an upward departure under USSG §5K2.0. It held, however, that quantity *per se* was insufficient to justify departure but that departure was warranted "only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution for others." *Id.* at 364; *see also* USSG §2D2.1, Application Note 1. The appellate court found that in this case, the evidence was unequivocal that the defendant did not intend anyone to consume the drugs he carried; and moreover, that he intended to turn the drugs over to government agents and did so.

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

United States v. Jacobs, 167 F.3d 792 (3d Cir. 1999). The district court erred in departing upward in an aggravated assault case based on extreme psychological injury because the court failed to find that the victim's psychological injury was "much more serious than that normally resulting from commission" of an aggravated assault. The court found that the victim suffered from post-traumatic stress disorder, mood disorders, depression, anxiety and sleeplessness, but had not made the required finding. The court also failed to provide reasons for the extent of the departure. The Third Circuit remanded the case and suggested that the court use USSG §2A2.2(b) as a guide for making sufficient findings regarding the extent of injury.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). The district court did not err in finding the Presentence Report (PSR) provided the defendant with the required notice that it was contemplating an upward departure pursuant to §5K2.8 and Application Note 5 of USSG §2A3.1 [now Application Note 6]. The defendant and a codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the PSR, located underneath the heading "Factors that May Warrant Departure" which stated, "According to U.S.S.G. §2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice. The defendant further argued that the record did not support the court's finding of extreme conduct because the victims stated they only pretended to have sex with each other. However, the district court did not err in finding that being put in the position where they had to pretend to have sex was degrading enough to warrant a finding of extreme conduct.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The district court did not err in imposing a nine-level upward departure based on "extreme conduct" under USSG §5K2.8. The defendant argued that pursuant to *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990), the district court erred in not applying a clear and convincing standard of proof to justify the departure. The district court cited the facts of this case (the defendant stabbed his wife 16 times with a butcher knife) and concluded that the defendant's conduct was unusually heinous, cruel and brutal. Although the court did not expressly recite the clear and convincing standard, the "[i]ncantation of the term 'clear and convincing' was not necessary on this record." The defendant also argued that the guideline for second degree murder takes into account the heinous nature of his conduct. A departure under USSG §5K2.8 is an "encouraged" departure, and the district court did not abuse its discretion in finding that the defendant's conduct was more heinous than conduct "that constitutes the so-called 'heartland' of second degree murders." Here the court made explicit findings that were even supported by the testimony of a pathologist who stated that "it was one of

the most severely violent deaths he had ever documented." Although the Third Circuit upheld the basis for the departure, it remanded the case for resentencing because the 365-month sentence imposed for the defendant's conviction for second degree murder was equal to a heavy sentence that could be imposed for a first degree murder conviction. The district court found no acceptable analogous guideline for the extent of the departure. Instead, the court cited four cases involving upward departures without comparing the conduct and grounds for departure in those cases with the instant case. If the defendant had pled guilty to first degree murder and received a two-level reduction for acceptance of responsibility, he would have faced a guideline range of 324 to 405 months–the median of which is the sentence he actually received. The Third Circuit found that "the lack of disparity between Paster's actual sentence and one he could have received had he pleaded guilty to, or been convicted of, a more serious crime distorts proportionality, a critical objective of the sentencing guidelines," and remanded the case for further findings and resentencing.

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

United States v. Mussayek, 338 F.3d 245 (3d Cir. 2003). Defendant was found guilty of conspiracy to commit extortion and interstate travel in aid of racketeering. On appeal, defendant argued that the district court erred by not applying a downward departure under §5K2.10. Section 5K2.10 provides that departures may be made where "the victim's wrongful conduct contributed significantly to provoking the offense behavior." First the Third Circuit noted that the key to the viability of a claim for a downward departure for victim provocation appeared to depend on the unique facts of each case regarding whether the requisite provocation existed. The court then noted that the mere fact that the victim's misconduct was a cause of the defendant's offense behavior, in the sense that the offense behavior may not have been committed but for the victim's conduct, was not enough; downward departures were authorized under the guideline only where the victim's misconduct contributed significantly to provoking the defendant's offense behavior. The court also noted courts have also relied heavily on the concept of proportionality, in other words, the necessary provocation only existed if the provoked offense was proportional to the provoking conduct. This reasoning made sense, as it would be exceedingly difficult to apply §5K2.10 to a situation in which the offense behavior was excessively disproportional to the victim's misconduct. The court agreed with the district court that the circumstances in the instant case did not evidence provocation as required by §5K2.10. Defendant was the apparent victim of Fogel's fraud, and Jacob's unethical behavior with regard to their partnership. However, there was no evidence that Fogel or Jacob somehow provoked defendant into attempting to extort money from them. Any wrong done to defendant was economic in nature, and took place without the immediacy, or the highly-charged context of tension, emotional build-up, or arousal, that typically exemplified the provocative situation. Additionally, defendant's response took place long after the alleged scams; he did not react within days, or even weeks, but many months, and in the case of Fogel, nearly a year later. Finally, defendant's offense behavior was grossly disproportionate to any provocation on the part of his victims. Accordingly, the district court did not err in holding that this was not the type of situation envisioned by §5K2.10.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The district court did not err in refusing to grant a downward departure under USSG §5K2.10, which authorizes a departure "if the victim's wrongful conduct contributed significantly to provoking the offense behavior." The defendant argued that his "wife's revelation of past infidelity exposed wrongful conduct and was the sole provocation for the fatal

stabbing." (The wife/victim had told the defendant that she had between 40 and 50 affairs and shortly thereafter, the defendant stabbed her 16 times.) The district court found that the conduct of the victim did not warrant a departure. Generally, only a victim's violent, wrongful conduct warrants a downward departure. Here there was no danger or perception of danger to the defendant. Even if a victim's "infidelities" could constitute "wrongful conduct" to justify mitigation, the defendant's response in this case was grossly disproportionate to any provocation by the victim.

§5K2.20 Aberrant Behavior (Policy Statement)[19]

§5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)[20]

§5K2.23 Discharged Terms of Imprisonment (Policy Statement)[21]

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). The district court did not err in revoking the defendant's supervised release and sentencing him to 12 months' imprisonment to be followed by a 3-year supervised release term. The defendant was indicted for knowingly, intentionally, and unlawfully possessing cocaine with intent to distribute, and he argued that the district court wrongly applied 18 U.S.C. § 3583(h), which was not in effect when he was originally sentenced. He claimed that this additional punishment for his crime could not have been imposed when he committed that crime, and that it therefore violated the *Ex Post Facto* clause of the Constitution. However, the circuit court rejected the defendant's contention on the grounds that he was not prejudiced by the enactment because the amended subsection (h) did not change the amount of time his liberty would have been restrained. Therefore, the circuit court did not find an *ex post facto* violation and affirmed the decision of the lower court.

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

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

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

ALL CHAPTERS: MISCELLANEOUS AMENDMENTS[22]

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

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

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

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

§§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) – Conforms departure provision in Application Note 6 of §2G2.1 with Note 12 of §2G1.1.

§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) – Amends §2G2.2(B)(5) to include receipt and distribution in the enhancement for use of a computer.

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

CONSTITUTIONAL CHALLENGES

Fifth Amendment–Double Jeopardy

United States v. Baird, 63 F.3d 1213 (3d Cir. 1995), *cert. denied*, 516 U.S. 1111 (1996). The district court did not err in denying the defendant's motion to dismiss an indictment on double jeopardy grounds when the indictment followed an administrative forfeiture hearing. The circuit court identified the differences between administrative and civil forfeitures for double jeopardy purposes, noting that administrative forfeitures are allowed only when the value of the property seized is less than a jurisdictional amount and no claim is filed within 20 days of the first publication of a notice of seizure. The circuit court ruled that an administrative forfeiture of unclaimed alleged drug proceeds did not constitute "punishment,"

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

especially since an administrative forfeiture cannot, by definition, "entail a determination of ownership of the property to be forfeited."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Plotts, 359 F.3d 247 (3d Cir. 2004). Because the defendant was denied the right of allocution at sentencing, the district court's sentence was remanded. Defendant was arrested by the Pennsylvania State Police for violating 18 Pa. Cons. Stat. § 6105, felon in possession of a firearm. Thereafter, the Probation Office filed a petition to revoke defendant's supervised release, alleging six violations of his release conditions. The district court revoked defendant's supervised release and sentenced him to 30 months' imprisonment followed by 30 months' supervised release. On appeal, defendant alleged that the district court erred in denying him the right of allocution at his release revocation hearing before the sentence was imposed. The Third Circuit noted that denying the right of allocution, at least in sentencing hearings, will generally result in resentencing under plain error review. However, the court noted that it had not ruled whether a defendant's right of allocution extended to a revocation hearing. The court noted that the Federal Rules of Criminal Procedure failed to define explicitly the scope of allocution rights. However, the court stated that almost every circuit considering this issue had ruled that allocution must be permitted before imposition of sentence at a supervised release revocation hearing. *See United States v. Waters*, 158 F.3d 933, 944-45 (6th Cir. 1998); *United States v. Patterson*, 128 F.3d 1259, 1260-61 (8th Cir. 1997); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1994); *United States v. Carper*, 24 F.3d 1157, 1160-62 (9th Cir. 1994); *United States v. Barnes*, 948 F.2d 325, 329-30 (7th Cir. 1991). Finally, the court noted that the denial of the right of allocution was not the sort of isolated or abstract error that it might determine did not impact the fairness, integrity or public reputation of judicial proceedings. The court reversed and remanded the case to the district court for resentencing.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 851

United States v. Kole, 164 F.3d 164 (3d Cir. 1998), *cert. denied*, 526 U.S. 1079 (1999). The district court did not err in imposing an enhanced sentence under 21 U.S.C. §§ 851 and 960(b)(1)(A) based on the defendant's prior felony drug conviction in the Philippines. The defendant argued that the Philippines conviction was obtained in violation of the United States Constitution because she was denied effective assistance of counsel and was not entitled to a jury trial. The Third Circuit found that the conviction was not obtained in a manner inconsistent with due process, even though the defendant was not entitled to a jury trial.

18 U.S.C. § 2259

United States v. Crandon, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999). The district court did not err in requiring the defendant to pay restitution of $57,050.96 to cover the victim's in-patient hospital treatment for "suicidal ideation." Congress intended that full restitution to minor victims is warranted when a defendant is convicted of federal child sexual exploitation and abuse offenses. After considering opinions from a licensed social worker and a psychiatrist, the district court found that the defendant's conduct was the proximate cause of the victim's worsening depression that led to the hospitalization. In addition, the victim had never been treated before the incident. Even if the victim had a preexisting mental condition, it was not unreasonable for the district court to conclude that the defendant's actions were a substantial factor in causing additional strain and trauma. The district court did not err in ordering full restitution rather than order nominal periodic payments. The defendant's higher education suggested that his potential earning capacity precluded a finding of indigence.

18 U.S.C. § 3553

United States v. Kellum, 356 F.3d 285 (3d Cir. 2004). The district court's imposition of the statutory mandatory minimum sentence was affirmed. Defendant pled guilty to possession of cocaine base with intent to distribute and carrying a firearm in relation to a drug trafficking offense pursuant to a written plea agreement. At sentencing, the district court expressed some concern about sentencing defendant to a total of 15 years imprisonment, and questioned the government about its refusal to file a motion for a downward departure under USSG §5K1.1. However, the district court sentenced defendant to the statutory minimum sentence. On appeal, defendant noted that the district court was obviously convinced that the 15 year sentence it felt compelled to impose was excessive. However, defendant argued that the district court erred by imposing the minimum mandatory sentence because it was unaware that it had authority under 18 U.S.C. § 3553(a) to impose a sentence below the statutory minimum if it believed that the statutory minimum was greater than necessary to achieve the four goals of sentencing. Relying on the language of section 3553(a)(2), defendant argued that by using the imperative "shall," Congress explicitly precluded district courts from imposing sentences that plainly exceeded that which is necessary to fulfill the four delineated purposes of sentencing. The Third Circuit disagreed with defendant's argument. The court noted that defendant produced no authority for his position. Furthermore, defendant's argument was based upon an extraction of only those portions of section 3553(a) that favored his argument, even though section 3553(a) set forth a number of other factors that a sentencing court must consider when sentencing. In addition, section 3553(b) states that a district court must sentence a defendant within the sentencing guideline range unless the court finds an aggravating or mitigating circumstance not taken into account by the Sentencing Commission. In other words, the court noted that the considerations in section 3553(a)(2) were not the only factors that a district court must consider when imposing a sentence. Finally, the court noted that it was clear that Congress intended that mandatory minimum sentences were not to be affected by the general considerations of section 3553(a)(2) because that statute also provided the authority for the district court to depart below the statutorily mandated minimum sentence in certain prescribed circumstances. Accordingly, it was clear that section 3553(a) did not give the district court authority to sentence defendant below the statutorily mandated minimum sentence. Therefore, the district court's sentence was affirmed.

18 U.S.C. § 3583

See United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997), *infra.*, §7B1.4, p. 45.

United States v. Crandon, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999). The district court did not err in imposing as a condition of supervised release a requirement that the defendant not "possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office." The defendant pled guilty to one count of receiving child pornography for possessing a photograph of a 14-year-old girl with whom he had sexual relations after communicating with her through electronic mail for several months. The defendant argued that the special condition restricting his computer access would limit his employment opportunities and freedoms of speech and association. The Third Circuit found that in light of the defendant's prior conduct, the special condition involving restrictions on constitutional rights was valid because it was narrowly tailored and "directly related to deterring Crandon and protecting the public."

United States v. Evans, 155 F.3d 245 (3d Cir. 1998). The district court erred in conditioning supervised release on reimbursement of the cost of court-appointed counsel. The court of appeals first noted that an order may be a condition of supervised release only to the extent that it: (1) is reasonably related to the factors set forth in the general sentencing statute, 18 U.S.C. § 3553(a); (2) involves no greater deprivation of liberty than reasonably necessary for the purposes set forth in 18 U.S.C. § 3553(a); and (3) is consistent with pertinent policy statements issued by the Sentencing Commission. Although the Criminal Justice Act, 18 U.S.C. § 3006A, permits a court to order reimbursement of fees for appointed counsel when it finds funds are available, such an order does not satisfy the requirements of the supervised release statute. The court held that the condition is not reasonably related to the defendant's offense, nor would it likely serve the statutory purposes of deterring crime, protecting the public, or serving any rehabilitative function. Thus, the district court improperly made the reimbursement order a condition of supervised release.

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

See United States v. Chorin, 322 F.3d 274 (3d Cir. 2003), §5G1.2, p. 35.

See United States v. Parmelee, 319 F.3d 583 (3d Cir. 2003), §2G2.4, p. 12.