SELECTED GUIDELINE APPLICATION DECISIONS FOR THE NINTH CIRCUIT

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U.S. Sentencing Commission

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§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical)–*U.S. v. Alfaro*, 336 F.3d 876 (9th Cir. 2003) (application of a 14-level upward departure, pursuant to guideline governing unlawful importation of a listed chemical, was unreasonable), p. 20.

§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic)–*U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (affirmed the district court's enhancement pursuant to §2G2.2(b)(3) for transmitting material that portrays sadistic conduct), p. 24.

§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)–*U.S. v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (vacated and remanded for re-sentencing; held the district court erred in enhancing the defendant's sentence under §2K2.1(a)(1) because neither the residential burglary nor attempted residential burglary was a crime of violence), p. 27.

§2L1.2 (Unlawfully Entering or Remaining in the United States)–*U.S. v. Grajeda-Ramirez*, 348 F.3d 1123 (9th Cir. 2003) (Colorado's reckless vehicular assault statute is a predicate "crime of violence" for the purposes of the sentencing guidelines), p. 31; ***U.S. v. Hernandez-Valdovinos*, 352 F.3d 1243 (9th Cir. 2003)** (a sentence suspended that imposed incarceration as a condition of probation constituted a "sentence imposed" for purposes of §2L1.2), p. 31; ***U.S. v. Medina-Maella*, 351 F.3d 944 (9th Cir. 2003)** (affirmed the district court's holding that a prior felony conviction for lewd or lascivious acts upon a child under the age of 14 years was a "crime of violence" for purposes of §2L1.2), p. 33.

§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tempering, and Falsification)–*U.S. v. Phillips*, 356 F.3d 1086 (9th Cir. 2004) (case remanded so the district court could include any reliable CERCLA-related expenses in its §2Q1.3(b)(3) calculation for its substantial cleanup expenditure), p. 37.

§3B1.3 (Abuse of Position of Trust or Use of Special Skill)–*U.S. v. Liang*, 362 F.3d 1200 (9th Cir. 2004) (extraordinary eyesight does not constitute a "special skill" and does not support a sentence enhancement under §3B1.3), p. 47; ***U.S. v. Peyton*, 353 F.3d 1080 (9th Cir. 2003)** (the district court did not err in applying an enhancement for abuse of defendant's position of trust based on defendant's involvement in identity theft scheme, where defendant was a supervisor for the postal service, was subject to significantly less supervision that regular postal employees, possessed managerial discretion to access a secured roster listing the names and social security numbers of postal employees, which were subsequently used to fraudulently obtain credit cards), p. 48.

§3C1.1 (Willfully Obstructing or Impeding Proceedings)–*U.S. v. Alvarado-Guizar*, 361 F.3d 597 (9th Cir. 2004)–(as a matter of first impression, the district court was not required to make factual findings on the elements of perjury when electing not to impose an enhancement for obstruction of justice), p. 50.

§3D1.2 (Multiple Counts)–*U. S. v. Melchor-Zaragoza*, 351 F.3d 925 (9th Cir. 2003) (as a matter of first impression, division of conviction of conspiracy to commit hostage taking into 23 separate groups for sentencing purposes, based on existence of 23 distinct victims, was proper), p. 55.

§4A1.1 (Criminal History Category)–*U.S. v. Ramirez*, 347 F.3d 792 (9th Cir. 2003) (the district court did not err in determining that neither of the two temporary detentions ordered by YOPB constituted either a prior sentence under §4A1.1(c) or a constructive revocation of parole under §4A1.2(k)), p. 59.

§4A1.2 (Definitions and Instructions for Computing Criminal History)–*U.S. v. Ramirez-Sanchez*, 338 F.3d 977 (9th Cir. 2003) (affirmed the district court's determination that defendant's deportation did not extinguish his

probation, and therefore the district court did not err in assigning two criminal history points, pursuant to USSG §4A1.1(d), because defendant was under a criminal justice sentence at the time he was arrested), p. 60; ***U.S. v. Semsak,* 336 F.3d 1123 (9th Cir. 2003)** (affirmed the district court's upward departure of four levels because the size of defendant's truck and the recklessness of defendant's driving took the case outside the heartland of the offense guideline), p. 63.

§4B1.2 (Definitions of Terms Used in Section 4B1.1)– *U.S. v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (reversed the district court; residential burglary and attempted residential burglary are not crimes of violence), p. 67.

§5K2.13 (Diminished Capacity)–*U.S. v. Dela Cruz,* 358 F.3d 623 (9th Cir. 2004) (affirmed the district court's decision not to grant defendant a departure under §5K2.13), p. 89.

§5K2.20 (Aberrant Behavior)–*U.S. v. Guerrero,* 333 F.3d 1078 (9th Cir. 2003) (vacated and remanded the district court's sentence because the district court did not make the required findings to grant a downward departure based on §5K2.20 aberrant behavior), p. 90; ***U.S. v. Vieke,* 348 F.3d 811 (9th Cir. 2003)** (affirmed the district court's sentence, the court did not need to address the government's argument because it failed to preserve the issue on appeal), p. 91.

Table of Contents

Page

Page

Table of Authorities

Page

Page

U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS—NINTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Jackson, 167 F.3d 1280 (9th Cir.), *cert. denied*, 528 U.S. 1012 (1999). The district court erred in failing to apply USSG §1B1.2(d). The jury returned a general verdict finding the defendant guilty of conspiracy, acquiring prescription drugs by fraud, and furnishing false prescription information; but, she was acquitted of distribution of prescription drugs and possession with intent to distribute. The government appealed the district court's failure to apply USSG §1B1.2(d) which requires a conviction on a single count of conspiracy to commit more than one offense to be treated as if the defendant had been convicted of a separate count of conspiracy for each offense the defendant conspired to commit. The appellate court agreed with the government, and rejected the defendant's argument based upon the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial, and held USSG §1B1.2(d) to be constitutional. The court then held that the facts before the district court, regardless of whether one relied on the evidence supporting the substantive distribution charges of which she had been acquitted or on the evidence of uncharged conduct, supported a finding that Jackson was guilty of conspiring to distribute prescription drugs. The district court's failure to apply USSG §1B1.2(d) and sentence Jackson accordingly was error, and the case was remanded for resentencing.

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

United States v. Cruz-Mendoza, 147 F.3d 1069 (9th Cir. 1998), *cert. denied*, 528 U.S. 1013 (1999). The court of appeals determined that a section of Amendment 518 made a substantive change to the guidelines and therefore could not be applied retroactively. The relevant portion of Amendment 518 provides that, in a reverse sting, the court shall exclude from relevant conduct the amount that the defendant did not intend to produce and was not reasonably capable of producing. An earlier decision, *United States v. Felix*, 87 F.3d 1057 (9th Cir. 1996), had held that another section of Amendment 518, regarding completed transactions, was a retroactive clarifying amendment.

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000). The district court erred by summarily adopting the amount of drugs attributed to the defendant by the PSR without first determining the amount that the defendant could reasonably foresee would be involved in the jointly undertaken criminal activity. The defendant was convicted of conspiracy to possess with the intent to distribute marijuana, among other narcotics and weapons offenses. At sentencing, the district court attributed the entire 800 pounds of marijuana to the defendant without making a specific finding that he was responsible for that amount. The Ninth Circuit held that such a

finding could not stand in light of the requirement in USSG §1B1.3(a)(1)(B) that in the case of jointly undertaken criminal activities, the defendant is accountable only for "'all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.'" 235 F.3d at 464 (citations omitted). The district court summarily adopted the recommendation of the PSR, which did not explain why the entire amount of drugs was attributed to the defendant. The court held that where such determinations are not supported by factual findings–either in the PSR or in the district court's opinion–or by the guidelines, they are impermissible.

United States v. Hicks, 217 F.3d 1038 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000). The district court erred when it failed to consider the bank's alleged misconduct subsequent to the offense before it calculated the bank's loss. After defaulting on a loan approved based on a false tax return and application, a jury convicted the defendant of making false statements to a federally insured financial institution. At sentencing, the defendant argued that after his offense, the bank had participated in criminal misconduct, which resulted in sales of some of the secured properties at unreasonably low prices, and that he should not be held accountable for the subsequent inflated loss. Based on a prior ruling, which held that subsequent consequential losses suffered by the bank could be attributed to the defendant for sentencing, the district court rejected the allegation without hearing argument, and concluded that the defendant could only raise the issue through a motion for downward departure. *See United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999) (holding that losses due to a falling market or the bank's improvidence could be calculated into the loss). The court distinguished this case from *Davoudi* on the ground that the bases for the inflated losses were different and vacated the sentence based on its interpretation of the relevant conduct guideline. Section 1B1.3(a)(3) allows consideration in a loss calculation of "all harm that *resulted from* the acts or omissions" of the defendant (emphasis added). Consistent with the other circuits interpreting this provision, the court found that "the term 'resulted from' establishes a causation requirement." 217 F.3d at 1048. *See United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999); *cert. denied*, 534 U.S. 1082 (2002); *United States v. Molina*, 106 F.3d 1118, 1123-24 (2d Cir.), *cert. denied*, 520 U.S. 1247 (1997); *United States v. Fox*, 999 F.2d 483, 486 (10th Cir. 1993). Because "[n]ew losses inflicted independently by third-party criminals after the completion and discovery of a defendant's crime do not 'result from' that crime for purposes of the Sentencing guidelines," the court held that "[f]or purposes of computing a fraud defendant's adjusted offense level under USSG §2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not 'result[] from' the defendant's crime and may not be considered." 217 F.3d at 1049. The court remanded the case for the district court to make findings regarding the defendant's argument. It added that the court should make such findings before determining whether the guideline range reflects the defendant's culpability, which the district court failed to do before declining to depart downward based on the bank's misconduct.

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999). In a case involving conspiracy to obstruct justice, the Ninth Circuit held that where the application of a sentencing enhancement would have an "extremely disproportionate effect" on a sentencing, the government bears the burden of proving the underlying conduct by clear and convincing evidence. At issue was whether the district court properly considered certain violent conduct of which the defendant was

acquitted as relevant conduct. The Ninth Circuit compared the defendant's maximum sentence without the disputed enhancement with the maximum sentence that would result if the enhancement applied–here, the enhancement would have increased the defendant's exposure from 30 months to 48 months–and held that the district court should have applied a clear and convincing standard. Therefore, the Ninth Circuit vacated the sentence and remanded for resentencing.

United States v. Hoskins, 282 F.3d 772 (9th Cir.), *cert. denied*, 536 U.S. 933 (2002). The defendant challenged a two-level enhancement, per USSG §2B3.1(b)(4)(B), for physically restraining someone to facilitate the robbery of a K-Mart. The defendant claimed that he did not actually physically restrain the subject attendant but instead that the attendant was cuffed by a co-conspirator. USSG §1B1.3(a)(1)(B) instructs that the reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity should be considered when imposing enhancements. Because the criminal plan involved taking over the K-Mart cash room and because it was likely that an employee would be working in or near the cash room, it was not clearly erroneous for the district court to conclude that the restraint was foreseeable.

United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000). The Ninth Circuit applied the rule that relevant conduct that would have an extremely disproportionate effect on a defendant's sentence must be proved by clear and convincing evidence to a case involving a Ponzi investment scheme. The defendants had been charged and convicted of two fraudulent sales of phony investments. At sentencing, the defendants did not dispute that they and their company made many more sales, but they argued that they only knew the sales were fraudulent during the time they made the sales of which they were convicted. If they were held responsible for only the two sales, a five-level upward adjustment applied, and their resulting sentencing range was 12-18 months; if held responsible for all the sales, a 14-level adjustment would apply, and a 41-51 month range would result. The Ninth Circuit held that the difference in sentencing exposure was sufficiently disproportionate to require the government to prove by clear and convincing evidence that the defendants knowingly and intentionally engaged in all the uncharged conduct.

United States v. Ochoa, 311 F.3d 1133 (9th Cir. 2002). The district court's conviction and sentence were affirmed. On appeal, the defendant argued that *Apprendi* renders section 1B1.3 unconstitutional because it allows courts to impose a sentence based on drug quantity neither charged in the accusatory pleading, nor proven beyond a reasonable doubt. The defendant pled guilty to distributing 3 kilograms of cocaine in violation of section 841(a)(1), which carries a maximum penalty of 40 years in prison. The defendant also stipulated to the fact that he participated in the distribution of an additional 36 kilograms of cocaine. Pursuant to §5G1.1(c), any application of §1B1.3 may not exceed the statutory maximum for the underlying offense of conviction. The Ninth Circuit held that it was unnecessary to submit the amount of drugs to a jury because the sentence did not exceed the statutory maximum. The court noted that defendant's 87-month sentence was substantially less than the 40-year statutory maximum for his offense of conviction, therefore, *Apprendi* was not implicated in his case.

United States v. Ortiz, 362 F.3d 1274 (9th Cir. 2004). The defendant was convicted of conspiracy to distribute methamphetamine, drug possession/distribution, and misprision of a

felony. The Ninth Circuit clarified the proper standard for determining relevant conduct for jointly undertaken criminal activity under §1B1.3(a)(1)(B) as amended in 1992: the conduct must be both in furtherance of jointly undertaken activity and reasonably foreseeable. This differs from the standard previously adopted for determining relevant conduct under the 1990 version of the guidelines–that each conspirator is to be held accountable for conduct that he reasonably foresaw or which fell within the scope of his particular agreement. *See United States v. Gutierrez-Hernandez*, 94 F.3d 582, 585 (9th Cir. 1996) (applying USSG §1B1.3, comment. (n.1) (Nov. 1990)). The court held that for sentencings governed by the revised guidelines which became effective November 1, 1992, district courts must make two findings in order to attribute the conduct of others to a defendant under §1B1.3(a)(1)(B): that the conduct was in furtherance of jointly undertaken criminal activity, and that it was reasonably foreseeable in connection with that activity. The defendant's sentence was based in part on relevant conduct of a co-conspirator under §1B1.3(a)(1)(B) of the 2001 *Guidelines Manual*. He challenged this determination because, in his view, there was no joint activity and the district court incorrectly cited *Gutierrez-Hernandez*. While the court agreed that *Gutierrez-Hernandez* was not controlling, the citation itself was harmless and the court was satisfied that the district court found that there was jointly undertaken criminal activity and that a co-conspirator's sale of drugs and use of a firearm were reasonably foreseeable. The defendant argued that the district court misinterpreted §1B1.3 by finding that it was reasonably foreseeable that a co-conspirator would sell drugs in the context of the overall conspiracy without also finding that the defendant and the coconspirator had an agreement to undertake the sale of these drugs. He submits that the court incorrectly cited *Gutierrez-Hernandez* because *Gutierrez-Hernandez* relied upon the 1990 version of the guidelines, which allowed for the quantity of drugs attributable to a defendant to be based upon the scope of his particular conspiracy or the quantity of drugs he reasonably foresaw. The Ninth Circuit concluded that the relevant conduct guideline for jointly undertaken criminal activity is to operate conjunctively. The court further noted that this means that the formulation of the standard based on the 1990 version of §1B1.3 in *Gutierrez-Hernandez* is of limited effect. Given the amendment, the disjunctive standard applies only to sentencings under the pre-1992 guidelines. The Court of Appeals joined other circuits that have considered the same question in holding that a district court must find that the conduct of others was both jointly undertaken and reasonably foreseeable for §1B1.3(a)(1)(B) as revised in 1992 to apply. Having clarified that the standard for applying the revised §1B1.3 is conjunctive, the court then considered whether the district court correctly determined that the defendant was accountable for the coconspirator's deliveries notwithstanding its incorrect citation to *Gutierrez-Hernandez*. The court concluded that it did. The district court adopted the PSR which distinctly found that the defendant was responsible for the 13 pounds delivered by the co-conspirator because they were in furtherance of the conspiracy in which the defendant was involved and of which he had knowledge. This left only the defendant's contention that he remained at home and was not involved with the conspiracy, but Ninth Circuit noted that the jury, the PSR, and the sentencing judge found otherwise.

United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000). The district court did not err when it sentenced each defendant based on the quantity of drugs attributable to him instead of the entire quantity involved in the offense. The defendants pled guilty to possession with intent

to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). A drug smuggler had hired each defendant independently to carry a backpack of marijuana from Mexico to the United States. Finding no evidence that any defendant was responsible for the marijuana carried by his codefendants or that any defendant knew or controlled where he was going, the district court held that the defendants "had not implicitly and willfully participated in a joint criminal enterprise," and sentenced each defendant based solely on the quantity of marijuana in his backpack, giving no consideration to the quantities in the other backpacks. *See id*. at 1184-85. The government argued that the defendants agreed implicitly to jointly import the total quantity of drugs, and thus, USSG §1B1.3, which states that "in the case of a jointly undertaken activity, [the defendant is accountable for] all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook," required that each defendant be held accountable for the entire amount. *Id*. at 1186 (quoting USSG §1B1.3, comment. (n.1)).[1] The court found that this case did not fit either scenario as provided in USSG §1B1.3, comment. (n.2(c)(8)) of which allows judges the discretion to determine the scope of the joint activity when the case cannot be easily categorized. While the defendants received individual shipments at the same time and walked together across the border with the same guide, the drug smuggler hired the defendants individually, at different times, and the defendants "otherwise operated independently." Thus, the caveat concluding this commentary example, which gives judges discretion to determine the scope of the joint activity when the case cannot be easily categorized, controlled the ruling of this case. Finding that the defendants did not "'coordinate their importation effort' for their 'mutual assistance and protection,' or 'aid[] and abet[] each other's actions,'" the court held that the record amply supported the district court decision not to find a "jointly undertaken activity." 198 F.3d at 1187 (quoting USSG §1B1.3, comment. (n.2(c)(8))). Each defendant was hired individually, and had his own criminal objective of transporting marijuana to the United States. None of the defendants participated in the planning of the activity, nor did any defendant know the route or their destination. Additionally, the record implied that none of the defendants knew or took responsibility for any codefendant, before or after the start of the trip.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court did not err when it increased the defendant's sentence for physical restraint of a victim based on relevant conduct. A jury convicted the defendant under 18 U.S.C. § 2113(a) and (d), as well as section 924(c), for conspiracy and a series of bank robberies and firearms violations. During one of the bank robberies, a codefendant "grabbed a teller by her hair and pulled her up from the floor." *Id*. at 1118. Affirming the enhancement, the court held that, under USSG §1B1.3(b), which "holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity," the defendant could reasonably have foreseen his codefendant's physical restraint of the victim, and thus he was accountable. *Id*. *See*

[1]The commentary to §1B1.3 provides two scenarios for carrying drugs from Mexico into the United States: one scenario where the defendants receive shipments "at the same time and coordinate their importation efforts" through "mutual assistance and protection," and thus are responsible for the "aggregate quantity" transported by all the defendants, and one scenario where the defendants were "hired individually, transported their individual shipments at different times, and otherwise operated independently," making them accountable only for the quantities they transported individually. §1B1.3, comment. (n.2(c)(8)).

also United States v. Shaw, 91 F.3d 86, 89 (9th Cir. 1996) (holding a defendant not present during the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery).

§1B1.9 Class B or Class C Misdemeanors and Infractions

United States v. Mack, 200 F.3d 653 (9th Cir.), *cert. denied*, 530 U.S. 1234 (2000).[2] The district court did not err when it sentenced defendants to harsher sentences than those imposed on their codefendant, who had pled guilty. The district court convicted defendants of unlawfully maintaining a structure and impeding a United States Forest Service road, after the defendants refused to remove the chains with which they had attached themselves to construction equipment in protest of the road building and logging in the community. The defendants challenged their sentences, which included 46 more days in custody than their codefendant, twice the amount in special assessment fees, and a $500 fine not imposed on their codefendant, arguing that the relative severity of their sentences indicated that the district court had penalized them for proceeding to trial. The court affirmed the sentences, holding that the district court's explanation that the defendants expressly refused to abide by any restitution order sufficiently justified the imposition of heavier sentences. Moreover, no evidence in the record suggested that the district court enhanced the defendants' sentences because they exercised their constitutional right to proceed to trial.

§1B1.11 Use of Guideline Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The district court did not violate the *ex post facto* clause when it relied on Application Note 4 to interpret USSG §5G1.3. The defendant challenged the district court's imposition of a sentence to run consecutive to the sentence the defendant was already serving for violating his supervised release. The circuit court ruled that Application Note 4 "merely makes explicit what was otherwise implicit in the operation of USSG §5G1.3(b) and 5G1.3(c)" which is that the sentence for any offense committed while on supervised release is to be served consecutive to the sentence for the supervised release violation in order to "achieve reasonable incremental punishment." The circuit court held that Application Note 4 confirms a sound prior interpretation of section 5G1.3 and does not violate the *ex post facto* clause. *See United States v. Glasener*, 981 F.2d 973 (8th Cir. 1992); *United States v. Flowers*, 13 F.3d 395 (11th Cir. 1994).

See United States v. Canon, 66 F.3d 1073 (9th Cir. 1995), *cert. denied*, 531 U.S. 885 (2000), §4B1.4, p. 67.

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[2]The defendants also argued that the "district court violated their right to allocution under 18 U.S.C. § 3553(a)(1) by precluding them from articulating their beliefs and motives about the environment and the law" when it interrupted their allocutions and asked them "to speak to the issues of mitigation." *Id*. at 657. The court rejected this argument, finding that because the district court did not intimidate or deter the defendants from speaking, merely requesting that they speak about the relevant issues, it did not deny the defendants the right of allocution.

See United States v. Chea, 231 F.3d 531 (9th Cir. 2000), §5G1.3, p. 64.

United States v. Felix, 87 F.3d 1057 (9th Cir. 1996). The court erred by failing to apply USSG §2D1.1, comment. (n.12), retroactively for the purpose of calculating drug amounts at sentencing. The court noted that the prior version of Application Note 12 applied only to incomplete transactions, in which the amount under negotiation would determine a defendant's sentence, unless evidence indicated that the defendant was unwilling or incapable of producing the amount. The appropriate amount of drugs for consideration in a completed transaction was ambiguous, because the court could base its sentence upon either the amount negotiated or delivered. In contrast to the prior version of Application Note 12 which was silent with respect to the calculation of sentences for completed transactions, the current version of Application Note 12 specifies the amount to be considered with respect to a completed transaction. The circuit holds that the current version of Application Note 12 should be treated as a clarifying amendment and given retroactive effect. The sentencing court should consider first whether the transaction is completed and then whether the amount delivered more accurately reflects the scale of the offense than the amount negotiated. In this case, the court noted that the transaction was completed because the cocaine was present at the negotiation and all conspirators were ready to sell the cocaine. The amount of cocaine delivered was easily calculated and no further delivery was contemplated. The sentence should be calculated based upon the amounts of drugs seized because it accurately reflects the scale of the offense.

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir.), *cert. denied,* 513 U.S. 975 (1994). The district court did not violate the *ex post facto* clause when it sentenced the defendant for being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The defendant argued that he committed his offense in 1990 when he reentered the United States after being deported and reported to his state parole officer under a different name, rather than when he was found by the INS agent in 1992. Thus, he claimed that the sentencing judge should have used the 1990 version of the guidelines because the 1992 version imposes harsher penalties. The circuit court did not find any *ex post facto* violation. A violation of 8 U.S.C. § 1326 is a continuing offense, and the violation continued until he was arrested in 1992.

Hamilton v. United States, 67 F.3d 761 (9th Cir. 1995). The district court violated the *ex post facto* clause in sentencing the defendant under the 1993 guidelines in effect at the time of resentencing. The defendant was originally sentenced under the 1988 guidelines as a career offender after pleading guilty to being a felon in possession of a firearm. In 1993, the defendant appealed his sentence based on Amendment 433, which provides that "the term `crime of violence' does not include the offense of unlawful possession of a firearm by a felon." The circuit court noted its previous holding in *United States v. Garcia-Cruz*, 40 F.3d 986, 990 (9th Cir. 1994), that "where the application of the amended guidelines results in a harsher sentence, the sentencing court is to apply the guidelines in effect at the time of the offense, but also must consider the clarification provided by Amendment 433." The court ruled that the defendant was entitled to be sentenced by the guidelines in effect at the time of the offense as they are affected by the retroactive application of Amendment 433.

United States v. Merino, 44 F.3d 749 (9th Cir. 1994), *cert. denied*, 514 U.S. 1086 (1995). The district court did not err in applying the guidelines to the defendant's conviction for repeated flights to avoid trial in violation of the Unauthorized Flight to Avoid Prosecution (UFAP) provisions in 18 U.S.C. § 1073, even though the defendant's first flight occurred prior to the guidelines' effective date. The appellate court relied on *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990) to conclude that UFAP is a continuing offense and thus subject to the guidelines if any portion of the offense occurred after the guidelines' effective date. In *Gray*, the circuit court held that failure to appear for sentencing is a continuing offense. The appellate court noted that UFAP is a continuing offense because of the "threat to the integrity and authority of the court" posed by a recalcitrant defendant who refuses to abide by lawful orders.

United States v. Sanders, 67 F.3d 855 (9th Cir. 1995). The Ninth Circuit reversed the district court's imposition of consecutive terms of supervised release pursuant to a 1994 amendment which "makes clear that supervised release terms are not to run consecutively, even in cases where punishments for the underlying crimes must be imposed consecutively." The defendant was originally sentenced to two consecutive terms of supervised release after pleading guilty to bank robbery and using a firearm during a crime of violence. The circuit court noted that at the time of the defendant's sentencing, Ninth Circuit precedent allowed consecutive terms of supervised release. *See United States v. Shorthouse*, 7 F.3d 149 (9th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994). In *Shorthouse*, the Ninth Circuit had held that a statute requiring the imposition of consecutive sentences would not be trumped by 18 U.S.C. § 3624(e), which provides that supervised release terms are to be concurrent. A 1994 amendment to the sentencing guidelines resolved a split in the circuits, and clarified the commentary to USSG §5G1.2, stating that supervised release terms are to be imposed concurrently. The Ninth Circuit ruled that defendants who now face sentencing for crimes mandating the imposition of consecutive sentences will not receive consecutive terms of supervised release. The circuit court held that as a clarifying amendment, the amendment retroactively applied to the defendant's sentence, and remanded the case to the district court for resentencing.

§1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995). The sentencing guidelines do not apply to a defendant sentenced under the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042. In considering an issue of first impression, the appellate court held that an adjudicated juvenile delinquent may not be sentenced to a term of supervised release.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault[3]

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994), *rev'd on other grounds*, 73 F.3d 229 (1995). The district court erred in applying a dangerous weapon enhancement to the defendant's sentence for aggravated assault resulting in serious bodily injury and involuntary manslaughter where the defendant had caused an automobile accident while he was intoxicated. The circuit court reasoned that an upward adjustment under USSG §2A2.2(b)(2)(B) is authorized only when a defendant used an instrument capable of causing serious bodily injury with the intent to injure his victim. The circuit court concluded the defendant's conduct was reckless, but not intentional, and thus he did not "use" a dangerous weapon within the meaning of the guidelines. Note: Amendment 614 expressly identifies a car as (potentially) a dangerous weapon.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse[4]

United States v. Michaud, 268 F.3d 728 (9th Cir. 2001), *cert. denied*, 537 U.S. 867 (2002). Because the cross-reference resulted in a higher offense level, pursuant to USSG §2A4.1(b)(7)(A), the district court cross-referenced USSG §2A3.1, based upon aggravated sexual abuse by force or threat, to determine the base offense level. The defendant contended that because USSG §2A4.1(b)(5) contains a separate provision for kidnaping involving sexual exploitation of the victim, a cross reference to USSG §2A3.1 rendered USSG §2A4.1(b)(5) superfluous. Because USSG §2A4.1(b)(7)(A) unambiguously states that the offense level from the other offense committed during a kidnaping is to apply if it results in a greater offense level, the district court did not err in its application of the guidelines.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[5]

See United States v. Michaud, 268 F.3d 728 (9th Cir. 2001), *cert. denied*, 537 U.S. 867 (2002), §2A3.1.

United States v. Sierra-Velasquez, 310 F.3d 1217 (9th Cir. 2002), *cert. denied*, 538 U.S. 952 (2003). The district court erred by not applying the ransom enhancement of §2A4.1(b)(1) to the sentences of three of the defendants. The defendants agreed to take a group of aliens from Mexico into the United States for a fee; defendants then brutally detained the aliens against their

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[3]An amendment to be come effective November 1, 2004, adds an enhancement to §2A2.2 (Aggravated Assault) if the defendant was convicted under 18 U.S.C. § 111(b) or § 115; decreases the base offense level by one level; and increases by one level each of the specific offense characteristics for degrees of bodily injury.

[4]An amendment to become effective November 1, 2004, increases the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Sexual Abuse) in response to the PROTECT Act, to reflect the seriousness of the offenses.

[5]An amendment to become effective November 1, 2004, increases the base offense level for §2A4.1 (Kidnaping, Abduction, Unlawful Restraint) from level 24 to base offense level 32, in response to the PROTECT Act, Public Law 108-21.

will while demanding that the fee be paid. The district court held that defendants could not foresee an increase in the smuggling fee and that there could be no ransom within the meaning of the guideline unless a price was demanded that was higher than the agree-upon fee. *Id.* at 1221. The Ninth Circuit disagreed with the district court's reasoning. The court joined sister circuits which have held a ransom enhancement applies anytime a defendant demands money from a third party for the release of a victim, regardless of whether that money was already owed to the defendant. *Id. See United States v. DiGiorgio*, 193 F.3d 1175, 1178 (11th Cir. 1999); *United States v. Escobar-Posado*, 112 F.3d 82, 83 (2nd Cir. 1997).

§2A6.1 Threatening or Harassing Communications

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The defendant argued that the district court improperly applied a two-level enhancement pursuant to USSG §2A6.1(b)(2) for threatening the victims of his crime because there was no evidence that the defendant intended to carry out the threats. Evidence of such intent is not necessary to apply the enhancement, and where there is such evidence, a six-level enhancement is prescribed under USSG §2A6.1(b)(1).

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994), *aff'd on other grounds*, 68 F.3d 481 (1995). The district court did not err in enhancing the defendant's sentence for engaging in conduct evidencing an intent to carry out a threat pursuant to USSG §2A6.1(b)(1). The defendant pled guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued the enhancement was not applicable because the conduct on which the adjustment was based occurred prior to the threatening communication. In support of his argument, he cited the Second Circuit's decision in *United States v. Hornick*, 942 F.2d 105 (2d Cir. 1991), *cert. denied*, 502 U.S. 1061 (1992), wherein that court considered the future conditional tense of the commentary to USSG §2A6.1 as evidence of the Commission's intent that the conduct occur contemporaneously with or after the threat. *Id*. at 108. The circuit court rejected the *Hornick* analysis as placing too much emphasis on the commentary's use of the future conditional tense instead of on the purpose of the enhancement. Thus, the circuit court concluded that the issue should not be one of timing but rather "whether the conduct shows the defendant's intent and likelihood to carry out the threats." Here, the defendant's theft of a firearm and his trip to Washington, D.C., was conduct which evidenced his intent to carry out his threats.

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[6]

United States v. Hardy, 289 F.3d 608 (9th Cir. 2002). The defendant contended that the district court based his sentence on an improper (retail) measure of the victim's loss. According to Application Note 2 to USSG §2B1.1, "Ordinarily, . . . the loss is the fair market value of the particular property at issue." This case presented two measures of value for the stolen goods (DVDs): wholesale price and retail price. It was undisputed that the true owner of the DVDs intended to sell the goods in the wholesale market, and the defendant engaged the same market. Under these facts, the wholesale market value governed the loss determination, and thus the case was remanded for re-sentencing using the wholesale value as the measure of loss.

United States v. McCormac, 309 F.3d 623 (9th Cir. 2002). The district court was affirmed for its calculation of loss under the sentencing guidelines. On appeal, the defendant argued that the district court erred in its loss calculation because it should have reduced the gross amount of the debt by the amount that HCFCU recovered by repossessing and selling her car. The defendant based her argument on Note 2(E)(ii) to §2B1.1, wherein loss is to be reduced by the amount that the victim has recovered at the time of the sentencing from the disposition of any collateral pledged by the defendant. The Ninth Circuit noted that the application notes and the commentary to the amendments did not say whether the credit against loss applied to both actual loss and intended loss. The court held that since application note 2(E)(ii) did not automatically require intended loss to be reduced by proceeds from disposition of collateral, its analysis was based on a calculation of the defendant's intended "pecuniary harm." Consequently, the court affirmed the district court's calculation of loss based on defendant's intention not to repay the loan and to prevent HCFCU from collecting the pledged collateral.

United States v. Yellowe, 24 F.3d 1110 (9th Cir. 1994). The district court did not err in applying USSG §2B1.1 to the unauthorized use of credit card numbers. The defendant pled guilty to the use of unauthorized access devices to obtain goods and services in violation of 18 U.S.C. § 1029. He argued that USSG §2B1.1, comment. (n.4) should only apply to loss caused by the unauthorized use of the credit card, not to the use of the number. The circuit court concluded that there was nothing in the guidelines which suggested such a distinction should be made since loss is caused in precisely the same manner. Note: Amendment 617 amended USSG §2B1.1, including the definition of loss.

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[6] An amendment to become effective November 1, 2004, references the new offense, 18 U.S.C. § 1037 (Fraud and Related Activity in Connection with Electronic Mail) to §2B1.1 (Theft, Fraud, or Property Destruction) in Appendix A; adds an enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through "improper means;"define "improper means;" and provides instruction in the Commentary to apply the "mass marketing" enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

United States v. Zuniga, 66 F.3d 225 (9th Cir. 1995). The district court did not err by enhancing the defendant's sentence pursuant to USSG §2B1.1(b)(5) for being a person in the business of receiving and selling stolen property. The defendant pled guilty to conspiracy to possess stolen goods from an interstate shipment and was sentenced to 30 months' imprisonment. On appeal, the defendant challenged the district court's application of the enhancement and argued that the circuit court should join the Fifth, Sixth, and Seventh Circuits in adopting the "fence" test to determine whether the defendant was "in the business." *See United States v. Warshawsky*, 20 F.3d 204, 214 (6th Cir. 1994); *United States v. Esquivel*, 919 F.2d 957, 959 (5th Cir. 1990); *United States v. Braslawsky*, 913 F.2d 466, 468 (7th Cir. 1990) (enhancement does not apply to a defendant who sells property that he himself has stolen). Under the "fence" test, the government must show that the defendant is a person who buys and sells stolen property and, thereby, encourages others to commit property crimes. The circuit court instead joined the First and Third Circuits in adopting the "totality of the circumstances" test. *See United States v. King*, 21 F.3d 1302, 1306 (3d Cir. 1994); *United States v. St. Cyr*, 977 F.2d 698, 703 (1st Cir. 1992). Under the "totality of the circumstances" test, the sentencing judge undertakes a case-by-case approach with the emphasis on the "regularity and sophistication of a defendant's operation." *St. Cyr*, 977 F.2d at 703. The circuit court ruled that based on the regularity and sophistication of the defendant's operation, the district court reasonably concluded that the defendant was warehousing and selling merchandise stolen by others, *i.e.*, fencing property, in addition to property he had stolen. The circuit court held that the district court's factual conclusions were not clearly erroneous, and the application of the enhancement pursuant to USSG §2B1.1(b)(1)(5) was correct. Note: Amendment 617 resolved the circuit split by adopting the totality of the circumstances test and delineating factors to be considered in applying the enhancement.

§2B3.1 Robbery

United States v. Burnett, 16 F.3d 358 (9th Cir. 1994). The district court enhanced the defendant's base offense level by five levels, pursuant to USSG §2B3.1(b)(2)(C), because he displayed a starter gun during the bank robbery. The circuit court vacated the defendant's sentence and remanded for the district court to determine whether the starter gun should be treated as a firearm under USSG §2B1.3(b)(2)(C) (five-level increase) or as a dangerous weapon under USSG §2B3.1(b)(2)(E) (three-level increase). "Although the guidelines treat items that appear to be dangerous weapons as dangerous weapons, the guidelines do not treat items that only appear to be firearms as firearms." 16 F.3d at 360. The government failed to meet its burden of proving, by a preponderance of the evidence, that the starter gun actually fit the definition of a firearm at USSG §1B1.1, comment. (n.1(e)). In order for the five-level firearm enhancement to apply, the government must prove that the starter gun "will or is designed to or may readily be converted to expel a projectile by action of an explosion." USSG §1B1.1, comment. (n.1(e)).

United States v. Duran, 4 F.3d 800 (9th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994). The defendant was convicted of robbery and use of a firearm in the commission of a robbery. Sentencing for robbery is governed by USSG §2B3.1, and sentencing for the use of a firearm in violation of 18 U.S.C. § 924(c) is governed by USSG §2K2.4. The district court erred by increasing the defendant's bank robbery offense level for an express threat of death under USSG

§2B3.1(b)(2)(F). Application Note 2 to USSG §2K2.4 states, "where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use or discharge of a firearm (*e.g.*, USSG §2B3.1(b)(2)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense." The circuit court held that the enhancement under USSG §2B3.1(b)(2)(F) for an express threat of death should not be applied where the defendant is convicted of the violation of 18 U.S.C. § 924(c).

United States v. France, 57 F.3d 865 (9th Cir. 1995). The appellate court upheld the district court's determination that the defendant's statement during a bank robbery that he had dynamite was an "express threat of death" for purposes of USSG §2B3.1(b)(2)(F). The appellate court looked to examples cited in the guidelines commentary, and found that the mention of dynamite met the guideline criteria that the offender "engaged in conduct that would instill in a reasonable person, who is the victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery." The appellate court rejected the Eleventh Circuit's decision in *United States v. Tuck*, 964 F.2d 1079, 1081 (11th Cir. 1992), which held that the threat "don't do anything funny or I'll be back" failed to qualify because it was not sufficiently "direct, distinct, or express." The appellate court noted that the *Tuck* opinion was written before the United States Supreme Court, in *Stinson v. United States*, 508 U.S. 36 (1993), made it clear that the guidelines commentary is authoritative. The appellate court joined the Seventh, Eighth, and Tenth Circuits in holding that an "express threat of death" does not require an explicit threat to kill the victim. Note: §2B3.1 was amended on this issue effective November 1, 1997 (Amendment 552).

See United States v. Hoskins, 282 F.3d 772 (9th Cir.), *cert. denied*, 536 U.S. 933 (2002), §1B1.3, p. 3.

United States v. Morgan, 238 F.3d 1180 (9th Cir.), *cert. denied*, 534 U.S. 863 (2001). The district court erred by imposing a four-level increase for serious bodily injury, rather than a six-level increase for permanent or life- threatening bodily injury, because its interpretation of what could constitute "life-threatening injury" was erroneous as a matter of law. The defendant was convicted of a carjacking and kidnaping in which he tied the victim up, beat him severely, threw him in a ditch, and left him there in freezing weather. The district court reasoned that the circumstances under which the victim found himself were life-threatening but the actual injuries sustained as a result were not life-threatening, and that the sentencing guidelines did not allow for an enhancement when only the circumstances, not the actual injuries, were life-threatening. The court held that such a narrow interpretation of the types of injuries that could be considered life-threatening was contradicted by the plain language in USSG §1B1.1(h), comment. (n.1(h)), which defines "permanent or life-threatening bodily injury." Under this definition, "maltreatment to a life-threatening degree" can be the basis for the enhancement regardless of the actual injury suffered. The circumstances in this case were precisely the type of maltreatment contemplated by that definition, where the victim was severely beaten, locked in a trunk in freezing weather, left in a ditch in freezing weather, and deprived of food, water, and medical treatment throughout the ordeal. Because the district court believed it lacked authority

to apply a six-level enhancement, it made no factual finding to determine whether such treatment was life threatening. The Ninth Circuit remanded for such a determination.

United States v. Napier, 21 F.3d 354 (9th Cir. 1994). The district court correctly interpreted "loss" under USSG §2B3.1(b)(6). The defendant, convicted of bank robbery, 18 U.S.C. § 2113(a),(d), argued that no loss occurred because government agents recovered the money shortly after the offense was committed. The Ninth Circuit disagreed. The commentary to USSG §2B3.1 refers to the commentary to USSG §2B1.1 for determining the valuation of loss. Since "`loss' means the value of property taken, damaged or destroyed," USSG §2B1.1, comment. (n.2), the court properly calculated the amount of loss based on the amount of money stolen from the bank.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court did not err when it increased defendant's sentence for physical restraint of a victim based on relevant conduct, but it was error to adjust defendant's sentence when his codefendant did not forcibly restrain the victim. A jury convicted the defendant under 18 U.S.C. § 2113(a) and (d), as well as section 924(c), for conspiracy and a series of bank robberies and firearms violations. During one of the bank robberies, a codefendant "grabbed a teller by her hair and pulled her up from the floor." *Id*. at 1118. Affirming the enhancement, the court held that, under USSG §1B1.3(b), which "holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity," the defendant could reasonably have foreseen his codefendant's physical restraint of the victim, and thus he was accountable. *Id*. *See also United States v. Shaw*, 91 F.3d 86, 89 (9th Cir. 1996) (holding a defendant not present during the planning of a robbery accountable for a co-conspirator's physical restraint of a victim during a bank robbery). However, the court reversed this enhancement with respect to a different robbery count on grounds that the conduct did not reach the necessary level of forcible restraint. The same defendant received a two-level enhancement because his codefendant "pointed a gun at a bank teller and yelled at her to get down on the floor." 241 F.3d at 1118. Generally, robberies warranting this enhancement "usually involve a *sustained focus* on the restrained person that lasts long enough for the robber to direct the victim into a room or order the victim to walk somewhere." *Id*. Pointing a gun and yelling at someone does not satisfy this "sustained focus" standard unless, unlike here, the robbery occurred in an unoccupied building. Moreover, imposing an enhancement for conduct so common to robberies would subject most robbery defendants to this adjustment, which is likely contrary to congressional intent.

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

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards, for which he used a counterfeit postage meter stamp, informing people that they had won $10,000, requiring that such individuals pay $15 in processing fees, then failing to award any money. The district court sentenced defendant under USSG §2B5.1. The defendant argued that the district court should have applied the fraud guideline, USSG §2F1.1, to his conviction for using a counterfeit postage

meter stamp because USSG §2B5.1 applies to postage stamps "that are not made out to a specific payee." The defendant reasoned that, unlike physical stamps, a postage meter imprint has specific payees because each imprint includes the specific meter user's authorization number, making it non-transferable and not redeemable for cash. The court rejected the defendant's argument, holding that the difference in form of counterfeit equipment is insignificant when, as with physical stamps and a counterfeit meter, both devices are used for the same illegal purpose, free mail delivery through the postal service.

§2B5.3 Criminal Infringement of Copyright or Trademark

United States v. Bao, 189 F.3d 860 (9th Cir. 1999). The Ninth Circuit held that the retail value of items that are produced in infringement of a copyright, not the loss caused by their production, is the proper measure for determining the applicable offense level under USSG §2B5.3. The defendant was convicted of printing counterfeit Microsoft Windows 95 manuals. The district court concluded that the loss should be based on the retail value, and determined that each manual had a value of $50, the price that the manual would have sold for once the software on a CD-ROM was included. The defendant appealed, arguing that the value should be $12, the value of the manual sold separately. The appellate court concluded that the district court erred in assigning the value of $50 rather than the $12 amount. The appellate court noted that under the guidelines, the retail value of the counterfeit product, rather than the value of the genuine product, should be relied upon in determining the proper enhancement under USSG §§2B5.3 and 2F1.1. *See United States v. Kim*, 963 F.2d 65, 68 (5th Cir. 1992). The appellate court rejected the government's contention that the manual's value cannot be separated out from the value of the whole package, including the CD-ROM.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right[7]

United States v. Gillam, 167 F.3d 1273 (9th Cir.), *cert. denied*, 528 U.S. 900 (1999). Following the lead of the Second, Seventh and Eighth Circuits, the Ninth Circuit upheld the district court's interpretation of USSG §2C1.1(b)(2)(A) as requiring the sentencing court to increase the offense level for bribery based on the greater of the benefit to either the payer or the recipient. *See United States v. Muhammad*, 120 F.3d 688 (7th Cir. 1997); *United States v. Falcioni*, 45 F.3d 24 (2d Cir. 1995), and *United States v. Ziglin*, 964 F.2d 756 (8th Cir. 1992). The appellate court noted that it was following the language of the guideline itself as well as the accompanying background notes of USSG §2C1.1. As a result of this interpretation of the "benefit" of bribery, the district court had used the benefit to the payer (profit of $558,000)

[7]An amendment to become effective November 1, 2004, consolidates §§2C1.1 and 2C1.7 as the new bribery and extortion guideline at §2C1.1 and consolidates §§2C1.2 and 2C1.6 as the new gratuity guideline at §2C1.2; adds two separate offense characteristics for "loss" and "status" and adds other enhancements if the offense involved an "elected public official"or a "public official" in a high-level decision-making or sensitive position or the offender is a public official whose position involves the security of the borders of the United States; and adds to commentary a clarification of the meaning of "high-level decision-making or sensitive position."

rather than the benefit to Gillam (receipt of bribes totaling $10,075) to increase the offense level. The appellate court upheld this interpretation and resulting offense calculation even though the codefendant received substantially more bribe money ($54,500) because the district court had found that, despite the different roles and amount in bribe money received by each codefendant, they were equally involved in the offense.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[8]

United States v. Aquino, 242 F.3d 859 (9th Cir.), *cert. denied*, 533 U.S. 963 (2001). The defendant pled guilty to conspiracy and possession with intent to distribute methamphetamine, as well as carrying a firearm during a drug trafficking offense, under 21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. § 924(c). Despite guideline language expressly prohibiting the application of any offense characteristic for possession of a firearm when the court must impose a five-year statutory minimum for conviction under section 924(c), the district court imposed a two-level enhancement under USSG §2D1.1(b)(1) for supplying codefendants with firearms. *See* §2K2.4, comment. (backg'd.). The district court reasoned that the enhancement did not constitute double counting, which the guideline was designed to prevent, because the statutory minimum applied to the defendant's possession of a weapon, while the enhancement applied to the defendant's providing firearms to his codefendants. However, since the sentencing, the Commission has amended the guideline to make clear that no enhancement can be applied for any conduct "for which the defendant is accountable under USSG §1B1.3 (Relevant Conduct)." USSG §2K2.4, comment. (n.2). Therefore, because the defendant's supplying firearms to his codefendants constitutes relevant conduct under USSG §1B1.3, the district court's enhancement was clearly erroneous. Furthermore, the court rejected the government's argument that the amended commentary did not apply because it changed the law substantively, citing several instances where the Commission indicated that the amendment was clarifying. The Historical Notes to the amendment twice noted that the Commission intended for the amendment to clarify under which circumstances weapons enhancements could be imposed for the same offense under a section 924(c) conviction; the commentary to the amendment states that one of its purposes is "to clarify the application of the commentary"; and the Commission indicated its disapproval of sentences that included a mandatory minimum and a weapons enhancement where generally the guidelines

[8]An amendment to become effective November 1, 2004, adds a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provides a definition of "interactive computer service"; increases penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons; and for triggering a ten-year sentence for GHB at 30 gallons; adds to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarifies that Note 12 applies to a defendant-buyer in a reverse sting operation; and provides a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repeal the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

would only mandate one weapons enhancement. USSG §2K2.4, App. C (2000). Moreover, even if the amendment substantively changed the law, the Commission expressly indicated that courts could apply it retroactively. *See* USSG §1B1.10(a) and (c). The court vacated the sentence and remanded for resentencing consistent with this opinion.

See United States v. Cruz-Mendoza, 147 F.3d 1069 (9th Cir. 1998), *cert. denied*, 528 U.S. 1013 (1999), §1B1.3, p. 1.

United States v. Culps, 300 F.3d 1069 (9th Cir. 2002). The Ninth Circuit held that the defendant's sentence was based on an approximated drug quantity that was not supported by sufficiently reliable information, vacated the sentence, and remanded. The defendant was convicted at a jury trial of three counts of distributing and possessing marijuana and one count of maintaining a drug house. The district court sentenced him to 88 months in prison based on the court's approximation of how much marijuana had been sold at his house over a three year period. The information available to the district court was as follows: At trial, there was evidence of two successful controlled buys from the defendant and seven from others, and of drugs found during the execution of a search warrant; neighbors testified regarding the traffic levels on the road leading to the house. The presentence report estimated the size of the average transaction (1/4 ounce), the estimated number of transactions per day (50), and the estimated number of days drugs were sold (1,205). Although the presentence report explained that the number of days was determined by calculating the period between the first controlled buy and the execution of the search warrant three years later, the report explained that the government would present evidence with regard to the estimated transaction size and the estimated number of transactions per day. At sentencing, the government relied on the presentence report and the evidence at trial, but did not independently establish the average transaction, the number of transactions per day, or the continuity of drug sales from the first controlled buy to the execution of the search warrant. The district court adopted the one-fourth ounce average transaction size and the 50 transactions per day, and multiplied these by 1,205 days, but then reduced the quantity by one half to account for uncertainties. The defendant argued on appeal that the district court's calculations were unreliable and the Ninth Circuit agreed.

Citing *United States v. August*, 86 F.3d 151 (9th Cir. 1996), for the proposition that the district court may adopt a multiplier method if each factor is (1) proved by the government by a preponderance of (2) reliable evidence, and (3) that the court must err on the side of caution, the Ninth Circuit held that the district court erred in adopting the presentence report's estimate with regard to average transaction size because the evidence was neither sufficient or reliable, and the district court erred by adopting the presentence report's figure of 1,205 days, even after correcting for error by halving the total, because no evidence supported the supposition that the drug dealing had occurred continuously for three years. The court approved of the estimate of 50 transactions per day because it was supported by sufficient and reliable evidence at trial.

United States v. Gamez, 301 F.3d 1138 (9th Cir. 2002), *cert. denied,* 538 U.S. 1067 (2003). The district court's conviction and sentence were affirmed. The defendant was sentenced to 151 months' imprisonment. The district court applied the murder cross-reference of §2D1.1(d)(1) to arrive at a base offense level of 43 for first degree murder. Had the murder cross-reference not been applied, defendant would have been subject to a guideline maximum

sentence of 46 months. In other words, by applying the murder cross-reference, the district court enhanced defendant's sentence by 105 months. The district court's reasoning for the application of §2D1.1(d)(1)'s murder cross-reference was that the murder was foreseeable and in furtherance of the marijuana importation conspiracy. One of the issues on appeal was whether a sentencing court could apply the murder cross-reference of §2D1.1(d)(1) to enhance a defendant's sentence for a drug-related conspiracy when it found that murder was both foreseeable and in furtherance of the conspiracy even though the defendant was acquitted of murder and the sentencing court specifically found that he did not commit murder. In accord with the district court, the Ninth Circuit noted that the fact that defendant did not pull the trigger did not foreclose the application §2D1.1(d)(1)'s murder cross-reference. Neither §2D1.1(d)(1), nor §1B1.3(a)(1)(B) require a sentencing court to find that the defendant in fact committed murder in order to apply the cross-reference. *Id.* at 1148. The court held that application of the murder cross-reference was proper as long as the sentencing court found that the murder was both reasonably foreseeable and in furtherance of the drug-related conspiracy. *Id.*

The First Circuit has adopted a similar position as to the application of §2D1.1(d)(1)'s murder cross-reference to enhance a defendant's sentence for drug trafficking even though the defendant was not convicted of murder. *See United States v. Martinez-Medina*, 279 F.3d 105, 121-23 (1st Cir.), *cert. denied,* 537 U.S. 921 (2002) (imposing a life sentence on two defendants convicted of conspiracy to import cocaine because the first defendant "ordered the murder" of an individual, and the second defendant "was responsible" for the murder of three others); *United States v. Padro Burgos*, 239 F.3d 72, 77 (1st Cir.), *cert. denied,* 533 U.S. 910 (2001) (imposing a life sentence on defendant convicted of cocaine trafficking because defendant was "responsible" for the murder of two rival gang members).

United States v. Highsmith, 268 F.3d 1141 (9th Cir. 2001). The defendant appealed the district court's finding that he was in constructive possession of a firearm during the commission of drug offenses thus warranting a two-level enhancement pursuant to USSG §2D1.1(b)(1). The firearm was found in someone else's bedroom, along with drugs. The evidence clearly established that the defendant had access to the bedroom and that he dealt drugs from the bedroom. Access to a gun is necessary but insufficient to establish constructive possession. Because there was no evidence that the defendant knew of the gun, there was insufficient evidence to support a finding of constructive possession and to apply the enhancement. *See United States v. Kelso*, 942 F.2d 680 (9th Cir. 1991).

United States v. McLain, 133 F.3d 1191 (9th Cir.), *cert. denied*, 524 U.S. 960 (1998). The district court properly resentenced the defendant after his section 924(c) conviction was vacated following the Supreme Court's opinion in *Bailey*. As a matter of first impression, the Ninth Circuit held that resentencing under the circumstances did not constitute double jeopardy despite the fact that the defendant had already completed that portion of the sentence connected to the underlying drug offense. The Ninth Circuit noted that following a successful section 2255 petition to vacate a section 924(c) conviction and sentence, a district court has the authority to resentence a defendant in order to correct the defendant's sentence related to the underlying offense, to reflect the possession of a weapon. Additionally, double jeopardy prohibits an increase in a defendant's sentence where there is a legitimate expectation of finality attached to the sentence. Double jeopardy is not violated when a defendant is resentenced after his section

924(c) conviction is vacated. *See United States v. Handa*, 122 F.3d 690, 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 1083 (1998).

United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997). The defendant pled guilty to two counts of cocaine distribution. On appeal, the defendant argued that district court erred in making no specific factual findings regarding the defendant's claim that he was entrapped into trading cocaine for firearms. The Ninth Circuit agreed, vacating the sentence and remanded for further proceedings. The appellate court noted that the gun enhancement is not applicable when the defendant is able to prove sentencing entrapment by a preponderance of the evidence. The government argued that the district court properly considered and rejected the defendant's evidence. The Ninth Circuit disagreed, noting that nothing in the record showed that the district court considered all the relevant evidence or made the required findings to reject such an argument.

United States v. Roth, 32 F.3d 437 (9th Cir. 1994). In addressing an issue of first impression in the Ninth Circuit, the appellate court held that the district court did not err in holding that it was precluded from departing downward to a sentence of probation where the defendant was entitled to a downward departure for substantial assistance under 18 U.S.C. § 3553(e), but was subject to a mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). The circuit court, following the Sixth and Seventh Circuits, held that while section 3553(e) allowed the district court to disregard the minimum sentence otherwise imposed by statute, it did not authorize the court to disregard the statutory ban on probation contained in 21 U.S.C. § 841(b)(1)(A). Rather, the circuit court concluded, the probation ban in section 841(b)(1)(A) was designed to limit the discretion granted sentencing courts to depart below a mandatory minimum under 18 U.S.C. § 3553(e) by eliminating probation without imprisonment as a sentencing option.

United States v. Scrivner, 114 F.3d 964 (9th Cir. 1997). The district court did not commit plain error when it sentenced a defendant under the sentencing formula for D-methamphetamine, rather than L-methamphetamine, when the government failed to present evidence as to which category of the drug was involved. As a matter of first impression, the Ninth Circuit held that the defendants, who were convicted of various methamphetamine offenses, failed to object during trial or sentencing about the type of drugs involved in their case, and therefore, it was not plain error for the trial court to sentence based on the more common form of D-methamphetamine. The appellate court noted that there is a circuit split regarding whether such a sentence would constitute plain error. The Eighth and Tenth Circuits have held that a district court does not commit plain error in the circumstances of this case. *See United States v. Griggs*, 71 F.3d 276, 282 (8th Cir. 1995); *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995). Conversely, the Third and Eleventh Circuits have held that it is plain error to sentence defendants for a drug crime involving D-methamphetamine when the government fails to introduce any evidence as to the type of methamphetamine involved. *See United States v. Bogusz*, 43 F.3d 82, 90 (3d. Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995); *United States v. Ramsdale*, 61 F.3d 825, 832 (11th Cir. 1995), *cert. denied*, 528 U.S. 1178 (2000). The Ninth Circuit concluded that, although a defendant's sentence varies significantly depending on which variety of methamphetamine is involved, the

defendants did not challenge the district court at anytime prior to their appeal. Only when a defendant seeks to challenge the factual accuracy of a matter contained in the presentence report must the district court at the time of sentencing make findings or determinations as required by Rule 32.

§2D1.8 Renting or Managing a Drug Establishment; Attempt or Conspiracy

United States v. Leasure, 319 F.3d 1092 (9th Cir. 2003). The district court erred by requiring defendant to prove at sentencing nonparticipation in the underlying offense. The issue on appeal was whether §2D1.8 simply establishes a base offense level, which the government must prove, or if it provides for both a base offense level and a mitigating departure, which a defendant must prove. The Ninth Circuit held that under §2D1.8 the government must prove the facts relevant to obtain the base offense level it seeks. The court's interpretation of §2D1.8 differed from that of the Tenth Circuit in *United States v. Dickerson*, 195 F.3d 1183, 1189-90 (10th Cir. 1999) (holding that §2D1.8 creates a rebuttable presumption that defendant participated in the underlying offense; since the presumption leads to a higher base offense level, the element of non-participation is considered a mitigating factor). Though the court agreed with defendant that the district court erred by requiring him to prove nonparticipation, the error was nonetheless harmless. The evidence of defendant's participation in the manufacturing of drugs was overwhelming; even had the district court placed the burden of proof on the government, the burden had been met.

§2D1.11 Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical[9]

United States v. Alfaro, 336 F.3d 876 (9th Cir. 2003). The appellate court affirmed the district court's decision to depart upward, however, the extent of the departure was unreasonable. The sentence was vacated and the case was remanded for re-sentencing. The defendant was sentenced for having illegally imported certain specified chemicals used in manufacturing a controlled substance. The district court applied a 14-level upward departure that was calculated using a sentencing guideline that did not govern the defendant's offense. On appeal, the defendant argued that the district court erred in applying the enhancement for a "large-scale" importation of chemicals on the grounds that his importation was not "large-scale;" the extent of the departure was unreasonable; and the calculation of the departure violated the *ex post facto* clause. The Ninth Circuit immediately noted that the standard of review for the defendant's first two claims was governed by 18 U.S.C. § 3742(e), which was amended by the PROTECT Act. The court noted that the PROTECT Act overruled in part the holding of *Koon v. United States,* 518 U.S. 81 (1996), because the amended statute required *de novo* review in certain situations

[9]An amendment to become effective November 1, 2004, adds a new enhancement to §2D1.11 for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; also provides, in a corresponding Application Note, a definition of "interactive computer service; provides two corresponding quantity options, similar to options added to §2D1.1 for GHB, for increasing penalties for GBL, a precursor of GHB; provides statutory re-designations in §2D1.11; adds white phosphorus and hypophosphorous acid (direct substitutes for red phosphorus in the production of methamphetamine) to the Chemical Quantity Table; adds a mitigating role reduction to §2D1.11, similar to that provided under §2D1.1, which provides net reductions that correspond with designated offense levels.

while continuing to require that appellate courts give due deference to the district court's application of the guidelines to the facts in all other situations. The instant case was argued and submitted approximately three weeks before the PROTECT Act was enacted and became effective. The court noted that the PROTECT Act made no difference to the outcome of this case. The Act altered the standard of review for only one issue on this appeal: the district court's decision to depart upward. Under the old law, this decision was subject to review for abuse of discretion. Under the new law, the court reviewed defendant's challenge to the departure decision *de novo*. In the instant case, the defendant imported 100.25 kilograms of iodine, more than 266 times the amount (376.2 grams) required to impose the highest base level for iodine under §2D1.11 (2001). That qualified as "large-scale" under either a *de novo* standard or an abuse of discretion standard. In other words, the court would affirm the district court's decision to depart upward under either standard. Consequently, the court did not need to decide in this opinion whether the amended standard applied to this case. As for the extent of the departure, the standard of review was unchanged by the PROTECT Act. The pre-amendment standard was abuse of discretion. Under the new law, defendant's challenge to the extent of the departure would constitute an argument under subsection (3)(c) that "the sentence departs to an unreasonable degree from the applicable guideline range. *See* 18 U.S.C. § 3742(3)(c) (April 30, 2003). The amended statute continued to demand that an appellate court afford "due deference" to determinations made under that subsection. *Compare* 18 U.S.C. § 3742(e) (April 30, 2003) *with* 18 U.S.C. § 3742(e) (2000). The language remained the same and showed no intent to overrule *Koon*'s holding that "due deference" requires review for abuse of discretion. It was therefore unnecessary to decide whether or not the amendment applied. In either case, the court would review defendant's challenge to the extent of the upward departure under the abuse of discretion standard. The court agreed with defendant that the extent of the departure was unreasonable. Pursuant to §1B1.2, the Statutory Index listed §2D1.12 as the sole guideline applicable to 21 U.S.C. § 843(a)(7), the statute defendant pled guilty to. Therefore, defendant could not be sentenced directly under §2D1.11; he could only be sentenced under §2D1.12. Finally, the court noted that the district court's calculation of the upward departure violated the *ex post facto* clause because the amended §2D1.11 was retrospective and defendant was disadvantaged by it. Accordingly, the sentence was vacated because the extent of the departure was unreasonable and violated the *ex post facto* clause.

Part F Offenses Involving Fraud or Deceit[10]

§2F1.1 Fraud and Deceit[11]

United States v. Riley, 335 F.3d 919 (9th Cir. 2003). The defendant pled guilty to conspiracy to produce fictitious obligations, possession of fictitious obligations, and identification fraud. On appeal, one of his arguments was that the district court erred by

[10]Effective November 1, 2001, §2F1.1 (Fraud) was deleted by consolidation with §2B1.1, USSG App. C, amendment 617.

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

applying a two-level enhancement under §2F1.1(b)(5)(C)(ii) for possession of five or more means of identification. The defendant argued and the court of appeals noted that in order to trigger this enhancement, the five pieces of identification must be of actual, as opposed to fictitious, individuals. USSG §2F1.1, Application Note 15. While a postal inspector testified that some of the names on the identifications were of actual people, the court found that the government presented no evidence showing specifically how many of the seized identifications were of actual people. Thus, the Court of Appeals held that the evidence did not support a finding that the defendant possessed false identifications of at least five actual people, and the district court clearly erred in applying the enhancement.

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

§2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct[12]

United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002). The court reviewed whether the cross-reference to USSG §2G2.1, contained in USSG §2G1.1(c)(1), applies when the defendant's primary purpose in causing the juvenile to engage in sexually explicit conduct was sexual gratification, but the secondary purpose was to produce a visual depiction, which triggers the cross-reference. The text, context, purpose, and legislative history of the cross-reference, along with case law, direct that the cross-reference applies. Indeed, Application Note 9 to USSG §2G1.1 instructs the broad application of the cross-reference.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). Pursuant to USSG §2G1.1(b)(1), the district court applied a four-level enhancement because the Mann Act violations involved physical force. The defendant argued that two of the Mann Act offenses at issue did not specifically involve physical force in the actual interstate travel and thus because the force was not specific to the interstate travel, the enhancement could not apply. The court rejected this argument, ruling that the physical force does not have to relate to the elements of the Mann Act violations, but instead those offenses must merely involve physical force in some fashion. Here, the physical force enhancement was justified because violence occurred to further the overall prostitution scheme.

§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[13]

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[12] An amendment to become effective November 1, 2004, makes conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct); and adds a special instruction to apply §3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in those cases in which more than one victim died.

[13] An amendment to become effective November 1, 2004, increases the base offense level in §2G2.1 to reflect the increase in the statutory maximum from 10 to 15 years for offenses under 18 U.S.C. § 2251; adds a number of enhancements associated with the production of child pornography; and adds to the Commentary definitions of the following terms: "sexual act," "sexual contact," "sexually explicit conduct," "computer,"

See United States v. Hughes, 282 F.3d 1228 (9th Cir. 2002), §2G1.1, p. 22.

§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[14]

United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997), *cert. denied*, 522 U.S. 1132 (1998). The defendant pled guilty to failing to report transportation of currency, making a false statement, and various child pornography offenses. In a cross-appeal, the government argued that the district court erred by failing to enhance the defendant's sentence because his conduct as a major distributor of child pornography amounted to a pattern of sexual exploitation of minors. In a case of first impression, the Ninth Circuit concluded that the defendant's extensive activities as a trafficker in child pornography did not constitute a pattern of sexual exploitation of minors. The appellate court reasoned that a "pattern of activity" for the purposes of USSG §2G2.2(b)(4) means a combination of two or more separate instances of sexual abuse or sexual exploitation involving the same or different victims. The few reported decisions involving 18 U.S.C. § 2251(c) and USSG §2G2.2(b)(4) have unanimously interpreted sexual exploitation of a minor as being inapplicable to traffickers in child pornography who are not directly involved in the sexual abuse. Section 2G2.1 sets out the various forms of exploitation of a minor which are prohibited. No guideline refers to the possession of, transporting, trafficking, or reproducing of child pornography as "sexual abuse" or "exploitation of a minor." Therefore, the Ninth Circuit concluded that the five-level sentence enhancement did not apply in this case. Note: USSG §2G2.2 was amended on this issue effective November 1, 1997 (Amendment 537).

United States v. Rearden, 349 F.3d 608 (9th Cir. 2003). The defendant appealed his sentence for e-mailing graphic child pornography images to another man, arguing that the district court erred by enhancing his sentence four levels under §2G2.2(B)(3). He contended that the district court mistakenly concluded that any conduct involving anal penetration of a child is *per se* sadistic. The court of appeals affirmed the four- level enhancement under §2G2.2(b)(3) for transmitting "material that portrays sadistic or masochistic conduct or other depictions of violence." The evidence showed that at least two of the images that the defendant transmitted depicted the anal penetration of young prepubescent children by adult males. The court noted

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"interactive computer service," "minor," and "distribution."

[14]An amendment to become effective November 1, 2004, consolidates §§2G2.2 and 2G2.4 to avoid confusion in the application of these guidelines; provides alternative base offense levels, if the defendant was convicted of 18 U.S.C.§ 2252(a)(4), 2252A(a)(5) (possession offenses) or § 1466 (solicitation offense), and a separate offense level for all other offenses; adds a number of enhancements related to trafficking and receipt of child pornography; broadens the computer enhancement to include "interactive computer" as defined in 47 U.S.C. § 230 (f)(2) and to apply to offenses in which the computer (or an interactive computer service) was used for possession of pornographic material; adds Commentary to §2G2.2 which counts each video, video-clip, movie, or similar recording as having 75 images; makes several other minor changes to §2G2.2, Commentary, such as providing the definitions of "computer" and "image;" clarifies existing definitions of "minor" and "distribution;" and clarifies that a defendant does not need to intend to possess, receive, or distribute sadistic or masochistic images for application of this enhancement.

that the ordinary meaning of sadism is a form of satisfaction, commonly sexual, derived from inflicting harm on another. The court concluded that the district court was well within its discretion to conclude that what was shown in the pictures was necessarily painful and thus sadistic. Common sense dictates that in order to engage in the acts depicted, the adult males in the photographs must have experienced some sexual excitement. More importantly, the court noted that what they are shown doing necessarily hurt the child. Alternatively, the defendant argued that the visual depiction of a child being sexually molested is already covered by the base offense level for shipping material involving the sexual exploitation of a minor, so that more than penetration must be shown for the "sadistic" enhancement to apply. The court of appeals found that this was not correct, because §2G2.2(b)(3) is narrower than the base offense level which could, for example, involve pictures of a naked child without physical sexual contact, as the Fifth Circuit observed in *United States v. Lyckman*, 235 F.3d 234, 240 (5th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001). Accordingly, the court affirmed the enhancement.

Part H Offenses Involving Individual Rights

§2H4.1 Peonage, Involuntary Servitude, and Slave Trade

United States v. Veerapol, 312 F.3d 1128 (9th Cir.), *cert. denied*, 538 U.S. 981 (2002). The district court did not err by adjusting the defendant's base offense level upward two points under §3A1.1(b)–the "vulnerable victim" enhancement. The defendant was convicted of involuntary servitude of Saeieo, a nonEnglish-speaking Thai villager with a second-grade education, of mail fraud and harboring aliens. On appeal, the Ninth Circuit noted that the specific offense characteristics under §2H4.1(b) did not provide an adjustment for victim characteristics such as Saeieo's immigrant status and the linguistic, educational, and cultural barriers that contributed to her remaining in involuntary servitude. The court also noted that the district court cited none of the specific offense characteristics named in §2H4.1 to justify its application of the vulnerable victim adjustment. The court held that it had forbidden the general application of §3A1.1 in rare circumstances where, unlike involuntary servitude cases, the victim's vulnerability was typically incorporated into the offense. However, the court noted that its limitation on the §3A1.1 enhancement in Mann Act cases did not apply in cases where the specific manner in which the defendant committed the offense was a scheme that typically targets people like the victims in that case. Consequently, since Saeieo's special characteristics as a vulnerable alien are not similarly incorporated into the specific offense characteristics, the district court did not err in applying the adjustment.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Arias, 253 F.3d 453 (9th Cir. 2001). The defendant was convicted of witness intimidation but was acquitted of the underlying drug offenses for whose obstruction the intimidation served. The district court erroneously refused to apply a higher enhancement for obstruction of justice under the cross-reference to USSG §2X3.1, believing that it was not permissible because the defendant was acquitted of the underlying offenses. Deciding an issue of first impression, the court held that USSG §2J1.2(c)(1)'s requirement to apply USSG §2X3.1 (Accessory After the Fact) should be followed regardless of whether or not the underlying offense was proved by a preponderance of the evidence or any other standard of proof. The court reasoned that not doing so would defeat the very purpose of the cross reference–to ensure that the sentence reflects the seriousness of the obstruction where it, in turn, depends on the seriousness of the underlying offense. "[O]therwise 'perjurers would be able to benefit from perjury that successfully persuaded' a jury not to convict." 253 F.3d at 461 (citations omitted).

§2J1.6 Failure to Appear by Defendant

See United States v. Gray, 31 F.3d 1443 (9th Cir. 1994), §5E1.2, p. 73.

§2J1.7 Commission of Offense While on Release

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002). The district court did not err by allowing an enhancement for offenses committed while on pretrial release pursuant to USSG §2J1.7 and 18 U.S.C. § 3147, even though the defendant did not receive the notice in the pretrial order that such an enhancement could be applied. The defendant was convicted of telemarketing fraud. While he was on pretrial release, he continued to engage in telemarketing fraud in violation of the pretrial release order. Subsequently, the district court enhanced his sentence pursuant to 18 U.S.C. § 3147 and USSG §2J1.7. The defendant argued that such an enhancement was a violation of due process because he was not specifically warned in the pretrial order that such an enhancement could be applied. Noting a circuit split on the issue, the Ninth Circuit sided with the majority of the circuits in holding that the lack of such a warning does not preclude the sentencing enhancement because the enhancement statute itself does not require such a warning. The guidelines do not require such a warning because the notice requirement in the Commentary of §2J1.7 is a "pre-*sentence* requirement rather than a pre-release requirement." 251 F.3d at 841. The court also rejected defendant's argument that an upward adjustment for the selection of vulnerable victims under USSG §3A1.2(b)(2) was plain error. The district court's finding that there were over 300 victims who were mostly elderly was not clearly erroneous. Although the guidelines do not define what a "large number" could be, the district court was justified in holding that 300 constituted a "large number." Contrary to defendant's argument, the imposition of the vulnerable-victim enhancement was not impermissible double-counting because it accounted for different aspects of the harm caused, it was necessary to reflect the wrongfulness of his conduct,

and it was consistent with congressional intent to punish more severely those who intentionally seek out vulnerable victims.

United States v. Tavakkoly, 238 F.3d 1062 (9th Cir.), *cert. denied*, 534 U.S. 917 (2001). The defendant was convicted of various drug offenses, all of which were committed while he was on pretrial release for another drug offense. The district court did not err by considering the commission of the offenses while on pretrial release both to enhance his sentence for the instant crime and to impose a separate consecutive sentence for violating the terms of pretrial release. Rejecting the defendant's argument that the dual consideration was impermissible, the court held that the court was within its authority both under the enhancement statute's terms and under the sentencing guidelines. The enhancement statute–18 U.S.C. § 3147–specifically mandates a separate sentence for committing an offense while on pretrial release and mandates that it be imposed consecutive to any other sentence. In addition, §2J1.7 of the guidelines allows district courts to consider an enhancement under section 3147 "as if this section were a specific offense characteristic in the offense guidelines."

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[15]

United States v. Lam, 20 F.3d 999 (9th Cir. 1994). The district court did not err in declining to extend the reduction for failure to register a firearm where the firearm was used only for sporting or collection purposes to firearms used for self-defense. The fact that self-defense is a lawful use does not mitigate the defendant's registration offense. However, the district court erred in finding that it did not have the discretion to depart downward for the defendant's aberrant behavior. A number of convergent factors, such as the defendant's lack of criminal history, the fact that he obtained the weapon to protect his family after they had been robbed at their place of business, and his unfamiliarity with registration requirements, created aberrant circumstances where a downward departure could have been considered.

United States v. Routon, 25 F.3d 815 (9th Cir. 1994). The district court did not err in finding that the defendant possessed a firearm "in connection with" the felony for which he was convicted pursuant to USSG §2K2.1(b)(5). The circuit court agreed with the Tenth Circuit's approach in *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993), which found

[15] An amendment to become effective November 1, 2004, increases the enhancement, for the offense involving a destructive device if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; but maintains a two-level enhancement for all other destructive devices; provide an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk of public welfare, and the risk of death or serious bodily injury that the destructive device created; adopt the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substituted statutory definitions for the definitions of "ammunition" and "firearm," and increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

18 U.S.C. § 924(c)'s phrase "in relation to" to be an appropriate guide in determining the meaning of USSG §2K2.1(b)(5)'s phrase "in connection with" because there is no difference "in the common understandings" between the two phrases. Therefore, the government must prove a firearm was possessed in a "manner that permits an inference that it facilitated or potentially facilitated . . . the defendant's felonious conduct." 25 F.3d at 819. This court declined to follow the Fifth Circuit's holding in *United States v. Condren*, 18 F.3d 1190 (5th Cir.), *cert. denied*, 513 U.S. 856 (1994), which held that section 924(c) should not be used as a guide in interpreting USSG §2K2.1(b)(5), but rather looked to USSG §2D1.1(b)(1) for an analogy.

See United States v. Wenner, 351 F.3d 969 (9th Cir. 2003), §4B1.2, p. 67.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Angwin, 271 F.3d 786 (9th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002). The defendant challenged the district court's USSG §2L1.1(b)(5) upward adjustment due to the substantial risk of death or serious bodily injury to another person created by the defendant. The district court applied the enhancement because the defendant drove a motor home with 16 (14 aliens) people, although it was rated to hold 6. None of the aliens utilized a seatbelt. The district court did not err, particularly because Application Note 6 explains that the enhancement applies to a "wide variety of conduct [including] carrying substantially more passengers than the rated capacity of a motor vehicle . . ., or harboring persons in a crowded, dangerous, or inhumane condition."

United States v. Herrera-Rojas, 243 F.3d 1139 (9th Cir. 2001). The district court did not err when it used a preponderance of the evidence standard under USSG §2L1.1(b)(5) to determine whether defendant had intentionally or recklessly created a substantial risk of death or bodily injury to another person. The defendant argued that because this adjustment had a disproportionate effect on the sentence, the district court should have employed a clear and convincing evidence standard. *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000) ("'When a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction,' the government may have to satisfy a 'clear and convincing' standard.") (quoting *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991) (*en banc*), *cert. denied*, 503 U.S. 961 (1992)). Rejecting this argument, the court held that the potential thirteen-month increase does not satisfy the "extremely disproportionate" standard established in *Restrepo*. *See, e.g., Hopper*, 177 F.3d at 833 (holding that, given the brevity of the original range, a possible 48-month increase disproportionately affected an otherwise 24- to 30-month sentence). The defendant also challenged the enhancement on grounds that he did not create the stated risk because "he was in the same situation as the other aliens he transported." 243 F.3d at 1144. The court rejected this argument, finding his argument irrelevant based on the guideline's focus on risk "to another person." Finally, the defendant challenged the eight-level adjustment under USSG §2L1.1(b)(6) for the death of one of the aliens, on grounds that it requires intent, and, in the alternative, that enhancements under both subsections (b)(5) and (b)(6) constituted double counting because subsection (b)(5) is a

necessary element of subsection (b)(6). Rejecting both arguments, the court held that the absence of a specific intent requirement in subsection (b)(6) immediately after subsection (b)(5), which language expressly requires intent, indicates that no intent is necessary for a subsection (b)(6) adjustment. Furthermore, the imposition of both a subsection (b)(5) and a subsection (b)(6) enhancement did not constitute double counting because each subsection addresses a different harm. Subsection (b)(5) accounts for the defendant's conduct of creating a risk of death or serious bodily injury, with no regard to the consequence of such conduct, while subsection (b)(6) accounts for the outcome of the defendant's intent or recklessness, the death of an individual. "It is not double counting to impose two sentences based on the same conduct when 'one increase focuses solely on the defendant's conduct and the other increase focuses on the nature and degree of harm caused by the defendant's conduct.'" 243 F.3d at 1144-45 (quoting *United States v. Perkins*, 89 F.3d 303, 310 (6th Cir. 1996)). Despite affirming all of the guideline appeals, the court vacated the sentence and remanded because the district court violated Rule 32 when it ignored the defendant's factual challenges to the presentence report at sentencing.

United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003). The district court erred in applying §3C1.2 in addition to §2L1.1(b)(5) in sentencing the defendant. The defendant sped away from the border checkpoint until she was apprehended; she was attempting to flee from the agents. Because the district court's application of §2L1.1(b)(5) enhancement was due to the defendant's reckless flight from law enforcement officers, under Application Note 6 to §2L1.1, the district court erred by enhancing the defendant's offense level for reckless endangerment during flight under §3C1.2.

United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001), *cert. denied*, 537 U.S. 930 (2002). The defendant challenged the district court's two-level increase, pursuant to USSG §2L1.1(b)(5), based upon the defendant intentionally or recklessly creating a substantial risk of death or serious bodily injury. Application Note 6 explains that the enhancement applies to a "wide variety of conduct [including] carrying substantially more passengers than the rated capacity of a motor vehicle . . ., or harboring persons in a crowded, dangerous, or inhumane condition." Because putting 20 people in a dilapidated van without seats or seat belts satisfies Application Note 6, the district court did not err in making the enhancement.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court did not err when it increased the defendants' sentences under USSG §2L1.1(b)(5) for recklessly creating a substantial risk of death or serious bodily injury. Having traveled through the mountains between Mexico and San Diego before, the defendants knew the conditions and potential dangers of that terrain, which included severe weather, injury, and vulnerability to water-bourne parasites and disease. The court reasoned that, upon observing the inadequate clothing, water, food, and equipment brought by the aliens, the defendants should have encouraged them to acquire appropriate provisions or should have refused to guide them to the United States. Moreover, circuit precedent dictates that "[b]ecause [defendants] were subject to subsection (b)(5) for recklessly creating the risk [of death or serious bodily injury], an additional eight-level increase was required by subsection (b)(6)(4) for the death that resulted from that risk." 255 F.3d 1059. *See United States v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001)

(holding that, upon finding the necessary intent to create substantial risk under USSG §2L1.1(b)(5), additional intent is not necessary to increase a sentence under USSG §2L1.1(b)(6)).

§2L1.2 Unlawfully Entering or Remaining in the United States[16]

United States v. Baron-Medina, 187 F.3d 1144 (9th Cir. 1999), *cert. denied*, 531 U.S. 1167 (2001). The Ninth Circuit held that the California crime of lewd or lascivious act on a child under 14 years constituted "sexual abuse of a minor," and thus was an aggravated felony under USSG §2L1.2. The defendant pled guilty to entering the United States after being deported in violation of 8 U.S.C. § 1326. The district court imposed the 16-level enhancement under USSG §2L1.2(b)(1)(A), concluding that his sexual abuse of a minor qualified as an aggravated felony. The appellate court noted that "sexual abuse of a minor" is listed as an aggravated felony in 8 U.S.C. §1101(a)(43). The appellate court stated that in determining whether a particular state statute qualifies as an aggravated felony, the court must look solely to the statutory definition of the crime, not to the name given to the offense or to the underlying circumstances of the predicate conviction. *See Taylor v. United States*, 495 U.S. 575 (1990). The appellate court found that the conduct reached by the California Statute (California Penal Code § 288(a)), indisputably falls within the common, everyday meanings of the words "sexual" and "minor," and thus, qualifies as sexual abuse of a minor.

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) (*en banc*). This case posited whether a California state conviction for the petty theft of cigarettes and beer constitutes an aggravated felony for USSG §2L1.2(b)(1)(A) enhancement purposes. Deploying the *Taylor* categorical analysis, the court first defined "theft offense" (a qualifying aggravated felony per 8 U.S.C. § 1101(a)(43)(G), as long as the term of imprisonment is at least one year), and then turned to whether the California conviction qualified as a theft offense. To answer this question, the court first had to determine the California statute of conviction, which the record left unclear; the court ultimately deduced the relevant statutes and determined that because the state statutes criminalize conduct that would not constitute a theft offense, the aggravated felony enhancement could not apply. Moreover, those state statutes did not provide for a term of imprisonment of at least one year, which is necessary for a conviction to qualify as an aggravated felony "theft offense." Although the defendant ultimately served more than one year, due to a recidivist enhancement, the sentence available for the crime itself was not at least one year, and thus under the *Taylor* categorical approach, did not qualify as an aggravated felony. Moreover, under the *Taylor* modified categorical approach, the record here did not unequivocally establish that the defendant was convicted of the generically defined crime of "theft offense" and thus the aggravated felony enhancement could not apply on that basis.

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[16] An amendment to become effective November 1, 2004, adds an Application Note permitting §2L2.2 (Fraudulently Acquiring Documents), arising from the same course of conduct, to be grouped with§2L1.2 (Unlawful Entry) under §3D1.2 (Multiple Counts); clarifies that "use" includes cases involving an attempt to renew previously issued passports; provides an upward departure provision for cases involving a defendant who fraudulently obtained or used a United States passport intending to enter the United States to engage in terrorist activity; and provides a four-level enhancement if the defendant fraudulently obtained or used a United States passport.

United States v. Echavarria-Escobar, 270 F.3d 1265 (9th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The defendant appealed the district court's aggravated felony enhancement under USSG §2L1.2(b)(1)(A), contending that because his prior theft offense sentence was suspended, it did not constitute an aggravated felony. Reviewing for plain error, the court disagreed. Relying on the language of 8 U.S.C. § 1101(a), which defines aggravated felonies, the court joined all other circuits in ruling that whether a sentence is suspended is immaterial to the aggravated felony question.

United States v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001). The defendant was convicted of illegal re-entry after deportation. The defendant challenged the 16-level adjustment on grounds that his previous conviction for transporting aliens within the United States does not constitute an aggravated felony under USSG §2L1.1. Title 8 U.S.C. § 1101(a)(43) defines "aggravated felony," in relevant part, as "'an offense described in paragraph (1)(A) or (2) of [8 U.S.C. § 1324(a)] (relating to alien smuggling) . . . ." *Id*. at 733 n.26. The defendant argued that the definition mandates the "involvement of smuggling," and since transporting aliens already in the United States does not involve smuggling, the aggravated felony provision does not apply. The court rejected this argument because the offenses involving transporting aliens, defined in section 1324(a)(1)(A)(ii), are expressly included in the aggravated felony provision. Moreover, the defendant's activities do relate to alien smuggling because the transporting offense requires that the defendant know or have "reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law." *Id*. at 734 (quoting section 1324(a)(1)(ii)). Therefore, the conviction indicated that the defendant knew that his activities related to alien smuggling. Finally, Congress has used the "related to" language inside a parenthetical as descriptive, rather than limiting. *See, e.g.,* 8 U.S.C. § 1101(a)(43)(J). The court affirmed the sentence.

United States v. Gonzalez-Mendez, 150 F.3d 1058 (9th Cir.), *cert. denied*, 525 U.S. 1010 (1998). The district court did not err in increasing the defendant's base offense level by 16 levels based on his having been deported following a conviction for an aggravated felony. The defendant argued that Application Note 7 to USSG §2L1.2 (1996) limits the offenses for which the enhancement may be applied to those for which the term of imprisonment was completed within the previous 15 years. The court of appeals rejected this argument, holding that the application note intends the explicit 15-year limit to refer only to convictions under foreign law. Therefore, the domestic crimes for which the defendant's term of imprisonment was completed more than 15 years prior to sentencing do trigger the 16-level enhancement. Note: Section 2L1.2 has subsequently been amended to incorporate by reference the statutory definition (8 U.S.C. § 1101(a)(43)) of "aggravated felony."

United States v. Gonzalez-Tamariz, 310 F.3d 1168 (9th Cir.), *cert. denied*, 538 U.S. 1008 (2003). The Ninth Circuit joined the Second, Third, Fifth, Tenth, and Eleventh Circuits in holding that an offense classified as a misdemeanor under state law may nevertheless be considered an aggravated felony for sentencing purposes if it meets the requirements of 8 U.S.C. § 1101(a)(43). Thus, the defendant who was convicted of battery, labeled a gross misdemeanor with a one-year maximum sentence, was properly considered an aggravated felony because it is a crime of violence and the (suspended) term of imprisonment was one year.

United States v. Grajeda-Ramirez, 348 F.3d 11123 (9th Cir. 2003). Colorado's reckless vehicular assault statute is a predicate "crime of violence" for the purposes of the sentencing guidelines. The defendant, a 27-year-old citizen of Mexico, was convicted of illegal reentry after deportation. On appeal, the defendant argued that reckless vehicular assault is not a predicate crime of violence under USSG §2L1.2, and that the district court misapplied §2L1.2 by applying a 16-level enhancement on the basis of a "crime of violence" that was not an "aggravated felony." The Ninth Circuit held that the Colorado statute created a categorical "crime of violence" because it reached only conduct involving the requisite use of force. To commit reckless vehicular assault under Colorado law, a person must be the "proximate cause of serious bodily injury to another" and must act with at least a "reckless" mental state. The court stated that this was indistinguishable from statutory language that it had previously held to create a categorical "crime of violence" under the sentencing guidelines. Accordingly, the court held that any violation of the Colorado reckless vehicular assault statute constituted a crime of violence for the purposes of the sentencing guidelines, and therefore the district court correctly applied the 16-level enhancement.

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002). The court reviewed whether an Arizona conviction for endangerment qualifies as an aggravated felony under USSG 2L1.21(b)(1)(A). Specifically, the court reviewed whether the Arizona conviction satisfied 18 U.S.C. § 16(b)'s definition of a crime of violence, which, if satisfied, would qualify the Arizona conviction as an aggravated felony, per 8 U.S.C. § 1101(a)(43). Using the *Taylor* categorical approach, the court concluded that endangerment under Arizona law is not, categorically, an aggravated felony because a "substantial risk of imminent death or physical injury," the Arizona statutory definition of endangerment, is not the same as a "substantial risk that physical force . . . may be used," which is necessary under 18 U.S.C. § 16(b). In other words, because not all conduct punishable under the Arizona law would constitute a crime of violence under 18 U.S.C. § 16(b), convictions under that statute are not, categorically, aggravated felonies. For that reason, and because the record was not adequately developed to engage in the modified categorical approach, the court vacated the aggravated felony enhancement and remanded for re-sentencing.

United States v. Hernandez-Valdovinos, 352 F.3d 1243 (9th Cir. 2003). A suspended sentence that imposed incarceration as a condition of probation constituted a "sentence imposed" for purposes of §2L1.2. The defendant was found after re-entering the United States illegally. At the sentencing, the district court imposed a 12-level sentencing enhancement pursuant to §2L1.2(b)(1)(B) because of a prior drug-trafficking conviction with a sentence of less than 13 months. On appeal, the defendant argued that the 12-level enhancement should not apply because he received only probation and, therefore, there was no sentence imposed. More specifically, the defendant argued that his two months' incarceration was a condition of probation, not a sentence, and that because he received only probation, there was no "sentence imposed" for purposes of §2L1.2(b)(1)(B). Relying on *United States v. Mendoza-Morales*, 2003 WL 22389234 (9th Cir. Oct. 21, 2003), the Ninth Circuit stated that any sentence of incarceration imposed after an adjudication of guilt counted as a sentence of imprisonment, and incarceration as a condition of probation was treated in the same way as ordinary incarceration. Accordingly, the defendant's two-month incarceration as a condition of probation constituted a

sentence imposed for purposes of §2L1.2. Furthermore, the guideline provided for the 12-level increase if the sentence imposed was 13 months or less. A sentence of probation, with or without the two months' incarceration, by definition was a sentence of 13 months or less. In the instant case, the defendant received a sentence of either two months or zero months; either way, his sentence was 13 months or less.

United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), *cert. denied*, 531 U.S. 1102 (2001). The district court did not err when it enhanced defendant's offense level under USSG §2L1.2(b)(1)(A) for illegal re-entry after deportation for conviction of an aggravated felony. Under 8 U.S.C. § 1101(a)(43), drug trafficking crimes defined in 18 U.S.C. § 924(c) constitute aggravated felonies under the guidelines. Section 924(c)(2) defines such crimes as "any *felony* punishable under the Controlled Substances Act" (emphasis added). The defendant argued that because his state felony conviction for possession of 0.4 grams of cocaine would not be a felony under federal jurisdiction, it is not punishable under the Controlled Substances Act, and thus is not a drug trafficking crime which could predicate an aggravated felony enhancement. Consistent with six other circuits to consider the term "felony" within section 924(c), the court rejected the defendant's argument and found that the term referred "to crimes denominated as felonies under *either* federal *or* state law." *Id*. at 1339. *See also United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir.), *cert. denied*, 528 U.S. 844 (1999); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.), *cert. denied*, 519 U.S. 885 (1996); *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364-66 (1st Cir. 1996); *United States v. Polanco*, 29 F.3d 35, 38 (2d Cir. 1994). Moreover, the commentary to USSG §2L1.2, the language of the Controlled Substances Act, and the policies underlying the sentencing guidelines, support the finding that state and federal felony convictions are equally relevant to the guidelines. *See* §2L1.2, comment. (n.1) (indicating that "any federal, state, or local offense punishable by imprisonment for a term exceeding one year" constitutes a felony); 21 U.S.C. § 802(13) (stipulating that for purposes of the Controlled Substances Act, "[t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony"); *Restrepo-Aguilar*, 74 F.3d at 365 (stating that "the guidelines operate on the foundational premise that a defendant's history of criminal activity in violation of state law is to be treated on par with his history of crimes committed in violation of federal law."). Affirming the sentence, the court held that any crime punishable by the Controlled Substances Act that was characterized as a felony by the convicting jurisdiction constitutes an aggravated felony under USSG §2L1.2(b)(1)(A).

United States v. Machiche-Duarte, 286 F.3d 1153 (9th Cir. 2002). The United States appealed the district court's downward departure under USSG §2L1.2, Application Note 5. The district court departed under that note but relied on several factors which are not discussed by the note. Moreover, Application Note 5 expressly precludes departure under its authority where the defendant has multiple previous felony convictions, as was the case here. Because this requirement was not met, and because the three Application Note 5 prongs are prerequisites to a sentencing departure under its authority, the district court erred in departing under it.

United States v. Maria-Gonzalez, 268 F.3d 664 (9th Cir. 2001), *cert. denied*, 535 U.S. 965 (2002). The defendant appealed the district court's aggravated felony enhancement under USSG §2L1.2(b)(1)(A), arguing that because his 1992 conviction was not an aggravated felony at the time of his 1993 deportation, that conviction could not qualify as an aggravated felony. The Supreme Court has ruled that classification of an offense as an aggravated felony applies retroactively. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Moreover, the offense of illegal reentry occurred after the 1992 conviction was classified as an aggravated felony, and the language of the statute, the legislative history, and the guidelines all establish that it is the classification of a prior conviction as an aggravated felony at the time of the reentry violation that justifies the aggravated felony status.

United States v. Medina-Maella, 351 F.3d 944 (9th Cir. 2003). The appellate court affirmed the district court's holding that a prior felony conviction for lewd or lascivious acts upon a child under the age of 14 years was a "crime of violence" for purposes of §2L1.2. The defendant's California conviction arose from a sexual relationship that he had with a girl who was 13 years old. At the time, the defendant was 26. After the victim ran away from home to live with the defendant, her mother contacted the police and the defendant was arrested. By that time, the girl was pregnant. Both the defendant and the victim admitted to the police that they had engaged in sexual intercourse on numerous occasions. The defendant served 25 months in state prison and was subsequently deported. In 2001, the defendant attempted to re-enter the United States. The defendant was indicted for attempted illegal entry after deportation in violation of 8 U.S.C. § 1326, and pled guilty. On appeal, the defendant argued that because his sexual relationship with the victim was consensual and because his conduct did not involve the necessary elements of force or threatened force, his prior conviction was not for a "crime of violence" and should not have subjected him to the higher 16-level sentencing enhancement. The Ninth Circuit, relying on *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), held that conduct which violated Cal. Penal Code § 288(a) constituted "sexual abuse of a minor" for purposes of §2L1.2, and was therefore a "crime of violence." Consequently, imposition of a 16-level sentencing enhancement was appropriate.

United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir.), *cert. denied*, 124 S. Ct. 840 (2003). The district court's judgment was affirmed. The defendant was convicted of illegal reentry into the United States and was subject to an enhanced sentence for a prior state drug conviction. After his state court conviction, the defendant received a three-year suspended sentence; however, his probation was revoked and he was sentenced to three years in prison. The defendant served just over 13 months of the sentence. Section 2L1.2(b)(1)(A)(I) requires a 16-level increase in the offense level if a defendant was deported after a conviction for a drug trafficking felony for which the sentence imposed exceeded 13 months. The issue on appeal was whether, notwithstanding Application Note 1(A)(iv), which excludes any time suspended, the three-year prison sentence imposed by the state court after defendant's probation was revoked was included in the calculation of the length of the "sentence imposed" under §2L1.2(b)(1)(A)(I). *Id.* at 458. The Ninth Circuit, analogizing §4A1.2, held that the prison sentence imposed after revocation of probation should be included in calculating the length of the sentence imposed for the prior offense. *Id.*

United States v. Pereira-Salmeron, 337 F.3d 1148 (9th Cir. 2003). Defendant was convicted of illegal re-entry into the United States after deportation, and the district court imposed a sentence based on its conclusion that defendant's conviction in Virginia for carnal knowledge of a child, without the use of force, was not a crime of violence under §2L1.2. The government appealed. The defendant argued that his prior Virginia conviction did not fall within the guidelines definition for a "crime of violence" because the statute under which he was convicted explicitly addresses conduct undertaken "without the use of force." The court was unpersuaded by this argument. It concluded that an offense constituting "sexual abuse of a minor," whether it includes–or even explicitly excludes–"force" as an element, is deemed to be a "forcible sex offense" and thus a "crime of violence" for the purposes of this guideline. Accordingly, the court vacated the sentence imposed by the district court held that a 16-level enhancement was warranted under §2L1.2(b)(1)(A).

United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir. 2003). The court addressed, as an issue of first impression, whether a "crime of violence" must be limited to "aggravated felonies" under §2L1.2 as it was amended in 2001. The court held that a "crime of violence" need only to be a "felony" as defined in the application notes of §2L1.2, and not an "aggravated felony" as statutorily defined in 8 U.S.C. § 1101(a)(43), to qualify for a 16-level enhancement. The court noted that the plain language of the guideline so demonstrates. The court stated that although the phrase "crime of violence" appears in both the statute and the new guideline, the new guideline takes care to include its own definition. Significantly, the guideline definition is different from the statutory definition of that phrase.

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001). The defendant appealed the district court's aggravated felony enhancement under USSG §2L1.2(b)(1)(A) based upon the defendant's five DUI convictions in California. Because those convictions did not include an intent requirement and thus a conviction could be based on negligence, under the *Taylor* categorical approach, the full range of conduct encompassed by the DUI statute does not qualify as an aggravated felony and thus the enhancement does not apply. The court found plain error and remanded for re-sentencing.

United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (*en banc*). The defendant pled guilty to 8 U.S.C. § 1326, for re-entering the country illegally after being deported. The district court raised the defendant's offense level, under USSG §2L2.1(b)(1)(A), after finding that the defendant's violation of California Health and Safety Code § 11360(a) for offering to transport, sell, or give away marijuana, was an aggravated felony. In *Taylor v. United States*, 495 U.S. 575, 602 (1990), the Supreme Court established that the sentencing court must analyze the underlying statute to determine if it considers the crime to be a felony, and, in certain cases, courts can examine more than the "fact of conviction." This circuit allows examination of "judicially noticeable facts," like the indictment or the transcript, to determine whether the case qualifies as a felony. However, if such materials suggest that the defendant could be convicted of an offense that does not qualify as an aggravated felony, then the offense does not constitute an aggravated felony under the guidelines. *See United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999). Relying on a previous decision, where this circuit found that a solicitation offense could not be grounds for an aggravated felony enhancement, the court found that the

defendant's solicitation conviction under the California Health and Safety Code does not constitute an aggravated felony under USSG §2L1.2. *See Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (holding that "solicitation to possess marijuana for sale is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B)."). However, the court remanded to allow the district court to determine whether the record includes "judicially noticeable facts" that would qualify the offense as an aggravated felony.

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002). The defendant appealed the district court's aggravated felony enhancement under USSG §2L1.2(b)(1)(A) based upon the defendant's prior Arizona convictions for drug possession. Reviewing a complex set of federal statutes, the court determined that to qualify as an aggravated felony, a state drug conviction must be punishable by imprisonment for more than one year. Because the convictions here were not so punishable, the aggravated felony enhancement did not apply.

United States v. Soberanes, 318 F.3d 959 (9th Cir. 2003). The district court's judgment was affirmed. The defendant had a prior state conviction for attempted possession of more than eight pounds of marijuana. On appeal, the issue was whether a prior conviction for attempted possession of more than eight pounds of marijuana is an "aggravated felony" within the meaning of §2L1.2(b)(1)(C), after the November 1, 2001, amendment. The defendant argued that under the amended guidelines a simple drug possession offense was no longer an aggravated felony, but rather a felony with a four-level sentencing enhancement. The defendant noted that Application Note 2 refers to 8 U.S.C. § 1101(a)(43)(B) for the definition of "aggravated felony" which includes "drug trafficking crimes" within its definition. The defendant argued that since amended §2L1.2 provides a definition for "drug trafficking offenses" that excludes simple possession offenses, the definition provided by §2L1.2 for "drug trafficking offenses" should prevail over the definition provided by 18 U.S.C. § 924(c)(2) and 21 U.S.C. § 802(13). The Ninth Circuit disagreed with defendant's argument. The court noted that Application Note 2 states that "aggravated felony" has the meaning given in 8 U.S.C. § 1101(a)(43) which states that an "aggravated felony" is a "drug trafficking crime" as defined in 18 U.S.C. § 924(c). Section 1101(a)(43) does not state that an aggravated felony should be defined as stated in Application Note 1 of §2L1.2.

United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001). The United States appealed the district court's refusal to apply the aggravated felony enhancement based upon the defendant's California DUI with bodily injury conviction. The court framed the issue as, does a California conviction for driving under the influence of alcohol with injury to another constitute a crime of violence as defined at 18 U.S.C. § 16? The court concluded that section 16's definition of crime of violence contains a volitional requirement, and thus cannot be satisfied by a negligence-based crime. Because the DUI statute at issue can be violated through negligence alone, it does not qualify as a "crime of violence" as that term is defined at 18 U.S.C. § 16, and thus under the categorical approach, the aggravated felony enhancement does not apply.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Novak, 284 F.3d 986 (9th Cir.), *cert. denied*, 537 U.S. 854 (2002). The defendant appealed the district court's refusal to adjust downward seven levels under USSG §2P1.1(b)(2). The decision defined when an escape begins to determine whether a defendant is entitled to the seven-level downward adjustment for returning to custody voluntarily within 96 hours of the escape. The court held that an escape begins when the prisoner departs from lawful custody with the intent to evade detection, even if no one is aware of the escape at that time and thus affirmed the district court's decision.

United States v. Patterson, 230 F.3d 1168 (9th Cir. 2000). The court did not err when it sentenced the defendant pursuant to USSG §2P1.1(a)(1) instead of (a)(2), based on an underlying conviction where the supervised release sentence had been revoked. The defendant pled guilty to escaping from custody, in violation of 18 U.S.C. § 751(a), after failing to return to a community corrections facility while on work release. At the time of his escape, the defendant was completing a 12-month custody sentence for having violated the conditions of a supervised release term imposed subsequent to a prior conviction for unlawful use of a communication facility. Finding that at the time of the escape, the defendant was in custody "by virtue of" the conviction for unlawful use of a communication facility, the district court sentenced the defendant under USSG §2P1.1(a)(1), which mandates an offense level of 13 "if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense." The defendant challenged his sentence, arguing that the district court should have followed the alternative subsection for all other escape convictions, USSG §2P1.1(a)(2), which mandates a base offense level of 8. Consistent with the Fourth and Eighth Circuits, the court held that "when supervised release is imposed as part of a sentence and then revoked in subsequent proceedings, the resulting confinement is 'by virtue of' the original conviction, and therefore, USSG §2P1.1(a)(1) applies." *Id*. at 1169; *United States v. Evans*, 159 F.3d 908, 913 (4th Cir. 1998) (finding that because the original sentence includes the term of supervised release, its revocation, and the subsequent additional custody time for its violation, incarceration after the revocation constitutes custody "by virtue of " the underlying offense); *see also United States v. Pynes*, 5 F.3d 1139, 1140 (8th Cir. 1993) (holding that if a defendant is on supervised release by virtue of the original offense, then "upon revocation of his supervised release[, he] was in custody for 'conviction of any offense.'"). The court reasoned that but for the original offense, there would have been no supervised release to violate and be revoked, resulting in a return to custody. This ruling is consistent with Ninth Circuit precedent that has found, in other contexts, that revocation for supervised release punishes the original conviction. *See, e.g., United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993) (finding that, for *ex post facto* purposes, revocation of supervised release is part of the original sentence); *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995) (holding that, for double jeopardy purposes, "the period of supervised release[] is the punishment for the original crime, and it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of his release.").

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce[17]

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001). The defendant contended that the district court improperly enhanced his sentence because there were insufficient facts to support findings that hazardous substances were discharged into the environment, resulting in a substantial likelihood of death or serious bodily injury, per USSG §2Q1.2(b)(1)(B). That guideline, interpreted in conjunction with Application Note 5, requires a release or emission of a hazardous or toxic substance or pesticide "into the environment,"*United States v. Ferrin*, 994 F.2d 658, 662 (9th Cir. 1993), and a showing that the environment was actually contaminated by the substance, *United States v. Van Loben Sels*, 198 F.3d 1161, 1164 (9th Cir. 1999). Here, the district court found that asbestos dust was emitted into the air thus warranting the enhancement. Similarly, the district court properly enhanced the sentence nine levels under USSG §2Q1.2(b)(2) because the offense resulted in a substantial likelihood of death or serious bodily injury. The enhancement was based upon the defendant's noncompliance with work practice standards resulting in workers being exposed to life-threatening asbestos fibers.

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). The district court did not err by upwardly adjusting the defendant's offense level under §2Q1.2. On appeal, the defendant objected to the district court's six-level upward adjustment pursuant to §2Q1.2(b)(1)(A). Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. *See* USSG §2Q1.2, comment. n. 5. In *Ferrin,* the Ninth Circuit held that Application Note 5 requires a showing that some amount of a pollutant in fact contaminated the environment. *United States v. Ferrin*, 994 F.2d 658, 663-64 (9th Cir. 1993). In *Van Loben Sels*, the Court also noted that in most cases reasonable inferences from available evidence will suffice to support a conclusion that illegal acts resulted in contamination. *United States v. Van Loben Sels*, 198 F.3d 1161, 1165 (9th Cir. 1999). The record showed that during long periods of time, the facility and the powerhouse were not even close to contained for purposes of asbestos abatement. Consequently, it was a reasonable inference to assume that contamination had occurred.

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Phillips, 356 F.3d 1086 (9th Cir. 2004). The case was remanded so the district court could include any reliable CERCLA-related expenses in its §2Q1.3(b)(3)

[17] An amendment to become effective November 1, 2004, adds a two-level enhancement to §2Q1.2 for a defendant convicted under 49 U.S.C. § 5124 or § 46312; provides an upward departure provision if the offense resulted in extreme psychological injury or was calculated for terroristic activity; and deletes 49 U.S.C. § 60123(d) (penalty provision) from the statutory provisions referred to in §2Q1.2.

calculation. The defendant was convicted of multiple violations of the Clean Water Act and conspiracy to violate the Clean Water Act. On appeal, the government argued that the district court erred in not including in its calculation of cleanup expenses under §2Q1.3(b)(3). The Ninth Circuit noted that this was an issue of first impression. The court noted that the district court decided to exclude CERCLA-related expenses, even if defendant's activities released pre-existing contaminants into the environment. However, the court noted that the text of the guidelines, the overall statutory scheme enacted by Congress, and other circuits' case law suggested that sentencing courts should include such expenses in the calculation. The court stated that the plain language of §2Q1.3(b)(3) supported a conclusion that the sentencing court must include reliable CERCLA expenses. Therefore the court held it would adopt the interpretation most consistent with the section's plain language. In other words, a district court must include all reliable cleanup costs in its calculation of whether a defendant's actions required a substantial expenditure for cleanup. The court noted that it drew additional support for its interpretation from sister circuits, which have concluded that a calculation under §2Q1.2, which is closely related to §2Q1.3, should include all cleanup costs. *United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997); *United States v. Bogas,* 920 F.2d 363 (6th Cir. 1990). Accordingly, the court vacated defendant's sentence and remanded to allow the district court to make the necessary calculation armed the court's interpretation of §2Q1.3(b)(3).

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[18]

United States v. Lomow, 266 F.3d 1013 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 845 (2003). The district court properly sentenced the defendant under the money laundering guideline. Pursuant to Appendix A of the guidelines and Amendment 591, USSG §2S1.1 is the appropriate guideline for a 18 U.S.C. § 1956 conviction.

Part T Offenses Involving Taxation

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

United States v. Bishop, 291 F.3d 1100 (9th Cir.), *cert. denied*, 537 U.S. 1176 (2002). The defendant challenged the district court's tax loss calculation. The court considered two of the defendant's arguments, deeming a third contention waived because it was not raised below. First, defendant claimed that the district court should have used "married filing jointly" status, instead of "married filing separately," the use of which resulted in a higher tax loss. The court decided that because the tax loss would have been the same under either status, there was no

[18]Effective November 1, 2001, the Commission consolidated §§2S1.1 and 2S1.2 into a single new guideline, §2S1.1, which resulted in increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct, and decreased penalties for defendants whose laundered funds derived from less serious underlying conduct. *See* USSG App. C, Amendment 634.

error: it reached this conclusion because tax loss includes the reasonably foreseeable conduct of all co-actors and thus under either status, the defendant's spouses income would have to be included. Second, the defendant claimed that the district court erred because it did not itemize the deductions to which he was entitled. According to the defendant, the district court should not have used the standard deduction, but rather, should have itemized, because itemizing permits a "more accurate determination" of tax loss than the default 20 percent of the gross income set forth in USSG §2T1.1(c)(2). Because the defendant failed to produce evidence in support of itemized deductions, the court ruled that using the standard deduction was a reasonable estimate given the available facts, citing USSG §2T1.1, comment. (n.1).

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The district court imposed both a two-level enhancement under USSG §3B1.3 for abuse of a position of trust and under USSG §2T1.1(b)(1) for "fail[ing] to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity." The district court based the enhancement on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. The court reasoned that because the USSG §2T1.1(b)(1) enhancement applies regardless of the manner in which the illegal income was derived (*i.e.,* whether it involved an abuse of a position of trust), both enhancements are appropriate where the conduct has been committed by abusing a position of trust, because the abuse of position of trust was not taken into account by the USSG §2T1.1(b)(1) enhancement.

United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994). The district court erred when it failed to consider preguidelines conduct in determining the defendant's tax loss under USSG §2T1.1. The government argued that the inclusion of the defendant's preguideline tax evasion did not violate the *ex post facto* clause because it is part of a "continuing pattern of violations of the tax laws by the defendant," USSG §2T1.1, comment. (n.2) which is presumed to be "part of the same course of conduct" for purposes of §1B1.3(a)(2). The Ninth Circuit agreed and joined several other circuits in so holding. *See United States v. Regan*, 989 F.2d 44 (1st Cir. 1993); *United States v. Haddock*, 956 F.2d 1534 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992).

United States v. Valentino, 19 F.3d 463 (9th Cir. 1994). The district court did not err in disallowing an evidentiary hearing to determine whether defendant's willful underreporting of interest income on his income tax returns resulted in a tax loss. The defendant claimed that, in addition to understating his interest income, he also understated depreciation deductions to which he was entitled. He argued that no additional tax would have been due had he disclosed the hidden income but also claimed the missed deductions. The circuit court agreed with the district court's finding that, as a matter of law, it did not matter whether the defendant was entitled to the depreciation deductions, or how much the government lost in taxes. Rather, the purpose of the tax fraud guideline is to "measure the size of the lie, not the size of the government's loss . . . ." 19 F.3d at 465. Here, the defendant had used false social security numbers and names to hide almost $100,000 of interest income. Note: §2T1.1 was amended on this issue effective November 1, 1997 (Amendment 491).

Part X Other Offenses

§2X3.1 Accessory After the Fact

See United States v. Arias, 253 F.3d 453 (9th Cir. 2001), USSG §2J1.2, p. 25.

§2X5.1 Other Offenses

United States v. Van Krieken, 39 F.3d 227 (9th Cir. 1994), *cert. denied*, 514 U.S. 1075 (1995). The defendant asserted that the district court applied the incorrect guideline in sentencing him upon his conviction for corrupt interference with the administration of tax laws, in violation of 26 U.S.C. § 7212(a). The district court sentenced the defendant using USSG §2J1.2(a), Obstruction of Justice, as opposed to USSG §2T1.5, Fraudulent Returns, Statements, or Other Documents. Under USSG §1B1.2, the commentary provides that the court will "determine which guideline section applies based upon the nature of the offense charged in the count of which the defendant was convicted," when the "particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines." In this case, the district court correctly followed the method set forth in USSG §2X1.5, which instructs the court to determine the most analogous guideline. The district court properly analogized the defendant's conduct in filing false tax returns and seeking a tax levy on innocent tax payers, among other conduct, to obstruction of justice.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court erred in applying a two-level upward adjustment because of either an abuse of a position of trust pursuant to USSG §3B1.3 or vulnerable victim pursuant to USSG §3A1.1, posed in the alternative, in sentencing a defendant convicted of traveling in interstate commerce to contract the murder-for-hire of his wife. The Ninth Circuit found that the defendant's spousal relationship did not create a position of trust that significantly facilitated the commission or concealment of the offense to justify enhancement under USSG §3B1.3. The Ninth Circuit likewise found defendant's status as the intended victim's spouse did not justify enhancement under USSG §3A1.1 because the spousal relationship did not make her any more vulnerable than any other intended victim of a murder-for-hire.

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant perpetrated a hoax on the family of a missing eight-year-old girl by claiming that he knew the identity of her assailant and the whereabouts of her body. The defendant was convicted of obstructing an FBI investigation, making false statements to the FBI, and obstructing justice by giving false testimony to the grand jury. He appealed the district court's upward adjustment of his sentence under the Vulnerable Victim provision of USSG §3A1.1. He asserted that the child's family was

not a victim of his offenses, because his false statements and obstruction were made to the government. The appellate court affirmed the district court's determination that the family was also a victim, and held that "courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a 'vulnerable victim' under section 3A1.1." The court joined the majority of the circuit courts that have addressed this issue. *See, e.g.*, *United States v. Echevarria*, 33 F.3d 175, 180-81 (2d Cir. 1994) (vulnerable victim need not be victim of the offense of conviction); *United States v. Lee*, 973 F.2d 832, 833-34 (10th Cir. 1992) (same); *United States v. Yount*, 960 F.2d 955, 957-58 (11th Cir. 1992) (same); *United States v. Bachynsky*, 949 F.2d 722, 735 (5th Cir. 1991) (same), *cert. denied*, 506 U.S. 850 (1992); *United States v. Callaway*, 943 F.2d 29, 31 (8th Cir. 1991) (dictum); *but see United States v. Wright*, 12 F.3d 70, 73 (6th Cir. 1993), *cert. denied*, 516 U.S. 923 (1995) (vulnerable victim must be victim of defendant's offense of conviction).

United States v. Mendoza, 262 F.3d 957 (9th Cir. 2001). Pursuant to USSG §3A1.1(b)(1), the district court imposed a two-level enhancement, because the defendant targeted illegal aliens in committing the offense of selling false employment documents. The defendant contested "class-based" vulnerability. The court explained that what made the victims vulnerable was not that they were Hispanic but that they were in the United States illegally (and thus would not investigate or report the defendant), they were unfamiliar with immigration law, they were not well educated, they could not speak or read English, and the defendant hold himself out as sophisticated and knowledgeable in INS procedures. The defendant was convicted of three offenses: 1) conspiracy to commit an offense against the United States, 2) sale of immigration documents, and 3) pretending to be a federal employee and obtaining money by so pretending. Because of the breadth of these convictions, the court ruled that not all of the victims are vulnerable in the same way for the same reasons. Therefore, the characteristics that made the victims vulnerable were not typically associated with the victims of the offenses and thus the victims were particularly vulnerable and the district court did not clearly err in applying the enhancement.

United States v. O'Brien, 50 F.3d 751 (9th Cir. 1995). The appellate court rejected the First Circuit's interpretation of USSG §3A1.1 in *United States v. Rowe*, 999 F.2d 14 (1st Cir. 1993), which held that the commentary requires that a defendant "target" vulnerable victims before the enhancement applies. While noting that the circuits have split on this issue, the court chose to follow its prior holding in *United States v. Boise*, 916 F.2d 497 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991), which "specifically rejected the argument that USSG §3A1.1 requires a defendant to select a victim intentionally because of his vulnerability." In this case, the defendants "knew or should have known" that many claimants in their medical insurance scam were vulnerable because they had medical conditions which realistically precluded them from switching insurance companies, and they continued to accept these claimants' premium payments. The appellate court also rejected the defendants' assertion that the victims were not "unusually vulnerable" or "particularly susceptible" to the fraud. "Here, victims who developed medical conditions and could not get their claims paid are, as a group, unusually vulnerable to

appellants' continued acceptance of premiums and appellants' promises of payment." The enhancement was affirmed.[19]

See United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003), §2H4.1(b), p. 24.

United States v. Wetchie, 207 F.3d 632 (9th Cir.), *cert. denied*, 531 U.S. 854 (2000). The district court did not err when it enhanced defendant's sentence under the vulnerable victim guideline because the victim was asleep at the time of the offense. The defendant pled guilty to abusive sexual contact committed within Indian country, in violation of 18 U.S.C. §§ 1153 and 2244(a)(1). The defendant argued that in the absence of aggravating factors, sleep does not make a victim vulnerable. Rejecting the argument, the court found that both the plain meaning of the guideline and its accompanying examples support the district court decision. Application Note 2 to USSG §3A1.1 states that a vulnerable victim under the guideline includes one "who is [] particularly susceptible to the criminal conduct." The court agreed with the district court's determination that the victim's sleep state diminished her ability to resist or call for assistance, making her more susceptible to the defendant's acts. Similar to a cancer patient targeted by a fraud defendant marketing an ineffective cancer cure or a handicapped victim targeted by a robber, the sleeping victim might not have been victimized had she been awake. *See* USSG §3A1.1, comment. (n.2) (listing examples for which USSG §3A1.1(b) would apply). Moreover, the district court sufficiently applied the test this circuit established for determining a vulnerable victim. In *United States v. Peters*, 962 F.2d 1410, 1417 (9th Cir. 1992), the court stated that the district court must first consider the victim's characteristics, reaction to the defendant's conduct, and the circumstances surrounding the act. The court "must then determine whether the defendant could reasonably have anticipated the victim's reaction." *Id*. at 1417. The district court recognized that the victim's sleep state substantially impaired her ability to react to the defendant's conduct and it considered that the defendant's responsibility of checking the beds and the group home provided him the opportunity to abuse the victim. Finally, in determining that an enhancement was warranted, the district court found that the defendant could reasonably have anticipated that the victim's sleep state would impair her ability to react to his actions. Affirming the sentence, the court held that courts can apply a vulnerable victim enhancement to a sentence for abusive sexual contact when the victim was sleeping at the time of the contact.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The Ninth Circuit affirmed a vulnerable victim enhancement for one minor victim of the Mann Act and remanded for further consideration with regard to another. Application Note 2 states that the enhancement for targeting a vulnerable victim is not appropriate if the factor that makes the person vulnerable is incorporated in the offense guideline. Citing *United States v. Castaneda*, 239 F.3d 978 (9th Cir. 2001), the Ninth Circuit held that the enhancement does not apply if the factor that makes the victim vulnerable is not "unusual" for victims of the offense. For example, economic vulnerability is not unusual for victims of the Mann Act; therefore, a court may not apply the enhancement if economic circumstances are what make the victim vulnerable. Here, the district

[19]The guideline was amended effective November 1, 1995, to delete language that suggested defendants must target their victims because of their vulnerability. *See* Appendix C, Amendment 521.

court applied the vulnerable victim enhancement with regard to both victims. The Ninth Circuit affirmed the enhancement with regard to one victim, whom the district court found to be vulnerable based on her mental condition, which followed from the facts that she had been raped by her mother's boyfriend when she was seven and that her mother had a serious chemical dependency problem. The Ninth Circuit reversed and remanded with regard to the other victim. The district court found that the instability in her personal life and her own chemical dependency made her particularly vulnerable to "pimps." The Ninth Circuit found these to be typical characteristics of Mann Act victims, and therefore were not sufficient to support the enhancement.

§3A1.2 Official Victim[20]

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002). The (disbarred attorney) defendant appealed a three-level "official victim" enhancement under USSG §3A1.2(a) because he threatened two members of the Montana Supreme Court Commission on Practice, which oversaw the defendant's disbarment. The defendant maintained that those two individuals were state employees and that the enhancement only applies to victims who are federal officials. The court first noted that USSG §3A1.2(a) does not limit the term "government officer or employee" to federal officials and employees. Moreover, the individuals were clearly government officials at the time of the threats and thus the enhancement applied. Finally, citing *United States v. Williams*, 14 F.3d 30 (9th Cir. 1994), the court ruled that it was not impermissible double counting to apply the enhancement even though USSG §2A6.1 already incorporated the status of the victims in setting the offense level.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under USSG §3B1.1(a).

United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001). The defendant contended that application of enhancements under USSG §§3B1.1(c) and 3B1.4 constituted impermissible double counting. Impermissible double counting occurs if a "guideline provision is used to increase punishment on account of a kind of harm already fully accounted for, though not when the same course of conduct results in two different types of harm or wrongs at two different times." *United States v. Calozza*, 125 F.3d 687, 691 (9th Cir. 1997). Here, each enhancement accounts for a different type of harm and thus there was no impermissible double counting: involving others in criminal wrongdoing is harmful without reference to age (USSG §3B1.1(c) enhancement); use of a minor is harmful whether or not the defendant's role in the offense is that

[20] An amendment to become effective November 1, 2004, restructures §3A1.2 (Official Victim) and provide a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was a Chapter Two, Part A (Offenses Against a Person).

of a leader or organizer (USSG §3B1.4 enhancement). Finally, USSG §3B1.4 is not a lesser included offense of USSG §3B1.1: the harm caused by the use of the minor is not fully accounted for by application of USSG §3B1.1(c).

United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002). The defendant challenged a four-level leadership role enhancement under USSG §3B1.1(a). The court first ruled there was no error in the district court's findings that there were five or more members involved in the criminal activity or that the activity was extensive. The court ruled, however, that the government did not satisfy its burden and establish that the defendant played a leadership role. The district court's reasons for finding to the contrary–the defendant's nephew's deference and the defendant's strong personality–were insufficient to support a role enhancement.

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards informing individuals that they had won $10,000, required that they pay $15 in processing fees, then failed to award any money. The defendant appealed the four-level enhancement under §3B1.1(a), for being an organizer or leader of an activity involving at least five participants, arguing that because his workers were unaware of the scheme, they could not be considered participants. Citing Application Note 1 to USSG §3B1.1, which excludes persons not criminally responsible for the offense from being participants, the court vacated the enhancement. It remanded so that the district court could determine the level of involvement of the defendant's ex-wife, whose participation might warrant the enhancement on grounds that the defendant would have been an organizer of a criminal activity that "was otherwise extensive." The court held that an enhancement on such grounds required the participation of at least one other criminally culpable individual.

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). The district court did not err in applying a two-level enhancement based on two equally adequate guideline provisions–defendant's aggravating role in the offense under USSG §3B1.1, or the involvement of his 18-year-old son in the criminal enterprise under the USSG §5K2.0 policy statement for circumstances that fall outside the "heartland" of the sentencing guidelines. The defendant was convicted of two counts of distribution of cocaine and was sentenced to a term of 64 months' imprisonment. The court held that the determination that the defendant was the "organizer, leader, manager, or supervisor" of a criminal enterprise that involved less that five people and was not otherwise extensive was not clearly erroneous. There was sufficient evidence to establish that the defendant "coordinated the distribution of drugs," "initiated drug deals with the undercover officer and negotiated the terms," and "exercised authority over his son and others." 249 F.3d at 1154-55. Furthermore, according to Application Note 2, it is sufficient that the defendant exercises control over *at least one* other person in order to qualify for the enhancement under USSG §3B1.1(c). The court also upheld the district court's conclusion that the two-level departure was supported by USSG §5K2.0, which allows a departure when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The district court did not abuse its discretion when

it held that involving one's son in a criminal enterprise, in light of the confidential relationship between father and son, is one of such circumstances. *See also United States v. Morgan*, 238 F.3d 1180, 1186-87 (9th Cir.), *cert. denied*, 534 U.S. 863 (2001) (two-level enhancement under USSG §3B1.1(c) was valid where the findings of fact that carjacking and kidnaping were defendant's idea, that defendant was in a position of control, and that defendant directed another perpetrator to harm the victim were not clearly erroneous).

§3B1.2 Mitigating Role

United States v. Demers, 13 F.3d 1381 (9th Cir. 1994). The district court erred in holding that a defendant was not entitled to an adjustment for mitigating role pursuant to USSG §3B1.2 as a matter of law based on the fact that the defendant was convicted of the single participant offense of possession with intent to distribute instead of the conspiracy with which he was originally charged. The Ninth Circuit held that, pursuant to a clarifying amendment to the introductory commentary to Chapter Three of the *Guidelines Manual*, the determination of a defendant's role in the offense is to be made on the basis of all relevant conduct, and is not limited to the defendant's role in the offense of conviction. The circuit court remanded the case to the district court for a factual determination as to the relative seriousness of the offense to which the defendant pled guilty compared to his actual criminal conduct.

United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002). The district court did not err when it declined to reduce the defendant's sentence for being a minor or minimal participant. The defendant was convicted of possession with intent to deliver methamphetamine and cocaine. Relying on *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989), where the court found that the presence of a substantial quantity of drugs could alone preclude a sentencing reduction, the court found "multi-kilogram quantities of drugs . . . worth over one million dollars" was sufficient for the district court to deny the defendant a reduction. *Murillo*, 255 F.3d 1179. Moreover, the evidence showed that the defendant was planning on making several stops and that defendant had acted as a drug courier several times before this incident.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001), *cert. denied*, 537 U.S. 852 (2002). The defendant argued he was entitled to a mitigating role reduction. To receive the reduction, "[h]e must show that he was substantially less culpable than the average co-participant." Although the district court concluded that a codefendant killed the victim and did so without advance notice to the defendant, the defendant participated in disposing of the body, had access to and withdrew money from the victim's account, spent some of the money on himself, and participated in the cover-up. The district court did not clearly err in refusing to apply the lesser role reductions.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court did not err when it refused to grant defendant a minor participant reduction. The defendant pled guilty to alien smuggling resulting in death after assisting an alien smuggler to guide several aliens into the United States. The court affirmed the sentence, finding that because the defendant's participation was necessary to the success of the trip and because he had confessed

both that he was a paid guide in training and that he had made such trips previously, he was precluded from receiving a role reduction. This decision follows the sentencing guidelines policy of increasing punishment proportional to ascending culpability. While his status as a guide in training prevented him from receiving the reduction that his codefendants, who were not guides, had received, the defendant's status saved him from receiving the aggravating role increase that the alien smuggler would have received had he been apprehended.

United States v. Smith, 282 F.3d 758 (9th Cir. 2002). The defendant appealed the district court's refusal to credit him for his alleged minor or minimal role. While the defendant may not have been a leader or organizer, to gain minor participant credit, he must show that he was less culpable than most other participants, per USSG §3B1.2, comment. (n.3). Here, the defendant traveled extensively to facilitate drug importation. The district court did not clearly err in refusing to apply the lesser role reductions.

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

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The defendant challenged a USSG §3B1.3 abuse of position of trust enhancement. The district court based the enhancement on the fact that the defendant was an INS border inspector who received bribes in return for letting cars pass through the border without routine inspection. In that position, the defendant had "wide discretion in deciding whom to admit into the United States" and "had discretion in deciding what vehicles to check for contraband." The court concluded that, "[c]learly, such a position is one of public trust characterized by professional discretion."

See United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994), §3A1.1, p. 40.

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1995), *cert. denied*, 519 U.S. 1136 (1997). The district court erred in determining that the knowledge the defendant gained about automated teller machines (ATM's) as an employee at an ATM service company and then as an employee of the bank she attempted to rob qualified as a special skill, where the defendant purposely caused an ATM to malfunction so that she could attempt to rob the ATM technicians when they opened the ATM to perform repairs. The circuit court ruled that the defendant's special knowledge of ATM machines and their service procedures did not involve the kind of education, training or licensing required to constitute a special skill under §3B1.3, comment. (n.2). *But see United States v. Aubin*, 961 F.2d 980 (1st Cir.), *cert. denied*, 506 U.S. 886 (1992).

United States v. Hoskins, 282 F.3d 772 (9th Cir.), *cert. denied*, 536 U.S. 933 (2002). The district court imposed a two-level USSG §3B1.3 enhancement because the defendant capitalized upon his position as a security guard to help engineer a robbery of K Mart. The court reversed, concluding that the defendant's security guard position was not a position of public or private trust. "In short, Hoskins was an ordinary employee who had no management function and virtually no discretion in the exercise of his duties." He was supervised and his duties were circumscribed. He did not enjoy any sort of meaningful discretion. His primary responsibility

was to sit in a security room and watch security monitors and to call 911 in the case of any suspicious activity.

United States v. Lee, 296 F.3d 792 (9th Cir. 2002). The Ninth Circuit reversed the district court's application of the special skills enhancement to a defendant who used computer skills to facilitate sales over the Internet using a fraudulent website. In holding that the defendant's use of computer skills did not warrant the enhancement, the Ninth Circuit looked to Application Notes 1 and 3 and set forth a two-part test: (1) whether the skill is not possessed by members of the general public; and (2) whether the skill usually requires substantial education, training, or licensing. Only if the skill meets both requirements may the application be applied. Here, where the defendant was a video rental store operator, his computer skills were not in the class of professionals ("pilots, lawyers, doctors, accountants, chemists, and demolition experts"); therefore, the enhancement was not warranted.

United States v. Liang, 362 F.3d 1200 (9th Cir. 2004). Extraordinary eyesight does not constitute a "special skill" and does not support a sentence enhancement. The defendant was a long-time gambler, when he met a group of players sharing a mutual dissatisfaction with the odds imposed upon them by casinos. They decided to get together and remedy the situation, so they began to cheat. Federal authorities eventually caught wind of the scheme, and defendant and his co-conspirators were indicted on charges of conspiracy to participate in an enterprise through a pattern of racketeering by cheating. At sentencing, all parties agreed to an offense level of 16. The government then orally moved for a two- level sentence enhancement for the use of "special skills," pursuant to USSG §3B1.3. The government argued that the defendant had "extraordinary eyesight" allowing him to peek at the cards in the shoe, and that he had become specially trained in the art of cheating at cards. The district court granted the enhancement, and, as a result, the defendant's offense level increased to 18. The defendant appealed objecting solely the "special skills" enhancement. The Ninth Circuit noted that application note to §3B1.3 defines "special skill" as "a skill not possessed my members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." The court noted that the district court imposed a §3B1.3 enhancement on the defendant because of his ability to cheat at cards. However, the court stated that when a "special skill" has little apparent use outside the criminal context, a §3B1.3 enhancement seldom will be appropriate. *See United States v. Mainard,* 5F.3d 404, 406 (9th Cir. 1993). The court stated that the ability to kidnap, to rob, or to smuggle was inherently illegitimate, creating little or no potential for gainful employment, and thus would not be considered a "skill." Likewise, the defendant's ability to cheat at cards could not be understood as legitimate: it was basically useless outside the criminal context, no matter how good he got. Furthermore, the court noted that a skill is only "special" for purposes of §3B1.3 if it is also a skill usually requiring substantial education, training or licensing. *See United States v. Lee,* 296 F.3d 792, 798 (9th Cir. 2002). Finally, the court also noted that intrinsic physical attributes are not skills because skills involve proficiency with respect to a discrete task or set of tasks. Consequently, no matter how much it contributed to his ability to peek at cards, the defendant's extraordinarily acute vision could not be described as a skill. The defendant's sentence was vacated and the case was remanded for re-sentencing.

United States v. Peyton, 353 F.3d 1080 (9th Cir. 2003). The district court did not err in applying an enhancement for abuse of the defendant's position of trust. A grand jury charged the defendant with falsely procuring American Express credit cards in the names of her fellow postal workers in order to obtain money, goods, services, or any other thing of value. The defendant was tried and convicted of access device fraud in violation of 18 U.S.C. § 1029(a)(1) and (2) and sentenced to 15 months' imprisonment for her role in an identity theft ring. The defendant raised a number of issues on appeal, one being a challenge to the two-level enhancement for abuse of a position of trust. The Ninth Circuit noted that as a supervisor with the U.S. Postal Service, defendant was subject to significantly less supervision than the regular postal employees. The defendant possessed managerial discretion to access a secured roster listing the names and social security numbers of postal employees so that she could authorize over-time. The defendant's position allowed her to use the personal information of her fellow postal employees to commit fraud in their names without being easily detected or observed. Based on these facts, the court held that the defendant occupied a position of trust with respect to the postal employees under §3B1.3. In other words, the defendant's argument that the enhancement was improper because she did not hold a position of trust with American Express–the only "victim"–was unpersuasive. The court noted that the victims of fraud were not limited to the entities that endured the ultimate financial burden. The defendant's actions also injured those people named on the credit cards because their credit histories were adversely affected. Accordingly, the victims of the fraud were both American Express and the targeted postal and naval employees. Consequently, the district court did not err by applying the enhancement for abuse of defendant's position of trust.

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). The Ninth Circuit held that the secretary/treasurer of an asbestos remediation corporation did not abuse a position of public trust; could have used a "special skill" in his offense; and did occupy a position of private trust, which, if abused, would support an enhancement. The defendants, an asbestos remediation corporation (TSI) and its secretary/treasurer, were convicted at jury trial of various counts of violating the Clean Air and Water Acts. At sentencing, the district court applied a two-level enhancement for abuse of trust. The Ninth Circuit identified three separate avenues towards an enhancement pursuant to §3B1.3: abuse of public trust, use of a special skill, and abuse of private trust. With regard to public trust, the Ninth Circuit noted that the position of trust must be established from the position of the victim. Here, the public and the government were the victims. And, notwithstanding his government contract and his license to abate asbestos, the Ninth Circuit held that the secretary/treasurer was not in a position of trust with the government or the public and therefore the enhancement could not be supported on this ground. The Ninth Circuit also noted, however, that the license to abate asbestos would support a special skills enhancement (if the defendant had not already received an aggravating role enhancement), and that it is possible that the defendant abused a position of private trust with respect to his employees.

§3B1.4 Using a Minor to Commit a Crime

United States v. Castro-Hernandez, 258 F.3d 1057 (9th Cir. 2001), *cert. denied*, 534 U.S. 1167 (2002). The defendant appealed the district court's two-level upward adjustment, under USSG §3B1.4, for use of a minor to assist in avoiding detection. Normally, the defendant's

mother-in-law cared for defendant's son during the workday, although when the defendant tried to drive marijuana over the border, his son was with him, leading the district court to conclude that the defendant used his son to try to conceal his offense. The defendant contended that use of a child as a decoy to reduce the likelihood of detection cannot support the enhancement; instead, active involvement or employment of the child in the offense is necessary. The court responded: the "minor's own participation in a federal crime is not a prerequisite to the application of USSG §3B1.4. It is sufficient that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense."

See United States v. Gonzalez, 262 F.3d 867 (9th Cir. 2001), §3B1.1, p. 43.

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The Ninth Circuit held that the fact that defendant had her son with her when she crossed the U.S.-Mexico border with marijuana did not, by itself, warrant an enhancement for using a minor. The district court had found that the defendant had "in essence . . . recruited" her son to assist in avoiding detection at the border. The Ninth Circuit held that this finding was clearly erroneous. Distinguishing *United States v. Castro-Hernandez*, 258 F.3d 1057 (9th Cir. 2001), *cert. denied*, 534 U.S. 1167 (2002), the Ninth Circuit noted that it was routine for the son to accompany his mother on trips to Mexico, that he was with his mother for the whole trip, and that she did not make a special trip to get him just to have him present for the crossing. As his mere presence in the car at the time of the offense was insufficient to support the enhancement, the Ninth Circuit held that the district court had erred in applying it.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001). The district court erred when it increased defendant's sentence by two levels under USSG §3B1.4 for using a minor to commit a crime. A jury convicted the defendant under 18 U.S.C. §§ 2113(a) and (d), as well as § 924(c), for conspiracy, bank robbery, and firearms violations. Reversing this part of the sentence, the court held that, "in the absence of evidence that the defendant acted affirmatively to involve the minor in the robbery, beyond merely acting as his partner," "a defendant's participation in an armed bank robbery with a minor does not warrant a sentence enhancement." *Id*. at 1120. No evidence existed in the record to demonstrate that the defendant had attempted, affirmatively, to involve the juvenile; being a partner and profiting from the minor's participation does not satisfy the standard. This decision conflicts with a Seventh Circuit decision that imposed an enhancement based on a defendant's request that a minor co-conspirator in the drug trafficking conspiracy deliver narcotics. *See United States v. Benjamin*, 116 F.3d 1204 (7th Cir.), *cert. denied*, 522 U.S. 974 (1997). The Ninth Circuit rejected this interpretation, finding that it would subject every adult involved in a conspiracy with a minor to a USSG §3B1.4 enhancement, contrary to the advisory note to the statute, which implies that only affirmative acts warrant the enhancement.

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Alvarado-Guizar, 361 F.3d 597 (9th Cir. 2004). This is an issue of first impression. The defendant was convicted on charges of conspiracy and possession with intent to distribute methamphetamine. The district court declined to impose a two-level enhancement for obstruction of justice under § 3C1.1. However, because the defendant maintained his claim of innocence at the sentencing hearing, the district court refused to reduce his sentence for acceptance of responsibility or to grant a reduction of sentence under 18 U.S.C. § 3553's "safety valve" provision. The defendant timely appealed his convictions, and the government cross-appealed. The appellate court noted that the district court had not found all the factual predicates that supported a finding of perjury and, therefore, the enhancement for obstruction of justice was not mandatory. Having concluded that the district court did not support the elements of perjury, the appellate court next considered whether the district court was required to make factual findings to support its decision not to impose a sentencing enhancement under §3C1.1. The Ninth Circuit noted that although its earlier discussions of § 3C1.1 provided some guidance, the court had yet to address this precise issue. The Court of Appeals then noted that other circuits that have answered the question whether a district court must make factual findings when deciding not to impose the obstruction-of-justice enhancement are evenly divided. Two have said "yes," (the First and Fifth Circuits) and two have said "no" (the Second and Eighth Circuits). *See United States v. Tracy*, 989 F.2d 1279, 1289-90 (1st Cir. 1993); *United States v. Humphrey*, 7 F.3d 1186 (5th Cir. 1993); *United States v. Vegas*, 27 F.3d 773 (2d Cir. 1994); *United States v. Aguilar-Portillo*, 334 F.3d 744 (8th Cir. 2003). The Ninth Circuit acknowledged that there is a tension between these two lines of authority. The court noted that the Second and Eighth Circuit cases do not cite or distinguish the First or Fifth Circuit cases. The Court of Appeals held that after a careful reading of *United States v. Dunnigan*, 507 U.S. 87, 98 (1993), that decision persuaded the court that the Second and Eighth Circuits have the better of the argument. The court noted that throughout its opinion in *Dunnigan*, the court discusses a district court's obligation to make factual findings to support an enhancement under §3C1.1 in the context of a defendant's objection to the enhancement: "If a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice . . . ." 507 U.S. at 95. The Ninth Circuit found that the requirement that a district court make factual findings that encompass all the elements of perjury "is a procedural safeguard designed to prevent punishing a defendant for exercising her constitutional right to testify." *United States v. Jimenez*, 300 F.3d 1166, 1171 (9th Cir. 2002). The court then found that there is no parallel that requires the same result when a defendant is not receiving a longer sentence. Unlike a testifying criminal defendant, the government does not face the risk of automatic punishment for its witnesses' testimony in an unsuccessful trial, nor does it have a constitutional or statutory right similar to the accused's with respect to trial testimony. Simply put, the government does not face the dangers that *Dunnigan's* requirement of factual findings is designed to prevent. The court noted that nothing in §3C1.1 or in 18 U.S.C. § 3553 required the district court to make specific factual findings in the present situation. Neither does controlling case law require a district court to support its decision not to impose the enhancement for

obstruction of justice with factual findings. *Dunnigan* discusses factual findings only in the context of a defendant's objection to the sentencing enhancement based on his own testimony. The Ninth Circuit noted that its own interpretations of §3C1.1 also suggested that the role of factual findings is to safeguard the constitutional and statutory right to testify on one's own behalf in a criminal proceeding. *Jimenez*, 300 F.3d at 1171. When a district court's sentencing decision does not threaten that right, the rationale for requiring factual findings vanishes. Therefore, the Ninth Circuit affirmed the district court's decision.

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court did not err in applying a two-level upward adjustment for obstruction of justice pursuant to USSG §3C1.1 because the defendant refused to submit to psychiatric testing. The Ninth Circuit found this refusal to be material because the defendant asserted the defense of diminished capacity.

United States v. Hernandez-Ramirez, 254 F.3d 841 (9th Cir.), *cert. denied*, 534 U.S. 1030 (2001). Deciding an issue of first impression, the Ninth Circuit held that submitting a false financial affidavit to a magistrate judge for purposes of obtaining appointed counsel is sufficient to warrant a USSG §3C1.1(B) two-level adjustment for obstruction of justice. The defendant was convicted on various counts of tax fraud. When requesting a court-appointed attorney, he listed a $35,000 debt while omitting $45,000 in equity from his ownership interest in a bar. The defendant argued that such an omission was not sufficiently related to tax fraud, and as such did not meet the requirement in USSG §3C1.1(B) that the conduct relate to the "offense of conviction," "any relevant conduct," or "a closely related offense." The court disagreed, holding that the obstructive conduct need not relate *substantively* to the offense of conviction. The court reasoned that the amendment to USSG §3C1.1 "was intended to clarify what 'instant offense' in the original version of the guideline meant," and that its purpose was "to expand the types of obstructive conduct warranting an adjustment to include obstructions in closely related cases." It is sufficient if the conduct relates to the investigation, prosecution, or sentencing of the instant offense; and just as providing false information to a probation officer relates to sentencing of the instant offense, providing a false affidavit to a magistrate judge relates to the prosecution of the instant offense. The district court's factual finding that this was a willfully false representation and that it was materially related to the determination of eligibility for court-appointed counsel was not clearly erroneous, especially in light of defendant's status as a professional tax preparer who was "familiar with the concepts of assets and liabilities." 254 F.3d at 843. *See also United States v. Morgan*, 238 F.3d 1180, 1187 (9th Cir.), *cert. denied*, 534 U.S. 863 (2001) (two-level enhancement for perjury under USSG §3C1.1 was valid where defendant's claim that he was coerced to participate in the crime was contradicted by testimony from other witnesses, was material to his defense of coercion, and the findings of fact discrediting the defendant's testimony were not clearly erroneous).

United States v. Hinostroza, 297 F.3d 924 (9th Cir. 2002). The Ninth Circuit upheld an adjustment for obstruction of justice based on defendant's testimony at sentencing; because the district court found that the testimony was false and because it was material to the sentencing determination, the enhancement was proper. The defendant was convicted at jury trial of being a person subject to a restraining order in possession of a firearm and making a false statement on a

firearm application. At sentencing, he sought a downward adjustment under §2K2.1(b)(2) because he possessed the weapon solely for lawful sporting purposes or collection. In support of this request, he testified that he did not know how the loaded weapons got next to his bedside, on top of his television set, in his closet, and in the truck he was driving. The district court found this testimony to be perjury and adjusted the sentence for obstruction of justice. On appeal, the defendant argued that the testimony was not material. The Ninth Circuit held that, if the district court had believed the testimony, the testimony would have supported the request for the §2K2.1(b)(2) adjustment; therefore, it was material. Thus, the enhancement was supported. The Ninth Circuit also noted the limitations on its holding: if the truth of the defendant's assertion would require the jury's verdict to be in error, then that pre-sentence, post-verdict assertion would not be material. In other words, if the defendant simply denied guilt after a jury verdict, such a denial would not constitute obstruction because it could not affect any issue under determination.

United States v. Jimenez, 300 F.3d 1166 (9th Cir. 2002). The Ninth Circuit held that the district court clearly erred in applying the obstruction of justice enhancement based on defendant's false testimony at trial because the district court did not expressly find that the false testimony was material. Charged with importation and possession of marijuana, the defendant told arresting officers that a man had paid her $500 to drive the vehicle across the border, then testified at trial that she did not know the marijuana was in the gas tank of the vehicle. At sentencing, the district court applied the enhancement because it found that she knowingly lied. The Ninth Circuit reversed, holding that the district court's finding did not encompass the three factual predicates of perjury for an obstruction enhancement: (1) that the defendant gave false testimony under oath; (2) concerning a material matter; (3) with the willful intent to provide false testimony. By finding that the defendant knowingly lied, the court found the first and third predicates, but did not expressly find that the testimony was material. Therefore, the Ninth Circuit held that the application of the enhancement was clearly erroneous and remanded for reconsideration.

United States v. Khang, 36 F.3d 77 (9th Cir. 1994). The district court permitted the defendants to bring forth evidence supporting their assertion that they brought opium into the United States for their sick father, which is in accordance with their Hmong culture. When the defendants failed to adequately prove their assertion, however the court properly enhanced their sentence pursuant to USSG §3C1.1 (Obstruction of Justice). The obstruction was material, because it was made in an attempt to receive a downward departure. The government argued that the defendants did not merit the district court's award of a downward adjustment for acceptance of responsibility under USSG §3E1.1 because the defendants lied about relevant conduct, *i.e.*, their motive for committing the crime. The court held that lying about motive does not preclude a downward adjustment for acceptance of responsibility where "the lie would not establish a defense to the crime or avoid criminal liability." However, the district court did err in assigning one of the defendants an additional one-level downward adjustment under USSG §3E1.1 for timely acceptance of responsibility where he did not plead guilty until the evening before trial. The trial court's rationale for granting the additional level was to achieve equality between the two defendants' sentences. The brothers were "not equal in the timeliness of their acceptance of responsibility." Thus, the trial court lacked authority to grant that adjustment.

United States v. Pizzichiello, 272 F.3d 1232 (9th Cir. 2001), *cert. denied*, 537 U.S. 852 (2002). The defendant contended that the obstruction enhancement did not apply because he did not obstruct justice in relation to his federal offense but only in relation to the prior state proceedings. The state officials to whom the defendant directed his obstructive conduct were investigating the same robbery offense to which he later pled guilty in federal court and thus the enhancement was proper. "So long as the district court found that the defendant willfully and materially impeded the search for justice in the instant offense, the enhancement should apply, even if the obstruction occurred before state rather than federal law enforcement officials." *See also United States v. Luca*, 183 F.3d 1018, 1023 (9th Cir. 1999) (quotation and citation omitted).

United States v. Verdin, 243 F.3d 1174 (9th Cir.), *cert. denied*, 534 U.S. 878 (2001). The defendant pled guilty to importing marijuana, in violation of 21 U.S.C. §§ 952 and 960. The district court enhanced the defendant's sentence by two levels for obstruction of justice based on his use of a false identity before the court. The defendant argued that under USSG §3C1.1(B), which requires that the "obstructive conduct [be] related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense," the enhancement was inappropriate because his failure to provide a true identity was irrelevant to his conviction of importing marijuana. The court affirmed the sentence for several reasons. First, the defendant concedes that his conduct would have warranted an enhancement under the previous version of the guidelines, which the Commission amended to adopt a broader definition that included conduct obstructing related cases. Because the amendment intended to expand the types of conduct that warranted enhancements, it follows that applicable conduct under the previous guidelines would not be precluded from warranting an enhancement under the amended guidelines. Moreover, the defendant's false identity was related to the instant conviction because the "'information could well have influenced or affected the district court's determination of [the defendant's] sentence within the appropriate guideline range.'" 243 F.3d at 1181 (quoting *United States v. Wilson*, 197 F.3d 782, 786 (6th Cir. 1999), which held that the use of a false identity is material to sentencing). Finally, the commentary to USSG §3C1.1 states expressly that the defendant's conduct warrants an adjustment. *See* USSG §3C1.1, comment. (n.4(h)) (stating that "providing materially false information to a probation officer in respect to a presentence or other investigation for the court" is an example of conduct to which an adjustment applies).

§3C1.2 Reckless Endangerment During Flight

United States v. Franklin, 321 F.3d 1231 (9th Cir. 2003). The Ninth Circuit reiterated that, as a matter of law, a defendant must do more than knowingly participate in an armed robbery in which getaway vehicles are part of the plan to warrant a reckless endangerment enhancement. The district court applied the enhancement even though the defendant was not in the car because the defendant had helped to plan the robbery and the plan included the use of getaway cars. Citing *United States v. Young*, 33 F.3d 31 (9th Cir. 1994), the Ninth Circuit held that not every getaway escalates into reckless endangerment during flight, and that the conduct that recklessly endangers must be more than reasonably foreseeable to the defendant for the enhancement to apply. Rather, the government must prove that the defendant was responsible

for or brought about the driver's conduct for the enhancement to apply. Because the government did not prove this, the Ninth Circuit remanded for resentencing without the enhancement.

See United States v. Lopez-Garcia, 316 F.3d 967 (9th Cir. 2003), §2L1.1, p. 28.

United States v. Luna, 21 F.3d 874 (9th Cir. 1994). The district court properly adjusted by two levels defendant Torres' offense level for reckless endangerment. While fleeing the scene of an armed bank robbery, the defendants ran three stop signs, stopped the car in the middle of the road and when they were approached by a police officer, defendant Luna reached down to the floorboards (where a gun was later recovered); after the police officer retreated, the defendants accelerated, forcing the police officer to make chase, after which the defendants jumped out of the vehicle while it was still moving. Torres argued that the traffic violations did not amount to reckless endangerment and that Luna's movement towards the gun was merely preparatory and could not form the basis of a USSG §3C1.2 enhancement. The circuit court concluded that the traffic violations did constitute a gross deviation from ordinary care because the conduct occurred in a residential area and created a substantial risk of serious bodily injury or death. However, the circuit court left for another day the question of whether preparatory conduct to avoid arrest could constitute reckless endangerment, although it noted the First Circuit's dictum in *United States v. Bell*, 953 F.2d 6 (1st Cir. 1992) that reaching for a gun could form the basis of a USSG §3C1.2 enhancement.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts[21]

See United States v. Alexander, 287 F.3d 811 (9th Cir. 2002), §2A6.1, p. 43.

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). Guideline §3D1.2(a) states that multiple counts are grouped together when they "involve the same victim and the same act or transaction." The defendant was convicted of felony murder and aggravated sexual abuse; the district court did not group the two offenses and the defendant received two concurrent life sentences. These two offenses constituted a single act, at essentially the same time, same place, against the same victim and with a single criminal purpose. Accordingly, the sentencing judge erred by not grouping these two offenses together pursuant to USSG §3D1.2. Contrary to the government's argument that "even if §3D1.2 was applicable, the district court established the basis for imposition of concurrent life sentences as an upward departure by commenting on the defendant's recidivism and psychopathic tendencies;" the circuit court found no indication in the record that the district court intended to depart upward in this manner. Consequently, the circuit court reversed the sentencing judge's failure to correctly group the two offenses and remanded the case.

[21] An amendment to become effective November 1, 2004, adds §2G3.1 to the list of guidelines at §3D1.2(d) since these offenses typically are continuous and ongoing in nature; and adds §2X6.1 to list of offenses specifically excluded from being grouped under §3D1.2(d).

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994), *aff'd on other grounds*, 68 F.3d 481 (1995). The district court did not err when it determined that the defendant's two convictions were not "closely related" for grouping purposes under §3D1.2. The defendant pled guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued that the possession was a "count embodied" in a specific offense characteristic used to enhance his base offense level because the district court relied on his possession of the firearm to increase his sentence for conduct evidencing an intent to carry out the threat under USSG §2A6.1. Although the circuit court found that the district court relied on the possession of the weapon to apply the USSG §2A6.1(b)(1) enhancement, it held that the counts were not groupable. "[T]he conduct embodied in being a felon in possession of a firearm is not substantially identical to the specific offense characteristic of engaging in conduct evidencing an intent to carry out a threat against the President [since] [c]onduct evidencing an intent to carry out a threat may be manifested in many different ways."

United States v. Melchor-Zaragoza, 351 F.3d 925 (9th Cir. 2003). It was proper for the sentencing court to divide the conspiracy conviction into separate count groups based on the number of victims under §1B1.2(d) and §3D1.2. The indictment alleged that defendants conspired to kidnap 23 illegal aliens from a group of smugglers. On appeal, the defendant argued that the district court erred by dividing the 23 victims into separate count groups, thereby increasing the combined offense level by five levels. In other words, the issue on appeal was whether a conspiracy to take several hostages should be treated as separate "offenses" committed against separate victims for purposes of §§3D1.2 and 1B1.2. The Ninth Circuit relied on the Eleventh Circuit's opinion in *United States v. Torrealba,* 339 F.3d 1238 (11th Cir. 2003) and held that where a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into that same number of distinct crimes for sentencing purposes. In the instant case, the 23 victims who were held hostage suffered separate harms. Consequently, the district court did not err in treating the taking of each hostage as a separate offenses under §§3D1.2 and 1B1.2(d) and dividing the conspiracy conviction into 23 separate count groups.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[22]

United States v. Blanco-Gallegos, 188 F.3d 1072 (9th Cir. 1999). The Ninth Circuit held that a defendant is entitled to the third-level reduction for acceptance of responsibility under §3E1.1(a) if (1) he qualifies for the initial two-level reduction under §3E1.1(a), and (2) he provides timely and complete information about the offense. Where, as here the defendant qualified for the initial reduction, and where his confession was immediate and complete, the

[22]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

fact that he later recanted his confession and went to trial does not alter this conclusion. The Ninth Circuit reversed the district court's decision denying the defendant the third level. *See also United States v. Eyler*, 67 F.3d 1386 (9th Cir. 1995) (defendant entitled to third level where he timely confesses but does not admit conduct of which he was acquitted at trial).

United States v. Colussi, 22 F.3d 218 (9th Cir. 1994). The district court incorrectly believed application of USSG §3E1.1(b)(2) was discretionary. The defendant entered a plea agreement whereby the government agreed to recommend the two-level adjustment for acceptance of responsibility. The defendant's sentencing was continued several months, during which time the Commission amended USSG §3E1.1 to provide an additional one-level adjustment where the defendant accepted responsibility, was at offense level 16 or above, and (1) assisted authorities by providing complete information about his involvement in the offense, or (2) timely notified authorities of his intent to plead guilty. The district court judge refused to grant the additional reduction, indicating that he believed the denial was within his discretion, and that the adjustment was unwarranted because the defendant had stipulated only to the two-level reduction. The Ninth Circuit vacated the defendant's sentence. Unlike departures, adjustments are "characteristically mandatory." The district court was ordered on remand to consider whether the defendant provided authorities with "sufficiently advance notice of his intent to plead guilty" to enable the government to avoid trial preparation and to allow the court to schedule its calendar efficiently, which would merit the additional one-level decrease.

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002), *cert. denied*, 537 U.S. 1224 (2003). The Ninth Circuit reiterated that a defendant may manifest his acceptance of responsibility in many ways other than a guilty plea–even where defendant contested factual guilt at trial. Application Note 1 provides a non-exhaustive list of factors–other than a guilty plea–which a sentencing court should consider when determining whether a defendant manifested acceptance of responsibility. The court noted that a defendant who went to trial could satisfy every condition listed. In denying the defendant a two-level reduction for his acceptance of responsibility, the district court noted that the defendant had not merely raised a constitutional defense, but also contested factual guilt at trial. Because the Ninth Circuit could not tell from the record if the district court had *sub silentio* balanced all the relevant factors, or if the district court believed that the defendant was ineligible because he had contested his guilt at trial, the Ninth Circuit remanded for re-consideration.

United States v. Jeter, 236 F.3d 1032 (9th Cir. 2000). The district court erred by allowing only a one-level adjustment for acceptance of responsibility. The defendant was convicted of importation of marijuana and possession of marijuana with intent to distribute. Although the district court applied an upward adjustment for committing perjury during trial, it also allowed for a one-level adjustment after the defendant admitted to knowing about the marijuana. The Ninth Circuit held that the adjustment was erroneous and clearly at odds with the plain language of USSG §3E1.1, which only allowed a two-level decrease for acceptance of responsibility. The court remanded for a reconsideration of the adjustment, especially in light of the fact that the obstruction of justice enhancement may preclude any downward adjustment at all. According to Application Note 4 of USSG §3E1.1, simultaneous adjustments may only be permissible when the "acceptance of responsibility is not contradicted by an ongoing attempt to

obstruct justice." 236 F.3d at 1035. In response to defendant's additional arguments, the court summarily concluded that the court properly calculated the defendant's criminal history and that the safety valve provisions were not applicable to this case. *See United States v. Hicks*, 217 F.3d 1038 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000) (holding that it is not plain error to deny an acceptance of responsibility reduction to a defendant who presents a thorough defense at trial, challenging the legal and factual validity of the government's case).

See United States v. Khang, 36 F.3d 77 (9th Cir. 1994), §3C1.1, p. 52.

United States v. Kimple, 27 F.3d 1409 (9th Cir. 1994). In addressing an issue of first impression, the circuit court determined what constitutes "timely" acceptance of responsibility, reversing the district court's denial of an additional reduction for timely acceptance of responsibility pursuant to USSG §3E1.1(b)(2). The district court denied the defendant the additional reduction based on the passage of one year's time before he pled guilty and his motion to suppress evidence. The circuit court explained that the time requirement in subsection (b)(2) is both functional and temporal and is context specific; thus passage of time is not the only consideration in determining whether the grant the additional reduction. Although the defendant did not enter his plea until a year after he was originally indicted, the plea came only five months after the government filed its second superseding indictment. The parties and the district court contributed to the delay by seeking and granting continuances. More importantly, however, the district court was wrong to deny the reduction because the defendant exercised his constitutional rights at the pretrial stage of the proceedings. The motion to suppress was not frivolous and the government's opposition to the motion did not constitute "trial preparation" within the meaning of subsection (b)(2). The sentence was vacated and remanded for resentencing.

United States v. McKinney, 15 F.3d 849 (9th Cir. 1994), *cert. denied*, 516 U.S. 857 (1995). The district court erred in denying the defendant an adjustment for acceptance of responsibility. Prior to trial, the defendant attempted to plead guilty and when he expressed confusion concerning his plea, the court declined to discuss the matter. At trial, the defendant presented the most perfunctory of defenses and did not even produce a witness to contest a material part of the government's case. Further, the defendant voluntarily confessed his involvement in the offense and disclosed the location of the gun used during the commission of the offense. The circuit court concluded that these factors presented one of the unusual cases in which a defendant is entitled to the reduction despite going to trial, and rejected the notion that the defendant was not entitled to the adjustment because he refused to implicate his co-conspirators. Acceptance of responsibility focuses on the defendant's contrition for his own conduct, not on the conduct of others. The circuit court remanded with instructions to resentence the defendant pursuant to the current version of the guidelines in effect at resentencing and with instructions to consider application of USSG §3E1.1(b).

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001). The district court improperly categorically barred the acceptance of responsibility reduction based upon the defendant failing to plead guilty. After conviction at trial, a defendant may still exhibit sufficient contrition to gain an adjustment under USSG §3E1.1. On remand, the district court should

determine whether the defendant demonstrated contrition for his offense and, in making this determination, should consider the factors in Application Note 1.

United States v. Rutledge, 28 F.3d 998 (9th Cir. 1994), *cert. denied,* 513 U.S. 1177 (1995). The district court did not err by denying the defendant a reduction for acceptance of responsibility. The defendant pled guilty to, and fully admitted to, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); however, he denied that he possessed the weapon during the commission of an attempted robbery. He challenged the district court's refusal of the USSG §3E1.1 adjustment on fifth amendment grounds. The circuit court rejected this argument and distinguished the defendant's case from other cases which have decided this issue. The defendant was not required to admit to any conduct outside the offense of conviction. "He was entitled to remain silent about any relevant, uncharged conduct. Once he chose to relinquish that right, however, he was required to be truthful in order to qualify for the reduction." *Rutledge*, 28 F.3d at 1003.

United States v. Sanchez Anaya, 143 F.3d 480 (9th Cir. 1998). The district court properly deducted levels for role in the offense prior to determining whether the defendant qualified for the additional offense level reduction for acceptance of responsibility. After the adjustment for minor role, the defendant's offense level was 14, which meant that he was entitled to no more than two levels for acceptance of responsibility. The guidelines instruct that the role points should be deducted before turning to the provision for acceptance of responsibility.

United States v. Stoops, 25 F.3d 820 (9th Cir. 1994). The district court erred in denying the defendant an additional one-level reduction under USSG §3E1.1(b), when the defendant confessed to the crime three times on the day it was committed. The court rejected the government's argument that a confession must assist the authorities in the prosecution of the defendant in order to warrant a one-level reduction under USSG §3E1.1(b). Although the defendant challenged the admissibility of his confessions in a pretrial motion, the motion did not delay his confession and did not bear on the timeliness of his guilty plea.

United States v. Wehr, 20 F.3d 1035 (9th Cir. 1994). The district court properly applied the two-level reduction for acceptance of responsibility. The defendant challenged the extent of the adjustment on constitutional grounds. Casting his argument in equal protection terms, he averred that the Commission acted irrationally in treating offense levels 15 and below differently from offense levels of 16 and above by providing for different adjustment levels. Noting that criminals do not present a suspect class, the Ninth Circuit interpreted this argument as a due process claim subject only to rational basis review. The court of appeals upheld the proportionality scheme as constitutional. "[A] defendant who accepts responsibility for a more serious offense normally saves the government more trouble and expense"; thus, there is a rational basis for providing incentives to plea bargain to defendants with higher offense levels.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Govan, 152 F.3d 1088 (9th Cir. 1998). The defendant argued that the sentencing guidelines violated due process by providing for an elevated criminal history category based on juvenile and adult misdemeanor offenses. The court of appeals upheld the district court's calculation of the defendant's criminal history and rejected the defendant's contention that consideration of misdemeanor crimes with summary probation and limited jail time results in sentences that are not truly reflective of an individual's criminal background or future criminal behavior. The court of appeals noted that a sentence under the guidelines is highly individualized under historically accepted criteria, which includes the defendant's criminal history, the degree of seriousness of the crime, as well as a more or less refined categorization of criminal offenses. Moreover, a sentencing court is permitted under USSG §4A1.3 to depart from a recommended sentence if it believes that a defendant's criminal history category significantly over-represents the seriousness of his criminal record or the likelihood that he will commit further crimes.

United States v. Mendoza-Morales, 347 F.3d 772 (9th Cir. 2003). The district court properly applied criminal history points under USSG §4A1.1. The defendant pled guilty to reentering the United States unlawfully after a previous deportation, in violation of 8 U.S.C. § 1326. At the sentencing, the district court added five criminal history points for the defendant's 1994 and 1998 convictions to seven undisputed criminal history points. The resulting total of 12 criminal history points placed the defendant in Criminal History Category V. On appeal, the defendant argued that the district court committed plain error in assigning five criminal history points for two of his prior state convictions. More specifically, the defendant argued that the district court erred when it considered his state court sentences as "sentences of imprisonment," because California law did not consider sentences imposing jail terms as conditions of probation to be "punishment." The Ninth Circuit noted that in deciding whether a prior state conviction should be counted for purposes of a federal criminal history calculation, a district court must examine federal law. In other words, state law was irrelevant in ascertaining whether a prior sentence was a "sentence of imprisonment" for the purpose of assigning criminal history points under §4A1.1. In the instant case, the applicable federal law was clear: any "sentence of incarceration" imposed after an adjudication of guilt counted as a "sentence of imprisonment,"§4A1.2(b)(1), and incarceration as a condition of probation was treated in the same way as ordinary incarceration. The district court's sentence was affirmed.

United States v. Ramirez, 347 F.3d 792 (9th Cir. 2003). The district court did not err in determining that neither of the two temporary detentions ordered by the Youth Offender Parole Board (YOPB) constituted either a prior sentence under §4A1.1(c) or a constructive revocation of parole under §4A1.2(k). The defendant pled guilty to a Class A felony with a statutory minimum sentence of ten years. At sentencing, the district court found that the defendant's prior temporary detentions, which were ordered by the YOPB as a result of alleged parole violations,

were neither prior sentences under USSG §4A1.1(c) nor terms of imprisonment imposed as a result of a revocation of parole that could be aggregated with the defendant's juvenile sentence under USSG §4A1.2(k). As a result, the district court determined that the defendant had no criminal history points and was eligible for a "safety valve" departure from the mandatory minimum under USSG §5C1.2. The government appealed and argued that the district court erred in finding that the defendant was eligible for a safety valve departure because the defendant should have had at least two points added to his criminal history score as a result of his two YOPB imposed temporary detentions, either because the detentions were "prior sentences" under USSG §4A1.1 or because the detentions constituted constructive parole revocations that, under USSG §4A1.2(k), could be aggregated with the defendant's juvenile sentence of imprisonment. The Ninth Circuit noted that the district court determined that the proceedings underlying the temporary detentions were not "adjudications of guilt." When interpreting the sentencing guidelines, a distinction has been made between confinement resulting from and adjudication of guilt and confinement for other reasons. Absent proof that the prior court found a defendant guilty beyond a reasonable doubt, an adjudication may not be used to increase a defendant's criminal history score. In the instant case, the government failed to show that either of the detentions resulted from a finding of guilt beyond a reasonable doubt. Because neither of the detentions were imposed as a result of, nor even required a finding of guilt beyond a reasonable doubt, the court agreed with the district court that neither could be viewed as "prior sentences" for the purpose of increasing defendant's criminal history score. With regards to the revocation argument, the Ninth Circuit noted that in determining the meaning of "revocation" under the guidelines, a uniform federal definition must be applied, not one depending upon the vagaries of state law. Thus, to the extent that the district court relied exclusively on state law definitions of "revocation," it erred. However, because under a federal definition of revocation, the defendant's parole was not revoked in either instance, such error by the district court was harmless. Accordingly, the district court's sentence was affirmed.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The appellate court affirmed the district court's determination that defendant's deportation did not extinguish his probation, and therefore the district court did not err in assigning two criminal history points, pursuant to USSG §4A1.1(d), because defendant was under a criminal justice sentence at the time he was arrested. The defendant was convicted of illegally reentering the United States following his deportation. At sentencing, the district court found that defendant was under a criminal justice sentence at the time of this offense, and applied two additional criminal history points pursuant to §4A1.1(d). On appeal, the defendant argued that, although he was sentenced to a term of "probation," he was immediately deported and never placed on any form of supervision. Therefore, the defendant claimed that his probationary period did not fall within the defined meaning of a "criminal justice sentence" under §4A1.1(d). The Ninth Circuit noted that the plain meaning of the guideline stated that a two point enhancement was appropriate where a defendant has committed the instant offense while under "any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." *See* USSG §4A1.1(d). Although Note 4 indicated that a "criminal justice sentence" was one having a custodial or supervisory component, it also made clear that active supervision was not required for this item to apply. The court agreed with the holding of the Fifth and Seventh Circuits that deportation did not terminate supervised release and therefore held that deportation

did not terminate probation. *See United States v. Brown,* 54 F.3d 234 (5th Cir. 1995), and *United States v. Akinyemi,* 108 F.3d 777 (7th Cir. 1997). The court saw no reason to treat probation any differently from supervised release under §4A1.1(d). The district court's sentence was affirmed.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The defendant was charged with illegally reentering the United States after he was deported. At sentencing, the district court assigned two criminal history points because the defendant was under a criminal justice sentence at the time he was arrested. The defendant argued that the district court erred by finding that he was under a "criminal justice sentence" at the time of the current illegal reentry, pursuant to guideline §4A1.1(d), because he had been deported upon his release from custody without having gone onto active probation supervision. The court of appeals disagreed, finding that active supervision is not a required element of §4A1.1(d) and that deportation does not terminate probation.

United States v. Reyes-Pacheco, 248 F.3d 942 (9th Cir. 2001). The district court did not err when it sentenced the defendant according to the date he illegally re-entered the country and not the date that he was arrested. The defendant pled guilty to 8 U.S.C.A. § 1326, which criminalizes attempting to enter, entering, or being found in the United States after deportation for a prior offense. The defendant re-entered the country in 1996, while he was on parole. Police arrested him in 2000 for being found in the country. The district court raised defendant's criminal history level under USSG §4A1.1(d) and (e) for being on parole and for having committed the offense within two years of release from prison. However, in February 2000, when the defendant was arrested, he was no longer on parole and more than two years had passed since he had been released from prison. As such, the defendant argued that he had been sentenced for the wrong crime because he was guilty of being "found in" the country in February 2000, not of "entering" the country in April 1996. Affirming the sentence, the court held that because being "found in" the country after deportation is a continuing offense, starting from the time one enters the country until the time the person is arrested, the district court appropriately applied USSG §4A1.1(d) and (e), based on the 1996 date when he entered the country while still on parole and within two years of release from prison.

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

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1995). The district court erred in departing upward on grounds that the defendant's criminal history category inadequately reflected his past criminal conduct, where the defendant was convicted more than 15 years earlier of several child molestation crimes. The government argued that the defendant's prior convictions were "similar" to his instant offense of falsifying a passport application because the defendant was motivated to falsify the passport application in order to escape investigation into new child molestation charges. The circuit court rejected this argument, holding that the causal link between the defendant's tendency to molest children and the false application did not make the two crimes "similar" for purposes of USSG §4A1.2 commentary. The district court, on resentencing, "must explain the extent of its departure by analogizing the increased criminal history category or offense level to the next relevant category or offense level."

United States v. Hayden, 255 F.3d 768 (9th Cir.), *cert. denied*, 534 U.S. 969 (2001). The district court did not err in holding that the defendant's convictions which were "set aside" in accordance with state procedures were not "expunged" within the meaning of USSG §4A1.2(j), and therefore, could still be counted in calculating his criminal history score. In 1993, the defendant was convicted of conspiracy to distribute cocaine and heroin and was sentenced pursuant to a plea agreement which stipulated to, among other things, a criminal history category of III. In 1998, the defendant petitioned to have two prior felony convictions from 1987 and 1990 set aside under California Penal Code §1203.4–a statute that allowed such relief if the defendant successfully completed probation for the offense. After these petitions were granted, defendant filed a habeas petition requesting a recalculation of his 1993 sentence because the criminal history calculation counted the convictions that were set aside. Under USSG §4A1.2(j), sentences for expunged convictions should not be counted in the criminal history calculation. Application Note 10 to USSG §4A1.2 differentiates between convictions that are "set aside" and those that are "expunged," concluding that sentences resulting from convictions which were *set aside can* be counted, while *expunged* convictions cannot be counted. The court concluded that the California law provides a "set aside" procedure because "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pled and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Section 1203.4. The court reasoned that the statutory language "does not purport to render conviction a legal nullity," and thus, does not expunge the conviction. *Id.* at 771. The court also determined that, even though the statute requires that a set-aside conviction be pled and proved in a subsequent proceeding, the federal courts need not follow state procedure. As such, failure to do so at the sentencing hearing did not violate the rule in *Apprendi*.

United States v. Pearson, 312 F.3d 1287 (9th Cir. 2002). The Ninth Circuit held that, where a defendant's prior sentence would have extended into the relevant time period to be counted as criminal history had the defendant not escaped from prison, the sentence should be counted. The defendant was sentenced in 1980 to ten years in prison, but escaped in 1981. He was arrested again in 1982, convicted and sentenced again, and paroled in 1997. In 1986, he was administratively discharged from serving the remainder of his 1980 sentence. In 1998, he was indicted and convicted again. At sentencing, he argued that the 1980 conviction should not be counted because the sentence was neither imposed nor served within 15 years of the 1998 offense. Noting that, "No one should profit from his legal wrong," the Ninth Circuit held that a sentence imposed more than 15 years before the instant offense, and which would have extended into the 15-year window if the defendant had not escaped, would be counted as falling within the 15-year window.

United States v. Ramirez-Sanchez, 338 F.3d 977 (9th Cir. 2003). The appellate court affirmed the district court's assessment of one criminal history point pursuant to USSG §4A1.2(c)(1) finding that the defendant's act of driving without an operator's license in his possession was similar to driving without a license. The defendant was convicted of illegally reentering the United States following his deportation. At sentencing, the district court determined that the offense of "driving without an operator's license in possession," justified an assignment of a criminal history point under §4A1.2(c)(1). On appeal, the defendant argued that the district court erred by finding that "driving without an operator's license in possession" was

similar to "driving without a license or with a revoked or suspended license" pursuant to §4A1.2(c)(1). The Ninth Circuit noted that "driving without a license or with a revoked or suspended license" was listed as an offense in this section. The plain language of §4A1.2(c)(1) was clear. It specifically accounted for "prior offenses and offenses similar to them, by whatever name they are known . . .". Driving without an operator's license in one's possession was similar to driving without a license; in both instances the driver did not have a valid license in his possession to present to the officer. Therefore, the district court appropriately assigned a criminal history point pursuant to §4A1.2(c)(1).

United States v. Sandoval, 152 F.3d 1190 (9th Cir. 1998), *cert. denied*, 525 U.S. 1086 (1999). The district court did not err in counting in the defendant's criminal history score a prior conviction for petty theft. The defendant argued that the district court erroneously believed it had no discretion to disregard the conviction. The court of appeals disagreed, finding that under the plain language of USSG §4B1.2(c), the defendant's prior petty theft was not excludable as a matter of law: USSG §4A1.2(c) provides that sentences for misdemeanors and petty offenses are counted, unless they fall within the enumerated exceptions. A conviction for petty theft is not similar to the offenses listed at USSG §4A1.2(c)(2); the conduct underlying it is not akin to the conduct underlying the excludable offenses. Petty theft requires proof of criminal intent. Moreover, none of the listed offenses involves stealing.

United States v. Sandoval-Venegas, 292 F.3d 1101 (9th Cir. 2002). The Ninth Circuit held that the district court erred in construing a prior conviction as a qualifying offense on the basis of documents that did not clearly indicate the offense of conviction. The defendant was sentenced as a career offender on the basis of two prior convictions: one for possessing marijuana for sale, and one for burglary. The Ninth Circuit affirmed the district court's finding that the possession for sale was a qualifying offense over the defendant's objection that the offense of which he was convicted –California Health and Safety Code § 11359–did not contain an adequate scienter requirement. Examining the statute categorically, the Ninth Circuit held that the offense requires knowledge and that the defendant's conviction was properly used as a qualifying offense. Turning to the burglary offense, the Ninth Circuit could not determine that the defendant had been convicted of a qualifying offense because, although the record contained the charging document, it did not contain a reliable record of the conviction. The presentence report listed a conviction for "first degree burglary," but did not list a penal code section that corresponded to first degree burglary. Although the defendant had not objected in district court to the use of the burglary conviction as a qualifying offense, the Ninth Circuit found plain error and vacated the sentence.

United States v. Semsak, 336 F.3d 1123 (9th Cir. 2003). The appellate court affirmed the district court's upward departure of four levels because the size of the defendant's truck and the recklessness of the defendant's driving took the case outside the heartland of the offense guideline. The defendant pled guilty to involuntary manslaughter. On appeal, the defendant challenged the district court's upward departure. The Ninth Circuit noted that prior to the PROTECT Act, it reviewed such departures for an abuse of discretion. However, the PROTECT Act required the court to review *de novo* whether the district court's departure was based on proper factors. The court concluded that because it would affirm under either a *de novo* or an

abuse of discretion standard, like several other circuits, it declined to decide whether the PROTECT Act applied to appeals that were pending on the date of its enactment. *See United States v. Camejo,* 2003 U.S. App. LEXIS 12920 (6th Cir. June 26, 2003); *United States v. Chesborough,* 2003 U.S. App. LEXIS 12923 (8th Cir. June 26, 2003); *United States v. Tarantola,* 332 F.3d 498 (8th Cir. 2003); *but see United States v. Jones,* 332 F.3d 1294 (10th Cir. 2003). In the instant case, the court stated that in assessing the district court's authority to depart upward, it must determine whether the bases for departure were already taken into account by the offense guideline. However, the court noted that a factor accounted for by the guideline may still justify an upward departure if it was present to an exceptional degree or in some other way made the case different from the ordinary case where the factor was present. The court concluded that the district court's recounting of defendant's extreme recklessness supported both the decision to depart and the extent of the departure. The court also added that when it compared the facts of the instant case to other reckless driving cases, it did not find the four-level enhancement excessive. The district court's sentence was affirmed.

United States v. Shumate, 329 F.3d 1026 (9th Cir. 2003). The Ninth Circuit affirmed the district court's determination that a conviction for delivery of marijuana for consideration under Or. Rev. Stat. § 475.992 is a controlled substance offense for the purposes of applying the career offender guidelines, despite the fact that the statute includes mere solicitation of delivery of marijuana. The Ninth Circuit, in conflict with the Sixth Circuit's decision in *United States v. Dolt*, 27 F.3d 235 (6th Cir. 1994), held that solicitation is within the guidelines' definition of a controlled substance offense. In reaching this conclusion the Ninth Circuit looked to Application Note 1 to §4B1.2, which states that "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses," and held that the word "include" renders that list non-exhaustive.

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

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1995). The district court erred in departing upward on grounds that the defendant's criminal history category did not adequately reflect the likelihood that he would commit other crimes based on a 1968 psychiatric evaluation which diagnosed the defendant as a homosexual deviant. The circuit court, reasoning that homosexuality is not an indicator of a defendant's propensity to commit crimes, ruled that homosexuality cannot be used as a departure factor.

United States v. Martin, 278 F.3d 988 (9th Cir. 2002). The district court did not abuse its discretion in horizontally departing upward because the defendant's criminal history category did not adequately reflect his criminal history. The district court also departed upward two offense levels based on the defendant's likelihood of future recidivism. That departure was improper because "the likelihood of future recidivism is encouraged as a factor to be considered in assessing whether a criminal history score is inaccurate, not in departing from an offense level."

United States v. Rodriguez-Martinez, 25 F.3d 797 (9th Cir. 1994). The district court erred in the method it used to depart above the statutory minimum. The court rejected the

method, which was similar to one approved by the Fifth Circuit in its decision in *United States v. Carpenter*, 963 F.2d 736 (5th Cir.), *cert. denied*, 506 U.S. 927 (1992). The government's argument, similar to *Carpenter*, would permit the court to raise a defendant's offense level so that the mandatory minimum would be encompassed within that guideline range. A mandatory minimum does not alter the manner in which a district court determines the appropriate extent of a departure. In rejecting the government's approach, the Ninth Circuit panel held that the court cannot initially change the defendant's offense range to force conformance with the mandatory minimum; conformance with the minimum is achieved after the range is determined. If after calculating a defendant's offense range the resulting sentencing range is under the statutory minimum, the district court must apply the statutory minimum. If the range includes the minimum, the court may impose a sentence above the minimum to the highest value within that range.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). Because the guidelines take into account a defendant's low likelihood of recidivism by creating a lower sentencing range under Criminal History Category I, the district court is forbidden from departing downward based upon a low likelihood of recidivism.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Carr, 56 F.3d 38 (9th Cir.), *cert. denied*, 516 U.S. 895 (1995). In a matter of first impression, the Ninth Circuit held that the application of the sentencing guidelines' career offender provision resulting in a sentence that is "disproportionate" to the offenses involved does not violate the Eighth Amendment's Cruel and Unusual Punishment clause. The defendant was convicted of possession with intent to distribute 66.92 grams of cocaine base and had two prior felony controlled substance offenses for relatively small quantities of drugs. The circuit court ruled that Supreme Court precedent forecloses the defendant's Eighth Amendment argument. *See Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991) (plurality opinion) (upholding against an Eighth Amendment challenge a sentence of life without parole for a first offense possession of 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370-71, 375 (1982) (rejecting a challenge to a 40-year sentence for possession of less than nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263, 265 (1980) (upholding a life sentence imposed under a "recidivist statute" where the three felonies involved were (1) passing a forged check for $28.36, (2) fraudulently using a credit card to obtain $80 worth of goods and services, and (3) obtaining $120.75 by false pretenses). The circuit court noted that although harsh, the defendant's sentence was less severe relative to his offenses than the sentences upheld in these cases. The appellate court noted precedent in other circuits and held that the defendant's sentence was not so disproportionate to the gravity of his offenses as to violate the Eighth Amendment. *See, e.g.*, *United States v. Spencer*, 25 F.3d 1105, 1111 (D.C. Cir. 1994); United States v. Garrett, 959 F.2d 1005, 1009 (D.C. Cir. 1992); *United States v. Gordon*, 953 F.2d 1106, 1107 (8th Cir.), *cert. denied*, 506 U.S. 858 (1992); *United States v. McLean*, 951 F.2d 1300, 1303-04 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1010 (1992).

United States v. Garcia-Cruz, 40 F.3d 986 (9th Cir. 1994). The defendant was convicted in December 1988 as a felon in possession of a firearm. The sentencing court treated this as a crime of violence for purposes of applying the Armed Career Criminal Act, and sentenced him to a 200-month sentence, and the defendant appealed. The government asserted that on resentencing, the defendant should be sentenced under the 1992 version of USSG §2K2.1, in effect at resentencing, or as a career offender under the 1988 version of §4B1.1, in effect at the time of the offense. The district court applied the guidelines most favorable to the defendant, sentencing him to 41 months imprisonment under the 1990 guidelines which were in effect at the time of the original sentencing. The defendant appealed from this sentence, asserting that amendments made to USSG §4B1.1 should have been applied retroactively because they clarified that the offense of being a felon in possession of a firearm was not a crime of violence for purposes of USSG §4B1.1. The appellate court noted that the United States Supreme Court's decision in *Stinson v. United States*, 508 U.S. 36 (1993), *cert. denied*, 519 U.S. 1137 (1997), makes it clear that guideline commentary must be given controlling weight. "With the benefit of Stinson we can comfortably conclude that applying the 1988 guidelines to Garcia-Cruz in light of the commentary would not qualify him as a career offender under Section 4B1.1." The defendant must be resentenced in light of this.

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

United States v. Heim, 15 F.3d 830 (9th Cir.), *cert. denied*, 513 U.S. 808 (1994). The district court correctly sentenced the defendant as a career offender pursuant to USSG §§4B1.1 and 4B1.2. The defendant challenged the district court's application of the career offender guidelines on the grounds that the Sentencing Commission exceeded its statutory authority under 28 U.S.C. § 994(h) by including conspiracy within the definition of "controlled substance offense." He relied on *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), in which the District of Columbia Circuit concluded that the elements of a conspiracy are different from the elements necessary for the substantive crime and that conspiracy to violate the Controlled Substances Act is not included in 21 U.S.C. § 841, the portion of the act which prohibits substantive drug offenses. The *Price* court further opined that since the Commission relied on section 994(h) as its enabling statute for §§4B1.1 and 4B1.2, including conspiracy within the definition of "controlled substance offense" was legally invalid. *Id.* at 1370. The Ninth Circuit declined to accept the holding of *Price* and determined instead that the career offender guidelines should be read less restrictively. The commentary to USSG §4B1.1 does not say that section 994(h) is the sole statutory authority for the promulgation of the career offender guidelines. Specifically, the guidelines are issued pursuant to 28 U.S.C. § 994(a)(1), which authorizes the Commission to promulgate guidelines, and section 994(a)(2), which governs the Commission's role in implementing general policy statements and any other aspect of sentencing that would further the purposes established under 18 U.S.C. § 3553(a)(2). Additionally, the Ninth Circuit considered the legislative history to section 994(h) and determined that the Senate Report clearly indicated that section 994(h) was not the sole enabling statute for the career offender guidelines. Thus, the court of appeals held that the Commission did not exceed its statutory authority by including conspiracy within the definition of "controlled substance offense."

United States v. Sandoval-Venegas, 292 F.3d 1101 (9th Cir. 2002). To determine if a defendant qualifies as a career offender under USSG §§ 4B1.1 and 4B1.2, documentation must establish that the defendant was convicted either under a categorically qualifying statute or for conduct sufficient to be a qualifying offense. The categorical approach analyzes the fact of conviction under a particular statute. The latter analysis, however, requires documentation that consists of judicially noticeable qualifying facts. *See United States v. Franklin*, 235 F.3d 1165, 1170 (n.5) (9th Cir. 2000). Here, one of the predicate offenses qualified as a "controlled substance offense," as defined in USSG §4B1.2(b), and thus satisfied the categorical approach test. The other predicate offense, however, was murky in terms of the statute of conviction and the record did not contain sufficient documentation to establish judicially-noticeable, case-specific facts.

United States v. Wenner, 351 F.3d 969 (9th Cir. 2003). The defendant pled guilty to being a felon in possession of a firearm. The defendant argued that his state convictions for residential burglary and attempted residential burglary were not crimes of violence under §4B1.2(a)(2). The court of appeals agreed with the defendant's contention that the Washington residential burglary did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2). The court construed "burglary of a dwelling" as limiting "burglary" to buildings or other structures. Under this definition, the scope of the Washington's residential burglary statute (under which a "dwelling" could include a fenced area, a railway car, or a cargo container) exceeded the federal definition. Thus, the Washington residential burglary did not meet the definition of "burglary of a dwelling" under §4B1.2(a)(2). Because the Washington residential burglary was not a crime of violence under §4B1.2(a)(2), the defendant's state conviction for attempted residential burglary also was not a crime of violence. Since neither state crime was a crime of violence, the district court erred in enhancing the defendant's sentence under §2K2.1(a)(1). The sentence was vacated and remanded for resentencing.

§4B1.4 Armed Career Criminal

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995), *cert. denied*, 531 U.S. 885 (2000). The district court violated the *ex post facto* clause when it considered a provision which was not a part of the 1989 version of the guidelines in calculating the defendant's base offense level. The defendant qualified as an armed career criminal pursuant to 18 U.S.C. § 924(e) which carried a 15-year mandatory minimum sentence. The 1989 version of the guidelines, however, did not mention the Armed Career Criminal Act. The district court departed upward for a number of factors including the defendant's extensive criminal history, and used the armed career criminal section in the 1990 version of the guidelines as a guide in reaching a base offense level of 34, resulting in a sentence of 327 months' imprisonment. The circuit court ruled that a departure for violent offenses already considered in calculating the defendant's criminal history is an impermissible basis for departure. The circuit court noted that under the 1989 guidelines, "any upward departure founded on the under-represented seriousness of their past criminal conduct could not be based merely on the violence of the past crime, and had to be `horizontal' . . . ." The circuit court ruled that although the 1990 version of the guidelines provided for an enhanced offense level for armed career criminals, the district court improperly used USSG §4B1.4 as a guide, subjecting the defendant to the "detrimental *ex post facto* effect" of USSG §4B1.4. The

circuit court rejected the Tenth Circuit's stand on this issue. The Tenth Circuit, in *United States v. Tisdale*, 7 F.3d 957, 965-68 (10th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994), permitted the use of USSG §4B1.4 as a retroactive guide to discretion, ruling that such practice did not violate the *ex post facto* clause because the court "made it clear that it was not applying the later guideline, but only using it as a benchmark or analogue."

United States v. Matthews, 278 F.3d 880 (9th Cir.), *cert. denied*, 535 U.S. 1120 (2002). The *en banc* court adopted the panel's conclusion that the district court erred in sentencing the defendant as an armed career criminal because the district court failed to analyze the statutes under which the defendant was previously convicted to determine whether they satisfied the elements of burglary under the *Taylor* categorical approach.

United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998), *cert. denied*, 526 U.S. 1052 (1999). The district court erred in failing to sentence the defendant as an armed career criminal. The district court had ruled that two burglaries committed by the defendant on October 21 and October 22, 1981, were not committed on occasions different from one another, for purposes of the Armed Career Criminal Act (ACCA). Near midnight on October 21, 1981, the defendant and an accomplice burglarized a barbershop; shortly thereafter, they burglarized an adjacent business. The court of appeals held that the burglaries were "temporally distinct" and therefore qualified as predicate offenses for the ACCA.

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001). Under *Apprendi*, the Armed Career Criminal Act remains constitutional, because prior convictions that increase a statutory penalty do not have to be charged in the indictment or proven beyond a reasonable doubt. However, this "prior conviction" exception to *Apprendi* does not include juvenile adjudications if those proceedings did not afford a jury trial and proof beyond a reasonable doubt.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Contreras, 136 F.3d 1245 (9th Cir. 1998). The Ninth Circuit, joined by the First and Fifth Circuits, held that the term "the government," as used in the provision of the safety valve statute (§5C1.2(5)) requiring the defendant to truthfully disclose all information and evidence in order to qualify for a reduced sentence, refers to the prosecuting attorney. The appellate court rejected the defendant's argument that his disclosures to his probation officer qualified him for a safety valve sentence reduction. The appellate court relied, in part, on USSG §5C1.2, Application Note 8, which cross-references to Federal Rule 32(c)(1). Rule 32(C)(1) refers to the "counsel for the government" and to the "attorney for the government" when discussing the government's opportunity to make a USSG §5C1.2(5) recommendation. *See United States v. Jimenez Martinez*, 83 F.3d 488, 495 (1st Cir. 1996); *United States v. Rodriguez*, 60 F.3d 193 (5th Cir.), *cert. denied*, 516 U.S. 1000 (1995).

United States v. Franco-Lopez, 312 F.3d 984 (9th Cir. 2002). The Ninth Circuit held that the government breached its plea agreement with the defendant when it recommended to the probation office that an enhancement for an "aggravating role" upward adjustment was appropriate, after having agreed to recommend a safety valve downward adjustment if the probation office determined that the defendant was eligible. The defendant had entered into a plea agreement in which the government promised to recommend application of the safety valve if the probation office found that he met the requirement of §5C1.2 and the government found that the defendant had truthfully disclosed information and evidence of his involvement. In the same agreement, both parties reserved the right to seek upward and downward adjustments and departures. Then, the government recommended to the probation office an upward adjustment for aggravating role. The defendant complained that this recommendation was a breach of the plea agreement because any defendant found to have played an aggravating role is ineligible for the safety valve. The district court found no breach because the government had specifically reserved the right to argue for adjustments, but the Ninth Circuit disagreed. The Ninth Circuit found that the conditional promise in the plea agreement to recommend the safety valve reduction if the probation office determined the defendant was eligible was rendered a nullity if the government was permitted to take the position before the probation office that the defendant was ineligible. Therefore, the Ninth Circuit vacated the sentence and remanded to a different judge for resentencing.

United States v. Miller, 151 F.3d 957 (9th Cir. 1998), *cert. denied*, 525 U.S. 1127 (1999). The district court did not err in finding that the defendant did not qualify for the safety valve when he failed to disclose all he knew about relevant conduct that was part of the same course of conduct or common scheme as the offense for which he was convicted. The court of appeals had previously decided this issue in *United States v. Washman*, 128 F.3d 1305 (9th Cir. 1997), but had not addressed the statutory argument raised by defendant Miller. Miller argued that use of the term "offense or offenses" in the safety valve statute limits the disclosure required to the offense of conviction. The court of appeals reasoned that because 18 U.S.C. § 3553(f)(5) on its face requires disclosure "concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," it plainly includes uncharged related conduct. Therefore a defendant who does not disclose all information he has concerning the offense of conviction and offenses that were part of the same course of conduct is not entitled to safety valve relief.

United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995). The district court did not err in ruling that it lacked the authority to impose a sentence below the mandatory minimum, not withstanding its finding that the defendant's criminal history category was overrepresented. In this case, the defendant pled guilty to possession of methamphetamine with intent to distribute. This offense carries a mandatory minimum term of ten years. *See* 21 U.S.C. § 841(b)(1)(A)(viii). The defendant argued that the judge should have departed from the mandatory minimum because "the obvious intent of Congress was to mitigate the harsh results of mandatory minimum sentences when a person has virtually no criminal history." The defendant's prior criminal history consisted solely of two convictions for driving with a suspended license. Pursuant to USSG §§4A1.1(c), 4A1.2(c)(1), the defendant was assigned two criminal history points which placed the defendant in Criminal History Category II. The circuit

court held that 18 U.S.C. § 3553(f)(1) expressly precludes a downward departure from the mandatory minimum if the defendant has more than one criminal history point. The circuit court stated "where the criminal history category over-represents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

Part D Supervised Release

§5D1.1 Supervised Release

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The Ninth Circuit ruled that the defendant's rights under the Double Jeopardy Clause were not violated by his prosecution for illegally reentering the United States, even though this reentry resulted in revocation of his term of supervised release imposed as punishment for an earlier offense. The defendant argued that revocation of supervised release constitutes double jeopardy because, unlike parole or probation revocation, revocation of supervised release constitutes punishment for the act which causes the revocation, not the original crime. He contended that because supervised release is imposed in addition to the original sentence, and not instead of it, any imprisonment resulting from a supervised release violation cannot be part of the original sentence but rather punishment for the new act constituting the violation. The circuit court disagreed, reasoning that the plain language of the supervised release statute states that supervised release, although imposed in addition to incarceration, is still considered "a part of the sentence." 18 U.S.C. § 3583(a). Thus, the circuit court ruled that revocation of the defendant's's supervised release did not violate the double jeopardy clause because his entire sentence, including the period of supervised release, was punishment for the original crime. Citing *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993), the Ninth Circuit concluded that "`it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms' of his release."

§5D1.2 Term of Supervised Release[23]

United States v. Sanchez-Barragan, 263 F.3d 919 (9th Cir. 2001). USSG §5D1.2 does not restrict the maximum term of supervised release permitted under 21 U.S.C. § 841(b)(1)(C).

§5D1.3 Conditions of Supervised Release

United States v. Eyler, 67 F.3d 1386 (9th Cir. 1995). The district court erred when it conditioned the defendant's supervised release on the repayment of the attorneys fees paid to his court-appointed counsel under the Criminal Justice Act. The defendant was convicted of possession of unregistered machine guns and of being a felon in possession of a firearm and was sentenced to 66 months' imprisonment as well as a term of supervised release conditioned on repayment of defense costs. In considering an issue of first impression, the Ninth Circuit ruled

[23] An amendment to become effective November 1, 2004, conforms §5D1.2 (Terms of Supervised Release) to be consistent with changes in the PROTECT Act to terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

that the district court's order that the defendant repay defense costs violated 18 U.S.C. § 3583(d) and exceeded the district court's authority. The circuit court noted that conditions of supervised release must comply with 18 U.S.C. § 3583(d) which sets out certain mandatory conditions. The first requirement is that the condition be "reasonably related" to the "goals of rehabilitation, deterrence, protection of the public, and training or treatment." The circuit court ruled that the recoupment order failed to meet this mandatory requirement, and thereby violated the statute.

United States v. Gallaher, 275 F.3d 784 (9th Cir. 2001). Citing USSG §5D1.3(b)(2), the defendant argued that a condition of his supervised release prohibiting his possession of bows, arrows, or crossbows involved a greater deprivation of liberty than is reasonably necessary. Reviewing for an abuse of discretion, the court noted the defendant's history of violence and his ability to hunt with bows and determined that the district court did not abuse its discretion in imposing the prohibition.

United States v. Lopez, 258 F.3d 1053 (9th Cir. 2001), *cert. denied*, 535 U.S. 962 (2002). The defendant challenged the district court's order that he participate in a mental health program as a condition of supervision. Because the record amply supports the district court's order, it did not abuse its discretion.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Dubose, 146 F.3d 1141 (9th Cir.), *cert. denied*, 525 U.S. 975 (1998). The court of appeals upheld the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A-3664, against constitutional challenges. The defendants were convicted of a church arson which resulted in $121,403 in damages. They contended that restitution orders that require full compensation in the amount of the victim's loss are grossly disproportionate to the crime committed and violate the Eighth Amendment's proscription against excessive fines. They also argued that the imposition of a restitution obligation that is enforceable through a civil action for 20 years after their release from prison is cruel and unusual punishment, in violation of the Eighth Amendment. The court rejected both arguments. First, the full amount of restitution is inherently linked to the culpability of the defendant. Second, the victim is limited to the recovery of specified losses, and restitution is ordered only after adjudication of guilt. Moreover, the district court has the discretion to impose a nominal payment schedule, and the defendant is not subject to resentencing for nonpayment unless he did not make bona fide efforts to pay.

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The district court did not err in its calculation of the restitution order. The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards informing people that they had won $10,000, required that the individuals pay $15 in processing fees, then failed to award any money. The defendant challenged the restitution amount, arguing that it was excessive. The court rejected the defendant's argument that the district court should have reduced the restitution by the amount of

a previous restitution a court had ordered the defendant to pay the post office for a prior offense. The post office's failure to deliver materials for which the defendant had paid with a bad check does not dictate that it should be deducted from the current restitution order. Furthermore, the district court adequately considered the defendant's ability to pay the restitution when it calculated the amount. The court found that the record satisfied the relatively lenient standard for determining a defendant's ability to pay, *i.e.*, "some evidence the defendant may be able to pay restitution in the amount ordered in the future." *Id*. at 1029 (quoting *United States v. Ramilo*, 986 F.2d 333, 335 (9th Cir. 1993). The defendant's college education, accounting background, and significant business experience suggest that he will be able to find employment once released from imprisonment. Moreover, the district court's decision not to add a fine to the restitution indicated that it did consider the defendant's ability to pay.

United States v. Najjor, 255 F.3d 979 (9th Cir. 2001), *cert. denied*, 536 U.S. 961 (2002). The district court erred when it accepted the probation office's restitution calculation. Despite being unsatisfied with the probation office's calculation and not having had time at the first hearing to complete its own calculation, the district court accepted the government's argument at the second hearing that it lacked jurisdiction to reconsider the restitution amount. In accord with *United States v. Barany*, 884 F.2d 1255, 1261 (9th Cir. 1989), *cert. denied*, 493 U.S. 1034 (1990), which stated that "the district court should not accept uncritically an amount recommended by the probation office," the court remanded so that the district court could make an independent finding of the victim's loss due to the defendant's actions.

United States v. Reed, 80 F.3d 1419 (9th Cir.), *cert. denied*, 519 U.S. 882 (1996). The district court erred in ordering the defendant to pay restitution under the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663-64. The defendant, allegedly in a stolen vehicle, was involved in a high-speed chase with the police, which ended with the defendant crashing into several other vehicles. After the defendant pled guilty to being a felon in possession of a firearm, the district court ordered the defendant to pay restitution for the damage caused to the other vehicles. Relying on *Hughey v. United States*, 495 U.S. 411, 413 (1990), the defendant argued that restitution is not appropriate because, under VWPA, restitution may be imposed "only for the loss caused by the specific conduct that is the basis of the offense of conviction." The government's contention, however, was based on two Sixth Circuit cases that were implicitly overruled by Hughey and explicitly overruled by subsequent Sixth Circuit cases. The First, Fourth, Ninth, and Tenth Circuits have similarly held that restitution may only be ordered for losses caused by conduct for which the defendant has been convicted. The circuit court noted that the VWPA was amended subsequent to the Supreme Court's ruling in *Hughey*. However, this amendment, which allows for restitution for losses occurring as a result of a scheme, conspiracy, or pattern of criminal activity, was irrelevant in this case because the defendant was not convicted of such an offense.

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998). The district court erred in ordering the defendant to pay restitution for an amount outstanding on a car loan. Under the Victim and Witness Protection Act, a defendant can only be ordered to pay restitution for conduct that was part of the scheme, conspiracy, or pattern of criminal activity. The defendant's auto loan was not

part of the tax fraud scheme of which he was convicted, even though the proceeds from the scheme were used as a down payment on the car.

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998), *cert. denied*, 525 U.S. 1168 (1999). The district court erred in ordering restitution of $116,223 after finding only $30,000 in actual loss resulting from the defendant's fraud conviction. The court of appeals reiterated that restitution can only include losses directly resulting from a defendant's offense; consequential expenses may not be legally included in an order of restitution.

§5E1.2 Fines for Individual Defendants

United States v. Brickey, 289 F.3d 1144 (9th Cir. 2002). The district court ordered defendant to pay a fine within the applicable guideline range per USSG §5E1.2(c)(3). The defendant has the burden of proof to demonstrate that he cannot afford to pay a fine. Here, uncontroverted evidence established that the defendant had the assets to pay the fine; moreover, the defendant refused to discuss his finances with the probation officer and thus did not demonstrate that he could not pay the fine, and he had numerous skills which could be reasonably expected to generate a good income.

United States v. Gray, 31 F.3d 1443 (9th Cir. 1994). Contrary to the defendant's argument, the district court did have the authority to depart upward from a fine range of $3,000-$30,000 to $250,000. However, because the district court failed to (1) make a finding as to whether the aggravating circumstances were taken into consideration by the Sentencing Commission in promulgating the guidelines, and (2) failed to address how or why it arrived at such an amount, the circuit court vacated the fine and remanded the case. The defendant further contended that the district court did not have the authority to depart upward because the language of USSG §5E1.2(b) limits departures from the applicable fine range to either USSG §5E1.2(f), which allows a downward departure if a defendant is unable to pay a fine or if a fine would unduly burden a defendant's dependents, or USSG §5E1.2(i), which allows the imposition of an additional fine in an amount that is sufficient to pay the costs of imprisonment, probation or supervised release. In rejecting the defendant's argument, the circuit court held that "the fact that the guidelines identify two grounds for departure does not preclude a district court from departing on a different basis." Note: USSG §5E1.2 was amended effective November 1, 1997.

United States v. Robinson, 20 F.3d 1030 (9th Cir. 1994), *cert. denied*, 522 U.S. 897 (1997). The district court erred in failing to determine at the time of sentencing the defendants' future ability to pay the fine imposed. Although the guidelines do not state explicitly that the sentencing court must assess the future payment ability before imposing the fine, the structure of USSG §5E1.2 strongly implies such a requirement. The language of USSG §5E1.2, particularly that the district court must decide whether the defendant "established" the present and likely future inability to pay, indicates that the assessment must be made before the sentence is imposed. The district court also erred in imposing as an alternative a period of community service in the event the defendants were unable to pay their fines. Community service cannot be imposed as a fallback punishment, but must be imposed as an alternative sanction in lieu of all or a portion of a fine. USSG §5E1.2(f). Such an alternate sentence violates 18 U.S.C. § 3572(e).

United States v. Zakhor, 58 F.3d 464 (9th Cir. 1995). The defendant challenged the constitutionality of USSG §5E1.2(i) and the Sentencing Commission's statutory authority to promulgate the guideline. The defendant was sentenced to three years' probation and ordered to pay more than $20,000 in fines and restitution, including a $6,500 fine under USSG §5E1.2(i) to cover the costs of community supervision. The appellate court upheld the district court's imposition of the fine covering the cost of community supervision. "Section 5E1.2(i) advances the deterrent purpose articulated in the Sentencing Reform Act by establishing the cost of incarceration as another cost a would-be criminal may have to face if he commits the criminal act and is caught. This deters criminal conduct by making the potential criminal internalize all the costs of such conduct." In so holding, the Ninth Circuit declined to follow the Third Circuit's approach in *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992), which invalidated the guideline because it did not find that the Sentencing Reform Act made any specific reference to assessing the costs of imprisonment. The appellate court further held that the guideline does not deprive the defendant of his property without due process, in violation of the Fifth Amendment because it bears a "rational relationship to a legitimate government purpose." Note: USSG §5E1.2 was amended on this issue effective November 1, 1997 (Amendment 572).

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Buckland, 289 F.3d 558 (9th Cir.), *en banc*, *cert. denied*, 535 U.S. 1105 (2002). Where the guideline range sentence for multiple counts of convictions exceeds the statutory maximum for those convictions, USSG §5G1.2(d) requires consecutive sentences to achieve the total punishment calculated by the guidelines.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The district court imposed consecutive sentences for separate counts involving different victims (and concurrent sentences for the counts involving the same victims). The defendant argued that he lacked notice of the district court's intention to impose consecutive sentences. Where the guidelines do not indicate consecutive sentences, the district court may still do so as a departure. *See United States v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991). Because there was no notice that consecutive sentences were being considered as a departure from the guidelines, the court vacated the sentence and remanded for resentencing.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

See United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (*en banc*), Post-*Apprendi*, p. . 100.

United States v. Chea, 231 F.3d 531 (9th Cir. 2000). The district court erred when it did not consider defendant's undischarged term of imprisonment when it sentenced defendant for the current convictions. A jury convicted defendant of conspiracy and armed robbery, in violation of 18 U.S.C. §§ 1951(a) and 924(c). With no mention of USSG §5G1.3, which explains how to

determine sentences for defendants with current undischarged terms of imprisonment, the district court sentenced defendant without considering a 116-month sentence the defendant was serving for a state armed robbery conviction. The defendant argued that the district court should have considered his current state conviction and that it should have applied the 1994 version of the sentencing guidelines, in effect at the time of the offenses, instead of the 1998 version, in effect at sentencing. The 1994 version of USSG §5G1.3(c) requires that the sentencing court determine a "reasonable incremental punishment in light of the undischarged term" by calculating a sentence based on a hypothetical where the instant and prior convictions are sentenced together. USSG §5G1.3, comment. (n.3) (1994). Even though the 1998 version of USSG §5G1.3(c) abandoned the 1994 methodology, the Ninth Circuit still requires that the sentencing court consider an undischarged term of imprisonment. In *United States v. Luna-Madellaga*, 133 F.3d 1293, 1296 (9th Cir.), *cert. denied*, 524 U.S. 910 (1998), the court stated explicitly that sentencing courts must carefully consider the factors enumerated in Application Note 3 to USSG §5G1.3 and listed in 18 U.S.C. § 3553(a). One such factor is Commission policy statements, one of which requires that courts "be cognizant of" various characteristics regarding the undischarged sentence. *See* USSG §5G1.3, comment. (n.3). Because under either the 1994 or the 1998 version of the guidelines, the district court was required to consider the defendant's undischarged term of imprisonment, the court vacated the sentence and remanded for such consideration.

United States v. Garrett, 56 F.3d 1207 (9th Cir. 1995). The district court erred in failing to properly consider the commentary methodology of USSG §5G1.3(C) or to explain its reasons for using an alternative methodology in sentencing the defendant. The district court calculated a sentence for the single, federal crime and determined that it should run concurrent with the undischarged portion of the defendant's state sentence. The court vacated the defendant's sentence because the district court did not make a determination on the record that the incremental punishment was reasonable, and because it did not make the necessary preliminary determination of USSG §5G1.3 in which the court should approximate the total punishment that would have been imposed had all the offenses been federal offenses sentenced simultaneously. Note: USSG §5G1.3 was amended on this issue effective November 1, 1997 (Amendment 535).

United States v. Kikuyama, 150 F.3d 1210 (9th Cir. 1998). The district court did not err in imposing consecutive sentences of 12 months' incarceration for violation of supervised release and 46 months' incarceration for bank robbery. The court of appeals noted that, in exercising its discretion to impose concurrent, partially concurrent, or consecutive sentences, the district court should consider the factors set out in the statute governing imposition of a sentence, 18 U.S.C. § 3553(a), as well as the factors listed at USSG §5G1.3, comment. (n.3). In this case, the court cited three factors that weighed in favor of imposing consecutive sentences: the defendant's previous adjudications on several occasions as a juvenile, defendant's prior manslaughter conviction, and defendant's escalating criminal behavior, which provided the appearance of enhanced dangerousness. Therefore, the district court acted within its discretion in assessing consecutive sentences.

United States v. King, 257 F.3d 1013 (9th Cir. 2001), *cert. denied*, 539 U.S. 908 (2003). The district court did not err when it declined to impose concurrent sentences based on a

commonality between the convictions. The defendant pled guilty to mail fraud, using a counterfeit postage meter stamp, and money laundering, stemming from a scheme where defendant mailed postcards informing people that they had won $10,000, required that the individuals pay $15 in processing fees, then failed to award any money. The defendant argued that, under USSG §5G1.3(b), his sentence should run concurrent to his prior bank fraud sentence because some of the revenues from the current mail scheme were deposited into the accounts for which he was convicted of bank fraud and thus were "fully taken into account" in the offense level determination for the current mail fraud sentence. The court rejected the argument, holding that mere commonalities in the offenses do not signify that the prior offense was considered in determining the current sentence. However, relying on circuit precedent, the court found that the 1995 guidelines were harsher on the defendant than the 1994 guidelines, and thus remanded so that the district court could determine, under §5G1.3(c) of the 1994 guidelines, to what extent the sentences should run concurrent. *See United States v. Chea*, 231 F.3d 531, 539-40 (9th Cir. 2000).

United States v. Redman, 35 F.3d 437 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995). The district court did not err in imposing upon the defendant an 18-month sentence to run consecutive to his 36-month state term of imprisonment. The defendant was convicted and sentenced on a state charge of second degree theft. He then pled guilty to a federal charge of conspiracy to aid and assist an escape. The district court considered USSG §5G1.3(c), but because the defendant would not receive any incremental punishment under subsection (c), the district court departed downward from the defendant's criminal history category by discounting the three levels from his state offense. The district court then sentenced the defendant to the bottom of the range and ordered that the resulting 18 months be imposed consecutive to the defendant's state sentence. The defendant argued that the district court misapplied the guidelines. The circuit court disagreed. Section 5G1.3(c) is unlike subsections (a) and (b) because it is only a policy statement. Further, the Commission's amendment of the commentary, changing the "shall consider" language of the 1991 version of USSG §5G1.3(c) to "should consider" language in the current version, indicates that the Commission expects that the sentencing court will consider USSG §5G1.3(c), but if that court decides that the commentary methodology will not yield a reasonable incremental penalty, the court may decline to impose a sentence pursuant to the commentary. Such a sentence is not a departure; however, the district court must give its reasons for choosing an alternative method. The district court did all that it was required to do. *But see United States v. Duranseau*, 26 F.3d 804 (8th Cir.), *cert. denied*, 513 U.S. 939 (1994) (the district court must apply a departure analysis when using a methodology different from that provided by USSG §5G1.3(c)). Note: USSG §5G1.3 was amended on this issue effective November 1, 1997 (Amendment 535).

United States v. Scarano, 76 F.3d 1471 (9th Cir. 1996). The court did not err in imposing consecutive sentences upon defendant convicted of two counts of mail fraud despite the fact that one offense was preguidelines and one offense was post-guidelines. The court rejected both defendant's argument that the imposition of consecutive sentences violated the Double Jeopardy clause and his argument that consecutive sentences violated the sentencing guidelines. The defendant argued that the calculation of loss of his sentence to include an amount of loss previously counted toward a preguidelines sentence violated the Double Jeopardy clause.

However, the court relied on the decision in *Witte v. United States*, 515 U.S. 389 (1995), which held that the use of relevant criminal conduct to enhance a penalty for an offense of conviction within statutory limits does not constitute "punishment" for the relevant conduct, to reject this argument. The court also rejected defendant's argument that aggregating the amount of loss for both the pre- and post-guidelines offenses was equivalent to treating both offenses as if they were post-guidelines offenses. Precedent supported the finding that courts have discretion to impose either concurrent or consecutive sentences upon a defendant convicted of a preguidelines offense. The court noted the factors to be considered in exercising this discretion to include the following: 1) nature of the offense, 2) history and characteristics of the defendant, 3) the need for deterrence, and 4) available sentences under the guidelines.

United States v. Steffen, 251 F.3d 1273 (9th Cir.), *cert. denied*, 534 U.S. 1062 (2001). The district court did not err by imposing a consecutive sentence pursuant to USSG §§5G1.3 and 7B1.3(f). The defendant was convicted of wire fraud and travel fraud, offenses which he committed in 1992 and 1993 while he was on probation for previous 1987 convictions of wire fraud. As a result, his probation was revoked and he was required to serve out the sentence. While he was serving the sentence for the 1987 offense, he escaped, was apprehended, and was sentenced for the escape conviction to run consecutive to the previous wire fraud conviction. When the district court imposed the sentence for the instant offense in 1998, the defendant had finished serving his sentence for the previous wire fraud and was still serving the sentence for the escape conviction. The district court, relying on the 1993 version of the sentencing guidelines, imposed a sentence to run consecutive to the sentence for the escape conviction. The defendant argued that the court should have used the 1998 manual, which was in effect at the time of sentencing and should have imposed the sentence to run concurrently with the sentence for escape. The Ninth Circuit held that, because the 1993 and 1998 versions did not change the applicable guideline, 5G1.3, the choice of guideline manuals was immaterial. It further held that USSG §7B1.3(f) "specifically provides that a sentence for revocation of probation shall be served consecutively to any sentence currently being served," and as such, the district court did not err in imposing a consecutive sentence. 251 F.3d at 1277. The defendant also argued that the record did not show that the district court adequately considered the factors listed in 18 U.S.C. §§ 3553(a) and 3584(b) to justify the imposition of a consecutive sentence. The court held that the district court's explanation which made reference to "the nature of the offense," "the significant amount of fraud," "the relatively elaborate scheme," and "the fact that the defendant is not a stranger to the criminal justice system" was sufficient evidence of proper consideration of the relevant factors. *Id.* at 1278.

United States v. Williams, 291 F.3d 1180 (9th Cir. 2002). The Ninth Circuit held that the district court must give the defendant notice of intent to impose, and grounds for imposing, consecutive sentences where consecutive terms were not indicated by the guidelines. The defendant was convicted at jury trial of four counts of inducing interstate travel to engage in prostitution, four counts of transporting a minor in interstate commerce for prostitution, and interstate travel in aid of racketeering. The district court imposed consecutive terms totaling 240 months. As an initial matter, the parties agreed that the district court erroneously imposed ten-year sentences for offenses that carried a five-year maximum. In addition to imposing erroneously lengthy sentences, the district court imposed consecutive sentences, contrary to

§5G1.3. The defendant appealed on the ground that the district court erred in imposing consecutive sentences without providing the defendant advance notice of its intent to do so, and the Ninth Circuit agreed. Because consecutive terms were not indicated by the guidelines, they constituted a departure. A district court may only depart upward if the defendant has received notice that a departure is being contemplated and of the specific grounds for the departure. Although the court's stated grounds for departure–extensive criminal history and extreme physical, sexual, and emotional abuse of the victims–are legally acceptable grounds for departure, the defendant was only given notice of the latter ground. The defendant did not receive notice of the former ground from the presentence report, the government, or the court. In addition, the defendant did not have notice that the court would depart by way of consecutive sentences. Although the government stated its intent to seek consecutive sentences in its sentencing brief, neither this submission nor the supplemental addendum to the presentence report identified consecutive sentences as a departure. The Ninth Circuit remanded with instructions that the district court ensure that the defendant be given notice of all the bases and mechanisms for contemplated departures.

Part H Specific Offender Characteristics

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

United States v. Leon, 341 F.3d 928 (9th Cir. 2003). This case thus turned on whether defendant's family circumstances were sufficiently extraordinary to justify the district court's downward departure. Defendant was convicted of preparing false income tax returns. At sentencing, the district court departed downward six levels based on defendant's indispensable role in caring for his wife, who recently had her kidney removed due to renal cancer and who had been diagnosed as being at risk of committing suicide if she were to lose her husband to death or incarceration. The court of appeals affirmed the departure. It concluded that the district court properly placed special emphasis on the wife's poor emotional and physical health and the fact that defendant was the only person available to tend to her needs. The government argued that reliance on the wife's suicidal feelings would cause virtually every defendant to claim that he or she had a family member who might commit suicide upon such defendant's incarceration. The court of appeals found that what was significant in the instant case, however, was that defendant's wife had a documented history of depression.

§5H1.12 Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

United States v. Burrows, 36 F.3d 875 (9th Cir. 1994). The government conceded that the district court erred in retroactively applying §5H1.12, which prohibits downward departures for youthful lack of guidance, to the defendant's sentence. This departure was originally established in *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), overruled on other grounds, 990 F.2d 501 (9th Cir. 1993). The circuit court concluded that while the promulgation of §5H1.12 in 1992 "wiped out" the availability of this departure in subsequent cases, the departure

[24]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this departure factor by adding language that prohibits this departure in child crimes and sexual offenses.

was available to this defendant, because retroactive application of the guideline violates the *ex post facto* clause. The case was remanded for the district court to consider whether this defendant warranted a departure based on youthful lack of guidance.

Part K Departures

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

United States v. Auld, 321 F.3d 861 (9th Cir. 2003). In an issue of first impression, the Ninth Circuit held that the appropriate point from which to depart pursuant to §5K1.1 is the statutorily required mandatory minimum sentence, rather than the lower otherwise applicable guideline range. The defendant was convicted of three counts of possession with intent to distribute drugs. The base mandatory minimum sentence was 10 years, but because the government filed a special information alleging a prior felony drug conviction, the mandatory minimum sentence was increased to 20 years. The defendant cooperated with the government and the government moved for a downward departure from 20 years to 15 years. The defendant argued that, as his guideline range without consideration of the mandatory minimum was 121 to 151 months, any departure should be from that range. The district court adopted the government's position over the defendant's objection and imposed a sentence of fifteen years. On appeal, the Ninth Circuit joined the Third, Fourth, Sixth, Seventh, and Eleventh Circuits in holding that the appropriate point of departure was the higher statutorily required mandatory minimum.

United States v. Emery, 34 F.3d 911 (9th Cir. 1994). The district court did not err in concluding that it did not have jurisdiction to grant the defendant a departure pursuant to §5K1.1. The defendant argued that he was entitled to a substantial assistance downward departure because he assisted the state in a drug conspiracy investigation when he agreed to withdraw his motion to unseal the search warrant. The circuit court concluded that the district court was without authority to depart because the government failed to file a substantial assistance motion. However, the circuit court noted that the government may have been under the mistaken impression that a USSG §5K1.1 recommendation was unavailable because the assistance was provided to the state authorities; accordingly, the circuit court instructed the United States attorney's office to reexamine whether such a recommendation was warranted.

United States v. Leonti, 326 F.3d 1111 (9th Cir. 2003). In an appeal of a motion to vacate, pursuant to 28 U.S.C. § 2255, the Ninth Circuit held that the right to effective assistance of counsel attaches to defendant's presentence attempts to cooperate with the government to obtain a downward departure for substantial assistance. The defendant pled guilty pursuant to a plea agreement in which he agreed to cooperate in exchange for a government motion for downward departure if he was able to provide substantial assistance; at sentencing, the government did not make the motion. On collateral attack, the defendant alleged that counsel made no attempt to ascertain what information the government wanted, that counsel failed to appear for proffer sessions, that counsel failed to respond to his concerns regarding his inability to cooperate, and that counsel failed to facilitate negotiations for substantial assistance motion or to communicate with him about how to obtain such a reduction. The district court refused to

hold an evidentiary hearing on these claims. The Ninth Circuit reversed and remanded for an evidentiary hearing because the allegations, if true, would make out a claim of ineffective assistance of counsel.

See United States v. Mukai, 26 F.3d 953 (9th Cir. 1994), §6B1.1, p. 92.

United States v. Quach, 302 F.3d 1096 (9th Cir. 2002). The Ninth Circuit held that the government erred by refusing to make a good faith evaluation of whether defendant had provided substantial assistance prior to sentencing to warrant a §5K1.1 motion, vacated defendant's sentence, and remanded for reconsideration by a different district court judge. The defendant had entered a plea agreement that required the government to move for a downward departure if the defendant cooperated fully and provided substantial assistance to the government. At sentencing, the government declined to move for the departure because the defendant's cooperation was not complete, and explained that it might file a motion under Rule 35(b) at the end of the cooperation. Citing the First Circuit's decision in *United States v. Drown*, 942 F.2d 55 (1st Cir. 1991), the Ninth Circuit held that the government had impermissibly merged §5K1.1, and Rule 35(b). Because the government had agreed to move for a §5K1.1 departure if the defendant had been fully cooperative and provided a substantial assistance, it was required to make a good faith evaluation whether the defendant had done so. The Ninth Circuit remanded for resentencing before a different district court judge because the sentencing court had stated that it would not grant a §5K1.1 motion even if made by the government.

United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994). The district court erred in refusing to grant the defendant a substantial assistance downward departure, even though the government did not make a motion for such a departure. The circuit court ruled that the government acted improperly in refusing the defendant's offer to testify against other defendants in exchange for a downward departure, and then later making *ex parte* contact with the defendant, subpoenaing him to testify at a grand jury proceeding without notifying his counsel or obtaining his counsel's consent. The circuit court concluded that if the government had properly notified the defendant's counsel and allowed the defendant an adequate opportunity to consult with him before testifying, the defendant may have obtained a written promise to move for a downward departure. Thus, in light of the government's improper conduct, the district court should have granted the defendant's request for a downward departure.

§5K2.0 Grounds for Departure (Policy Statement)[25]

United States Supreme Court

Koon v. United States, 518 U.S. 81 (1996).[26] The Supreme Court unanimously held that an "appellate court should not review the [district court's] departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." In applying this standard, the court noted that "[l]ittle turns, however, on whether we label review of this particular question [of whether a factor is a permissible basis for departure] abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The court divided, however, in its determination of whether the district court abused its discretion in relying on the particular factors in this case. The majority of the court held that the Ninth Circuit erroneously rejected three of the five downward departure factors relied upon by the district court. The district court properly based its downward departure on (1) the victim's misconduct in provoking the defendants' excessive force, USSG §5K2.10; (2) the defendants' susceptibility to abuse in prison; and (3) the "significant burden" of a federal conviction following a lengthy state trial which had ended in acquittal based on the same underlying conduct. However, the district court abused its discretion in relying upon the remaining two factors, low likelihood of recidivism, and the defendants' loss of their law enforcement careers, because these were already adequately considered by the Commission in USSG §§2H1.4 and 4A1.3. The judgment of the Court of Appeals for the Ninth Circuit was affirmed in part and reversed in part, and the case was remanded for further proceedings.

United States v. Basalo, 258 F.3d 945 (9th Cir. 2001). The district court erred in granting a four-level sentencing departure on the grounds that the defendant was prejudiced when the government withheld information that customs agents had received cash awards for preparing trial testimony. The defendant was convicted of conspiracy to export cocaine, conspiracy to possess with intent to distribute cocaine, and aiding and abetting possession with intent to distribute cocaine. The defendant later, after trial, joined with codefendant Sanderson's motion for departure on the basis of the Customs Program in which a customs agent received a "Dinner for Two" gift certificate "for the extra work on her part in preparation for testifying at the trial [of Basalo and Sanderson]." *Id.* at 947-48. The court, citing *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 973 (9th Cir. 2000), stated that prosecutorial policy choices are not mitigating circumstances because they do not serve to "lessen [ ] the severity of [a] defendant's conduct or make [ ] his criminal or personal history more sympathetic." *Id*. at 949. The court found that the conduct complained of (withholding information about the Customs Program) was a prosecutorial policy decision which may not be used as the basis for a departure under

[25]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. *See* USSG App. C, Amendment 649.

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

Banuelos-Rodriguez because it did not lessen the severity of the defendant's conduct or make his criminal of personal history more sympathetic. *Id.* The court held that the district court abused its discretion when it departed downward based on the governmental policy. *Id.*

United States v. Caperna, 251 F.3d 827 (9th Cir. 2001). The court vacated and remanded a downward departure based on sentence disparity among cooperating and non-cooperating defendants. The district court had granted a downward departure based on sentence disparity among the codefendants but, on appeal, the government argued that it was not appropriate for a sentencing court to depart on the basis of codefendant sentence disparity unless the codefendant was convicted of the same offense as the defendant. Citing *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000), the Ninth Circuit held that the district court erred by departing downward in the defendant's case because it considered two codefendants' sentences, one of which was convicted of an offense different from the defendant's.

United State v. Cruz-Guerrero, 194 F.3d 1029 (9th Cir. 1999). The Ninth Circuit held that a district court may not depart downward from the guidelines on the basis of a defendant's substantial assistance to the government unless the government has moved for such a departure. The defendant argued that the district court should have given him a downward departure for substantial assistance to the government, despite the fact that the government did not move for a departure. The defendant relied on *In Re Sealed*, 181 F.3d (D.C. Cir.) (*en banc*), *cert. denied*, 528 U.S. 989 (1999), in the District of Columbia Circuit which had held that the *Koon* decision enabled district courts to authorize substantial assistance departures without a government motion. The Ninth Circuit stated that since this appeal was filed, the District of Columbia vacated and overruled that decision in an en banc decision. *See id.* The Ninth Circuit agreed with the reasoning that the Sentencing Commission clearly intended to limit such departures to situations in which the government requests a departure, and noted that the Third and Fifth Circuits are in accord. *See United States v. Solis*, 169 F.3d 224 (5th Cir.), *cert. denied*, 528 U.S. 843 (1999), and *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 526 U.S. 1077 (1999).

United States v. Cuddy, 147 F.3d 1111 (9th Cir. 1998). The district court properly departed upward by two levels based on the defendants' threats to the extortion victim's daughter. The defendants were convicted of interference with interstate commerce by threats of violence after kidnaping the daughter of a hotel owner and demanding ransom. The district court departed upward based on USSG §2B3.2, comment. (n.8), which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court erred in making an upward departure based on its determination that the defendant's base offense level for making a false statement in a passport application was inadequate because he was being investigated for possible sexual misconduct with his nephew at the time he was being sentenced. The government argued that a upward departure was warranted because the defendant's motive in falsifying his passport was to escape possible prosecution for sexual misconduct. The circuit court disagreed, reasoning that the version of USSG §5K2.0 in effect at the time of sentencing

allowed departures based on additional "harms" only when the harms were relevant to the offense of conviction. Intending to use the false passport for purposes of escaping criminal prosecution is not an element of the crime of making a false statement in a passport application. Thus, the circuit court held, the defendant's reason for wanting a fake passport was not relevant to the offense of falsifying the application, and could not be used as a departure factor.

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court did not err in departing from a defendant's guideline sentencing range of 57 to 77 months for interstate travel to contract a murder for hire of his wife to impose a sentence of 108 months based on the defendant's profit motive and more than minimal planning. The record indicated that the defendant had taken out a $100,000 life insurance policy on his wife, and had made multiple long distance phone calls, in addition to engaging in interstate travel, to facilitate the offense.

United States v. G.L., 143 F.3d 1249 (9th Cir. 1998). The court erred in departing on two grounds. First, a finding that grouping of the defendant's auto theft offenses, where the three auto thefts were overshadowed by the defendant's conviction for involuntary manslaughter did not result in sufficient punishment was an improper basis for departure. The court of appeals held that the correct course is a sentence in the upper regions of the guidelines range rather than a departure. The court of appeals also rejected as a basis for departure the fact that the stolen vehicles were destroyed. Under the guidelines, the court noted, the loss figure is the same whether or not the stolen property is recovered. Thus, the guidelines adequately take into account the destruction of the vehicles.

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err in departing upward three levels based on the defendant's extraordinarily dangerous mental state. The defendant asserted that the district court did not have the authority to depart on such a basis, relying on *United States v. Doering*, 909 F.2d 392 (9th Cir. 1990), in which the Ninth Circuit reversed an upward departure that was based on the defendant's need for psychiatric treatment. The circuit court distinguished the instant case from *Doering* because the instant departure was not based on the defendant's need of psychiatric treatment; rather, the departure was imposed because the defendant's serious psychiatric disorders posed an extraordinary danger to the community. However, the circuit court remanded with a limited instruction to the district court to articulate the reasons for the extent of the departure.

United States v. Ono, 997 F.2d 647 (9th Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994). The district court did not err in making a ten-level upward departure based on the potency of a synthetic drug not listed in the guidelines. The defendant was convicted of conspiracy to manufacture OPP/PPP, which is not listed in the guidelines. The district court had authority to depart, stated adequate reasons for its departure, and made a reasonable departure. *See United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (*en banc*).

United States v. Pacheco-Osuna, 23 F.3d 269 (9th Cir. 1994). The district court erred in departing downward based on possible violations of the Fourth Amendment. The defendant pled guilty to being a deported alien found in the United States in violation of 8 U.S.C. § 1326(a). He

averred at sentencing that he was arrested merely because he looked Mexican and that this constitutional violation entitled him to a downward departure. The district court agreed and granted the departure. The circuit court reversed, concluding that Fourth Amendment violations do not warrant downward departures because constitutional violations do not speak to the defendant's culpability. *See United States v. Crippen*, 961 F.2d 882 (9th Cir.), *cert. denied*, 506 U.S. 965 (1992) (ineffective assistance of counsel not proper departure basis; a permissible "aggravating or mitigating circumstance" is one that relates to the defendant's culpability or the seriousness of the offense or "otherwise relate[s] to a congressionally authorized legitimate sentencing concern.").

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002). The Ninth Circuit upheld downward departures for conduct that fell outside the heartland of the applicable guidelines and for susceptibility to prison abuse. In a case involving possession of child pornography, the district court departed downward based on its finding that the fact that the defendant had not affirmatively downloaded pornographic files, but that the files had downloaded automatically into his temporary internet cache file, took his conduct outside of the heartland of the sentencing guideline for the conduct. The court also departed downward based on its determination that the defendant's stature, demeanor, and naivete, as well as the nature of his offense, rendered him susceptible to abuse by other inmates. The government appealed, and the Ninth Circuit affirmed the district court's departures noting that the district court had conducted an evidentiary hearing and was in a superior position to evaluate the evidence.

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995). The district court did not err in departing upward two levels based on the size and sophistication of the defendants' drug trafficking operation. The defendants claimed the departure improperly considered the quantity of drugs. The appellate court noted that it had already rejected this argument in *United States v. Shields*, 939 F.2d 780 (9th Cir. 1991), *aff'd on other grounds*, 985 F.2d 576 (1993), wherein it stated that "Common sense requires the conclusion that duration is not the same thing as quantity. A judge could easily find that a 14-month drug conspiracy is more serious than a single episode of importation." *Shields*, 939 F.2d at 783. The district court correctly based its departure on the "harm to society, the sophisticated nature of the offense, and the long duration of the conspiracy." 18 U.S.C. § 3443(b). The appellate court ruled that the district court did not abuse its discretion by departing upwards two levels due to the considerable length and sophistication of the drug trafficking operation.

United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001). The district court did not abuse its discretion in departing downward by only three levels after it departed by four levels for the most helpful codefendant. The defendant, who pled guilty to alien smuggling resulting in death, argued that he should have received a more substantial departure because he could not foresee the snowstorm which killed one of the aliens and because he stayed with one of the immigrants who was lagging behind, shared his food, and chose to call for help and direct the rescuers instead of escaping the scene. Affirming the sentence, the court found that the district court reasonably departed by three levels based on the defendant's decision to call for help and direct the rescuers to the immigrants instead of fleeing. Moreover, the court did not abuse its discretion for determining the extent of the departure based on the level of assistance provided

by the codefendant. It appropriately granted a four-level departure to the codefendant who actually made the phone call to the authorities.

United States v. Rose, 20 F.3d 367 (9th Cir. 1994). The district court properly denied the defendant's request for downward departure based on sentencing disparity. The defendant argued that a downward departure was warranted because USSG §2S1.1 imposes stricter punishment for conduct underlying the money laundering counts that also underlies the wire fraud counts. The circuit court relied on the commentary to USSG §2S1.1 in concluding that the Commission intended to impose harsher penalties on defendants convicted under 18 U.S.C. § 9156(a)(1)(A). Thus, the resulting sentencing disparity is not a valid departure basis.

United States v. Salcido-Corrales, 249 F.3d 1151 (9th Cir. 2001). The court affirmed an upward departure of two levels based on two grounds: 1) the defendant's role in coordinating the distribution of drugs; and 2) the defendant's use of his 18-year-old son in the drug dealing activities. The defendant pled guilty to distributing cocaine. On appeal, the court upheld the district court's holding that the upward departures were warranted based on the evidence in the record. The court found that the defendant coordinated the distribution of drugs that he received from out-of-state sources, initiated and negotiated drug deals with the undercover officer, and exercised authority over his son and others in the apartment complex in order to complete the deals. It further found that the defendant directed the participation of his son in drug activities that were the foundation of the offenses to which the defendant pled guilty. The fact that the defendant's son was 18 years old did not render the departure improper.

United States v. Scrivener, 189 F.3d 944 (9th Cir. 1999). The district court did not err in departing upward based on the targeting of the elderly in a telemarketing scheme. The defendant pled guilty to nine counts of wire fraud resulting from a telemarketing scheme in which the defendants targeted senior citizens. The district court granted a two-level upward departure based on the fact that the sentencing guidelines do not adequately take into account consideration the unique evils inherent in telemarketing fraud upon the elderly. The defendant appealed, arguing that the district court already addressed the harm suffered by the elderly victims when it imposed the two-level vulnerable victim enhancement under USSG §3A1.1(b), and thus, the district court impermissibly "double counted." The appellate court rejected the defendant's argument, noting that the SCAMS Act (Senior Citizens Against Marketing Scams Act) reflected Congress' view that the guidelines did not adequately punish defendants who targeted the elderly. The appellate court stated that the district court decision to depart upwards along with a vulnerable victim enhancement, comports with the holdings in the Sixth and Tenth Circuits which have granted upward departures in similar cases. *See United States v. Brown*, 147 F.3d 477 (9th Cir.), *cert. denied*, 525 U.S. 918 (6th Cir. 1998), and *United States v. Smith*, 133 F.3d 737 (10th Cir. 1997), *cert. denied*, 524 U.S. 920 (1998), *cert. denied*, 532 U.S. 1057 (2001). Thus, the appellate court concluded that it was not impermissible double counting if a court departs based on a court's finding that the guidelines did not adequately take into consideration the unique evils inherent in telemarketing fraud upon the elderly, and applies a USSG §3A1.1(b) enhancement based on vulnerable victim.

United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994). The district court erred in refusing to consider whether the defendant warranted a downward departure from his guideline sentence on the basis of sentencing entrapment. The defendant was a user and infrequent seller of LSD, but was not predisposed to sell the amount of LSD required by the government agent. The district court had agreed that sentencing entrapment should be recognized as a proper ground for departure, but declined to depart because it believed it lacked the authority to do so. The circuit court noted that the First and Eighth Circuits have decided that sentencing entrapment may be a valid basis for a downward departure in some instances, but that the Eleventh Circuit had rejected the sentencing entrapment theory. *See United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992); *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir.), *cert. denied*, 499 U.S. 968 (1991); *but see United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992), *cert. denied*, 517 U.S. 1157 (1996) (other grounds) (rejecting sentencing entrapment). In deciding an issue of first impression in the Ninth Circuit, the appellate court concluded that the presence of sentencing entrapment may be the basis for a downward departure. In this case, the court found that such a downward departure was warranted because the defendant was not predisposed "to involve himself . . . in an immense amount of drugs." The circuit court noted that its findings were consistent with both the recent amendment to the guidelines allowing departures in certain instances where the government structures a reverse sting operation, *see* USSG §2D1.1, comment. (n. 17) (Nov. 1993), and with sentencing factors prescribed by Congress.

United States v. Stevens, 197 F.3d 1263 (9th Cir. 1999). The court held that the determination of whether the defendant's conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant's conduct with that of other offenders. The court reasoned that the defendant's substantial number of "old" images of child pornography was typical of heartland cases under USSG §2G2.4. Consistent with the Second and Eighth Circuits, the court held that the defendant's failure to engage in additional wrongful conduct is impermissible as a grounds for departure when sentencing for the crime of possession of child pornography. The court further held that the use of a computer is equally inappropriate to prove the defendant as less culpable when the same factor is provided as a sentencing enhancement under USSG §2G2.4.

United States v. Walker, 27 F.3d 417 (9th Cir.), *cert. denied*, 513 U.S. 955 (1994). The district court did not err in denying the defendant a downward departure based on "self-inflicted punishment." The defendant argued at his sentencing that he was entitled to a downward departure because he suffered anxiety attacks, had difficulty sleeping and was placed on antidepressant drugs. The circuit court concluded that what the defendant suffered was nothing more than post-arrest emotional trauma, which is a natural result of being charged with a crime. The court cited the Sixth Circuit to support its conclusion that allowing such departures would result in barrage of disingenuous claims. *United States v. Harpst*, 949 F.2d 860 (6th Cir. 1991) (rejected suicidal tendencies as departure basis because it would create boilerplate appeals for every defendant).

United States v. Zamora, 37 F.3d 531 (9th Cir. 1994). The district court erred in departing upward. The defendant defrauded DEA agents by selling them less than the agreed

amount of cocaine. The district court departed upwards five levels based on its finding that there is a greater risk of violence during an attempted drug fraud than an actual drug sale. The extent of the departure was calculated by way of analogy to the fraud guideline. The circuit court determined that the danger of violence was an aggravating factor already taken into account by the guidelines since the guidelines provide for sentencing enhancements for possession of a weapon during a drug trafficking offense. "Possession of a gun . . . is dangerous precisely–and only–because it may be used when one drug trafficker tries to cheat or rob another or when law enforcement officials try to apprehend a drug trafficker." Further, the defendant's mandatory five-year sentence pursuant to 18 U.S.C. § 924(c)(1) adequately reflected the increased likelihood of violence associated with the fraudulent drug sale.

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

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to USSG §5K2.3 based on the psychological damage suffered by the family of a missing child when he falsely reported that he knew the whereabouts of the child's body and the identity of her assailant. The appellate court affirmed the departure, holding that the family was singled out by the defendant, and thus, along with the government, was a victim of his false statements. Furthermore, the evidence supported the finding that the child's mother suffered serious psychological injury and physical impairment. The appellate court also rejected the defendant's assertion that the departure would constitute impermissible double counting because the conduct was already punished under the Vulnerable Victim adjustment of USSG §3A1.1. "There is no double counting if the extra punishment is attributable to different aspects of the defendant's criminal conduct." Section 5K2.3 focuses on the harm the defendant caused his victims, USSG §3A1.1 punishes the defendant for his choice of a victim who is vulnerable to his offense.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court erred in making an upward departure based on its finding that the defendant's conduct resulted in property damage or loss not taken into account by the guidelines, where the defendant caused a fatal automobile accident while he was intoxicated. The circuit court noted that the district court's calculation of $165,000 in damages included only $13,595.43 actually due to property damage. The remainder was based on consequential financial losses to the victim's widow. A departure under USSG §5K2.5, the circuit court reasoned, may be based only on property damage or loss, and not other harms. In this case, the circuit court noted, the amount of actual property damages attributable to the defendant's conduct was not sufficient to warrant an upward departure.

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

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court erred in making an upward departure based on a finding that the defendant's conduct resulted in a significant disruption of governmental function and significantly endangered the public welfare, where the defendant caused an automobile accident resulting in the death of an officer of the Arizona

Department of Public Safety. The circuit court held that the evidence on which the departure was based, namely testimony from the victim's co-worker that the victim's death negatively affected other co-workers' concentration at work, was insufficient to support a finding that the department's functioning was significantly impaired or that the public welfare was significantly endangered. The fact that officers were stressed by the victim's death, the circuit court reasoned, did not demonstrate any actual disruption of police activity.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to USSG §5K2.8, which punishes extreme conduct which was unusually heinous, cruel, degrading, or brutal to the victim. In this case, the court properly departed based on the defendant's deliberate false statements that he knew the whereabouts of the body of a missing eight-year-old girl and the identity of her assailant. The focus is on whether the defendant's actions were "unusually cruel or degrading within the universe of obstruction of justice and lying to the FBI and the grand jury." The crimes for which the defendant was sentenced "do not account for extreme cruelty or degradation." The district court properly departed.

United States v. Quintero, 21 F.3d 885 (9th Cir. 1994). The district court did not err in departing upward based on USSG §5K2.8, but its failure to adequately explain the extent of the departure warranted a remand. The defendant argued that a departure for extreme conduct did not apply to acts committed after the victim died. The Ninth Circuit concluded that the heinous treatment of the victim's body clearly fell within the scope of "extreme conduct." Further, even if departures based on extreme conduct were limited to live victims, an upward departure would nonetheless be warranted under USSG §5K2.0 because there is no evidence that the Commission considered acts as extreme as the defendant's when it promulgated the guideline for voluntary manslaughter. *See* USSG §2A1.3. However, since the district court did not fully explain the reason for "the extent of its departure with reference to the structure, standards, and policies of the Act and the guidelines," *United States v. Hicks*, 997 F.2d 594 (9th Cir. 1993); *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (*en banc*), remand was necessary.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993). The Ninth Circuit held that post-traumatic stress disorder can support a downward departure for diminished capacity where it reduces a defendant's mental capacity, where the reduction is significant, where there is a nexus between the reduced capacity and the offense, and where §5K2.13 does not otherwise preclude the departure. Considering the case of a defendant who was convicted of being a felon in possession of a firearm and who argued that his post-traumatic stress disorder from his experiences in Vietnam mitigated his conduct, the Ninth Circuit held that §5K2.13 covered emotional illness (along with mental illness). The Ninth Circuit further held that a defendant may be eligible under §5K2.13 regardless of the severity of the condition so long as the condition has the effect of significantly reducing the defendant's mental capacity, and there is some degree of causation between the mental capacity and the commission of the crime. In

addition, the Ninth Circuit held that a defendant is not disqualified from the departure if his reduced capacity is caused *in part* by voluntary drug or alcohol use, so long as this use is not the sole cause of the reduced capacity. Throughout, the Ninth Circuit emphasized that the purpose of the guideline is "lenity toward defendants whose ability to make reasoned decisions is impaired."

United States v. Davis, 264 F.3d 813 (9th Cir. 2001). The district court concluded that the defendant suffered from an extraordinary mental disease but found that his substantial criminal history demonstrated a need for incarceration to protect the public, and, thus, precluded a departure under USSG §5K2.13. The court affirmed this legal conclusion. It further rejected defendant's challenge to the adequacy of the district court's finding that his criminal history demonstrates a need to protect the public. The parties disputed whether protecting the public requires a court to predict future crimes by the defendant or to predict future violence (or the threat of violence). Because the defendant's criminal history demonstrates a need to protect the public from both, the court did not resolve that question and affirmed the district court's ruling.

United States v. Dela Cruz, 358 F.3d 623 (9th Cir. 2004). The defendant appealed his conviction of making telephonic bomb threats. The defendant argued, on appeal, that his threat did not involve a serious threat of violence. The court of appeals held that the defendant fully intended his threat to cause immediate disruption, and noted that he admitted that the threat was made to force the postponement of collection proceedings against him that were set for hearing on the date of the threat. The Ninth Circuit concluded that the district court did not err in deeming the defendant ineligible for a departure under §5K2.13.

United States v. Smith, 330 F.3d 1209 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1096 (2004). The Ninth Circuit affirmed the district court's interpretation that it could not depart downward on the basis of extraordinary circumstances surrounding the defendant's mental condition where the defendant did not meet the criteria set forth in §5K2.13. The district court found that the defendant was suffering from an extraordinary mental condition but that he did not meet the requirements for a downward departure pursuant to §5K2.13. Therefore, the district court concluded that it lacked the discretion to depart. Joining the Fifth Circuit, the Ninth Circuit affirmed, holding that the district court lacked discretion to depart either under §5K2.0 or *Koon v. United States*, 518 U.S. 81 (1996), which permit departures on grounds not adequately considered by the Commission. Because mental condition was adequately taken into consideration in §5K2.13, the district court could not depart unless the defendant qualified for a departure under §5K2.13.

United States v. Walter, 256 F.3d 891 (9th Cir. 2001). The Ninth Circuit reversed and remanded the defendant's case for the district court to grant an evidentiary hearing so that the defendant can substantiate his expert's conclusions that there was a connection between the defendant's history of abuse and his crime.[27] The defendant, who was convicted of several

[27]The Ninth Circuit also addressed the denial of defendant's request for downward departure based on his extraordinary history of child abuse. The court reversed and remanded the case with instructions to grant the defendant an evidentiary hearing to substantiate his claims of his abuse.

crimes involving threatening the President of the United States, requested a downward departure on the grounds of his extraordinary history of childhood abuse and his diminished capacity. The district court's decision not to depart downward on the grounds of diminished capacity was primarily due to a reference in the defendant's psychological report that the defendant had a tendency to be "manipulative" and was based on a determination by the district court that the defendant's crime constituted a "serious threat of violence" under USSG §5K2.13(2). *Id.* at 895. On appeal, the court concluded that this decision was erroneous because all the evidence showed that the defendant did not possess any real intent to cause physical harm to the President or any other person. *Id.*

§5K2.20 Aberrant Behavior[28]

United States v. Guerrero, 333 F.3d 1078 (9th Cir. 2003). The appellate court vacated and remanded the district court's sentence because the district court did not make the required findings to grant a downward departure based on §5K2.20 aberrant behavior. The defendant pled guilty to conspiracy to possess marijuana with intent to distribute. On appeal, the government challenged the district court's downward departure based on aberrant behavior. The Ninth Circuit noted that §5K2.20 was enacted on November 1, 2000, and that this new section was an issue of first impression for the court. Prior to the enactment of §5K2.20, the Ninth Circuit had adopted a "totality of the circumstances" approach regarding the determination of aberrant behavior. Section 5K2.20, however, rejected this approach. The court noted that only the Third and Eighth Circuits had considered the application of §5K2.20. *See United States v. Castano-Vasquez*, 266 F.3d 228, 235 (3d Cir. 2001); *United States v. Jimenez,* 282 F.3d 597, 602 (8th Cir. 2002). The court joined these circuits in their analysis of this section. When applying §5K2.20, the sentencing court must conduct two separate and independent inquiries, both of which the defendant must satisfy before a departure can be granted. First, the court must determine whether the defendant's case is extraordinary and whether the defendant's conduct constituted aberrant behavior. Then, the offense conduct to be considered as aberrant behavior must have the following three characteristics: the conduct was (A) committed without significant planning; (B) was of limited duration; and (C) represented a marked deviation by the defendant from an otherwise law-abiding life. In the instant case, the district court did not determine that the defendant's case was extraordinary or that her offense conduct had the characteristics concerning planning, duration, and deviation from an otherwise law-abiding life. Accordingly, the district court's sentence was vacated and the case was remanded for resentencing.

See United States v. Lam, 20 F.3d 999 (9th Cir. 1994), §2K2.1, p. 26.

United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002). In a cocaine importation case, the Ninth Circuit remanded for resentencing where the district court departed downward for aberrant conduct without either making a specific finding with regard to the controverted

[28]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended the guidelines by adding language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

matter of whether the defendant admitted to a customs officer that he had crossed the border numerous times with cocaine in the week prior to his arrest, or stating that it would not affect the sentencing decision. The defendant's sentence resulted from a four-level downward departure based on aberrant behavior. The government appealed because it had asserted that the defendant admitted making numerous crossings in the week prior to the arrest, the defendant had denied the admission, and the district court had declined to make a finding. Noting that §5K2.20 only permits departures for aberrant behavior for a "single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law abiding lifestyle," the Ninth Circuit held that the district court was required to either make a finding regarding the controverted admission or hold that it would not consider the matter in its sentencing decision. Recognizing that Rule 32(c)(1)'s requirement that sentencing courts expressly resolve conflicts is more frequently invoked by defendants, the court held that the government is nevertheless also entitled to the express resolution of conflicts. Therefore, the Ninth Circuit remanded for the district court's strict compliance with Rule 32(c)(1).

United States v. Vieke, 2003 U.S. App. LEXIS 22565 (9th Cir. Nov. 3, 2003). The appellate court affirmed the district court's sentence, noting that the court did not need to address the government's argument because it failed to preserve the issue on appeal. The defendant entered a guilty plea to one count of identity theft in violation of 18 U.S.C. § 1028(a)(7). At the sentencing, the defendant requested a departure on the basis of diminished capacity pursuant to guideline §5K2.13, contending that she suffered from a compulsive gambling disorder. She also requested a departure on the basis of aberrant behavior pursuant to §5K2.20. The district court declined to depart on the basis of diminished capacity, noting that defendant's behavior was volitional, but the district court granted a departure on the basis of aberrant behavior. The district court stated the departure was justified because there was probably a coupling of pathological nature of the gambling addiction that she had and it was totally out of suit with the rest of her life and apparently was exhibiting since the charges in this case. The district court granted a four-level departure on the basis of section 5K2.20 and sentenced the defendant to five years' probation and ordered her to pay restitution in the amount of $51,536.37. The government appealed. The Ninth Circuit stated that it need not address the district court's application of §5K2.20 because the government's purported objection to the aberrant behavior departure failed to preserve the issue on appeal. Accordingly, the district court's sentence was affirmed.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hinojosa-Gonzalez, 142 F.3d 1122 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998). The district court erred by departing upward based on grounds of which the defendant did not receive adequate notice. Although the defendant knew the court might depart based on criminal history, the court ultimately departed on other grounds–a combination of prior

unpunished criminal conduct and extraordinary drug quantity–which were not advanced until the sentencing hearing. The court of appeals emphasized that the defendant is entitled to notice of both the factual an legal grounds for upward departure.

§6A1.3 Resolution of Disputed Factors

United States v. Berry, 258 F.3d 971 (9th Cir. 2001). The district court did not abuse its discretion in relying on the hearsay statements of codefendants to enhance the defendant's sentence under USSG §3B1.1(a). USSG §6A1.3(a) provides that such evidence can be considered "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The court has qualified the admissibility of hearsay at sentencing by requiring that such statements have "some minimal indicia of reliability." *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993).

See United States v. Culps, 300 F.3d 1069 (9th Cir. 2002), §2D1.1, p. 17.

United States v. Herrera-Rojas, 243 F.3d 1139 (9th Cir. 2001). The Ninth Circuit emphasized that it is mandatory for the district court to resolve disputed factors, or state that disputed factors would not be considered, on the record.

See United States v. Leyva-Franco, 311 F.3d 1194 (9th Cir. 2002), §5K2.20, p. 90.

United States v. Pinto, 48 F.3d 384 (9th Cir.), *cert. denied*, 516 U.S. 841 (1995). The district court did not err in considering at the defendant's sentencing hearing evidence that was not included in either the stipulation of facts in his plea agreement or the sentencing report. The district court judge had considered testimony relating to a delivery of cocaine based on the judge's own recollection of evidence presented at a codefendants' trial. The defendant argued that consideration of this testimony was improper because he was not given notice that it would be used against him at his sentencing hearing. The circuit court acknowledged that the evidence to which the defendant objected clearly came from his codefendants' trial. However, because the defendant made no objections to use of this evidence at his sentencing hearings, did not challenge the substance of the evidence on appeal, and because the district court relied on evidence of numerous other incidents, the circuit court ruled that consideration of the disputed evidence did not constitute plain error.

Part B Plea Agreements

§6B1.1 Plea Agreement Procedure (Policy Statement)

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994). The district court erred in departing downward based on its conclusion that "exceptional circumstances" justified disregarding the terms of the defendant's accepted Rule 11(e)(1)(C) plea agreement. The circuit court, citing Ninth Circuit precedent, reasoned that while an "exceptional case" may occasionally warrant a downward departure after initial sentencing, such a reduction may only be granted in response to

a Rule 35(b) motion. Here, the defendant made no Rule 35(b) motion. The circuit court rejected the defendant's argument that the government's 5K1.1 motion gave the sentencing court discretion to depart downward "as much as it deemed appropriate without regard for the terms of the agreement." The Ninth Circuit, citing to the Second Circuit's decision in *United States v. Cunavelis*, 969 F.2d 1419 (2d Cir. 1992), as well as the sentencing guidelines and legislative history of Rule 11, held that the dictates of Rule 11 trump the discretion afforded the district court under USSG §5K1.1.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part A Introduction to Chapter Seven

United States v. Trenter, 201 F.3d 1262 (9th Cir. 2000). The district court did not err when it reinstated the defendant's term of supervised release under 18 U.S.C. § 3583(e) after he violated conditions of the release. Upon his conviction for aiding and abetting armed bank robbery, the defendant received a sentence which included five years of supervised release. After having served less than two months of that supervised release, the defendant violated several of its conditions when he fled the state. When the police arrested him two years later, the district court reinstated the original five-year term of supervised release, tolling the two years that the defendant was a fugitive. The defendant challenged this reinstatement, arguing that section 3583(e) does not grant judges the authority to reinstate an original term of supervised release after the defendant violates it. Section 3583(e) requires that courts consider the factors listed in 18 U.S.C. § 3553(a), which include "'the applicable guidelines and policy statements issued by the Sentencing Commission.'" *Id*. at 1263 (quoting 18 U.S.C. § 3553(a)(4)(B)). Based on a Commission policy statement stating that "when a court finds that a defendant has violated a condition of supervised release, 'it may continue the defendant on supervised release, with or without extending the term or modifying the conditions,'" the court affirmed the sentence, holding that district courts do have the authority under section 3583(e) to reinstate an original term of supervised release after the defendant has violated its conditions. *Id*. (quoting USSG Ch. 7, Pt. A, intro. comment. 2(b)).

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations (Policy Statement)

United States v. Jolibois, 294 F.3d 1110 (9th Cir. 2002). The Ninth Circuit held that the district court properly determined that defendant's simple possession of drugs was a Grade B supervised release violation under state law that allowed punishment exceeding a year, although it would have been a Grade C violation if punished under federal law. Although the offense was arguably both a Grade B violation (under state law) and a Grade C violation (under federal law), the Ninth Circuit noted that the guidelines themselves provide that if violation includes conduct that constituted more than one offense, the most serious grade applies.

§7B1.2 Reporting of Violations of Probation and Supervised Release (Policy Statement)

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999). The Ninth Circuit, in an issue of first impression, held that pretrial detention does not operate to toll a term of supervised release under 18 U.S.C. § 3624(e), which provides for tolling "during any period in which the person is imprisoned in connection with a conviction . . . unless the imprisonment is for a period of less than 30 consecutive days." The defendant pled guilty in 1995 to illegal reentry by an alien in violation of 8 U.S.C. § 1326(a), and received a two-year sentence followed by a one-year term of supervised release. The defendant's term of supervised release commenced on February 4, 1997. On October 21, 1997, he was indicted on a charge of illegal reentry and thereafter was placed in pretrial detention. He pled guilty on February 2, 1998. On February 18, 1998, while awaiting sentence on the new reentry offense, the district court judge revoked the one year supervised release term from the 1995 offense and imposed a one-year imprisonment term to run consecutive to the sentence imposed on the new reentry conviction. The defendant appealed the revocation of the supervised release term, arguing that the expiration of his supervised release which should have ended on February 4, 1998, deprived the district court of jurisdiction to revoke the term. The appellate court agreed with the defendant and concluded that 18 U.S.C. § 3624(e) provides for tolling when the person is "imprisoned" in connection with a conviction." The appellate court stated that pretrial detention does not fit this definition because a person in pretrial detention has not been convicted and might never be convicted. Thus, the appellate court reversed and remanded with instructions to vacate the order revoking the defendant's one-year supervised release term.

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

United States v. Garcia, 323 F.3d 1161 (9th Cir.), *cert. denied*, 124 S. Ct. 842 (2003). The Ninth Circuit held that a district court need not provide a defendant with notice before imposing a sentence upon revocation of probation that falls outside the Chapter 7 policy statements, so long as the court considers the policy statements before imposing sentence. The Ninth Circuit had previously held that Chapter Seven sentencing ranges were advisory, rather than binding, and that so long as the court considers the policy statements, it could impose any term up to the statutory maximum available. *See, e.g., United States v. George*, 184 F.3d 1119 (9th Cir. 1999). The Ninth Circuit joined the Second, Fifth, Eight, Tenth, and Eleventh Circuits in reasoning that a sentence outside the recommended range was not a departure; therefore, no notice need be given.

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court did not err in imposing a three-year term of supervised release upon resentencing the defendant after probation revocation.

See United States v. Steffen, 251 F.3d 1273 (9th Cir.), *cert. denied*, 534 U.S. 1062 (2001), §5G1.3, p. 77.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996). The district court did not err in imposing a $1.5 million fine on the defendant organization. No statute or guideline precludes imposition of a fine on a defendant organization merely because it jeopardizes their continued viability. The defendant argued that the district court's determination of the restitution amount was contrary to USSG §8C3.3 in that the amount imposed had potentially devastating implications to the corporation. The circuit court disagreed, and held that USSG §8C3.3 permits, but does not require, a court to reduce a fine upon a finding that the defendant organization is not able to pay it. The only time that a fine reduction is mandated by USSG §8C3.3 is when the amount of the fine would impair the defendant's ability to pay restitution to the victim(s). In the instant case, the defendant organization was able to make restitution to the government, therefore, the plain language of USSG §8C3.3 did not require the district court to further reduce the fine.

See United States v. Canon, 66 F.3d 1073 (9th Cir. 1995), *cert. denied*, 531 U.S. 885 (2000), §4B1.4, p. 67.

See United States v. Chea, 231 F.3d 531 (9th Cir. 2000), §5G1.3, p. 74.

See United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994), §2T1.1, p. 39.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Jernigan, 60 F.3d 562 (9th Cir. 1995). The district court did not violate the double jeopardy clause in sentencing the defendant to consecutive sentences. The defendant failed to appear at trial for counterfeiting and conspiracy charges, and the district court enhanced his sentence for "obstruction of justice" by two levels under USSG §3C1.1. The defendant was separately indicted for failure to appear under 18 U.S.C. § 3146(a)(1), and sentenced to five months on the charge to run consecutively to his sentence for the counterfeit and conspiracy charges. The defendant argued that he was already punished for his failure to appear by the enhancement applied to his earlier sentence, and that the sentence violated double jeopardy. The circuit court, relying on *Witte v. United States*, 515 U.S. 389 (1995), *cert. denied*, 519 U.S. 1120 (1997), concluded that the subsequent imposition of a consecutive sentence for the defendant's failure-to-appear offense was not a double jeopardy violation where that offense had been taken into account for previous sentencing on the counterfeit and conspiracy charges. The circuit court stated "[b]ecause the defendant's punishment in the first case fell "within the range authorized by statute," his double jeopardy claim necessarily fails."

Eighth Amendment

United States v. Parker, 241 F.3d 1114 (9th Cir.), *cert. denied*, 534 U.S. 856 (2001). A jury convicted the defendant under 18 U.S.C. §§ 2113(a) and (d), as well as 18 U.S.C. § 924(c), for conspiracy, bank robbery, and firearms violations. The district court imposed a sentence of 300 months for Section 924(c) weapons violations, which the defendant argues is cruel and unusual punishment. Citing cases where both the Supreme Court and this circuit have upheld more severe sentences, the court affirmed this portion of the sentence. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (holding that a state drug possession statute that imposes a mandatory life sentence without the possibility of parole does not violate the Eighth Amendment); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998), *cert. denied*, 528 U.S. 830 (1999) (holding that mandatory consecutive sentences of 1141 and 597 months for codefendants who had violated Section 924(c) did not violate the Eighth Amendment); *see also United States v. Wilkins*, 911 F.2d 337, 339 (9th Cir. 1990) (ruling that mandatory minimum sentences for Section 924(c) violations were constitutional).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Arellano-Gallegos, 351 F.3d 966 (9th Cir. 2003). The defendant appealed his 51-month sentence imposed following his guilty plea to illegal re-entry after deportation. In his written plea agreement, the defendant agreed to waive his right to appeal the imposition of sentence. The Court of Appeals found that the magistrate judge who took the defendant's plea upon consent failed to adhere to the requirements of Rule 11 regarding the waiver of appeal. Furthermore, the magistrate judge filed with the district court "Findings and Recommendation Upon a Plea of Guilty and District Judge's Acceptance of Plea of Guilty," but these findings and recommendations omitted any reference to the waiver of appeal. The district court still accepted the defendant's plea of guilty. No mention of the waiver of appeal was ever made in open court until the time of sentencing on April 25, 2001, when, in passing, the district court noted that "the record shows that [the defendant] waived his right to appeal." The Ninth Circuit concluded that, given these facts, the failure to comply with Rule 11 constituted plain error within the meaning of *United States v. Vonn*, 535 U.S. 55, 59 (2002). The court held that neither the magistrate judge nor the district court ascertained whether the defendant's waiver of appeal was knowing and voluntary "before" the acceptance of the plea, as Rule 11 requires. The court noted that the sentencing judge's comment "The record shows he waived his right to appeal," did not satisfy the requirements of Rule 11. The sentencing judge neither "addressed the defendant personally" regarding the waiver nor "determined" that the defendant "understood" the meaning of the waiver. The court thus held that because there was a "wholesale failure" to comply with Rule 11 or otherwise ensure that the defendant understood the consequences of waiving his right to appeal the sentence which had yet to be imposed, the enforcement of the waiver would seriously affect the fairness, integrity and public reputation of plea proceedings. Therefore, the court of appeals reversed and remanded the district court's decision.

United States v. Cervantes-Valencia, 322 F.3d 1060 (9th Cir. 2003). The Ninth Circuit held that the district court erred by accepting a binding plea agreement to a 30-month sentence, then imposing 20-month sentence to credit the defendant for ten months served on a state sentence. The defendant had entered into a binding plea agreement that provided for a 30-month sentence. At sentencing, the defendant advised the Court that he had been in custody for ten months for a parole violation stemming from the same conduct as his federal conviction: illegal entry into the United States. The district court accepted the plea agreement, but imposed a 20-month sentence to credit the defendant for the ten months spent in state custody. On appeal, the government argued that the district court was required to either impose the 30-month sentence specified in the plea agreement or allow the parties to void the agreement. The Ninth Circuit agreed, noting that the district court did not apply any provision of the guidelines or any default rule requiring the court to credit the defendant 10 months against the 30-month term.

United States v. Reyes, 313 F.3d 1152 (9th Cir. 2002). The Ninth Circuit held that the district court erred in imposing a sentence that exceeded the specific terms of binding plea agreements, where the defendants had not satisfied the conditions on which the agreements were premised. The defendants entered binding plea agreements under former Rule 11(e)(1)(C), which required their full cooperation with the government, and pursuant to which the government agreed to move under §5K1.1 for a departure to 120 and 150 months respectively. Neither defendant ever cooperated. Instead, first the defendants, then the government joined by the defendants, moved to void the plea agreements and set aside the pleas. The district court refused, finding that the portions of the plea agreements dealing with cooperation and §5K1.1 motions were severable. At sentencing, the district court sentenced the defendants pursuant to the guidelines without the benefit of the §5K1.1 motions. The defendants appealed, and the Ninth Circuit held that the district court had erred in sentencing the defendants to terms higher than those stipulated in the binding plea agreements. The district court's only options were to accept the plea agreements and sentence as provided therein, or to reject the agreements and allow the defendants to withdraw their pleas. In light of the district court's statements that it believed the defendants had attempted to manipulate the system, the Ninth Circuit remanded the case to a different district court judge.

United States v. Villalobos, 333 F.3d 1070 (9th Cir. 2003). The defendant pled guilty to a drug offense and stipulated to a range of drug quantity. The defendant appealed, contending that the plea colloquy under Fed. R. Crim. P. 11 was inadequate because it failed to advise him that the government was required to prove drug quantity beyond a reasonable doubt to expose defendant to a sentence beyond the statutory maximum. The government conceded that the colloquy failed to advise defendant of the government's burden of proof but argued that the error was harmless because defendant understood the significance of drug quantity and stipulated to quantity. The appellate court held, however, that the district court violated Rule 11 by not informing defendant of the nature of the charges against him, the error was not harmless, and defendant was thus entitled to enter a new plea. Drug quantity was a critical element of defendant's offense and defendant's understanding of the significance of such quantity did not change the fact that he was unaware that the government had to prove drug quantity beyond a reasonable doubt. Further, defendant's stipulation concerning quantity did not establish that

defendant would have pled guilty in any event, and there was very little actual evidence to as to the quantity involved.

Rule 35

United States v. Doe, 351 F.3d 929 (9th Cir. 2003). This is an issue of first impression. The defendant pled guilty to conspiracy to import cocaine. The district court sentenced him to 210 months in prison. The district court later corrected that sentence and later still reduced it pursuant to Fed. R. Crim. P. 35(b). The district court then declined the Government's second Rule 35(b) motion. The defendant appealed, arguing that the judge committed an error of law by considering factors unrelated to his substantial assistance to the Government in refusing to depart to the extent requested by the Government's Rule 35(b) motion. The government asserted that the district court properly considered factors other than the defendant's substantial assistance in denying his second motion for a downward departure. The Ninth Circuit agreed and affirmed. The defendant argued that the language of Rule 35(b) requires a district court to consider only a defendant's substantial assistance in deciding whether to reduce a custodial sentence. Because this issue is one of first impression, the defendant urged the court to adopt the Eleventh Circuit's reasoning in *United States v. Chavarria-Herrara*, 15 F.3d 1033 (11th Cir. 1994), and hold that a district court may not consider factors other than the defendant's assistance in contemplating a Rule 35(b) sentencing reduction. In *Chavarria-Herrara*, the district court granted a Rule 35(b) reduction based on factors other than the defendant's substantial assistance. In *United States v. Manella*, 86 F.3d 201 (11th Cir. 1996), the Eleventh Circuit clarified *Chavarria-Herrara*, and held that "the only factor that may militate *in favor of* a Rule 35(b) reduction is the defendant's substantial assistance. Nothing in the text of the rule purports to limit what factors may militate *against* granting a Rule 35(b) reduction," or "the factors that may militate in favor of granting a smaller reduction." *Id*. at 204 (emphasis in original). The court noted that the district court denied a Rule 35(b) reduction based on factors other than the defendant's assistance. The district court weighed several factors against the defendant's substantial assistance, including the nature of the cocaine importation conspiracy to which he pled guilty; the extent and duration of his participation in the cartel; the massive amount of cocaine he was importing; and the sentencing reductions the court had already awarded. The Court of Appeals held that the district court's consideration of these factors was proper under 18 U.S.C. §§ 3553 and 3582, and concluded that nothing in the language of Rule 35(b) prohibits the district court from considering these factors in denying the government's motion to reduce Doe's sentence. Therefore, the court joined the Eleventh Circuit and held that in denying a Rule 35(b) motion, a district court's consideration of relevant factors other than a defendant's substantial assistance to the government is a proper exercise of its discretion.

See United States v. Mukai, 26 F.3d 953 (9th Cir. 1994), Ch. 1, Pt. A, p. 92.

United States v. Portin, 20 F.3d 1028 (9th Cir. 1994). The district court exceeded its authority under Fed. R. Crim. P. 35 when it increased the defendants' fines at resentencing. The defendants' original sentencing was vacated because of Fed. R. Crim. P. 11(e) violations. On remand, the sentencing court not only corrected the terms of the defendants' sentences to conform to their plea agreements, but also increased the fines originally imposed. However,

Fed. R. Crim. P. 35 authorizes only the correction of sentences that were imposed illegally; thus the district court is not permitted to reconsider or reopen issues which were resolved at the initial sentencing. Since there were no errors as to the defendants' fines, the circuit court vacated and remanded for further action.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924

United States v. Harris, 154 F.3d 1082 (9th Cir. 1998), *cert. denied*, 528 U.S. 830 (1999). After being found guilty of multiple counts of armed robbery and use of a firearm during and in relation to a crime of violence, the defendants were sentenced to the statutory mandatory minimums 1,141 months (95 years) and 597 months (49.75 years) respectively. The defendants argued that these sentences constitute cruel and unusual punishment in violation of the Eighth Amendment. The court of appeals rejected the defendants' contention that the sentences violate the Eighth Amendment because they are disproportionate to their crimes. Armed robberies are extremely dangerous crimes. Moreover, Congress mandated the sentences, and a sentence which is within the limits set by a valid statute may not be overturned as cruel and unusual. The court has previously upheld the section 924(c) mandatory minimums and upheld multiple consecutive sentences under the statute. The state has a legitimate interest in treating repeat offenders more severely than first offenders. Thus, the court of appeals stated it could not find the defendants' sentences grossly disproportionate to their crimes. The court did express concern that some level of discretion should be vested with the courts to consider mitigating circumstances in cases such as these, and urged Congress to reconsider the harsh scheme of mandatory minimums.

See United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998), *cert. denied*, 526 U.S. 1052 (1999), §4B1.4, p. 68.

21 U.S.C. § 841

United States v. Rodriguez-Sanchez, 23 F.3d 1488 (9th Cir. 1994). In addressing an issue of first impression, the circuit court reversed the district court's imposition of the ten-year mandatory statutory sentence for possession of methamphetamine with intent to distribute, 18 U.S.C. § 841(b)(1)(A), which was based on the entire amount of methamphetamine found in the defendant's possession at the time of his arrest. The defendant argued that he only intended to distribute a portion of the amount he possessed and that his sentence should have been based only on this amount. The circuit court agreed. Section 841(a) of Title 21 criminalizes distribution, not mere possession, which is covered by other statutes. *See* 21 U.S.C. § 844. Relying on the principle announced in *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993), for a sentence governed by the guidelines ("[d]rugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not `part of the same course of conduct' or `common scheme' as drugs intended for distribution"), the circuit court held that the sentence for possession with intent to distribute a narcotic substance, under the statutory penalty provisions of 21 U.S.C. § 841(b)(1)(A), should also be based only on the amount

intended for distribution. Accordingly, the defendant's sentence was vacated and remanded for a factual determination of the amount of methamphetamine the defendant intended to distribute.

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

United States v. Buckland, 289 F.3d 558 (9th Cir.), *en banc*, *cert. denied*, 535 U.S. 1105 (2002). In a fractured decision, the Ninth Circuit held that 21 U.S.C. § 841(b)(1)(A),(B) is not facially unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The defendant-appellant was sentenced to 292 months, based on the district court's finding that he possessed eight kilograms of methamphetamine with intent to distribute, despite the fact that the statutory maximum penalty for possession with intent to distribute an unstated amount of methamphetamine is 20 years. On appeal, he argued that, as a solid wall of authority had held that drug type and quantity in the federal drug statute were sentencing factors to be determined by the court at sentencing, and as *Apprendi* rendered unconstitutional a scheme whereby the maximum sentence to which a defendant is exposed is found by the court, the penalty provisions of the federal drug statute were facially unconstitutional. The court, sitting *en banc*, rejected this argument and held that the factors that set the statutory maximum sentences–drug type and quantity–are sentencing factors that must nevertheless be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt.

Despite the fact that there was no jury finding of drug quantity at Buckland's trial, the Ninth Circuit nevertheless affirmed his sentence, which erroneously exceeded the 20-year statutory maximum for a single conviction of possession with intent to distribute methamphetamine, on two grounds: (1) it did not constitute *plain error* in light of the overwhelming evidence with regard to drug quantity, and (2) the 292-month sentence did not exceed the statutory maximum sentence because the defendant was convicted of four separate counts, each of which exposed him to a 20-year maximum sentence. The Court explicitly approved of this latter method of "stacking" statutory maxima, so that multiple convictions for related conduct would support consecutive sentences, each at the statutory maximum. *See also United States v. Hernandez*, 322 F.3d 592 (9th Cir. 2003) (affirming the validity of *Buckland* after *Harris v. United States*, 536 U.S. 545 (2002)).

United States v. Carranza, 289 F.3d 634 (9th Cir.), *cert. denied*, 537 U.S. 1037 (2002). The Ninth Circuit held that 18 U.S.C. § 960 was facially constitutional, *see United States v. Buckland*, 289 F.3d 558 (9th Cir.) (*en banc*), *cert. denied*, 535 U.S. 1105 (2002), and that, even after *Apprendi*, the government is not required to prove the defendant knew the type and amount of drugs involved in an offense, but only that he knew he had some controlled substance in his possession.

United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002). The Ninth Circuit reversed life sentences for convictions for manufacturing methamphetamine because the sentences were in excess of the statutory maximum term allowed for the offenses of conviction and thus were in violation of *Apprendi*. The district court imposed life sentences based on the court's finding that more that 50 grams of methamphetamine were involved, but the quantity was neither charged in the indictment nor submitted to the jury. Because the defendant objected to this procedure before the district court, appellate review was for harmless, rather than plain, error. The Ninth

Circuit held that it could not find the error harmless beyond a reasonable doubt because it could only speculate as to what defenses the defendant could have raised to minimize the drug quantity. Moreover, the Ninth Circuit rejected the government's argument that a stipulation by the defendant at sentencing could cure the error because post-trial stipulations are irrelevant to the jury's findings. The Ninth Circuit therefore reversed and remanded for resentencing.

United States v. Minore, 292 F.3d 1109 (9th Cir. 2002), *cert. denied*, 537 U.S. 1146 (2003). As a matter of first impression, the Ninth Circuit held that the court must advise a defendant of the government's obligation to prove drug quantity to the jury beyond a reasonable doubt before accepting a guilty plea when the drug quantity exposes the defendant to higher statutory maximum than he would otherwise receive. The indictment set forth drug quantity as more than one thousand kilograms of marijuana. The defendant entered a plea agreement in which he stipulated to the quantity of marijuana and the applicable guidelines, but the plea agreement did not list drug quantity as an element of the offense and the district court did not advise the defendant prior to accepting his plea that the government bore the burden of proving drug quantity to the jury beyond a reasonable doubt. At sentencing, the defendant argued sentencing entrapment; without retreating from his stipulation on the quantity of marijuana involved, he argued that a certain portion should be disregarded. On appeal, the Ninth Circuit held that it was error for the district court to accept the defendant's plea without fully advising him of the nature of the charge–which includes an advisement on drug quantity if it affects the statutory maximum sentence. But because the defendant did not object below, the Ninth Circuit applied plain error review and found that the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings.

See United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001), §4B1.4, p. 68.

United States v. Velasco-Heredia, 319 F.3d 1080 (9th Cir. 2003). The Ninth Circuit held that *Apprendi* precluded the application of the mandatory minimum penalties in 21 U.S.C. § 841(b) in the absence of an allegation of drug quantity that would trigger the application of the mandatory minimum term in the indictment and proof to a jury beyond a reasonable doubt (or an admission in a guilty plea). The defendant pled guilty to one count of conspiring to distribute an unspecified quantity of marijuana. Although the defendant's sentencing guideline range was 37 to 46 months, the district court imposed a five-year mandatory minimum sentence. On appeal, the defendant argued that the district court erred in applying the mandatory minimum term where the indictment alleged no drug quantity. The government argued that, even without an allegation of drug quantity, the statutory maximum was 20 years, and therefore the district court could legally impose a five-year sentence. The Ninth Circuit rejected the government's argument that mandatory minimum terms could be imported from one penalty provision to another. Because the five-year minimum was tied to a 40-year maximum, and because the offense to which the defendant plead guilty could not constitutionally expose him to a 40-year maximum, the district court could not impose the five-year mandatory minimum.

United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000). The defendants, Hernandez-Guardado and Jiminez-Frias, were charged in a nine-count superseding indictment with conspiring to transport illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). In

addition to the conspiracy charge, defendant Jiminez-Frias was charged with one count of transporting an illegal alien and aiding and abetting. At the second trial, the defendant was convicted by the jury of all the charges against him. He objected to the recommendation in the presentence report (PSR) to apply the two-level enhancement under sentencing guideline §2L1.1(b)(5). *Id.* at 1024. However, at sentencing the court adopted the PSR's recommendation in support of the enhancement and sentenced the defendant to 51 months which fell within the applicable 51 to 63 months guideline range. On appeal, defendant Jiminez-Frias challenged the application of the enhancement under USSG §2L1.1(b)(5) as a violation of his Fifth and Sixth Amendment rights because the facts necessary to support the enhancement were not charged in the indictment and proven to the jury beyond a reasonable doubt, as required under the Apprendi rule. *Id.* at 1025. The court stated that it was clear from the record that the enhancement imposed by the district court related to defendant's conspiracy conviction. It further found that upon grouping the counts of conviction for defendant Jiminez-Frias, the resulting guideline range of 51 to 63 months did not exceed the ten-year statutory maximum for defendant's conspiracy conviction. The court held that because the defendant was not exposed to "a greater punishment than that authorized by the jury's guilty verdict" based upon the finding that the defendant intentionally or recklessly created a substantial risk of death or serious injury to another person, *Apprendi* was not implicated. *Id.* at 1027.

United States v. Kentz, 251 F.3d 835 (9th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002). The defendant was convicted by jury of telemarketing fraud. While on pretrial release, the defendant, in violation of the conditions of his release, continued to engage in telemarketing fraud. Subsequently, the defendant was charged with 24 counts of mail fraud in violation of 18 U.S.C. § 1341, and to enhanced penalties under section 2326, because the mail fraud was committed in connection with telemarketing, and to enhanced penalties under section 3147 because two of the 24 counts involved offenses committed while he was on pretrial release. The defendant was sentenced to 150 months on each of the mail fraud counts, a ten-month consecutive sentence pursuant to section 3147, and a three year supervised release term. On appeal the defendant argued section 3147 was unconstitutional on its face and as applied under *Apprendi* because the total sentence of 160 months exceeded the statutory maximum of five years for fraud convictions in violation of 18 U.S.C. § 1341. *Id.* at 841. He also argued that the two-level adjustment under USSG §3A1.1(b)(2), that was applied to the defendant based upon a preponderance determination by the court, ran afoul of *Apprendi*. *Id.* at 842-44. The court found that the defendant failed to show how section 1341 was incapable of being constitutionally applied and held that because the defendant's sentence did not exceed the statutory maximum for the offenses of conviction or affect his substantial rights, *Apprendi* was not violated. *Id.* at 841-42. It further held that no error plainly appeared regarding the adjustments because the indictment charged the age of the 11 victims, which ranged from 75-91 years; each testified about her age and the jury convicted the defendant on all counts. *Id.* at 844. *See also United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001) (Apprendi did not require firearm and abduction enhancements to be proven beyond a reasonable doubt); *United States v. Johansson*, 249 F.3d 848, 861 (9th Cir. 2001) (increase in the defendant's offense level by two levels under USSG §2F1.1(b)(6)(A) did not violate *Apprendi* because the defendant's 15-month sentence did not trigger a sentence that exceeded the defendant's prescribed statutory maximum of five years); *United States v. Ellis*, 241 F.3d 1096, 1104 (9th Cir. 2001) (imposition of the enhancement under

USSG §2J1.7 is not an Apprendi violation because the defendant's 87-month sentence was within the defendant's 120-month statutory range); *United States v. Panaro*, 241 F.3d 1104,1114 (9th Cir. 2001) (sentencing enhancements imposed under USSG §3B1.1(c) did not violate *Apprendi*).

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002), *cert. denied*, 535 U.S. 1105 (2002). The defendant was charged with conspiracy to possess with intent to distribute marijuana, manufacture of marijuana, and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. At trial, the district court instructed the jury that it need not determine the amount of marijuana that defendant manufactured, possessed or conspired to possess with intent to distribute. The jury was further instructed that "the government is not required to prove the amount or quantity of marijuana manufactured as long as the government proves beyond a reasonable doubt that defendant manufactured a measurable or detectable amount of marijuana." The defendant was convicted by jury on all three counts. At sentencing, the court found the defendant responsible for 1,000 or more marijuana plants which subjected defendant to a statutory minimum of ten years and a statutory maximum of life. *Id.* at 1059. He was sentenced to ten years, five years higher than the sentence prescribed for the defendant based on the jury's findings. On appeal, the defendant challenged the amount of marijuana that the government sought to attribute to him. The appellate court held that the district court had made insufficient findings at sentencing and vacated and remanded for re-sentencing. At re-sentencing, the district court again determined defendant was responsible for the same drug amount and sentenced the defendant to ten years. The defendant appealed this re-sentencing as a violation of the Apprendi rule. The court found that under *Apprendi*, the "prescribed statutory maximum" for a single conviction under section 841 for an undetermined amount of marijuana was five years. As a result of the district court's finding, determined by a preponderance of the evidence, the statutory maximum penalty for defendant's crime was increased from five years to life in violation of Apprendi. The defendant's case was remanded for re-sentencing subject to the statutory maximum supported by the jury's findings. *Id.* at 1062.

United States v. Pacheco-Zepeda, 234 F.3d 411 (9th Cir. 2000), *cert. denied,* 532 U.S. 966 (2001). The defendant was convicted of illegally reentering the United States following deportation in violation of 8 U.S.C. § 1326 and was sentenced to 57 months. On appeal, the defendant argued that the district court improperly enhanced his sentence based on prior convictions for aggravated felonies not charged in the indictment. The court held that this argument was foreclosed by *Almandarez-Torres v. United States*[29] in which the U.S. Supreme Court held that section 1326(b)(2) simply authorizes a court to increase the sentence for a recidivist and does not define a separate crime. The court further held that since the Supreme Court in *Apprendi* did not to overrule *Almandarez-Torres*, and unmistakably carved out an exception for "prior convictions" that specifically preserved the holding of *Almandarez-Torres*, *Almandarez-Torres* rules in this case. *See also United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001), *cert. denied*, 534 U.S. 1151 (2002) (defendant's argument that the two year statutory maximum found under 8 U.S.C. § 1326(a) was unconstitutional was foreclosed by the Supreme

[29]523 U.S. 224 (1998).

Court's decision in *Almandarez-Torres* and the Ninth Circuit's decision in *Pacheco-Zapeda* in which it was held that enhancing the defendant's sentence on the basis of prior convictions for aggravated felonies does not require that fact to be submitted to the jury and proven beyond a reasonable doubt).

United States v. Saya, 247 F.3d 929 (9th Cir.), *cert. denied*, 543 U.S. 1009 (2001). In this case of first impression, the Ninth Circuit addressed the issue of the interplay between *Apprendi* and the appropriate calculations under the "career offender" guideline, §4B1.1, and concluded that although the defendant's career offender calculations violated *Apprendi*, the defendant was not entitled to relief because the error was harmless. The defendant was convicted of conspiracy to possess and attempted possession with intent to distribute crystal methamphetamine. The court noted that *Apprendi* and its Ninth Circuit progeny required the jury to find beyond a reasonable doubt facts which may alter the calculation of the offense statutory maximum. *Id.* at 941. In the defendant's case, USSG §4B1.1 made the offense statutory maximum the determinative factor in calculating a sentence under the career offender guideline. *Id.* The court was only empowered to sentence the defendant to 20 years, the maximum authorized by the jury's verdict. The court concluded that because the defendant was sentenced to 240 months [20 years] and his sentence did not exceed the statutory maximum authorized by the jury's verdict, 20 years, there was no Apprendi violation. The court held that any error that may have affected the calculation of the defendant's sentence did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 942.

United States v. Silva, 247 F.3d 1051 (9th Cir. 2001). The defendants pled guilty to conspiracy to manufacture, distribute, and possess methamphetamine, with intent to distribute, and each was sentenced to 292 months which exceeded the statutory maximum of 20 years for the crimes charged in the indictment. The indictments did not specify the amounts of methamphetamine involved. The defendants' plea agreement contained an express waiver of their right to "challenge [the] conviction, sentence or the manner in which it was determined in any collateral attack," and also stated that the maximum potential sentence the defendant faced was ten years to life. *Id.* at 1060. On appeal, the defendants argued that under Apprendi their sentences must be remanded for re-sentencing to no more than the 20-year statutory maximum for violation of 21 U.S.C. § 841(b)(1)(C). The court held that the defendants' sentences were within the statutory range for the crime to which they pled guilty under the plea agreement, which carried a sentence of ten years to life, and further held that because of the express waiver in their plea agreement the defendants cannot now claim that their sentences are inconsistent with the principle announced in *Apprendi*. *Id.*