# SELECTED GUIDELINE APPLICATION DECISIONS FOR THE DISTRICT OF COLUMBIA CIRCUIT


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

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# District of Columbia Circuit
# Case Law Highlights

**§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)–*U.S. v. Norman*, 350 F.3d 128 (D.C. Cir. 2003)** (treating attempted burglary as "crime of violence" was not plain error), p. 9; ***U.S. v. Williams*, 358 F.3d 956 (D.C. Cir. 2004)–** (application of base offense level of 20 under guideline for unlawful possession of firearm or ammunition on ground that the defendant's prior robbery conviction constituted a "crime of violence" required the district court to examine the record for evidence that the robbery conviction constituted a "crime of violence"), p.11.

**§4B1.2 (Definitions of Terms Used in Section 4B1.1)–*U.S. v. Thomas*, 361 F.3d 653 (D.C. Cir 2004)** (offense of escape is a "crime of violence" under the sentencing guidelines), p. 21.

**§5G1.3 (Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment)–*U.S. v. Heard*, 359 F.3d 544 (D.C. Cir. 2004)** (prior narcotics offense for which the defendant was still serving undischarged term of confinement was not "fully taken into account" in determining offense level for narcotics offense he committed while on release, so that sentence for this second offense did not have to be imposed concurrently), p. 25.

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# U.S. SENTENCING COMMISSION GUIDELINES MANUAL
# CASE ANNOTATIONS—DISTRICT OF COLUMBIA CIRCUIT

## CHAPTER ONE: *Introduction and General Application Principles*

### Part B General Application Principles

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

*United States v. Childress*, 58 F.3d 693 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1098 (1996). Seven defendants convicted of a drug conspiracy appealed their sentences on the ground that the district court erroneously attributed 50 kilograms of cocaine to each appellant on the basis of its general findings that the conspiracy involved more than 50 kilograms of cocaine. The District of Columbia Circuit held that the district court erred in failing to make individualized findings about the scope of each appellant's conspiratorial agreement and the evidence that led it to conclude in each of their cases that the 50 kilos distributed were reasonably foreseeable. *Id*. at 162. The court instructed that, in applying USSG §1B1.3 and the theory of co-conspirator liability, a district court must make particularized findings that (1) the defendant's conduct was within the scope of that the defendant's conspiratorial agreement, and (2) that it was reasonably foreseeable. With respect to firearms, the court further explained that "findings that a defendant handled . . . extensive quantities of drugs in the course of a conspiracy are adequate to support the conclusion that the use of guns by co-conspirators was reasonably foreseeable to him." *Id*. at 725.

*United States v. Foster*, 19 F.3d 1452 (D.C. Cir. 1994). The district court properly enhanced the defendant's base offense level for possession of a dangerous weapon pursuant to USSG §2D1.8(a)(1). The defendant challenged the inclusion of the weapon possession as relevant conduct because the district court granted his motion for judgment of acquittal on the 18 U.S.C. § 924(c)(1) count. The District of Columbia Circuit joined ten other circuits in concluding that acquitted conduct may be used to determine sentencing enhancements.

*United States v. Pinnick*, 47 F.3d 434 (D.C. Cir. 1995). The district court properly included conduct from two dismissed counts as relevant conduct for sentencing, and erred in including the conduct from a third dismissed count. The defendant pleaded guilty to one of four counts of fraud, and the government dismissed the other three counts. Two of the dismissed counts involved counterfeit checks, and were properly included by the district court as relevant conduct at sentencing. The other dismissed count involved the defendant's fraudulent use of a credit card. The circuit court noted that in fraud offenses conduct from dismissed counts which is part of "the same course of conduct" may be considered when determining a guideline range for the offense of conviction. In determining what constitutes "the same course of conduct," the court must consider several factors including "the degree of similarity of the offenses and the time interval between the offenses." Where the defendant's offense of conviction and the acts offered as relevant conduct can be "separately identified" and are of a

different "nature," the conduct will not be considered as part of the same course of conduct. The government must demonstrate a connection between the conduct and the offense of conviction; not between the conduct and other relevant conduct. The circuit court ruled that the government failed to demonstrate a connection between the credit card fraud and the offense of conviction. The sentence was vacated and the case was remanded for resentencing.

*United States v. Vizcaino*, 202 F.3d 345 (D.C. Cir. 2000). The District of Columbia Circuit held that, because the defendant had failed to request a downward departure at sentencing, he did not preserve the issue for review on appeal, and that the district court did not commit plain error by failing to grant the departure *sua sponte.* The defendant had been indicted for possession with intent to distribute both crack cocaine and powder cocaine. The defendant entered into a plea agreement with the government in which he pled guilty to the powder cocaine charge and took responsibility for 185 grams of crack cocaine in exchange for the Government dropping the crack cocaine charge. The crack cocaine was treated as relevant conduct pursuant to USSG §1B1.3(a)(2) and increased the defendant's sentencing range from 27 to 33 months to a range of 121 to 151 months. *Id.* at 346. At sentencing, the defendant explained that he had entered into the plea agreement to avoid the mandatory minimum associated with crack cocaine. *Id.* at 346. The district court responded that it was bound by the guidelines and had no grounds on which to depart. *Id.* at 346. On appeal, the defendant raised the argument, which he did not raise at the sentencing hearing, that he was entitled to a downward departure under USSG §5K2.0 because the consideration of relevant conduct drastically distorted his sentence. *Id.* at 347. Because the defendant did not ask the district court for a downward departure or argue that his sentence had been so distorted as to remove it from the guidelines' heartland, the circuit court held that the issue had not been preserved for appeal. *Id.* at 348. Thus, the court reviewed the district court's failure to depart *sua sponte* for plain error. *Id.* at 348. Although other circuits had held that drastic distortion of a sentence due to inclusion of relevant conduct was a grounds for departure under USSG §5K2.0, the District of Columbia Circuit and the Supreme Court had not had occasion to consider the issue. *Id.* at 348. The court held that, in the absence of binding authority or a clear legal norm, the district court's failure to depart could not constitute plain error, and affirmed the defendant's sentence. *Id.* at 348.

*United States v. Williams*, 216 F.3d 1099 (D.C. Cir.), *cert. denied*, 531 U.S. 970 (2000). The defendants were convicted of receiving bribes in violation of federal law and, on appeal, they challenged the relevant conduct attributed to them in the calculation of their sentences. Both defendants were motor vehicle inspectors and were part of a scheme to sell inspection stickers to cab drivers in the District of Columbia. *Id.* at 1101. At sentencing, the district court assumed that each defendant joined the scheme as soon as he began working at the inspection station instead of making a particularized finding to determine when each of the codefendants actually joined the conspiracy. Thus, the district court held each defendant responsible for all of the illegal proceeds earned the day after they began working at the inspection station despite the fact that there was no evidence that either joined until later in the conspiracy. The court held that this calculation constituted clear error. *Id.* at 1104. The court calculated the bribe amounts based on the years each codefendant had been involved. The result was

that one defendant's bribe amount was reduced by only $4,700, an amount that would not affect his sentence, and the court held that the error as to his sentence was harmless. *Id.* at 1105. The other defendant would have received a reduction in his amount by at least $24,000. Because this amount could affect his sentence, the court remanded for further proceedings and re-sentencing. *Id.* at 1105.

## CHAPTER TWO: *Offense Conduct*

### Part A Offenses Against the Person

**§2A1.4** Involuntary Manslaughter[1]

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

*United States v. Yelverton*, 197 F.3d 531 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1195 (2000). The District of Columbia Circuit held that the district court did not err by applying an enhancement under USSG §2A4.1(b)(3) for use of a firearm, where the use of the firearm was portrayed in a photograph and was accompanied by threats of further violence to the mother of the kidnap victim in an effort to obtain ransom. The defendant was convicted for kidnaping, abduction and unlawful restraint and sentenced under USSG §2A4.1, including an enhancement under (b)(3), because a firearm was "otherwise used" in the commission of the offense. *Id.* at 533. The definitions to the guideline indicated that "otherwise used" meant that the use of the weapon did not amount to discharging but was more than brandishing. *Id.* at 533. The defendant argued that for the enhancement to apply, the gun must be used upon the same victim that is being coerced into acting and that showing the photograph to the mother amounted only to "brandishing." *Id.* at 533. The court noted that virtually all of the circuits have held that where a weapon and threats are used to engender fear and facilitate the commission of a crime, the enhancement is warranted even if the target of the threat and the person forced into compliance are not the same individual. *Id.* at 533. The distinction in the defendant's case is that the gun and the threats "were directed at two different people in two different locations at two different times." *Id.* at 534. The defendant conceded that the enhancement would apply if the gun holder increased the threat of injury to those in his presence, but the court found no reason to read the term "otherwise used" so narrowly. *Id.* at 534. Because the defendant explicitly threatened to the mother that the gun would be used to harm her son if she did not comply, the court upheld the enhancement to the defendant's sentence. *Id.* at 535.

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

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

**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]

**Part C Offenses Involving Public Officials**

**§2C1.8** Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act[4]

**Part D Offenses Involving Drugs**

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

*United States v. Goodwin*, 317 F.3d 293 (D.C. Cir. 2003). The defendant was arrested by DEA agents who had just sold him cocaine. The defendant pled guilty to possession of 500 grams or more of cocaine with the intent to distribute. At the sentencing, Agent Abrams testified that the price of cocaine at the time was $26,000 or $27,000 per kilo in New York or Miami, and that the prices in the District of Columbia were higher than in New York or Miami. Abrams testified that the $20,000 per kilo price agreed to by the defendant reflected a negotiated bulk discount. On appeal, the defendant argued that the district court erred because the price for the first kilogram of cocaine–about $20,000 rather than upwards $27,000–was artificially low and triggered the court's power to depart pursuant to Application Note 14 of §2D1.1. Application Note 14 states that: "If, in a reverse sting . . ., the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly

[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.

[4]Effective January 25, 2003, the Commission, in response to a congressional directive contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, created this new guideline for penalties for violation of the Federal Election Campaign Act of 1971 and related election laws. *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.

greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted. The District of Columbia Circuit noted three ambiguities with Application Note 14. First, it appeared to see a low price as an inducement only in the sense that it might enable a potential buyer to stretch his resources farther, *i.e*., it would increase the quantity that a buyer is able to buy. Thus it seemed to overlook the conventional notion of price elasticity–the effect on the quantity that a buyer, even one with ample resources, would be willing to buy. Second, the Note's focus on how much a buyer's "available resources" would allow him to purchase could be read to skew the role of credit. Credit transactions allowed a buyer to purchase more drugs than if he were required to pay cash up front. Finally, the Note said nothing explicit on how a court was to determine whether a purchase increment induced by discount pricing was significant. In any event the court concluded that the defendant had simply failed to offer adequate proof of a material deviation from market terms. Accordingly, the court found no clear error in the district court' s conclusion that the defendant failed to prove that the agents set a price that was substantially below the market value of the drugs.

*United States v. Hinds*, 329 F.3d 184 (D.C. Cir. 2003). The defendant and his codefendant sold cocaine to an undercover police officer on three occasions. They were subsequently arrested and indicted on several charges related to the three drug transactions. At sentencing, the defendant disputed the calculation contained in the PSR. He argued that under Application Note 12 of §2D1.1, the district court was required to exclude the 60.3 grams of crack from the relevant conduct used to calculate his sentence. Application Note 12 states in relevant part that "if, . . ., the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing." On appeal, the defendant argued that the language in Application Note 12 required the district court to exclude the 60.3 grams of crack he sold to the undercover officer from the calculation of his offense level, and that the district court's failure to do so constituted reversible error. The District of Columbia Circuit noted that in order to show that the defendant should have been sentenced pursuant to Application Note 12, the defendant had to establish that he "did not intend to provide" or "was not reasonably capable of providing" the agreed-upon quantity of the controlled substance. The defendant's real argument was that he would not have been reasonably capable of providing the crack without assistance of the government informant. He averred that when he agreed in the recorded telephone conversation to provide the crack, he did so "assuming" that the informant would cook the powder for him. The District of Columbia Circuit rejected the defendant's argument. The court noted that the essence of the defendant's argument was his contention that, but for the request and assistance of the government and its informant, he would have sold powder rather than crack and hence should be subject to the less stringent sentencing guideline provisions applicable to the former. The court stated that this was the type of argument it had consistently rejected. Accordingly, the district court's sentence was affirmed.

*United States v. Mathis*, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. On appeal, the defendant challenged a two-level enhancement under USSG §2D1.1(b)(1) for possession of a dangerous weapon during the commission of a drug offense. The district court found that a loaded firearm recovered from the getaway vehicle had been possessed by a co-conspirator during the drug transaction. The court held that application of the enhancement to the defendant was not clear error because it was foreseeable that the co-conspirator would be carrying a firearm during a large scale drug transaction. *Id.* at 27 (citation omitted).

*United States v. Young*, 247 F.3d 1247 (D.C. Cir. 2001). In 1991, the defendant was convicted for conspiracy to manufacture and distribute phencyclidine (PCP) and sentenced under USSG §2D1.1. In 1998, the defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), which permits a court to reduce a previously imposed sentence if the sentence has subsequently been lowered by the Sentencing Commission. The defendant argued that Amendment 484, which altered Application Note 1 to USSG §2D1.1 and went into effect on November 1, 1993, should result in a reduction to his sentence. Amendment 484 specified that, for the purposes of the drug table, a "mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." *Id.* at 1250. The defendant's motion was denied because the defendant was not sentenced under Application Note 1 but under Application Note 12 which applies when the quantity of drugs seized does not reflect the seriousness of the offense. The court held that the defendant was sentenced correctly under Application Note 12, considering his capacity to produce pure PCP in addition to the PCP in his possession. The district court also concluded that amendment 484 would not affect the calculation of the defendant's sentence because a precursor chemical would ordinarily need to be separated out prior to using the controlled substance. The court upheld the district court's denial of the defendant's motion.

## Part F Offenses Involving Fraud or Deceit

### §2F1.1 Fraud and Deceit[6]

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

### §2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct

*United States v. Long*, 328 F.3d 655 (D.C. Cir.), *cert. denied*, 124 S. Ct. 921 (2003). The defendant was tried on a seven-count indictment charging four counts of interstate transportation of a minor with the intent to engage in criminal sexual activity, and two counts of possession of visual depictions of minors engaged in sexually explicit conduct. The district court found that the cross section

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

in §2G1.1 applied and treated §2G2.1 as controlling. The application of the cross references resulted in an eight-level increase in the defendant's base offense level. *Compare* §2G1.1(a)(1) (specifying base offense level of nineteen), *with* §2G2.1(a) (setting base offense level of 27). On appeal, the defendant challenged his sentence because the district court's application of the cross reference in §§2G1.1(c)(1) and 2G2.4(c)(1) of the guidelines resulted in an eight-level increase in his offense level. The defendant argued that this increase required clear and convincing proof to show that his offenses included conduct that had as its purpose the production of sexually explicit depictions of the minors, as required by the cross references. The District of Columbia Circuit stated that the Supreme Court has noted a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. *See United States v. Watts,* 519 U.S. 148 (1997). The court noted that the Third and the Ninth Circuit had required clear and convincing evidence for extreme sentencing enhancements. *See United States v. Paster,* 173 F.3d 206 (3d Cir. 1999); *United States v. Jordan,* 256 F.3d 922 (9th Cir. 2001). The other circuits had found that the case before them did not merit a higher standard. *See United States v. Cordoba-Murgas,* 233 F.3d 704 (2d Cir. 2000); *United States v. Montgomery,* 262 F.3d 233 (4th Cir. 2001); *United States v. Graham,* 275 F.3d 490 (6th Cir. 2001); *United States v. Lewis,* 115 F.3d 1531 (11th Cir. 1997). The District of Columbia Circuit stated that it had noted the split among the circuits on this issue but had declined to require more than the preponderance standard at sentencing. *See United States v. Graham,* 317 F.3d 262 (D.C. Cir. 2003); *United States v. Jackson,* 161 F.3d 24 (D.C. Cir. 1998). Accordingly, the district court did not err by failing to treat the defendant's case as presenting "extraordinary circumstances" that required a heightened standard of proof.

**§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[7]

**§2G2.4** Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[8]

**Part J Offenses Involving the Administration of Justice**

**§2J1.2** Obstruction of Justice[9]

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[7]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.

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

[9]Effective January 25, 2003, the Commission, in response to a congressional directive contained in sections 805 and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, increased the base offense level and added a two-

**§2J1.7** Commission of Offense While on Release

*United States v. Samuel*, 296 F.3d 1169 (D.C. Cir.), *cert. denied*, 537 U.S. 1078 (2002). The defendant attempted to sell crack cocaine to an undercover DEA agent. He pled guilty to the offense and was released pending sentencing by the district court. While on release, the defendant was again arrested on a narcotics charge. At sentencing, the district court, pursuant to §2J1.7, applied a three level increase in his offense level because the defendant committed his second offense while on release pending sentencing. On appeal, the defendant objected to the enhancement on the ground that it was barred by *Apprendi*. More specifically, the defendant argued that §2J1.7 was unlike other sentencing guidelines enhancements because it did not independently increase a defendant's offense level, but rather did so only by reference to the violation of another statutory provision, 18 U.S.C. § 3147. The defendant argued that, because §2J1.7 applied only if an enhancement under 18 U.S.C. § 3147 applied, a district court may not apply the three-level enhancement without first finding that the defendant violated 18 U.S.C. § 3147. The defendant further argued that, as a result of the district court's application of §2J1.7, he was sentenced to 43 months more than he would have been sentenced on the drug crimes to which he did plead, and exposed to a penalty of up to ten years more than the statutory maximum for these crimes. All of this, he claimed, violated the rule of *Apprendi*. The District of Columbia Circuit noted that the defendant's record did not reflect a conviction for a crime to which he neither pled nor was convicted. Instead, the district court merely sentenced him under the sentencing guidelines for the narcotics offenses to which he did plead, considering the fact that the defendant committed an offense while on release just as the court would have considered any other specific offense characteristic that adjusts an offense level upward. Furthermore, the court noted that the Sentencing Commission treated 18 U.S.C. § 3147 as an enhancement provision, rather than an offense, and explained that guideline §2J1.7 merely provided a specific offense characteristic to increase the offense level for the offense committed on release. The court also noted that the Sentencing Commission's interpretation of its own guideline was binding on the court, unless that interpretation violated the Constitution or a federal statute, or was inconsistent with or a plainly erroneous reading of the guideline. Finally, the court noted that, contrary to the defendant's contention, the district court's application of §2J1.7 neither increased his sentence above the statutory maximum for the drug offenses to which he pled guilty, nor exposed him to the possibility of such an increase. The former point was obvious, as the defendant 's actual sentence of 108 months was considerably lower than the statutory maximum sentence of life imprisonment applicable to each drug offense. Consequently, the impact of §2J1.7 was limited to determining where, within that statutory maximum, the defendant should be sentenced. The court held that the district court did not commit *Apprendi* error when it enhanced the defendant's sentence because he committed the second of his narcotics offenses while he was on release for the first. The court further noted that, even if the enhancement of the defendant's sentence was in error under *Apprendi*, it would at most be harmless error and hence

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level enhancement to ensure deterrence and punishment of obstruction of justice offenses generally, especially in cases involving destruction or fabrication of documents or other physical evidence. *See* USSG, App. C, Amendment 647.

not grounds for reversal because: 1) the defendant's actual sentence fell below the statutory maximum for his drug trafficking offenses; and 2) the defendant did not and could not contest the fact that he was on release at the time he committed his second offense.

## Part K Offenses Involving Public Safety

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

*United States v. Bowie,* 198 F.3d 905 (D.C. Cir. 1999). The defendant was convicted by a jury of three charges including one count for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and two counts for assaulting a police officer while armed with a dangerous weapon, in violation of District of Columbia Code. *Id.* at 907. On appeal, the defendant challenged upward adjustments under USSG §3A1.2, "official victim," and under USSG §2K2.1(b)(5), possession of a firearm in connection with another felony. *Id.* at 913. The defendant argued that the "official victim" enhancement was unwarranted because he did not cause a "substantial risk of bodily harm" to the officers. *Id.* at 913. Likewise, he argued that the second enhancement was unjustified because he did not use his firearm during the assault. *Id.* at 913. The district court found that the defendant attempted to pull his gun from his waistband during the assault thereby creating a substantial risk and indicating his intent to use his weapon to facilitate the assault. *Id.* at 913. The court held that both enhancements were justified by the evidence and affirmed that portion of the sentence. *Id.* at 913.

*United States v. Hart,* 324 F.3d 740 (D.C. Cir. 2003). The defendant was indicted on one count of unlawful possession of a firearm and ammunition by a felon. The defendant raised several issues on appeal among which the defendant argued that §2K2.1(b)(5) was inapplicable as a matter of law because the other felony offense to which it referred in this case, the homicide of David Jones, was not factually and temporally related to the offense of which the defendant was convicted– unlawful possession of the .32 Colt. The District of Columbia Circuit noted that the Tenth Circuit had addressed the same argument in *United States v. Draper,* 24 F.3d 83 (10th Cir. 1994). The Tenth Circuit held that under §2K2.1(b)(5) a four-level enhancement to the base offense level was permissible where the other alleged felony offense occurred weeks or months prior to the offense of conviction. The court noted that the Tenth Circuit's interpretation had stood for nearly ten years without any effort by the Sentencing Commission–despite multiple amendments; this was reason enough not to break rank with sister circuits. Accordingly, the District of Columbia Circuit held that the Jones homicide qualified as another felony offense under §2K2.1(b)(5) even though it occurred months prior to the defendant's arrest for possession of the .32 Colt.

*United States v. Norman,* 350 F.3d 128 (D.C. Cir. 2003). The court affirmed the district court's holding that attempted burglary is a "crime of violence." The issue presented on appeal was whether attempted burglary is a "crime of violence" within the meaning of §2K2.1(a)(2). The District of Columbia Circuit noted that according to Application Note 5 to §2K2.1 of the guidelines, "crime of

violence" is defined by §4B1.2(a) and its Application Note 1, which specifies that a crime punishable by more than one year's imprisonment qualifies as a "crime of violence" if one of two conditions is met. The crime must have (1) "as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) the crime is "burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." On the face of it, attempted burglary thus fell within the definition of "crime of violence." However, the defendant argued that §4B1.2(a)(1) specifically includes crimes having as an element the "attempted use" of physical force; §4B1.2(a)(2) identifies certain offenses as "crimes of violence" but does not mention attempts to commit those crimes; therefore the drafters did not intend to include attempts to commit the listed crimes as "crimes of violence." Furthermore, the defendant added that some circuits interpreting "crimes of violence" as used in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), which has language identical to §4B1.2(a)–had ruled that attempted burglary is not such a crime. *See United States v. Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994); *United States v. Martinez*, 954 F.2d 1050, 1053-54(5th Cir. 1992); *United States v. Strahl*, 958 F.2d 980, 986 (10th Cir. 1992). Regardless of this argument, the District of Columbia Circuit joined four other circuits in holding that under §4B1.2, attempted burglary was a "crime of violence." *See United States v. Claiborne*, 132 F.3d 253, 256 (5th Cir. 1998); *United States v. Sandles*, 80 F.3d 1145, 1150 (7th Cir. 1996); *United States v. Carpenter*, 11 F.3d 788, 791 (8th Cir. 1993); *United States v. Jackson*, 986 F.2d 312, 313 (9th Cir. 1993).

*United States v. Thomas*, 333 F.3d 280 (D.C. Cir. 2003). The defendant pled guilty to unlawful possession of a firearm by a convicted felon, and assaulting, resisting, and interfering with a police officer. On appeal, the defendant argued that escape was not a crime of violence. The defendant relied on the definition found in §4B1.2 which states that a "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that–(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) . . . otherwise involves conduct that presents a serious potential risk of physical injury to another. The District of Columbia Circuit first noted that §2K2.1(a)(4)(A) enhanced a defendant's sentence if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of a crime of violence. Pursuant to Application Note 5 to §2K2.1(a)(4)(A), "crime of violence" is given the meaning outlined in §4B1.2(a). The court noted that the defendant's prior offense of conviction, escape from an officer, conceitedly was punishable by imprisonment for a term exceeding one year. The issue in the instant case was whether it fitted the definition borrowed from §4B1.2 more specifically, whether the offense by its nature presented a serious potential risk of physical injury to another. The court noted the categorical approach adopted by the Fourth, Fifth, Sixth and Eighth Circuits which held that every offense of escape, even a so-called walkaway escape, involved a potential risk of injury to others, and therefore was a crime of violence. The court stated that the approach taken by these circuits proved too much. While it may be true that the recapture of an escapee inherently contained a risk of violent encounter between the escapee and the arresting officers, the same was true as to the capture of any lawbreaker. Thus, under the approach of these circuits, all crimes became crimes of violence and the crime of violence enhancement created by §2K2.1(a)(4)(A)

destroyed the base offense level that would exist in its absence for all defendants with prior felony convictions for whatever nature. Therefore, the District of Columbia Circuit was reluctant to adopt the categorical approach. However, the court noted that in the instant case it made no difference which approach it adopted as to the outcome of this case. The court noted that the defendant effected his escape from the person of an officer, and therefore the risk of violence was much more apparent. Accordingly, whichever approach was applied, the district court did not err in concluding that the defendant's escape from an officer constituted a crime of violence within the meaning of §2K2.1(a)(4)(A).

*United States v. Williams,* 358 F.3d 956 (D.C. Cir. 2004). The defendant was convicted under 18 U.S.C. § 922(g)(1) of unlawful possession of a firearm and ammunition by a convicted felon. One of the issues raised by the defendant on appeal was that the district court erred in calculating his base offense level under the guidelines and that his attorney was constitutionally ineffective by failing to object to this error. The District of Columbia Circuit noted that the defendant was a "prohibited person" under 18 U.S.C. § 922(g) by virtue of his prior felony conviction: his base offense level should be at least 14 under §2K2.1(a)(6). Section 2K2.1(a)(4)(A), however, calls for a base offense level of 20 if the defendant previously had sustained one felony conviction for a "crime of violence." The court noted that the defendant's PSR indicated that the defendant was convicted of "robbery" in the District of Columbia Superior Court in 1994, an offense for which he received a sentence of 30 to 90 months. The PSR recommended, and the district court agreed, that the defendant's base offense level under §2K2.1 should be 20. The court stated that had the district court examined the record and found no evidence that the defendant's previous conviction constituted a "crime of violence," his base offense level would have been only 14, resulting in a sentence range of 27 to 33 months, instead of the 51 to 63 months that the PSR recommended and the district court adopted. The court concluded that the district court clearly erred in adopting the base offense level of 20 without confirming that the defendant's 1994 robbery conviction constituted a "crime of violence." The defendant did not object to this error. Therefore, the court reviewed the district court's sentence only for plain error. Under the plain error standard, the court stated that it did not require the defendant to proffer new evidence establishing conclusively that his sentence would be different absent the district court's error. However, the defendant had to offer some reason to suspect that the district court's error likely resulted in an incorrect sentence. The court concluded that there was nothing before it to suggest any likelihood that the district court would have assigned the defendant a different base offense level had it first conducted the proper inquiry into the 1994 robbery conviction. To the contrary, the only indications on the sparse record suggested that the defendant's sentence would not be reduced. Accordingly, the court held that it could not say the defendant had satisfied his burden of demonstrating a "reasonable likelihood" that the district court's error affected his sentence.

## Part L Offenses Involving Immigration, Naturalization, and Passports

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

*United States v. Yeh*, 278 F.3d 9 (D.C. Cir. 2002). The defendants were convicted of bringing unauthorized aliens into the United States for financial gain. On appeal, one of the defendants disputed the district court's application of a two-level increase pursuant to USSG §2L1.1(b)(1) for "intentionally or recklessly creating a substantial risk of death or serious bodily injury" to the aliens aboard the vessel. Applying a plain error standard because the defendant failed to raise his objection in the district court, the District of Columbia Circuit rejected the defendant's contention that he had no control over the conditions aboard the vessel. The record indicated that the defendant admitted in district court that he was responsible and received compensation for keeping order and for distributing food and water to the aliens. It also indicated that the aliens had suffered without food or water for at least several hours by the time the Coast Guard arrived and that conditions below deck were appalling.

**§2L1.2** Unlawfully Entering or Remaining in the United States[10]

## Part Q Offenses Involving the Environment

**§2Q1.4** Tampering or Attempted Tampering with a Public Water System[11]

## Part S Money Laundering and Monetary Transaction Reporting

**§2S1.1** Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[12]

*United States v. Kayode*, 254 F.3d 204 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1147 (2002). The District of Columbia Circuit held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of USSG §2S1.2. The defendant was convicted on eight charges, including one count of conspiracy to commit money laundering in violation of

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[10]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.

[11]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.

[12]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. *See also* USSG App. C, Amendment 634.

18 U.S.C. § 1956(h). The defendant's sentence for this count was calculated under USSG §2S1.2, but she argued on appeal that she should have been sentenced under the fraud or money structuring guideline, §2F1.1. The defendant asserted that USSG §2S1.2 was intended to apply to laundering of proceeds from drug trafficking or serious organized crime, not proceeds from bank fraud, as was the case here. Because laundering funds from bank fraud would not be "atypical" under this guideline, the defendant argued that the court should have departed and used the less severe guideline. The circuit court held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of USSG §2S1.2 and upheld the sentence. The application note to USSG §2S1.2 specifies illegal activity as that covered by 18 U.S.C. § 1956(c)(7) and racketeering. "Racketeering activity" is defined in 8 U.S.C. § 1961(1) as including acts indictable under 18 U.S.C. § 1344, financial institution fraud. Because the court found that the defendant's behavior fell within the heartland of USSG §2S1.2 under the 1998 *Guidelines Manual*, the effect of Amendment 591, effective November 1, 2000, was not considered.

**Part T Offenses Involving Taxation**

**§2T1.1** Tax Evasion

*United States v. Hunt*, 25 F.3d 1092 (D.C. Cir. 1994). The circuit court joined the majority of courts of appeals in rejecting the defendant's argument that tax loss, for sentencing purposes, should not include the amount the defendant "attempted to evade" from the government, but rather should only reflect the amount of money actually lost by the government in the form of fraudulently obtained funds or reduction in taxes paid. Although the defendant's approach was effectual in *United States v. Schmidt*, 935 F.2d 1440 (4th Cir. 1991), the weight of authority is to the contrary.

**CHAPTER THREE:** *Adjustments*

**Part A Victim-Related Adjustments**

**§3A1.2** Official Victim

*See United States v. Bowie*, 198 F.3d 905 (D.C. Cir. 1999), §2K2.1, p. 9.

**Part B Role in the Offense**

**§3B1.1** Aggravating Role

*United States v. McCoy*, 242 F.3d 399 (D.C. Cir.), *cert. denied*, 534 U.S. 872 (2001). The defendant argued that the two-level enhancement she received for being an "organizer, leader, or manger," pursuant to USSG §3B1.1(c), was inappropriate because, as the Presentence Report reported, those that she directed were "unwitting participants." *Id.* at 410. The court

agreed that the participants must have known of the criminal activity in order to be considered criminally responsible participants as required by USSG §3B1.1(c). *Id.* at 410. Therefore, the court remanded for further proceedings with respect to the aggravating role enhancement and affirmed the rest of the sentence. *Id.* at 411.

*United States v. Wilson*, 240 F.3d 39 (D.C. Cir. 2001). The District of Columbia Circuit held that the court should inquire solely into the number of people involved in the activity in determining whether criminal activity is "otherwise extensive" for the purposes of a USSG §3B1.1(a) enhancement. Following a conviction for bank fraud and various related offenses, the defendant was sentenced to 51 months' imprisonment, followed by a term of 3 years' supervised release. *Id.* at 42-43. The defendant challenged the two-level enhancement under USSG §3C1.1 for obstruction of justice on the grounds that statements made were not material to the subject matter of the hearing. *Id.* at 46. The defendant then challenged the district court's determination
that he was an "organizer or leader" and that he organized criminal activity that was "otherwise extensive" for purposes of an enhancement under USSG §3B1.1(a). *Id.* at 46. The court upheld the finding that the defendant was an "organizer or leader" because of evidence that he had decision making authority, recruited others, and claimed a larger share of the proceeds. *Id.* at 46-47. The court elected to use the test which relied on the number of individuals involved in the criminal activity. This test demands that "an activity [was] the functional equivalent of an activity involving five or more participants," and carries the implication that it must include at least five participants to meet that standard. *Id.* at 50. The court vacated the portion of the sentence based upon the "otherwise extensive" finding because the unknowing participants performed ordinary and automatic duties, such as opening credit card accounts, and could not be included under factors set forth in *Corrozzella*.[13]

**§3B1.2** Mitigating Role

*United States v. Mathis*, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 ( 2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. On appeal, the defendant argued that he should have received a minor role reduction under USSG 3B1.2(b) because his level of participation was no more than that of a "messenger" or "gopher." *Id.* at 26. The district court found, however, that the defendant had been involved in phone calls in

[13]The circuits have a split regarding the test to determine whether criminal activity was "otherwise extensive." Some circuits examine the totality of the circumstances; some focus on the number of individuals involved. *Id.* at 47. The court chose to follow the test enunciated by the Second Circuit in *United States v. Corrozzella*, 105 F.3d 796 (2d Cir. 1997), and adopted by the Third Circuit in *United States v. Helbling*, 209 F.3d 226, 224-45 (3d Cir. 2000), which allows the court to consider: "(1) the number of knowing participants; (2) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent [as opposed to mere service providers]; and (3) the extent to which the services of the unknowing participants were peculiar or necessary to the criminal scheme [rather than fungible with others generally available to the public]." 240 F.3d at 47.

which he and others "discussed, planned, and arranged" a large drug delivery. *Id.* at 26. The court held that the denial of the reduction was not clearly erroneous. *Id.* at 26.

*United States v. Olibrices*, 979 F.2d 1557 (D.C. Cir. 1992). The defendant pled guilty to one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 18 U.S.C. § 371. At the sentencing hearing, the district court determined that the defendant was responsible only for the quantity of drugs in the single transaction and was not responsible for the quantity of drugs distributed by the entire conspiracy. In addition, the district court determined that the defendant was not entitled to a mitigating role adjustment pursuant to USSG §3B1.2 because the defendant was a major participant in the crime of conviction upon which the base offense level was calculated. The district judge sentenced the defendant to 51 months' incarceration. On appeal, the District of Columbia Circuit upheld the district court's denial of a USSG §3B1.2 adjustment because the larger conspiracy was not taken into account in establishing the base level. "To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted and as a major participant in a smaller scheme for which she was convicted, would
receive a shorter sentence than a defendant involved solely in the smaller scheme." *Id*. at 1560.

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

*United States v. Robinson*, 198 F.3d 973 (D.C. Cir. 2000). The defendant, president of a school for emotionally disturbed children, was convicted after a jury trial on 11 counts of defrauding the District of Columbia school system by misappropriating funds and using his position to facilitate bank fraud. *Id.* at 976. The circuit court upheld the district court's sentencing enhancement for abuse of a position of trust based on the defendant's job title and position, control over the finances, managerial discretion, and lack of outside supervision. *Id.* at 978. The defendant also alleged that the district court double counted certain liabilities when it calculated restitution. *Id.* at 979. The defendant did not raise the issue at sentencing and the court only reviewed it for plain error. *Id.* The defendant was paid by the school system for services rendered, and he was in turn responsible for hiring employees and leasing space. *Id.* at 979. Because the lease and employment contracts were separate from the school contract, the school system would not necessarily be held accountable for the payment of these contracts. *Id.* Therefore, the court held that the defendant's double counting argument did not establish plain error. *Id.* The court affirmed the sentence and the amount of restitution, but directed the restitution to be reduced by $13,000 due to a computational error. *Id.*

*United States v. Smaw*, 22 F.3d 330 (D.C. Cir. 1994). The district court, on resentencing, erred in enhancing the defendant's sentence for abuse of a position of trust. The defendant used her position as a time and attendance clerk to retrieve personal employee data in order to obtain credit cards fraudulently. At the resentencing, the district court noted that amended commentary to USSG §3B1.3 would become effective shortly thereafter, which provided a definition of "public or private trust." The district court did not consult the amendment and applied the enhancement, but expressed doubt as to whether the enhancement was appropriate. The circuit court concluded that the amended

commentary excluded the defendant's position from the definition of a position of trust, and that to hold otherwise would result in "converting `the position of every person who handles property into one of trust.'" *United States v. Cuff*, 999 F.2d 1396, 1398 (9th Cir. 1993). The circuit court additionally noted that the commentary must be given controlling weight based on *United States v. Stinson*, 508 U.S. 36 (1993), on remand, 30 F.3d 121 (11th Cir. 1994), and on appeal after remand, 97 F.3d 466 (11th Cir. 1996), and *cert. denied*, 519 U.S. 1137 (1997). The district court should have applied the amended version of the commentary since the amendment was merely clarifying.

*United States v. Young*, 932 F.2d 1510 (D.C. Cir. 1991). The defendant challenged his drug sentence for conspiracy to manufacture and distribute PCP, in violation of 21 U.S.C. § 846. Specifically, he argued on appeal that there was no proof that he abused a "special skill" within the meaning of USSG §3B1.3. The District of Columbia Circuit agreed with the defendant and reversed the district court's sentence. It noted the lack of evidence that the defendant was a "chemist" in the ordinary sense of the term. In fact, there was no evidence the defendant knew anything about any chemical process other than how to manufacture PCP. The court rejected the government's contention that the defendant possessed a "special skill" because the general public does not know how to manufacture PCP. *Id*. at 1512-13. In addition, the court noted that neither the criminal statute nor USSG §2D1.1 distinguishes between the manufacture and the distribution of PCP, thereby suggesting that Congress and the Sentencing Commission determined that, all other things being equal, those who manufacture PCP and those who distribute it deserve equal sentences. Adoption of the government's position, however, would undermine that principle by resulting in an across-the-board divergence in the sentences for the manufacture and distribution of PCP. *Id*. at 1513.

**§3B1.5** Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence[14]

**Part C Obstruction**

**§3C1.1** Obstruction or Impeding the Administration of Justice

*United States v. Maccado*, 225 F.3d 766 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1094 (2001). The District of Columbia Circuit held that the obstruction of justice enhancement in USSG §3C1.1 does not require a showing of a substantial effect on the proceedings. *Id.* at 773. After being indicted for possession of false identification with intent to defraud the United States and for making false statements in a passport application, the defendant was ordered to provide a handwriting exemplar to the Government. *Id.* at 768. The defendant failed to comply for 19 days, but did not delay any scheduled proceedings. Thus, the defendant argued on appeal that he should not receive the

[14]Effective November 1, 2003, the Commission, in response to a congressional 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.

obstruction of justice enhancement because his delay had no substantial effect on the investigation or prosecution of his case. *Id.* at 767. In the alternative, the defendant argued that any obstruction was cured by his guilty plea. *Id.* at 767. The court held that refusal to comply with a court order compelling out-of-court conduct, such as providing a handwriting exemplar, would tend to frustrate the judicial process and did not justify the heightened requirement that the proceedings be substantially affected. *Id.* at 772. According due deference to the district court's application of the guidelines to the defendant's case, the court affirmed the enhancement for obstruction of justice. *Id.* at 773.

*United States v. Monroe*, 990 F.2d 1370 (D.C. Cir. 1993). The District of Columbia Circuit held that the district court improperly gave the defendant a two-level upward adjustment for obstruction of justice under USSG §3C1.1. The basis for the section 3C1.1 adjustment was willful failure to appear for her arraignment or to turn herself in. The defendant had presented unrebutted evidence that the letter announcing the arraignment arrived at her address one day after the hearing took place and thus her initial failure to appear could not have been labeled "willful." As to Monroe's failure to turn herself in, the record indicated that she made affirmative and documented efforts to determine what action was required of her by placing several calls to Pretrial Services. The office failed to answer her questions and did not provide her with explicit instructions. *Id*. at 1376.

**Part D Multiple Counts**

**§3D1.2** Groups of Closely Related Counts[15]

**Part E Acceptance of Responsibility**

**§3E1.1** Acceptance of Responsibility[16]

*United States v. Forte*, 81 F.3d 215 (D.C. Cir. 1996). The district court did not err in denying the defendant's request for a two-level reduction in his base offense level for acceptance of responsibility under USSG §3E1.1 because he lied about the extent of his wife's participation in his prison escape. The district court took the view that the defendant's lies went beyond a factor to be considered in granting a departure and precluded an acceptance of responsibility reduction. Although the circuit court doubted that the guidelines create an absolute bar to the reduction, it did not resolve

[15]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.

[16]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.

the issue. Section 3E1.1 Application Note 1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with an acceptance of responsibility, but differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category.

*United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1065 (1994). The sentencing judge granted a defendant a two-level downward adjustment for acceptance of responsibility even though the defendant went to trial. The sentencing judge decided, however, not to sentence the defendant to the bottom of the guideline range because he went to trial. The trial court also observed that simply saying after trial, "Yes, you got me this time," is a "rather meager basis upon which I might conclude that he truly was remorseful and had accepted full responsibility." *Id*. at 1476 (citation omitted). The defendant appealed and the District of Columbia Circuit, *en banc*, affirmed the district court's decision. The court recognized the possibility that the defendant's sentence might have infringed on the defendant's constitutional guarantee to a trial. The court distinguished the enhancement of a sentence for going to trial (which would be unconstitutional) and the withholding of leniency in sentencing (which would be constitutional). In this case, the district court merely exercised its long-standing discretion to show leniency when a defendant has demonstrated contrition. The four-judge dissent was not persuaded by the majority's distinction between increasing a defendant's sentence for exercising his constitutional right to trial (which is impermissible) and giving his less of the benefit allowable for acceptance of responsibility. According to the dissent, regardless of how the action is characterized, it was unconstitutional for the trial judge to de facto increase the defendant's sentence because he chose to go to trial rather than plead guilty.

*United States v. Kirkland*, 104 F.3d 1403 (D.C. Cir.), *cert. denied*, 520 U.S. 1246 (1997). The defendant was convicted by a jury of distributing a controlled substance within 1,000 feet of a school. He appealed his sentence because the district court refused to give him a downward adjustment for acceptance of responsibility under USSG §3E1.1 because he argued to the jury that he had been entrapped. The District of Columbia Circuit affirmed. It reasoned that an entrapment defense is a way of challenging one factual element of guilt–intent. "It has been generally held that a defendant's challenge to the requisite intent is just another form of disputing culpability." *Id*. at 1405 (citations omitted). The court stated that it could think of no hypothetical in which a plea of entrapment was consistent with acceptance of responsibility, but acknowledging a circuit conflict on the issue, stated that "[i]t may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we doubt it." *Id*. at 1406.

*United States v. Thomas*, 97 F.3d 1499 (D.C. Cir. 1996). The defendant appealed the district court's refusal to grant him a two-level downward adjustment for acceptance of responsibility pursuant to USSG §3E1.1. The defendant went to trial, pleading an entrapment defense. The District of Columbia Circuit noted that Application Note 2 to USSG §3E1.1 states that conviction by trial does not automatically preclude a defendant from consideration for such a

reduction, but the application note was not applicable here because the defendant persisted in his entrapment defense from trial through sentencing and offered not one word of remorse, culpability or human error.

*United States v. Williams*, 86 F.3d 1203 (D.C. Cir. 1996). The appellant challenged the district court's denial of his motion to modify his sentence, filed pursuant to 28 U.S.C. § 2255. He argued that his counsel rendered ineffective assistance by failing to request an additional one-level reduction pursuant to USSG §3E1.1(b)(2). He contended that he was entitled to the third level by having "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *Id*. The district court had determined that Williams was not entitled to the additional one-level reduction under USSG §3E1.1(b)(2) because his decision to plead guilty was untimely and did not permit the court to allocate its resources efficiently. The District of Columbia Circuit affirmed, concluding that the district court's determination was not clearly erroneous. It explained that "[a] defendant does not receive the subsection (b)(2) one-level reduction unless the record manifests that he assisted the government with sufficient timeliness to (1) permit the prosecution to avoid trial preparation *and* (2) permit the court to allocate its resources efficiently. 86 F.3d at 1206 (emphasis in original).

## **CHAPTER FOUR:** *Criminal History and Criminal Livelihood*

### Part A Criminal History

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

*United States v. Johnson*, 28 F.3d 151 (D.C. Cir. 1994). The district court did not err in considering the defendant's juvenile record when determining his criminal history. The defendant argued that the Commission exceeded its statutory authority under 28 U.S.C. § 994 when it included juvenile adjudications in the criminal history provisions because the District of Columbia code states that a juvenile adjudication "is not a conviction of a crime." D.C. Code Ann. § 16-2318. The circuit court disagreed. Whether a juvenile adjudication is a "conviction" is of little moment since what is relevant is that a provision of criminal law was violated. Juvenile records are relevant for purposes of calculating a defendant's criminal history since recidivism generally warrants increased punishment. Accordingly, the Commission did not exceed its statutory authority.

*United States v. McDonald*, 991 F.2d 866 (D.C. Cir. 1993). The defendant appealed his sentence, contending that a juvenile conviction he received should not have been included in his criminal history calculation. Although USSG §4A1.2(j) provides that sentences for "expunged convictions" are not counted in the criminal history calculation, the defendant's juvenile conviction had not been "expunged." Rather, the conviction had been "set aside" pursuant to the District of Columbia Youth Rehabilitation Act. The District of Columbia Circuit affirmed the sentence, distinguishing between "set aside" and "expunged" convictions. In doing so, the court

relied primarily on application note 10, which provides in pertinent part, "[a] number of jurisdictions have various procedures pursuant to which previous convictions may be set aside . . . Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted." 991 F.2d at 871 (quoting USSG §4A1.2, comment. (n.10)). The District of Columbia Circuit acknowledged that the Ninth Circuit has reached a different conclusion on the issue, but distinguished the California statute because it expressly provides that if a court "set[s] aside" a juvenile's conviction, the youth is "released from all penalties and disabilities resulting from the offense." *Id*. at 872 (citation omitted). In contrast, the District of Columbia Youth Rehabilitation Act contains no such provision.

**§4A1.3** Adequacy of Criminal History Category

*In re Sealed Case*, 199 F.3d 488 (D.C. Cir. 1999). The defendant pled guilty to several counts of cocaine possession and distribution and she was sentenced under the career offender guideline. *Id.* at 488-89. In response to defense counsel's complaints about the harshness of the sentencing range, the district court responded that it wished it could sentence the defendant to less than the guidelines demanded, but that a long sentence was needed and there was no alternative. *Id.* at 489. At sentencing, the defendant contested portions of her presentence report and requested leniency in the imposition of her sentence. However, the defendant never requested a departure under USSG §4A1.3, which allows for a downward departure if the "criminal history category significantly over-represents the seriousness of a defendant's criminal history or likelihood that the defendant will commit further crimes." *Id.* at 489 (quoting §4A1.3). On appeal, the defendant argued that the district court's comments demonstrated that it was under the mistaken belief that it lacked authority to depart under USSG §4A1.3. *Id.* at 489. Evaluating the comments in the context of the transcript, the circuit court concluded that the district court did not mean that it could not impose a lower sentence, but rather that it could not do so with a clear conscience. *Id.* at 491. The court dismissed the defendant's appeal for lack of jurisdiction after concluding that the district court's comments did not indicate a belief that it lacked authority to depart downwards under USSG §4A1.3. *Id.* at 492.

*United States v. Spencer*, 25 F.3d 1105 (D.C. Cir. 1994). The district court refused to depart downward from the guidelines pursuant to USSG §4A1.3, but subsequently departed from the career offender provisions of the sentencing guidelines to impose a lower sentence at the statutory ten-year minimum, based on constitutional grounds previously rejected by the circuit or the Supreme Court. This constituted error. Although the Third and Fourth Circuits do not require the district court to find "an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Commission," before the court can depart pursuant to USSG §4A1.3, the Supreme Court as well as the First and Tenth Circuits suggest that a court may only depart from the sentencing range provided in the guidelines pursuant to USSG §5K2.0. Because the district court failed to adequately address why it did not depart downward under USSG §4A1.3, and because it is unclear whether on remand the court will get to the point of exercising or refusing to exercise its discretion to depart under USSG §4A1.3, the circuit court chose not to address the conflict.

**Part B Career Offenders and Criminal Livelihood**

**§4B1.1** Career Offender

*United States v. McCoy*, 215 F.3d 102 (D.C. Cir. 2000). The District of Columbia Circuit held that counsel's assistance was constitutionally ineffective where, but for counsel's miscalculation of the career offender guideline, there was a reasonable probability that the defendant would not have pled guilty. The defendant pled guilty to conspiring to distribute and to possess with intent to distribute cocaine base. Following the denial of a motion to withdraw his guilty plea, the defendant appealed, arguing that his plea was involuntary as it was based upon legal advice that fell below the level of reasonable competence, depriving him of his constitutional right to assistance of counsel. *Id.* at 107. Counsel had miscalculated the career offender guideline and told the defendant that by pleading guilty he would receive a sentence within the range of 188 to 235 months, when he actually faced a sentence of 262 to 327 months. *Id.* at 108. The court conceded that an error in applying the guidelines will not always amount to ineffective assistance of counsel, but added that "familiarity with the structure and basic content of the guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation. *Id.* at 108 (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)). The court held that the defendant satisfied both prongs of the *Strickland* test for ineffectiveness: (1) that counsel's performance "fell below an objective standard of reasonableness;" and (2) that there was a "reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have gone to trial." 215 F.3d at 107 (quoting *Strictland v. Washington*, 466 U.S. 668 (1984)). The court remanded the case with instructions that the defendant be allowed to withdraw his plea. *Id.* at 108-09.

*United States v. Webb*, 255 F.3d 890 (D.C. Cir. 2001). The defendant argued that his sentence constituted plain error because he was sentenced under the career offender guideline, §4B1.1, using the maximum sentence of life from section 841(b)(1)(A) and (B), both of which required that drug quantity be submitted to the jury under *Apprendi*, as the basis for the calculation. However, because the evidence of drug quantity was "overwhelming and uncontroverted," the court found that the error did not "seriously affect the fairness, integrity or public reputation of judicial proceeding" and did not constitute grounds for reversal under the four-prong plain error analysis. Because the underlying convictions survived plain error analysis, the application of the career offender guideline by the district court was not in error.

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

*United States v. Thomas*, 361 F.3d 653 (D.C. Cir. 2004). One of the issues raised on appeal, a question of first impression for the District of Columbia Circuit, was whether escape is a "crime of violence" under §4B1.2(a)(2). The District of Columbia Circuit joined nine of its sister circuits in holding that escape is a "crime of violence" that falls within the ambit of §4B1.2. *See United States v. Jackson*, 301 F.3d 59, 62 (2d Cir. 2002); *United States v. Luster*, 305 F.3d 199, 199-202 (3d Cir. 2002); *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996); *United States v. Ruiz*, 180 F.3d 675, 677 (5th Cir. 1999); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999); *United States v. Bryant*, 310 F.3d 550, 553-54 (7th Cir. 2002); *United States v. Nation*,

243 F.3d 467, 472 (8th Cir. 2001); *United States v. Turner*, 285 F.3d 909, 915 (10th Cir. 2002); *United States v. Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001).

The court first noted that all parties agreed that, in determining whether the crime of escape comes within the scope of §4B1.2(a), the categorical approach must be used. The court noted that because the defendants' escape indictments were devoid of detail, the parties agreed that the court should look no further than the statutory language. The parties also agreed that neither the District of Columbia Code provisions, nor the federal escape statute, fall within the first subsection of §4B1.2(a). The parties also agreed that escape is not one of the four crimes of violence specifically enumerated in §4B1.2(a)(2)–burglary, arson, extortion, or the use of explosives. Therefore, the court stated that the only remaining question was whether escape fell within the "otherwise" clause of §4B1.2(a)(2)–a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The court then noted that the fact that escape can take place without force merely confirmed the point upon which all parties have agreed: that escape does not have to use or threat of force "as an element," and thus does not fall within §4B1.2(a)(1). The court also noted that the fact that the defendants could hypothesize circumstances in which escape could be committed without either force or risk of injury could not be dispositive under §4B1.2(a), as such an analytical approach would eviscerate the notion of a "categorical" definition. The court stated that the issue, then, was whether the offense of escape, as a category, carried appreciably less risk of injury to another than the listed crimes. The court also noted that the risk of injury had to be evaluated not only at the time of the defendants' escape from imprisonment, but at also at the time of reapprehension. The court held that there was no basis for concluding that the risk of physical injury during an escape was any less than during a burglary, arson, or extortion. Like burglary of a dwelling or arson, a defendant could accomplish an escape in the safest possible way. But just as the cautious burglar could be startled by the unexpected return of the homeowner, or the careful arsonist surprised by a fire that spreads out of control, the stealthy escapee may suddenly be confronted by police officers sent to apprehend him, leading to injury to the officers and bystanders. Accordingly, the court concluded that the offense of escape is a "crime of violence" within the meaning of §4B1.2(a).

**§4B1.5** Repeat and Dangerous Sex Offender Against Minors[17]

[17] *See* USSG App. C., Amendment 615. Effective April 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended this guideline. *See* USSG, App. C, Amendment 649.

## CHAPTER FIVE: *Determining the Sentence*

### Part C Imprisonment

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

*United States v. Evans*, 216 F.3d 80 (D.C. Cir.), *cert. denied*, 531 U.S. 971 (2000). The defendant, who was convicted of numerous drug charges, argued on appeal that he should have received the benefit of the USSG §5C1.2 safety valve provisions and a downward departure for extraordinary family circumstances. *Id.* at 91. The court found that there was ample evidence that the defendant had not been forthcoming or truthful in providing evidence to the Government. *Id.* at 91. Because the district court was aware that it had the discretion to grant a downward departure and thought such a departure was unwarranted, the circuit court upheld that decision. *Id.* at 91.

*United States v. Mathis*, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. The court upheld the denial of the section 5C1.2 safety valve provision for a defendant who met four of the five requirements but had not provided any information to the Government. The defendant argued that he had no useful information and that the Government had indicated that a debriefing would be futile. *Id.* at 29. Although USSG §5C1.2(5) does not require that the information provided be useful, there was no disclosure at all on the part of the defendant and the court held that the district court did not clearly err. *Id.* at 29.

*In re Sealed Case (Sentencing Guidelines' "Safety Valve")*, 105 F.3d 1460 (D.C. Cir. 1997). The defendant pled guilty to conspiring to distribute and possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 846. The defendant appealed the district court's denial of the "safety valve." Codified at 18 U.S.C. § 3553(f), the safety valve waives the statutory mandatory minimum penalties for defendants who meet five criteria. *See also* USSG §5C1.2. The district court denied the safety valve because it found that both the defendant and his brother were "responsible for having a gun to protect the drugs and/or the money that they would get." 105 F.3d at 1462 (citation omitted). The District of Columbia Circuit vacated the defendant's sentence and remanded to the district court for resentencing in accord with the safety valve. The District of Columbia Circuit inferred that the district court must have relied on either co-conspirator liability or constructive possession in finding that the defendant possessed the gun discovered in his brother's car. It then reversed the district court's finding on both legal theories. Based upon application note 4 to section 5C1.2, the District of Columbia Circuit held that co-conspirator liability cannot establish possession under the guidelines' safety valve. 105 F.3d at 1462-63. It also found that the defendant did not constructively possess his brother's gun because one of the usual factors establishing the ability to exercise dominion and control–the defendant's proximity to the contraband–is missing in this case. *Id.* at 1464. The defendant remained in the restaurant during the drug transaction while the

gun was located in the car. Nor does anything in the record suggest that he was anywhere near the gun immediately prior to the sale. *Id*.

**Part G Implementing The Total Sentence of Imprisonment**

**§5G1.3** Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment[18]

*United States v. Hall*, 326 F.3d 1295 (D.C. Cir. 2003). In 1997, the defendant was convicted in District of Columbia Superior Court of assault with intent to commit aggravated assault, for shooting a victim in the face, and of possession of a firearm during a crime of violence. In 1999, while on probation for the District of Columbia offenses, the defendant was arrested in Maryland for robbery with a deadly weapon. The Maryland court sentenced him to two to five years of incarceration, with all but eighteen months suspended, to be followed by five years of probation. As a result of his Maryland conviction, the District of Columbia Superior Court revoked the defendant' s Youth Act probation and sentenced him as an adult to concurrent terms of 20 months to five years on the assault charge and a mandatory minimum of five years to a maximum 15 years on the weapons charge. The defendant's new District of Columbia sentence was set to commence upon the completion of his Maryland sentence. The Maryland jail mistakenly and inexplicably released him from custody instead of returning him to the District to begin serving his August 1999 sentence. In 2001, while still on probation for his Maryland conviction, the defendant was arrested again, this time on the charge that led to the instant case: the unlawful possession of a firearm and ammunition by a convicted felon. The district court relied on Note 6 to §5G1.3 in concluding that it should impose the defendant' s federal sentence to run consecutively to his District of Columbia sentence. On appeal, the defendant argued that the district court erred in running his federal sentence consecutively to the sentence imposed by the District of Columbia. The District of Columbia Circuit noted that even if the district court was misled to believe that Note 6 required consecutive sentencing, the defendant suffered no prejudice, and therefore the court did not plainly err, because the guideline provision that correctly applied to the defendant's case clearly mandated a consecutive sentence. Application Note 1 to §5G1.3 states that "if the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." In other words, while the district court may have erred in thinking that Note 6 was the relevant application note, a consecutive sentence was nonetheless required, and the consecutive sentence that the district court imposed therefore contained no error.

*United States v. Heard*, 359 F.3d 544 (D.C. Cir. 2004). The court affirmed the district court's imposition of a consecutive sentence rather than a concurrent sentence. On appeal, the

[18]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.

defendant asserted two arguments: 1) that the district court erred in not applying §5G1.3(b), which requires a concurrent sentence; and 2) that even if §5G1.3(c) applied and the district court had discretion, the district court abused its discretion by imposing a consecutive rather than partially concurrent sentence. The defendant first argued that §5G1.3(b) governed his case because his 2000 offenses were taken into account in the following sense: the probation office recited them in the PSR, and the district court discussed them at the sentencing hearing. The District of Columbia Circuit noted that the question, however, was not whether those offenses were taken into account in some colloquial sense, but whether they were fully taken into account in the determination of the offense level for the instant offense, as required by the words of the guideline. In the instant case, the defendant's January 2000 offenses were not taken into account as "relevant conduct" in determining his offense level for the January 2001 offense, and the consecutive sentences did not otherwise cause him to suffer duplicative punishment. Both the probation office and the court treated the former as separate crimes, unrelated to the latter. Accordingly, the court concluded that §5G1.3(b), and its requirement that the court impose a sentence to run concurrently with an undischarged term of imprisonment, did not apply to this case. Next the defendant argued that, even if §5G1.3(c) was the appropriate provision, the district court erred by declining to exercise its authority to impose a partially concurrent sentence under that subsection. The District of Columbia Circuit noted that by contrast to subsections (a) and (b)–which command that the sentence shall be imposed to run consecutively if the case falls within (a) and concurrently if it falls within (b), subsection (c) plainly leaves the decision to the discretion of the district court. The court then noted that it may overturn the district court's exercise of its discretion under §5G1.3(c) only if that discretion has been abused. The court found no such abuse in the instant case. Consequently, the district court's sentence was affirmed.

*United States v. Sobin*, 56 F.3d 1423 (D.C. Cir.), *cert. denied*, 516 U.S. 936 (1995). The appellate court affirmed the district court's decision to impose the six concurrent bankruptcy fraud sentences to run consecutively to the state sentences for sexual offenses involving children. "Because the five sexual offense sentences did not result at all from conduct taken into account here, the district court properly imposed fully consecutive sentences as 'reasonable incremental punishment' for the instant offenses."

## Part H Specific Offender Characteristics

### §5H1.1 Age (Policy Statement)

*United States v. Brooke*, 308 F.3d 17 (D.C. Cir. 2002). The defendant pled guilty to a drug conspiracy charge. The defendant's conviction, at the age of 82, was his third since coming to the United States in 1980. At the sentencing, the defendant moved for a downward departure based on his age and physical condition. The defendant stated that he was 82 years old, and that he had the following serious physical infirmities: 1) a markedly swollen right knee with obvious joint effusions, and tenderness and flexion of knee of only six degrees with some pain; 2) stiffness in his hands and difficulty holding objects; 3) prior evaluations for chest pains; and 4) respiratory problems and arthritis. On appeal, the defendant argued that the district court erred by failing to grant him a downward departure pursuant to §§5H1.1 and 5H1.4. The District of Columbia Circuit affirmed the district court's holding.

Regarding a departure pursuant to §5H1.1, the court noted that the district court did not question that the defendant was elderly and infirm, nor did the district court hold that the defendant's medical infirmities were insufficient to permit a departure under §5H1.1. Rather the problem the district court discerned was with the third element of §5H1.1: that an alternative "form of punishment such as home confinement . . . be equally efficient as . . . incarceration." The district court concluded that home confinement would not be effective in restraining the defendant's criminal conduct because the defendant had a history of drug dealing in his home. Regarding a departure pursuant to §5H1.4, the court noted that the district court concluded that the defendant's impairment was insufficient to qualify under §5H1.4. Unlike §5H1.1, §5H1.4 required not just "infirmity" but "extraordinary physical impairment," and while the district court did not dispute the underlying facts of the defendant's medical condition, it did not regard them as reflecting an extraordinary impairment. Accordingly, the District of Columbia Circuit affirmed the judgment of the district court.

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

*See United States v. Brooke*, 308 F.3d 17 (D.C. Cir. 2002), §5H1.1, p. 25.

**§5H1.6** Family Ties and Responsibilities, and Community Ties (Policy Statement)[19]

**Part K Departures**

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

*In re Sealed Case*, 244 F.3d 961 (D.C. Cir. 2001). The District of Columbia Circuit held that the district court did not err in denying the defendant's motion to compel the Government to file a USSG §5K1.1 motion for a downward departure for substantial assistance when the Departure Guideline Committee refused to authorize the filing. The defendant entered into a plea agreement with the Government in which he agreed to plead guilty to two counts and cooperate with the Government in other relevant matters in exchange for the Government dropping five remaining charges and informing the Departure Committee of any assistance tendered that might qualify the defendant for a downward departure. The defendant provided testimony in one case and helped to secure superceding indictments against several other defendants, but refused to testify at the last minute in a second case, allegedly out of fear for himself and his family. The prosecutor informed the Departure Committee of the extent of the defendant's cooperation in the relevant cases and recommended that they authorize the a USSG §5K1.1 motion for a "modest departure." The Departure Committee refused without offering

[19]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.

any reason for its denial. On the theory that the Government had breached the plea agreement, the defendant filed a motion to compel the Government to file the motion. The district court denied the motion and imposed the sentence with no downward departure. The court upheld the district court's denial, stating that the decision to file the USSG §5K1.1 motion is largely within the Government's discretion. Without an explanation from the Departure Committee or an objective standard for definition "substantial assistance," the court could not presume that the Committee violated the plea agreement.

*In re Sealed Case*, 204 F.3d 1170 (D.C. Cir. 2000). In an agreement with the Government, the defendant pleaded guilty to one count of a ten-count indictment and was sentenced to 57 months' imprisonment. Although in District of Columbia Superior Court the defendant had provided the Government with information concerning a homicide case, the Government did not request a substantial assistance departure under USSG §5K1.1. *Id.* at 1172. On appeal, the defendant contended that the district court should have granted a departure under USSG §5K2.0, because the assistance he had rendered fell outside the "heartland" of USSG §5K1.1. *Id.* at 1172. The defendant argued that USSG §5K1.1 covered assistance in the investigation and prosecution of federal crimes, and therefore the district court had the authority to depart without a motion by the Government. *Id.* at 1172. Because the defendant did not present this argument in district court, the circuit court held that the issue had been waived and reviewed the sentence for plain error only. *Id.* at 1173. The court concluded that the term "offense" in USSG §5K1.1 need not be limited to federal offenses, especially in the District of Columbia where the U.S. Attorney prosecutes federal and local crimes and has the authority to join local charges with federal ones. *Id.* at 1174. The court further held that the district court did not plainly err in denying the defendant's request for a downward departure. *Id.* at 1174.

**§5K2.0** Grounds for Departure (Policy Statement)[20]

*United States v. Smith*, 27 F.3d 649 (D.C. Cir. 1994). The district court erred in concluding that it did not have the authority to depart downward based on the likelihood that the defendant would face more severe prison conditions because of his status as a deportable alien. The defendant was a Jamaican citizen who entered the United States illegally and who pled guilty to possession with intent to distribute cocaine in violation of 21 U.S.C. § 841. He argued that he was entitled to a downward departure because his deportable alien status rendered him ineligible to serve any portion of his sentence in a minimum security prison or under house confinement. In addressing this issue, the court of appeals first concluded that the provisions of Chapter Five, Part H and 18 U.S.C. § 3553(b) reach aggravating and mitigating factors that relate to the offender as well as to "moral blameworthiness."

[20]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.

*See, e.g.,* §§5H1.1, 5H1.4 (extreme age or disability may be appropriate downward departure factor when lesser form of incarceration may be equally efficient as prison). Thus, the Bureau of Prisons limitations on a deportable alien's access to minimum security facilities and to home confinement fall under possible mitigating circumstances. The court of appeals found that a downward adjustment "in anticipation of the Bureau's application of assignment policies, is [no] more of a disapproval or encroachment than was the departure made in *Lara* in anticipation of the defendant's expected assignment to solitary." Further, if the Bureau's policies are to ensure that the defendant's status as a deportable alien would not be defeated by his escape, then the defendant's status does increase the severity of the sentence and may justify a downward departure. However, the "severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence." The case was remanded for resentencing and the district court's consideration of whether any departure is appropriate.

**§5K2.7** Disruption of Governmental Function (Policy Statement)

*United States v. Root*, 12 F.3d 1116 (D.C. Cir. 1994). The defendant, an attorney representing clients before the Federal Communications Commission, pled guilty to wire fraud in violation of 18 U.S.C. § 1343 and altering or forging public records in violation of 18 U.S.C. § 494. The circuit court affirmed the district court's two-level upward departure based upon disruption of a government function. Although the district court also relied on improper factors, "[r]emand is not automatically required when a trial court has relied in part on improper factors in reaching a sentence under the guidelines. Rather, we may affirm such a sentence if we determine `on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed."' *Quoting Williams v. United States*, 503 U.S. 193 (1992).

**§5K2.13** Diminished Capacity (Policy Statement)[21]

*United States v. Draffin*, 286 F.3d 606 (D.C. Cir. 2002). The District of Columbia Circuit held that the district court's failure to depart downward *sua sponte* when not requested by the defendant did not constitute plain error. The court, however, recognized one "unlikely circumstance–and there may conceivably be others–in which plain error might be shown: namely, when, notwithstanding the defendant's silence, the sentencing court makes it plain on the record *sua sponte* that it is choosing not to depart on a particular ground because it believes (mistakenly, as it turns out) it lacks authority to do so. *Id*. at 610. Nevertheless, the court held that in this case no such error occurred.

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

*United States v. Greenfield*, 244 F.3d 158 (D.C. Cir. 2001). The district court's denial of a USSG §5K2.13 downward departure for diminished capacity based upon the defendant's depression did not constitute error. The defendant pled guilty to conspiracy to possess with intent to distribute cocaine base. At sentencing, the defendant filed a memorandum alleging that he suffered from depression, and that his mental state contributed to his commission of the offense. *Id.* at 159. After hearing the expert testimony on the defendant's mental state, the court denied the motion, stating that the testimony "mandates that the court not take into consideration diminished capacity." *Id.* at 160 (citing Sentencing Hr'g Tr. at 52). The district court denied the defendant's request for departure and sentenced the defendant to 60 months. On appeal, the defendant argued that if drug addiction contributed only in part to the defendant's commission of the crime, then it should not preclude a departure because the defendant's mental state could also have played a role. *Id.* at 162. The court found that the district court had not focused on the defendant's addiction, but rather on whether the defendant's depression had *significantly* diminished his mental capacity. *Id.* at 162. Because the expert had not provided adequate testimony that the defendant's mental capacity had been significantly diminished, and the district court clearly understood its authority to depart, the court affirmed the district court decision. *Id.* at 162.

**§5K2.20** Aberrant Behavior (Policy Statement)[22]

**§5K2.22** Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)[23]

**§5K2.23** Discharged Terms of Imprisonment (Policy Statement)[24]

**CHAPTER SIX:** *Sentencing Procedures and Plea Agreements*

**Part B Plea Agreements**

*United States v. Goodall*, 236 F.3d 700 (D.C. Cir. 2001). The District of Columbia Circuit held that a district court can, in its discretion, accept a Rule 11(e)(1)(C) plea agreement stipulating to a sentence below the range assigned by the sentencing guidelines. The defendant pled guilty to one count of possession with intent to distribute heroin in exchange for the Government's agreement to drop seven

[22]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.

[23]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.

[24]Effective November 1, 2003, the Commission added a new downward departure provision regarding effect of discharged terms of imprisonment. *See* USSG, App. C, Amendment 660.

other drug charges. *Id.* at 701. The Rule 11(e)(1)(C) plea agreement specified a sentencing range of 57 to 71 months and the Government recommended a sentence at the bottom of that range. The presentence report recommended a guideline range of 70 to 87 months. *Id.* at 702. The district court, believing it was bound by both the guidelines and the plea agreement that it had accepted, only considered sentences at a sentencing range of 70 to 71 months. *Id.* at 702. The circuit court held that, by not considering sentences between 57 and 69 months, the district court had impermissibly altered the plea agreement. *Id.* at 703, 706. While the First and Sixth Circuits held that USSG §6B1.2 restricts a court's discretion under Rule 11(e), the District of Columbia Circuit joined the remaining circuits in holding that USSG §6B1.2 does not limit the court's otherwise broad discretion under Rule 11. Although the language of USSG §6B1.2 mandates that the guidelines be followed, the policy statements to the guideline and the Introduction to the *Guidelines Manual* indicate that it is intended only as a guide to courts in deciding whether to accept a Rule 11(e) plea agreement. *Id.* at 704. The court vacated the sentence and remanded for re-sentencing. It instructed the district court that, if it intended to accept the plea agreement, it should consider the range of 57 to 71 months, and if it intended to reject the plea agreement in favor of the guideline calculation, then the defendant should be allowed to withdraw his plea. *Id.* at 706.

## CHAPTER SEVEN: *Violations of Probation and Supervised Release*

### Part B Probation and Supervised Release Violations

**§7B1.3** Revocation of Probation or Supervised Release (Policy Statement)

*United States v. Bruce*, 285 F.3d 69 (D.C. Cir. 2002) (*per curiam*). The District of Columbia Circuit had previously held that Chapter Seven policy statements are not mandatory. *United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993). A year later, Congress amended 18 U.S.C. § 3553 to clarify that resentencing for probation and supervised release should be based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose, rather than upon the guidelines applicable to . . . the original offense. In *Bruce*, the District of Columbia Circuit reaffirmed *Hooker* notwithstanding the 1994 amendment to section 3553. It reasoned that the plain language of the post-1994 law merely states that a district court must "*consider* . . . the applicable guidelines or policy statements issued by the Sentencing Commission" when imposing a sentence for a violation of supervised release. *Bruce*, 285 F.3d at 73 (emphasis in original).

## ALL CHAPTERS: MISCELLANEOUS AMENDMENTS[25]

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

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

§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 referencing the following guidelines: §§2B1.1, 2C1.3, 2H2.1, 2K2.5, 2N2.1, and 2R1.1.

## OTHER STATUTORY CONSIDERATIONS

### 18 U.S.C. § 841

*United States v. Budd*, 23 F.3d 442 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1115 (1995). The district court erred in failing to sentence the defendant pursuant to the statutory minimum sentence provided in 21 U.S.C. § 841(b)(1)(B). The defendant was convicted of distribution of cocaine in violation of 21 U.S.C. § 841(a). Although he had a prior conviction in District of Columbia Superior Court for attempted possession with intent to distribute PCP, the district court concluded that the statutory minimum did not apply because there was "no federal crime of an attempt to possess with the intent to distribute narcotics [and thus] Budd's conduct did not rise to the level of a federal crime." The circuit court reversed. First, 21 U.S.C. § 846 specifically criminalizes attempts to possess with intent to distribute a controlled substance. Second, a plain reading of section 841 illustrates that it applies equally to felony violations of the District of Columbia laws. *Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980); *see also* D.C. Code § 23-101. Congress additionally extended the mandatory minimum provision to prior state drug convictions in 1984. Most

importantly, however, the defendant's attempted possession with intent to distribute PCP is a prior felony within the meaning of the statute requiring the imposition of the statutory minimum.

**28 U.S.C. § 994**

*See United States v. Johnson*, 28 F.3d 151 (D.C. Cir. 1994), p. 19.

## Post-*Apprendi (Apprendi v. New Jersey, 530 U.S. 466 (2000))*

*United States v. Agramonte*, 276 F.3d 594 (D.C. Cir. 2001). The court held that failure to submit the drug quantity question to the jury violated *Apprendi* for the defendant's convictions under 21 U.S.C. §§ 841 and 846, but did not violate *Apprendi* for his conviction of unlawful possession with intent to distribute heroin within 1000 feet of a school, 21 U.S.C. § 860. In addition, the court rejected the defendant's contentions that *Apprendi* applies to a court's determination of a leadership role adjustment under USSG §3B1.1 and to sentences that trigger a mandatory minimum sentence.

*United States v. Fields*, 251 F.3d 1041 (D.C. Cir. 2001), *cert. denied*, 124 S. Ct. 2003). The District of Columbia Circuit granted a rehearing in this case to clarify its earlier decision in *United States v. Fields*, 242 F.3d 393 (D.C. Cir. 2001). (Fields I) The defendant was convicted on numerous counts, including narcotics conspiracy and RICO conspiracy. On appeal, the defendant argued that the district court committed plain error when it sentenced the defendant to a life term for the narcotics conspiracy charge without submitting the drug quantity to the jury as required by *Apprendi*. The Government argued that the drug quantity issue was not reversible error because it had been supported by "overwhelming proof." In the alternative, the Government argued that the life sentence imposed for the RICO count constituted a "statutorily available sentence" under *Apprendi*. The court disagreed that the evidence of drug quantity had been "overwhelming" as it rested on vague admissions by the defendant and "imprecise testimony"of cooperating witnesses. The court did agree that the RICO sentence would be a "statutorily available sentence" if it had been premised on the racketeering act of armed kidnapping.

*In re Sealed Case*, 246 F.3d 696 (D.C. Cir. 2001). The defendant pled guilty to unlawful possession of a firearm in violation of 18 U.S.C. § 922. The district court applied the four-level enhancement under USSG §2K2.1 because the defendant had threatened to shoot someone while he was in possession of the firearm. The defendant received a sentence of 48 months on the count of firearm possession, well below the statutory maximum of ten years. On appeal, the defendant argued that the gun threat should have been proved beyond a reasonable doubt to comply with *Apprendi*. The court upheld the district court decision and held that *Apprendi* is not applicable to sentences that trigger a mandatory minimum sentence. *Id*. at 698.

*United States v. King*, 254 F.3d 1098 (D.C. Cir. 2001). A jury found the defendant guilty of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). The defendant's applicable guideline range was enhanced because of the existence of the defendant's two prior convictions and because the firearm the defendant possessed was stolen. The district court imposed the maximum sentence available, 120 months for violation of 18 U.S.C. § 922(g). On appeal, the

defendant argued that this sentence violated the Supreme Court's holding in *Apprendi* because the judge relied upon guideline enhancements at sentencing that had not been submitted to the jury. The court rejected this argument, reiterating that *Apprendi* did not constrain the district court's application of the guideline enhancements when the resulting sentence did not exceed the statutory maximum.

*See United States v. Samuel,* 296 F.3d 1169 (D.C. Cir.), *cert. denied,* 537 U.S. 1078 (2002), §2J1.7, p. 8.

*United States v. Webb*, 255 F.3d 890 (D.C. Cir. 2001). The District of Columbia Circuit held no *Apprendi* violation where the sentence was increased beyond the statutory maximum due to the existence of prior convictions. The defendant was convicted of distributing and possessing with intent to distribute cocaine base in violation of 21 U.S.C. § 841. The defendant was sentenced under the career offender guideline, §4B1.1, because of the existence of two prior felony drug convictions and received a base offense level of 37. Although he could have received up to life imprisonment, the district court sentenced him to 30 years, at the bottom of the guideline range. The defendant argued on appeal that, because the issue of drug quantity was not submitted to the jury and his sentence exceeded the 20-year maximum sentence for section 841(b)(1)(C) (the only section for which drug quantity need not be treated as an element), his sentence constituted plain error under *Apprendi*. The court notes that section 841(b)(1)(C) increased the maximum sentence to 30 years where the offense was committed after the conviction of another felony drug offense. Because *Apprendi* left undisturbed the judge's ability to determine whether there was a prior conviction, using the enhanced section 841(b)(1)(C) maximum was appropriate. Therefore, the defendant's sentence did not exceed the statutory maximum and there could be no error on those grounds.