SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FIFTH CIRCUIT

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Fifth Circuit Case Law Highlights

§1B1.3 (Relevant Conduct) – *U.S. v. Brummett,* 355 F.3d 343 (5th Cir. 2003) (held that district court properly determined that defendant was responsible not only for two firearms charged in indictment but also for two additional firearms under relevant conduct), p. 2; ***U.S. v. Reinhart,* 357 F.3d 521 (5th Cir. 2004)** (held co-conspirator's sexual exploitation of two minor boys in videotape created before defendant entered into conspiracy was not attributable to defendant for purposes of establishing his base offense level), p. 3.

§2K1.4 (Arson; Property Damage By Use of Explosives) – *U.S. v. Smith*, 354 F.3d 390 (5th Cir. 2003) (held motel room counted as "dwelling" within meaning of sentencing guideline setting base level offense for arson involving destruction of a dwelling), p. 18.

§2L1.2 (Unlawfully Entering or Remaining in the United States) – *U.S. v. Calderon-Pena*, 357 F.3d (5th Cir. 2004) (prior Texas conviction for endangering child was a "crime of violence"), p. 21; ***U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (*en banc*)** (held that prior conviction for intoxication assault did not qualify as "crime of violence" for sentence enhancement purposes), p. 24.

§3C1.1 (Obstructing or Impeding the Administration of Justice) – *U.S. v. Johnson*, 352 F.3d 146 (5th Cir. 2003) (held appropriate remedy was to vacate sentence and remand case for specific findings where district court imposed obstruction of justice enhancement based on defendant's subornation of perjured testimony by defendant's sister, and finding only that sister lied and that defendant knew her sister lied, but failed to make a finding that defendant procured her sister's testimony), p. 33.

§4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement) – *U.S. v. Lee*, 358 F.3d 315 (5th Cir. 2004) (affirmed upward departure for inadequacy of criminal history due to defendant's extensive 14-year history of committing non-violent theft, drug, and weapons offenses), p. 42.

§4B1.2 (Definitions of Terms Used in Section 4B1.1) – *U.S. v. Turner*, 349 F.3d 833 (5th Cir. 2003) (held elements of defendant's prior offense of burglary of a building under Texas law were not alone sufficient to establish that offense was a crime of violence), p. 44.

§5K2.0 (Grounds for Departure (Policy Statement); §5K2.8 (Extreme Conduct) – *U.S. v. Froman*, 355 F.3d 882 (5th Cir. 2004) (held the district court did not err in finding that the facts of this case placed it outside the "heartland" of general child pornography cases, warranting an upward departure of three levels), p. 57.

APPLICABLE GUIDELINES/EX POST FACTO –*U.S. v. Bell*, 351 F.3d 672 (5th Cir. 2003) (held the standard of review for departures in the PROTECT Act is procedural and applies retroactively, however, in this case the court's decision to grant downward departure was not subject to *de novo* review), p. 66.

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

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

See United States v. Dixon, 273 F.3d 636 (5th Cir. 2001), *cert. denied*, 537 U.S. 829 (2002), §2B3.1, p. 9.

Part B General Application Principles

United States v. Miro, 29 F.3d 194 (5th Cir. 1994). The district court did not err when it applied the guidelines only to conduct that occurred after November 1, 1987. The defendant pled guilty to several mail fraud counts, some of which were based on conduct that occurred before the effective date of the guidelines. The defendant asserted that the guidelines applied to all of the mail fraud counts because his criminal activity constituted a continuing offense. The circuit court disagreed. "Just because criminal activity takes place over a period of time does not mean it is a continuing or 'straddle' offense." *Id*. at 198. Even though the defendant's mail fraud was a continuing course of conduct, each mailing was a separate completed offense. The district court was correct in ordering that the sentence for the preguidelines counts be consecutive to the sentence for the guideline counts.

§1B1.1 Application Instructions

See United States v. Calbat, 266 F.3d 358 (5th Cir. 2001), §2A2.2, p. 5.

§1B1.2 Applicable Guidelines

United States v. Ogle, 328 F.3d 182 (5th Cir. 2003). The district court erred in not considering the availability of a three-level reduction under §§1B1.2 and 2X1.1(b). The defendant was convicted and sentenced for conspiring to launder monetary instruments and laundering monetary instruments. At sentencing, the district court denied the defendant's request of a three-level reduction reasoning that §2X1.1 did not apply to offenses under 18 U.S.C. § 1956. On appeal, the defendant argued that the district court erred in not considering a three-level reduction of his offense level under §2X1.1. The government attempted to argue that §2X1.1 was not applicable because the jury found the defendant guilty not of attempting to launder money, but of the completed offense of money laundering and that §2X1.1 did not apply to offenses under section 1956, since the offense guideline for money laundering, §2S1.1, expressly covered attempts and conspiracies to commit money laundering. The Fifth Circuit was unpersuaded by the government's arguments. The court noted that §§1B1.2(a) and 2X1.1 clearly direct that §2X1.1 shall be applied to attempts, conspiracies, and solicitation unless the specific attempt, conspiracy, or solicitation was expressly covered by the guideline for the

substantive offense. *See* USSG §§1B1.2(a) and 2X1.1(c)(1). Accordingly, the district court's sentence was vacated and the case was remanded for resentencing.

§1B1.3 Relevant Conduct

United States v. Brummett, 355 F.3d 343 (5th Cir. 2003). The district court did not err using relevant conduct to determine the defendant's responsibility for additional firearms not charged in the indictment. Defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). During a search in January, police found two firearms at the defendant's home. In July, during another home search for a methamphetamine lab, police found a third firearm. In September, while using defendant as an informant, police discovered a fourth firearm. Defendant pled guilty to felon in possession of a firearm based on the January search. The district court held defendant responsible for all four firearms and increased the offense level pursuant to USSG §2K2.1(b)(1)(A) because the offense involved three to four firearms and the court increased the offense level pursuant to §2K2.1(b)(5) because the two additional firearms were possessed in connection with another felony, methamphetamine manufacture. Defendant argued the district court's relevant conduct determination was erroneous because the additional firearms were not part of the same scheme or plan as the offense of conviction, not charged in the indictment and too remote in time to warrant an enhancement. Relevant conduct includes non-adjudicated offenses occurring after the offense of conviction if they are part of the same course of conduct, scheme or plan as the offense of conviction, §1B1.3, and the offenses are substantially connected by at least one common factor, such as common victims, accomplices, purpose or *modus operandi*. §1B1.3, comment. (n.9(A)). The defendant possessed four firearms on three separate occasions within a nine month period and possessed them after a felony conviction, permitting a conclusion that the firearms possessions was part of an ongoing series of offenses.

See United States v. Cade, 279 F.3d 265 (5th Cir. 2002), §4A1.3, p. 33.

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). The district court did not err in finding that the defendant was responsible for the sale of at least one kilogram of heroin. The Fifth Circuit held that because it is established that co-conspirators are responsible for all reasonably foreseeable acts in furtherance of the conspiracy, the defendant is potentially responsible for any drugs sold within the conspiracy. Although the Fifth Circuit acknowledges that membership in the conspiracy does not make a defendant responsible for all the drugs involved, the district court was correct in its assessment that because the defendant was involved in the conspiracy for nearly two years, he could have reasonably foreseen at least one kilogram's worth of heroin being distributed. Furthermore, the Fifth Circuit held that because the district court considered all of the evidence presented by the defendant in making its decision, that decision was not clearly erroneous.

United States v. Hammond, 201 F.3d 346 (5th Cir. 1999). The defendant was convicted of numerous charges relating to his embezzlement of union funds. On appeal, he challenged the district court's finding, asserting that the total loss attributed to him incorrectly included $41,712 embezzled by

third parties. The appellate court noted that (1) under USSG §2B1.1(b), the base offense level for embezzlement is based upon the loss amount caused by the embezzlement; (2) USSG §1B1.3 provides that, in determining this loss amount, a defendant is responsible for loss resulting from his own conduct as well as from his "relevant conduct"; and (3) under USSG USSG §1B1.3(a)(1)(B), "relevant conduct" includes all reasonably foreseeable actions taken by others in furtherance of jointly undertaken criminal activity. The appellate court concluded that the district court must make a specific finding that a defendant was engaged in jointly undertaken criminal activity with the third parties. Furthermore, the district court did not indicate that, assuming that the defendant was engaged in these activities, the actions of the third parties in the embezzlement of funds were reasonably foreseeable. Thus, the appellate court vacated the sentence and remanded with instructions for further findings.

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998). In a matter of first impression in the Fifth Circuit, the court of appeals held that a defendant's offenses in Mexico did not fall within the sentencing guidelines' definition of "relevant conduct" for purposes of determining the sentencing range and imposing sentences for his domestic convictions. The defendant did not commit the offenses in Mexico during the commission of the domestic crimes for which he was convicted, and although his foreign offenses were part of the same course of conduct as those crimes, they were not offenses of a character for which another guidelines section would require grouping of multiple counts. However, the court of appeals went on to hold that the district court could have imposed a sentence outside the range established by the sentencing guidelines, given that the aggravating circumstances were not literally or adequately taken into consideration by the guidelines. The defendant murdered a man in Mexico, took flight, and shot at pursuing Mexican law officers with a deadly firearm, immediately prior to and for the purpose of bringing himself and his weapon illegally into the United States. The defendant's circumstances differed significantly from the "heartland" cases.

United States v. Phipps, 319 F.3d 177 (5th Cir. 2003). The district court properly applied the guideline for sexual abuse, USSG §2A3.1, even though the defendant, Michael Phipps, did not commit a sexual assault on the victim. The two defendants declared to a witness that they intended to steal a car from a woman whom they could also kidnap for the purpose of raping her. Phipps forced the victim into the car at gunpoint and restrained her by driving the car while the codefendant, Dean Gilley, forced her to perform sex acts on him and then raped her. Phipps attempted to sexually assault the victim and stopped only because of Gilley's fear of detection by passing drivers. Thus, Phipps was responsible for the actions of Gilley pursuant to USSG §1B1.3(a)(1).

United States v. Reinhart, 357 F.3d 521 (5th Cir. 2004). The district court erred in holding a co-conspirator accountable for the exploitation of two minor boys in a videotape made prior to defendant's entering conspiracy. A search of the defendant's residence uncovered 1,800 images of child pornography on the defendant's computer storage media. Agents also seized film and videotapes depicting pornographic images of children, as well as diskettes, video cameras, and film cameras. The defendant later surrendered a videotape depicting his roommate engaging in sexual intercourse with two minor males who were then 13 and 14 years old. At sentencing, the court held the defendant accountable for the exploitation of the two minors. On appeal, the defendant argued that the videotape

of these minors was created by his roommate alone, long before the conspiracy's formation in December 1996. Thus, he cannot be held accountable as a co-conspirator for the exploitation of the minors under §1B1.3(a)(1)(B)'s "reasonable foreseeability" requirement. Vacated and remanded for resentencing.

United States v. Roberts, 203 F.3d 867 (5th Cir.), *cert. denied*, 530 U.S. 1238 (2000). The district court correctly applied a seven-level increase under USSG §2B3.1 for discharge of a firearm when the gun was fired by a police officer. A deputy fired two shots during a struggle over his gun with the defendant and a codefendant, whom he was trying to arrest for poaching. The defendants fled with the weapon. One of the defendants was convicted under 18 U.S.C. § 922(g), possession of a firearm by a felon. The court applied the cross reference in USSG §2K2.1(c) to sentence the defendant under USSG §2B3.1, the robbery guideline. Under USSG §1B1.3, the seven-level enhancement for discharge of a firearm can be applied if a non-participant discharges a firearm. Subsection (a)(1)(A) requires that a defendant be responsible for "all acts and omissions . . . induced or willfully caused . . ." The defendant "unquestionably induced and willfully caused" the deputy to fire the gun. *Id*. at 870.

See United States v. Rodriguez, 278 F.3d 486 (5th Cir.), *cert. denied*, 536 U.S. 913 (2002), §2S1.1, p. 26.

See United States v. Rosogie, 21 F.3d 632 (5th Cir. 1994), §4A1.3, p. 43.

United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000). Conduct of conspirators after a defendant withdraws from a conspiracy is excluded from the defendant's relevant conduct. The district court erred in including as relevant conduct the quantity of drugs trafficked after defendant effectively withdrew from the conspiracy.

United States v. Wall, 180 F.3d 641 (5th Cir. 1999). Incidents in 1996 and 1997 involving seizure of marijuana from defendant's former girlfriend could not be considered relevant conduct because they were not "part of a common scheme or plan" of the instant 1992 marijuana offense. Two offenses do not constitute a single course of conduct simply because they both involve drug distribution. The "temporal proximity" between the 1996 and 1997 offenses and the instant offense is lacking; the offenses did not involve the same drug supplier or destination; and the modus operandi of the later offenses differs from the instant offense.

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

United States v. Ramirez, 271 F.3d 611 (5th Cir. 2001). The district court did not err in allowing hearsay as evidence of relevant conduct to increase the defendant's offense level. At sentencing, "[t]he district court may consider any information which has a sufficient indicia of reliability to support its probable accuracy." *Id*. at 612. *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995). This may even include findings of drug quantities, so long as *Apprendi* is not implicated.

§1B1.8 Use of Certain Information

See United States v. Taylor, 277 F.3d 721 (5th Cir. 2001), §6A1.3, p. 63.

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

United States v. Domino, 62 F.3d 716 (5th Cir. 1995). The district court violated the *Ex Post Facto* Clause in sentencing the defendant under the 1993 version of the sentencing guidelines. The defendant pled guilty to unlawful use of a telephone to facilitate the possession of a listed chemical with intent to manufacture a controlled substance in violation of 21 U.S.C. § 843(b) in 1990. In determining the defendant's base offense level, the probation officer determined that the defendant's guilty plea contained a stipulation that established the more serious offense of possession under 21 U S.C. § 841(d)(1) and calculated a base offense level of 32, instead of 12 under the 1989 version of the guidelines. The defendant objected to this determination and insisted that he did not stipulate that he actually possessed the phenylacetic acid at issue, only that he used the telephone to facilitate possession. The defendant failed to appear for sentencing and was not sentenced until 1994. Prior to the defendant's sentencing in 1994, the presentence report was updated to incorporate the 1993 version of the sentencing guidelines resulting in a base offense level of 28. The defendant was sentenced to 48 months on each count to run consecutively for a maximum of 96 months with a term of supervised release of one year on each count to run concurrently. The defendant argued on appeal that his sentence violated the *Ex Post Facto* Clause because, calculated correctly, it would be more lenient under the 1989 version of the guidelines. The circuit court determined that the stipulated facts did not specifically establish that the defendant possessed phenylacetic acid with intent to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1), and remanded the case directing the district court to sentence the defendant pursuant to the 1989 version of the guidelines.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.4 Involuntary Manslaughter[1]

See United States v. Calbat, 266 F.3d 358 (5th Cir. 2001), §2A2.2, p.5.

§2A2.2 Aggravated Assault

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001). The district court did not err in sentencing the defendant under the most analogous guideline, 2A2.2, for an offense of intoxication assault rather than under USSG §2A1.4. Looking to other circuits, the court found that the Eighth

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

Circuit in particular has held that both guidelines, in different cases, were the most analogous to the crime of vehicular battery. *See United States v Osborne*, 164 F.3d 434, 439 (8th Cir. 1999); *United States v. Allard*, 164 F.3d 1146, 1148 (8th Cir. 1999). Reviewing the issue *de novo*, the court compared "the elements of the defendant's crime of conviction to the elements of federal offenses already covered by a specific guideline." 266 F.3d 358 at 363. *See United States v. Nichols*, 169 F.3d 1255, 1270 (10th Cir. 1999). The analogous federal statute (18 U.S.C. § 113) states "assault resulting in serious bodily injury" is a general intent crime and thus the *mens rea* requirement would be satisfied by voluntarily consuming alcohol and then operating a motor vehicle when intoxicated. *Id*. at 363. In addition, while USSG §2A1.4 does mention the specific behavior of driving while intoxicated, the element of the death of the victim is not present in this case. Therefore, this federal statute, and the corresponding sentencing guideline, §2A2.2, is most analogous to the state crime of intoxication assault. There was no error by the court in its consideration of the victim's injuries, nor in enhancing the defendant's sentence for more than minimal planning on the finding that he attempted to flee the scene of the crime. The court relied on the factual basis that there was more than minimal planning to cover up the offense, not that there was planning prior to the act. *Id.* at 364.

United States v. Perrien, 274 F.3d 936 (5th Cir. 2001). The district court did not err in allowing a two-level sentencing enhancement for the defendant based on "more than minimal planning." *Id*. The defendant was convicted of assault within the "special maritime and territorial jurisdiction of the United States" after he was determined to have abused his two daughters. The district court held that since "more than minimal planning" included "taking significant affirmative steps . . . to conceal the offense," his behavior constituted more than minimal planning. *Id*. The Fifth Circuit agreed that since the defendant acknowledged hurting the children, not seeking medical attention, and initially claiming not to know what was wrong with the child, the defendant had committed sufficient affirmative actions to conceal his crime therefore district court's holding was not clearly erroneous.

United States v. Price, 149 F.3d 352 (5th Cir. 1998). The district court correctly applied the six-level enhancement for "permanent or life-threatening bodily injury" rather than the four-level enhancement for "serious bodily injury" where damage to the victim's hand was permanent and had resulted in a 15- to 25-percent loss of function. The court of appeals rejected the defendant's claim that the six-level enhancement should be reserved for the most serious injuries: the plain language of Application Note 1(h) to USSG §1B1.1 encompasses injuries that may not be terribly severe but are permanent. The enhancement punishes not just the severity of the injury, but its duration.

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

United States v. Garcia-Lopez, 234 F.3d 217 (5th Cir. 2000), *cert. denied*, 532 U.S. 935 (2001). The district court did not err in sentencing the defendant under the guideline for sex with a minor (§2A3.2) and its cross-reference to USSG §2A3.1, rather than the guideline for criminal sexual abuse (§2A3.1) based on the minor victim's testimony that the defendant raped her. On appeal the defendant argued that the district court erred in applying USSG §2A3.1, through the cross-reference under USSG §2A3.2(c)(1), in determining the proper base offense level for the count of conviction

because he was not convicted of forcible rape and because the alleged rape occurred in a foreign country. The Fifth Circuit disagreed and held that the defendant did not point to any case that a conviction of forcible rape and the commission of such rape within the United States are requisites for the application of the cross-reference.

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). The district court properly increased the defendant's base offense level by four levels under §2A3.1(b)(5) because the seven-year-old victim was "abducted" during an incident of sexual abuse. The defendant tricked the victim into going with him by the trees near the playground by asking her to find a place to go "pottie." After instructing her to "squeez[e] [his] private," he tricked her into selecting a new place for him to go to the bathroom when it appeared that the victim's older siblings were approaching. Note 1(a) to USSG §1B1.1 defines "abducted" to mean "that a victim was forced to accompany an offender to a different location." The Fifth Circuit determined that the term "forced to accompany" was flexible and thus susceptible to multiple interpretations. The court rejected the defendant's contention that physical force or coercion was necessary for an enhancement under §2A3.1(b)(5). Relying on similar holdings in the Seventh and Eighth Circuits, the Fifth Circuit held that the term "forced to accompany" was not meant to preclude adjustments where force was applied by means of "veiled coercion" rather than brute physical strength. Accordingly, it affirmed the district court's finding that the defendant abducted the victim by appealing to "a seven year old's sense of obedience to adults . . . He was able to isolate the victim by dominating her lack of intellectual ability, and also by appealing to the credulous nature of a seven year old."

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

United States v. John, 309 F.3d 298 (5th Cir. 2002). The defendant was convicted of two counts of sexual contact with a minor under the age of twelve, in violation of 18 U.S.C. § 2244(a)(1). The Fifth Circuit held that the fact that the victim was under the age of twelve had already been taken into account in the base offense level of USSG §2A3.4(a)(3) and thus an additional enhancement under USSG §2A3.4(b)(1) resulting in double-counting. The court explained that, by process of elimination, there are only two offenses, 18 U.S.C. § 2244(a)(1) insofar as it incorporates section 2241(c) and 18 U.S.C. § 2244(a)(3), that are covered in the base offense level in §2A3.4(a)(3). The background commentary to USSG §2A3.4 exempts section 2244(a)(3) from the age enhancement because age is already an element of the offense. Similarly, in cases involving section 2244(a)(1), age is an element of the offense. Accordingly, the court concluded that the enhancement in USSG §2A3.4(b)(1) should not apply.

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

[1]Effective May 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended §2A4.1 to reflect the seriousness of those offenses involving sexual exploitation. *See* USSG App. C, Amendment 652.

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[2]

United States v. Chung, 261 F.3d 536 (5th Cir. 2001). The district court did not err in its estimated calculation of the amount of loss involved in the offense. Since the issue was not timely appealed, and because "questions of fact capable of resolution by the district court can never constitute plain error," the court found no plain error in the calculation. *Id*. at 539; *see United States v McCaskey*, 9 F.3d 368, 376 (5th Cir. 1993), cert. denied, 511 U.S. 1042 (1994); *see also United States v Vital*, 68 F.3d 114, 119 (5th Cir. 1995).

United States v. Londono, 285 F.3d 348 (5th Cir. 2002). The district court erred in applying a two-level enhancement under USSG §2B1.1(b)(2) for a theft that was not from the person of another. The defendant served as a lookout for those committing a diamond theft at an airport. Section 2B1.1 permits an enhancement for "theft from the person of another" and defines it as "theft, without the use of force, of property that was being held by another person or was within arms' reach." The Fifth Circuit held that the theft to which Londono served as an accomplice did not fulfill this definition. The owner of the stolen property was ten feet away from it at the time it was stolen. There was linear separation and three impediments separating the owner from the property, including an accomplice, a magnetometer, and an x-ray machine. In addition, the guideline requires some sort of physical temporal interaction between the victim and the thief, typically within arms' reach of one another. Such contact was not involved in Londono's situation. Finally, USSG §2B1.1 commentary states that the victim must be aware of the theft in order for the enhancement to be applied. Without this awareness, the potential for victim injury, which is the focus of the sentence enhancement, does not exist. Here, the victim did not know he was being robbed. He had lost visual and physical contact with his property while undergoing security procedures at the airport.

United States v. Onyiego, 286 F.3d 249 (5th Cir.), *cert. denied*, 537 U.S. 910 (2002). The district court correctly computed the victim's loss when sentencing defendants under USSG §2B1.1 for carrying out a conspiracy to traffic stolen airline tickets. One defendant challenged the government's use of the price written on the blank airline tickets by a co-conspirator as the "fair market value" of the

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[2]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. Effective January 25, 2003, the Commission, in response to a congressional directive in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, made several modifications to §2B1.1 pertaining to serious fraud offenses involving a substantial number of victims and their solvency or financial security, destruction of evidence, and officers and directors of publicly traded companies who commit fraud offenses. *See* USSG App. C, Amendment 647. Effective November 1, 2003, the Commission, in response to a congressional directive in the Homeland Security Act of 2002, Pub. L. 107-296, made several modifications to §§2B1.1, 2B2.3, 2B3.2, and 2M3.2 to address the serious harm and invasion of privacy that can result from offenses involving the misuse of, or damage to, computers. *See* USSG App. C, Amendment 654.

ticket. The defendant asserted that the fair market value was better estimated by the amount he received for the false tickets. The Fifth Circuit disagreed, stating that the black market price of a stolen good rarely reflects the true fair market value. Therefore, the district court was permitted by USSG §2B1.1 to use reasonable means to determine the level of loss to the victim. The court appropriately measured the loss as the amount the airlines billed to the victim.

§2B3.1 Robbery

United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). The district court did not err in enhancing the defendant's offense level under USSG §2B3.1, despite the fact that the "express threat of death" was made to bystanders, rather than to the victim, and occurred during the escape phase of the robbery.

United States v. Dixon, 273 F.3d 636 (5th Cir. 2001), *cert. denied*, 537 U.S. 829 (2002). The district court did not violate the defendant's Fifth Amendment rights against double jeopardy by sentencing him to both robbery and attempted robbery. In looking to the statute, the court found that the defendant committed two separate offenses with two separate victims, not one act of robbery against two people. Therefore, each violation deserves punishment and multiplicity of sentences does not apply.

United States v. Franks, 230 F.3d 811 (5th Cir. 2000). The district court erred in applying the two-level enhancement for an express threat of death under USSG §2B3.1(b)(2)(F) because it resulted in "double counting" for the use of a firearm during the commission of a robbery under USSG §2K2.4 and also for threatening the victim of the robbery with the firearm under USSG §2B3.1. The defendant filed a section 2255 motion challenging the district court's two-level enhancement to his sentence under USSG §2B3.1(b)(2)(F) for an express threat of death but the motion was dismissed. On appeal, the defendant argued that the threat of death related to the use of the firearm was covered under Application Note 2 of USSG §2K2.4[3] so that the district court was precluded from enhancing his sentence on this ground. The court held that it was clear from the trial testimony that the threat of death the defendant made was plainly related to the use of the firearm and that the district court erred in enhancing the defendant's sentence under USSG §2B3.1(b)(2)(F).

United States v. Hickman, 151 F.3d 446 (5th Cir. 1998), *cert. denied*, 530 U.S. 1203 (2000). The district court erred in concluding that the defendant "physically restrained" his victim when he tapped him on the shoulder with a gun. The court of appeals held that, while a defendant may physically restrain a victim without actually tying, locking, or binding him up, the defendant did nothing to restrain his victim that an armed robber would not normally do. The court agreed with the Seventh

[3]It should be noted that effective November 1, 2000, Application Note 2, §2K2.4 was amended as referenced in App. C, Amendment 599. The amendment no longer references in Application Note 2 the "*e.g.*, clause" referred to in the *Franks* decision, which previously stated "(*e.g.*, §2B3.1(b)(2)(A)-(F) (Robbery), is not to be applied in respect to the guideline for the underlying offense.)"

Circuit in noting that merely brandishing a weapon cannot support the enhancement because then the enhancement would be warranted every time an armed robber entered a bank. The district court did not err in enhancing the defendant's offense level for abducting his victims. The district court found that defendant initially accosted certain victims in the parking lot and then forced them back into the restaurant. The court of appeals held that it is not necessary to cross a property line or the threshold of a building to establish a change of location.

Part C Offenses Involving Public Officials

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

United States v. Snell, 152 F.3d 345 (5th Cir. 1998). A juror qualifies as a "government official" in a "high-level, decision-making or sensitive position" within the meaning of USSG §2C1.1(b)(2)(B). The defendant pled guilty to a charge of bribery under 18 U.S.C. § 201(b)(2)(A) for taking a bribe from criminal defendants on whose jury he sat as a foreman. The sentencing court enhanced the defendant's sentence by eight levels under USSG §2C1.1(b)(2)(A). The Fifth Circuit affirmed the enhancement holding that jurors occupy a central position in the criminal justice system that is at least equivalent to that of the other public service officers, such as judges and prosecutors, explicitly mentioned in the application note.

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

Part D Offenses Involving Drugs

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

United States v. Allison, 63 F.3d 350 (5th Cir.), *cert. denied*, 516 U.S. 955 (1995). The circuit court held that the district court could properly sentence the defendant based on the size and capability of the methamphetamine laboratory. The defendant argued that under Amendment 484, he

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

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

could only be sentenced on the basis of the methamphetamine in his possession at the time of his arrest, and therefore his original sentence must be reduced. The circuit court noted that Amendment 484 does not speak to the situation in which the district court is sentencing the defendant based on the size and capability of the laboratory involved; instead, the amendment instructs the district court that the full weight of mixtures cannot be attributed to the defendant as the amount seized. The circuit court stated that if the district court is sentencing the defendant based on the size and capability of the laboratory, it is the size and production capacity of the laboratory, not the actual amount of methamphetamine seized, that is the touchstone for sentencing purposes. The district court properly sentenced the defendant on this ground.

United States v. Bustos-Useche, 273 F.3d 622 (5th Cir. 2001), *cert. denied*, 535 U.S. 1071 (2002). The district court did not err in enhancing the defendant's offense level for weapon possession in the commission of the offense, even though the weapon was never displayed or brandished. The defendant argued that because the firearm was never used or shown, there was an insufficient connection to warrant the increase. The court relied on circuit precedent and held "possession of a firearm will enhance a defendant's sentence . . . where a temporal and spatial relationship exists between the weapon, the drug-trafficking activity, and the defendant." *Id*. at 629; *see United States v. Marmolejo*, 106 F.3d 1213, 1216 (5th Cir. 1997), *cert. denied*, 525 U.S. 1056 (1998).

United States v. Carbajal, 290 F.3d 277 (5th Cir.), *cert. denied*, 537 U.S. 934 (2002). The district court did not err in applying a USSG §2D1.1 enhancement to the defendant's sentence for death or serious bodily injury resulting from the use of a substance. The defendant was convicted of participating in a conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. §§ 841 and 846. The district court applied the enhancement due to its finding beyond a reasonable doubt that two overdose deaths resulted from the use of heroin sold by the defendant's organization. The defendant argued that the district court used too lenient a standard of causation in determining whether the deaths "resulted from" heroin the defendant sold and that the prosecution did not show sufficient evidence linking him with the deaths necessary to warrant the USSG §2D1.1 enhancement. The Fifth Circuit held in accordance with other circuits' interpretation of section 841(b)(1)(C) that USSG §2D1.1 is a "strict liability provision that applies without regard for common law principles of proximate cause or reasonable foreseeability." *Id*. at 283. Thus, it was irrelevant whether the drugs attributable to the defendant were the proximate, reasonably foreseeable cause of death. In addition, the Fifth Circuit held that there was sufficient evidence, including testimony that heroin was the cause of death and that the heroin the defendant sold killed the deceased, to support the district court's attribution of the heroin-related deaths to the defendant.

The defendant also argued that the district court erred by imposing a sentence greater than that authorized for a cocaine-only conspiracy. The defendant claimed that the jury attributed more than one kilogram of heroin and more than five kilograms of cocaine to him, but that the district court declined to consider the jury's finding on cocaine in determining his sentence. Thus, the defendant asserted that the district court granted a motion for judgment of acquittal with respect to the cocaine charge, thereby requiring the district court to sentence him within the statutory maximum for the drug carrying the least severe penalty–cocaine. The Fifth Circuit stated that while this assertion would be true if the jury

verdict was ambiguous, such a circumstance did not exist in the case at hand. The jury made very specific findings regarding the amounts of drugs and the level of participation involved in the conspiracy. The jury's finding left no doubt that the conspiracy involved both cocaine and heroin. Therefore, the district court properly sentenced the defendants.

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). The district court erred in enhancing defendant Faulk's sentence based on possession of a firearm in connection with a drug offense. The government discovered a firearm in the vehicle in which defendant Faulk was a passenger when the gun was seized. However, the government did not show a relationship between the gun and the drugs involved in the offense. Although the Fifth Circuit acknowledged that firearms are considered the "tools of the trade" for drug conspiracies, the government still needed to demonstrate a spatial connection between a weapon and the drugs. In this case, the government did not establish such a connection and, therefore, the enhancement of the defendant's sentence was inappropriate.

United States v. McWaine, 290 F.3d 269 (5th Cir.), *cert. denied*, 537 U.S. 921 (2002). The district court did not err in applying USSG §2D1.1(c)(1) to determine the base offense level for a defendant convicted of 21 U.S.C. §841(b)(1)(C) (2001). The defendant asserted that the application of USSG §2D1.1(c)(1) to convictions under 21 U.S.C. § 841(b)(1)(C), is to evade *Apprendi*. The defendant argued that Application Note 10 and the background information in USSG §2D1.1 make clear that the different subsections providing base offense levels for differing drug quantities correspond to the different drug quantity levels provided for in section 841 (b)(1)(A)-(C). Therefore, the defendant maintained that the district court had the discretion to determine the base offense level for his conviction within the range allowed by USSG §2D1.1(c)(8)-(14) only. The defendant also claimed that the use of USSG §2D1.1 to determine his base offense level was unconstitutional because that subsection is only applicable when a defendant is convicted under section 841 (b)(1)(A). The court looked to *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2001), *cert. denied*, 531 U.S. 1177 (2002), to reject the defendant's arguments. In *Doggett*, the court held that "if the government seeks enhanced penalties based on the amount of drugs under 21 U.S.C. § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt." *Id*. *citing Doggett* at 164-5. The *Doggett* court further held that *Apprendi* only applies when the defendant is sentenced above the statutory maximum and that *Apprendi* has no effect on the district court's determination of drug quantity under USSG §2D1.1. Based on *Doggett*, the Fifth Circuit held that the district court did not err in applying USSG §2D1.1 to determine McWaine's offense level because McWaine was not sentenced to more than the statutory maximum that section 841(b)(1)(C) permits.

United States v. Leonard, 157 F.3d 343 (5th Cir. 1998). A drug defendant need not face a mandatory minimum sentence in order to be entitled to a downward sentencing adjustment under USSG §2D1.1(b)(6). The provision, providing for a decrease of two offense levels if the criteria of USSG §5C1.2 ("safety valve") are met, applies on its face, as a "specific offense characteristic," regardless of whether or not the defendant is subject to a mandatory minimum sentence.

United States v. Martinez, 151 F.3d 384 (5th Cir. 1998), *cert. denied*, 525 U.S. 1085 (1999). The defendant argued that the district court violated due process of law by imposing a sentence of life imprisonment based on his offense conduct when only about 40 kilograms of marijuana was actually seized by government authorities. The court of appeals rejected this argument, noting that a defendant convicted in a drug trafficking offense is responsible for the quantity reasonably foreseeable to him, regardless of what quantity was actually seized or was alleged in the indictment. A penalty based on conduct that was an element of the offense of conviction cannot violate a defendant's due process rights.

United States v. Pardue, 36 F.3d 429 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). The defendant moved to recalculate his sentence pursuant to 18 U.S.C. § 3582(c)(2) in light of the amendment to USSG §2D1.1(c) prescribing a new method for calculating the quantity of LSD to be used in determining a guideline sentence. The appellate court joined the First and Tenth Circuits in holding that the mandatory minimum of 21 U.S.C. § 841 "overrides the retroactive application of the new guideline." *See United States v. Dimeo*, 28 F.3d 240 (1st Cir. 1994); *United States v. Mueller*, 27 F.3d 494, 495-97 (10th Cir. 1994). The issue was one of first impression in the circuit, and the appellate court concluded that a logical reading of the policy statement to USSG §2D1.1(c) recognizes that the new approach to calculating the amount of LSD "does not override the applicability of `mixture or substance' for the purpose of applying any mandatory minimum sentence." *Id*. at 431. The appellate court noted that, in *Chapman v. United States*, 500 U.S. 453, 460-64 (1991), the Supreme Court interpreted the term "mixture or substance" in 21 U.S.C. § 841 to require the weight of the carrier medium for LSD to be "included for purposes of determining the mandatory minimum sentence." *Id*.

§2D2.1 Unlawful Possession; Attempt or Conspiracy

United States v. Dodson, 288 F.3d 153 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002). The district court did not err in increasing the defendant's sentence above the statutory maximum of one year after he violated 21 U.S.C. § 844, simple possession of crack cocaine. Section 844 permits a sentence range to be increased from 15 days to 2 years if a defendant has a prior drug conviction. The district court sentenced the defendant to 24 months' imprisonment. The defendant argued that his sentence was improper because the government did not file a notice of intent to use his prior drug conviction during sentencing, as is required by 21 U.S.C. § 851. The Fifth Circuit held that section 851 is subject to waiver and forfeiture and that it could be said that the defendant did both in this case. The defendant waived his rights by agreeing to the terms of the plea agreement–the government stated that it would eliminate a gun charge and ask for this two-year sentence. The court noted even if the defendant had not waived the section 851 requirement (that the government must inform him of its intent to seek an enhanced sentence based on his prior conviction), he forfeited his right to complain by failing to object at the time.

Part F Offenses Involving Fraud and Deceit[6]

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

United States v. Brown, 186 F.3d 661 (5th Cir. 1999). The Fifth Circuit held that an adjustment to restitution does not necessarily affect loss enhancement. The defendant pled guilty to wire fraud which resulted from a fraudulent warranty claim. The district court applied a six-level enhancement because of its determination that the loss was $75,104.18. After the sentencing was completed, the government advised the court that the restitution to the victim insurance companies and individuals was actually lower and it gave the figure of $67,938.72. The district court lowered the restitution amount accordingly. The defendant argued that this moved him out of the $70,000 to $120,000 range and that he should only have received a five-level enhancement for the loss. The Fifth Circuit rejected that argument because adjustments in a restitution figure do not necessarily translate into corresponding decreases in the loss amount. In this case, the Court determined that the defendant's loss amount still exceeded $70,000 because there was no adjustment in the amount defendant owed to General Motors.

United States v. Coscarelli, 105 F.3d 984 (5th Cir. 1997). In an appeal by the government, the appellate court held that the district court erred in applying USSG §2F1.1, the provision for fraud and deceit, in calculating the term of the defendant's sentence. The government maintained that the district court should have used USSG §2S1.1, the money laundering guideline, regardless of that fact that the government did not charge the defendant with a substantive count of money laundering and there was no independent money laundering allegation in the indictment. The appellate court agreed and noted that the defendant pled guilty as charged to the indictment which included Count I of the indictment charging him with violating 18 U.S.C. § 371 by conspiring to commit mail fraud, wire fraud, and money laundering. Because the offenses alleged in the conspiracy are to be grouped under USSG §3D1.2(d), and USSG §3D1.3 requires that the highest offense level of the counts in the group must be applied, the money laundering guideline must be used.

United States v. Godfrey, 25 F.3d 263 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994). The district court did not err in enhancing the defendant's sentence for more than minimal planning under USSG §2F1.1 and for his leadership role pursuant to USSG §3B1.1(a). The defendant challenged the application of the two adjustments as constituting double-counting. The circuit court disagreed. Not all double-counting is impermissible. "Double-counting is impermissible only when the particular guidelines in question forbid it." Since USSG §§3B1.1 and 2F1.1 do not forbid double-counting with each other, adjustments may be made under both sections.

United States v. Izydore, 167 F.3d 213 (5th Cir. 1999). A bankruptcy trustee's fees are not to be included in the calculation of the amount of loss from a bankruptcy fraud. Section 2F1.1 defines loss as "the value of the money, property, or services unlawfully taken." Bankruptcy trustees' fees are consequential damages, according to the Fifth Circuit, and the commentary to USSG §2F1.1 makes clear that, as a general rule, consequential losses are not to be included in a loss calculation. Because consequential losses are to be considered in certain circumstances enumerated by the commentary to USSG §2F1.1, the Court said that this evidenced an intent by the Sentencing Commission to omit

consequential damages from the general loss definition. In this case, the trustees' fees were incurred after the defendant's criminal conduct was completed and, therefore, should not have been included in the defendant's loss determination.

United States v. Magnuson, 307 F.3d 333 (5th Cir. 2002) (*per curiam*), *cert. denied*, 537 U.S. 1178 (2003). The district court properly applied a two-level enhancement in a fraud case for "mass marketing" under USSG §2F1.1(b)(3) (currently §2B1.1(b)(2)(A)). The Fifth Circuit held that "mass-marketing" merely requires that the advertising reaches a "large number of persons." There is no requirement that the defendant engage in active (rather than passive) solicitation. Accordingly, the defendant qualified for the enhancement when he placed ads in grocery store tabloid newspapers.

United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996). The district court erred in refusing to enhance the defendants' sentence four levels under USSG §2F1.1(b)(6) on the basis that the failure of the reinsurer prior to the defendants' fraud rendered the institution insolvent and the enhancement inapplicable. The Court of Appeals rejected the district court's reasoning that once a financial institution becomes insolvent, it has no "safety" or "soundness" which can be jeopardized. This mandatory enhancement applies not only to insolvency, but also to cases in which the defendants' actions substantially reduced benefits to insureds, rendered the institution unable to refund deposits or payments or placed the institution in jeopardy of the same. Fraud upon an already insolvent institution may result in the loss of benefits to insureds or render the institution unable to refund a payment or deposit. Alternatively, the court rejected the reasoning that the enhancement should not be applied because it was not intended to apply to situations in which the defendant established himself as principal stockholder of the financial institution. The court reasoned that the policy behind the enhancement was the protection of third party interests, which are affected regardless of the financial interests of the defendants.

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in increasing the defendant's base offense level by three levels under USSG §2F1.1(b)(1)(D) based on the finding that the defendant caused losses of over $10,000. The defendant pled guilty to making false statements on immigration documents and education grant applications. The defendant was sentenced to ten months' incarceration and was ordered to be deported as a condition of supervised release. The defendant argued on appeal that the court erred in calculating the loss attributable to him because he intended to repay the money. The circuit court ruled that the district court erred in failing to make a finding as to whether the defendant would pay back the loans. The district court erred in calculating loss on the basis of the amount it believed the defendant intended to receive.

United States v. Smithson, 49 F.3d 138 (5th Cir. 1995). The appellate court vacated the defendants' sentences and remanded for the district court to revisit its valuation of loss under USSG §2F1.1. The defendants purchased options to purchase land, and during the option period, would attempt to make zoning changes and other improvements, and then search for buyers for the land. When defendant Pyron filed a Chapter Seven bankruptcy petition, he failed to reference two options he had owned two days earlier. Rather, prior to filing the petitions, he had his codefendant Smithson, an attorney, create two corporations for the purpose of receiving the options. A jury found the defendants

guilty of five counts of bankruptcy fraud. In determining loss, the district court attempted to calculate the defendants' gain. The PSR calculated the total gain to be $278,730.42 by adding the current value of the defendants' shares in one of the corporations, Smithson's legal fees earned in the purchase of a building subject to one of the options, plus expenses Pyron recovered in connection with the sale of other option property. The appellate court noted that what the defendants concealed from the trustee "was an option, not a building." *Id*. at 144.The options were difficult to value at trial, and evidence indicated that the loss to the bankruptcy estate was "for all practical purposes, zero." *Id*. Although Application Note 8 to USSG §2F1.1 provides that gain can be used as alternative valuation method, the gain was also difficult to calculate. The appellate court noted that "[i]t is imperative, however, that the value ascribed to the options cannot be measured after their first post-petition expiration dates. On remand, the district court must decide the value of the TeamBank option based on this standard; this, and only this, is what the appellants gained by concealing the options from the bankruptcy estate." *Id*.

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

§2G1.1 Promoting Prostitution or Prohibited Sexual Conduct

United States v. Rhodes, 253 F.3d 800 (5th Cir. 2001). The district court did not err in applying the cross-reference under USSG §2G1.1 to USSG §2A3.1 and in not permitting the defendant to withdraw his plea. The defendant pled guilty to traveling interstate with the intent to engage in a sexual act with a juvenile, in violation of 18 U.S.C. § 2423(b). The district court applied the cross-reference under USSG §2G1.1 to USSG §2A3.1 in determining the defendant's base offense level because stipulated facts supported defendant actually committed criminal sexual abuse. The defendant was not permitted to withdraw his guilty plea after the court rejected the sentencing guideline provision recommended by the government in the plea agreement. On appeal, the Fifth Circuit held that the district court did not err in its ruling because "[w]here the defendant has pled guilty to violating 18 U.S.C. § 2423(b) but has also stipulated to facts which constitute aggravated sexual abuse, in violation of 18 U.S.C. § 2241(c), [pursuant to USSG §1B1.2, the defendant] may likewise be sentenced for the offense of conviction by application of USSG §2A3.1." *Id*. at 806.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[7]

United States v. Paul, 274 F.3d 155 (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2002). The district court did not err in applying USSG §2G2.2 as the appropriate sentencing guideline rather than USSG §2G2.4 because the government showed sufficient proof that there was an indication of the

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

defendant's intent to traffic in child pornography. The defendant argued that the district court should have sentenced him under USSG §2G2.4 because he merely possessed child pornography and did not traffic in it as alleged by the government. However, the Fifth Circuit agreed that §2G2.2 was the proper guideline since a cross-reference in USSG §2G2.4 requires use of USSG §2G2.2 if there is an indication of an intent to traffic. *Paul*, 274 F.3d at 159. The district court found that email exchanges between the defendant and another man in which the defendant spoke about posting on pornographic websites and about sending the other man copies of books containing child pornography were sufficient evidence of an intent to traffic in child pornography. The defendant argued that the books he intended to send constituted a gift, and furthermore he really did not intend to send the books. The defendant also argued that the government failed to prove that the books themselves actually contained child pornography. The Fifth Circuit found that the defendant's arguments were without merit because he obtained hundreds of images of child pornography from the Internet, and furthermore, there were significant indications that he did post images on a child pornography website at some point. Since this type of exchange is considered sufficient to constitute trafficking, the Fifth Circuit held that it was also sufficient to invoke the cross-reference in USSG §2G2.4. Although the defendant was correct in his assertion that the district court cannot make a determination that the books contained child pornography based on speculation alone, the Fifth Circuit held that there was sufficient circumstantial evidence in the form of the descriptions the defendant gave in his e-mails and the names of the books in question, to determine that both contained child pornography.

United States v. Simmonds, 262 F.3d 468 (5th Cir. 2001), *cert. denied*, 534 U.S. 1098 (2002). The district court did not err in enhancing the defendant's sentence on the finding that he had "distributed" pictures of child pornography. The defendant argued that pursuant to USSG §2G2.4, "distribution" means something of value was received in exchange for the photographs. The court recently concurred with other circuits in holding "even purely gratuitous dissemination of child pornography is considered 'distribution.'" *Id.* at 472; *see United States v. Hill*, 258 F.3d 355 (5th Cir.), *cert. denied*, 534 U.S. 1033 (2001). The court also noted that the plain meaning of "distribution" means "to dispense or to give out or deliver" and thus, for purposes of the guidelines, includes gratuitous transmissions. *Id*.

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

See United States v. Paul, 274 F.3d 155 (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2002), §2G2.2, §5D1.3, pp. 16, 48, 36.

See United States v. Simmonds, 262 F.3d 468 (5th Cir. 2001), *cert. denied* 534 U.S. 1098 (2002), §2G2.2, p. 17.

Part J Offenses Involving the Administration of Justice

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

§2J1.7 Commission of Offense While on Release

United States v. Dadi, 235 F.3d 945 (5th Cir. 2000), *cert. denied*, 532 U.S. 1072 (2001). The district court did not err by not applying the enhancement under 18 U.S.C. § 3147 and USSG §2J1.7 for committing an offense while on release on another charge. On appeal, the court found that notice must be given at the time of the defendant's release from custody in order to be deemed sufficient. The government did not file its notice of intent to enhance the defendant's sentence until more than a month after the presentence report was initially disclosed to counsel, and 19 days after the deadline for filing objections had passed. The court determined that the government could point to nothing in the record to show that the defendant received such notice upon his release and therefore held that the district court's decision not to apply the enhancement under section 3147 and USSG §2J1.7 would stand.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage By Use of Explosives

United States v. Pazos, 24 F.3d 660 (5th Cir. 1994). The district court did not err in refusing to find that the defendant knowingly created a substantial risk of death or serious bodily injury pursuant to USSG §2K1.4(a)(1). The circuit court ruled that the district court was not clearly erroneous in finding that the defendant's commission of arson did not substantially endanger the firemen.

United States v. Smith, 354 F.3d 390 (5th Cir. 2003). In a case of first impression, the Fifth Circuit, consistent with the Third, Sixth, and Eleventh Circuits, determined that a hotel room counts as a "dwelling" within the meaning of §2K1.4(a)(1)(B), regardless of whether it is occupied at the time of the crime. Defendant was convicted by a jury of, among other things, arson of an unoccupied motel. The defendant challenged the district court's conclusion that the motel was a "dwelling" within the meaning of §2K1.4(a)(1)(B).[9] The defendant conceded that the motel would be a dwelling while occupied, but argued that it ceased to be a dwelling during the three-month seasonal vacancy during which the arson took place. The Court of Appeals then considered whether the nature of the motel as a dwelling changed during its three-month seasonal vacancy. The defendant, relying on *United States v. Jackson*, 22 F.3d 583 (5th Cir. 1994), argued that §2K1.4(a)(1)(B) should not apply because a co-conspirator knew the motel was unoccupied and that the arson posed correspondingly little risk of danger to an inhabitant. In *Jackson*, the Fifth Circuit refused to apply a portion of the sentencing guidelines that defines burglary of a dwelling as a "crime of violence," on the ground that the burglary took place in a building that had been vacant for seven years. "Logically, whether by vacancy, physical deterioration, altered use, or otherwise, a point in time exists at which a dwelling loses its character as a residence and becomes a 'mere' building." *Jackson*, 22 F.3d at 585. The court noted that there was,

[9]*See United States v. Ray*, 245 F.3d 1256, 1257 (11th Cir. 2001); *United States v. McClenton*, 53 F.3d 584, 587 (3d Cir. 1995); *see also United States v. Barker*, 208 F.3d 215 (table), 2000 U.S. App. LEXIS 3666, at *5-*7 (6th Cir. Mar. 7, 2000) (unpublished) (holding that it was not plain error to conclude that an occupied motel is a dwelling for purposes of the sentencing guidelines.

however, a marked difference between the seven-year abandonment of the building in *Jackson* and the three-month seasonal vacancy of the motel. The court found that whatever the "point in time" at which a building's core nature is altered, it was not reached in just three months, particularly in light of the fact that the motel would again be occupied by visitors in the near future. Moreover, the court held that unlike the circumstance in *Jackson*, its interpretation of "dwelling" in §2K1.4(a)(1)(B) does not require finding that the arson posed a substantial risk of death or serious bodily injury to another. Rather, the guideline may be applied either if there is a risk of serious injury *or* if the arson involved the destruction of a dwelling. Accordingly, the Fifth Circuit held that the district court did not err in concluding that the motel was a dwelling within the meaning of §2K1.4(a)(1)(B).

United States v. Condren, 18 F.3d 1190 (5th Cir.), *cert. denied*, 513 U.S. 856 (1994). The district court did not err in finding that the defendant used or possessed a firearm "in connection with" another felony offense. Section 2K2.1(b)(5) mandates an enhancement if the defendant "used or possessed any firearm or ammunition *in connection with* another felony offense." *Id.* at 1196 (*emphasis added*). The district court correctly found that a firearm located in close proximity to narcotics, fully loaded and readily available to the defendant to protect drug-related activities is a firearm that was used in connection with the drug offense.

United States v. Kirk, 111 F.3d 390 (5th Cir. 1997). In an issue of first impression, the district court did not err in enhancing the defendant's base offense level based upon a finding that his prior conviction for sexual indecency with a child involving sexual contact constituted a crime of violence. The court referred to the definition of "crime of violence" in USSG §4B1.2(a)(2), which states that a crime of violence is an offense punishable by imprisonment for a term exceeding one year that ". . . otherwise involves conduct that presents a serious potential risk of physical injury to another." The court addressed this issue by analogy to its determination that, in the context of 18 U.S.C. § 16, indecency with a child involving sexual contact constitutes a crime of violence. The reasoning in such cases presumes that adults are larger and stronger than children, and there is always the risk that an adult will use physical force to ensure his victim's compliance. Whenever there exists a risk of physical force, there exists a risk that physical injury will result. The threat of violence in such cases is inherent in the size, age and authority position of an adult dealing with a child. The facts of this case were such that the defendant lured his victim, an eight-year-old boy, into a secluded area of a local park using deceit and then sexually molested the boy. This constituted a crime of violence.

United States v. Luna, 165 F.3d 316 (5th Cir.), *cert. denied*, 526 U.S. 1126 (1999). A defendant who is convicted of possession of stolen firearms, in violation of 18 U.S.C. § 922(j), is not subjected to impermissible double-counting when the sentencing court enhances his offense level under USSG §2K2.1 on the basis of both the fact that he possessed firearms in connection with the burglary in which he stole them, USSG §2K2.1(b)(5), and the fact that the firearms he possessed were stolen, USSG §2K2.1(b)(4). First, the unambiguous language of USSG §2K2.1 and its commentary authorize application of both subsections. Second, there are significant differences between the aims of the two subsections. Finally, even assuming that application of both subsections does amount to double-counting, such double-counting was intended by the guidelines because the Sentencing Commission provided no express exception to the application of both subsections.

United States v. Mitchell, 166 F.3d 748 (5th Cir. 1999). The district court erred in applying USSG §2D1.1, the drug guideline, using the cross reference in USSG §2K2.1(c) based on the defendant's possession of a gun. The record did not show that the defendant possessed the firearm "in connection with the commission or attempted commission" of a drug possession offense. The gun, but no drugs, was recovered from the defendant's car; the drugs were recovered from his girlfriend's house in a locked box in the living room; there was no evidence that the car was used to transport drugs; and

no evidence of "either spatial or functional proximity of the gun in the car and the drugs in the house." The requirement in USSG §2K2.1(c) that a firearm be possessed in connection with the commission of another offense "mandate[s] a closer relationship between the firearm and the other offense than that required" under USSG §2K2.1(b)(5). *Id*. at 756.

United States v. Rome, 207 F.3d 251 (5th Cir. 2000). The district court erred in applying a six-level enhancement under USSG §2K2.1(b)(1)(F) based on the PSR's assertion that the defendant's offense involved more than 50 firearms, where the assertion was not otherwise supported by the record. The defendant pled guilty to conspiracy to steal firearms. The defendant and an accomplice had twice attempted to break into separate businesses to steal firearms, but were caught by the owner before stealing anything. At the request of the government, the PSR asserted that the defendants would have stolen the entire inventory of firearms in each store if they had not been interrupted. "To allow such inferences to support this sentencing enhancement would essentially charge every burglar with intending to steal every visible item within a targeted location so long as it would be 'possible' to load all of the items into a getaway car." *Id*. at 256.

See United States v. Turner, 305 F.3d 349 (5th Cir. 2002), §4B1.2, p. 44.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crime

United States v. Dixon, 273 F.3d 636 (5th Cir. 2001), *cert. denied*, 537 U.S. 829 (2002). The district court did not commit "double counting" when applying the weapon enhancement for the robbery offenses because the enhancement was not applied to the underlying offense for the section 924(c) conviction. Looking to Application Note 2 in the guideline, the court held that the prohibited "double counting" only applies to the offense which underlies the gun count. *Id*. at 643.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Cuyler, 298 F.3d 387 (5th Cir. 2002). The defendant pled guilty to two counts of aiding and abetting the transportation of illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(A)(v)(II). The district court properly determined that the defendant's transportation of seven illegal aliens in the bed of his pickup truck, while driving on the highway, intentionally and recklessly created a substantial risk of death or serious bodily injury to the aliens under USSG §2L1.1(b)(5). The illegal aliens were unrestrained in the bed of the pickup truck, and easily could have been thrown from the truck, and almost certainly would have been injured in the event of an accident. Although it is not illegal under Texas law for adults to ride in the bed of a pickup truck, it is illegal for children to do so, which reflects the danger of this situation.

United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002). The district court properly applied the guideline enhancements for reckless endangerment and death of an individual

under USSG §2L1.1(b)(5) and (6). The defendant had pled guilty to knowingly and recklessly transporting an undocumented alien for purposes of financial gain. He acted as a paid guide to a group of nine undocumented aliens from San Luis Potosi, Mexico, to San Antonio, Texas, guiding the group, on foot, through the South Texas bush from early morning until midnight over a few days. One member of the group died of heat stroke. The Fifth Circuit determined that the district court properly increased the defendant's base offense level for recklessly creating a substantial risk of death to another person under USSG §2L1.1(b)(5) and that that provision was not limited to vehicular transportation. The defendant had misinformed the group about the length of the journey and did not inform them of the 100+ degree weather. They were not given adequate food and water and, for the most part, lacked insulated clothing. Although the defendant had no control over the climate conditions, the court found that he placed these individuals in a substantially risky situation, thereby satisfying the causation requirement. The court also held that intent is not required for a defendant to receive an eight-level increase under section 2L1.1(b)(6)(4) because the Commission specifically stated that intent was required for (b)(5) but was silent as to (b)(6).

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

United States v. Caicedo-Cuero, 312 F.3d 697 (5th Cir.), *cert. denied*, 123 S. Ct. 1948 (2003). The defendant was convicted of a Texas jail felony of simple possession of marijuana prior to his deportation. The statutory sentence of incarceration was between 180 days and 2 years. However, for a first-time offender, the courts *must* suspend imposition of the sentence and place the defendant on community supervision. Seven years later, the defendant pled guilty to illegal re-rentry into the United States in violation of 8 U.S.C. § 1326. The Fifth Circuit affirmed the district court's determination that the prior marijuana conviction was an "aggravated felony" for purposes of USSG §2L1.2. The court distinguished a Ninth Circuit case that held that a similar drug conviction under Arizona law was not a "felony" under USSG §2L1.2. The Arizona statute mandated a sentence of probation for a first or second drug possession. In contrast, the Texas statute mandates a suspension of a sentence of imprisonment of up to two years.

United States v. Calderon-Pena, 357 F.3d 518 (5th Cir. 2004). The appellate court denied a rehearing where it found defendant's charged offenses were "crimes of violence" under USSG §2L1.2(b)(1)(A)(ii), Application Note 1(B)(ii)(I) (2001). Defendant contested "whether an element of causing (or, in this case, risking) bodily injury is tantamount to an element of using or attempting to use force" when determining whether an offense is a "crime of violence." Defendant was convicted under the Texas child endangerment statute which provides a "person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or mental impairment." Ordinarily, the statute would not classify as a "crime of violence" because the disjunctive elements

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

describing the mental state of the crime do not all require intent with regards to the creation of an imminent danger. However, the court looked to defendant's indictment and found that he was convicted of "intentionally" engaging in the prescribed behavior and that defendant was convicted of two counts of intentionally . . . engaging in conduct that placed a child . . . in imminent danger of . . . bodily injury[.]" *United States v. Calderon-Pena*, 339 F.3d 320, 329 (5th Cir. 2003). The court concluded that where there is bodily harm, there is some sort of accompanying use of force. The defendant was aware of an imminent danger and undertook to create it; he attempted to make use of the force that would cause the injury, resulting in a "crime of violence" for the purposes of enhancement under §2L1.2.

United States v. Cervantes-Nava, 281 F.3d 501 (5th Cir.), *cert. denied*, 536 U.S. 914 (2002). The district court erred in holding that a conviction for DWI constituted an aggravated felony for the purposes of enhancement under the guidelines. The district court enhanced the defendant's sentence due to his prior conviction of DWI as if that crime were a crime of violence. However, the Fifth Circuit decided a case in which they held that DWI did not constitute a crime of violence. *Cervantes-Nava*, 281 F.3d at 506 (*citing United States v. Chapa Garza*, 243 F.3d 921, 923-28 (5th Cir.), *reh'g denied*, *reh'g, enbanc, denied*, 262 F.3d 479 (2001). Because "changes in sentencing law between sentencing and appeal that benefit the defendant require[s the Court] to reverse and remand for resentencing" *Cervantes-Nava*, 281 F.3d at 506, the Court held that the district court erred in sentencing and must remove the enhancement for the aggravated felony from the calculation of defendant's sentence.

United States v. Dabeit, 231 F.3d 979 (5th Cir. 2000), *cert. denied*, 531 U.S. 1202 (2001). The district court did not err in applying the 16-level enhancement under USSG §2L1.2 based on the existence of the defendant's prior conviction for conspiracy to perpetrate a checking and savings account kite scheme in violation of 18 U.S.C. §§ 1014 and 2113(b). The presentence report's recommendation of a 16-level enhancement was based on identifying the defendant's prior conviction as an "aggravated felony." On appeal, the defendant argued that the government failed to meet its burden of proof in demonstrating that his prior conviction constituted an "aggravated felony" under USSG §2L1.2(b)(1)(A). The Fifth Circuit disagreed and found that the defendant's prior conviction, for which he was sentenced to four years imprisonment, in violation of 18 U.S.C. § 2113(b), involves the taking of another's property. The court held that the district court correctly enhanced the defendant's sentence because the defendant's prior conviction fits within the definition of a theft offense and his sentence was for more than one year. *But see United States v. Chapa-Garza*, 243 F.3d 921, 927-28 (5th Cir. 2001) (holding that felony DWI is not a crime of violence as defined by 18 U.S.C. § 16(b) because intentional force against the person or property of another is seldom, if ever, employed to commit the offense of felony DWI.).

United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir.), *cert. denied*, 124 S. Ct. 271 (2003). The district court's 16-level sentencing enhancement under §2L1.2 was affirmed. The defendant pled guilty to illegal reentry into the United States following deportation after having been convicted of an aggravated felony. At sentencing, the district court, applying the then-in-effect 2001 version of the

guidelines, determined, pursuant to §2L1.2(b)(1)(A)(iii) that the defendant's base offense level should be increased by 16 levels because of the defendant's prior conviction for a firearm offense. On appeal, the defendant argued an *ex post facto* violation, maintaining that he should have been sentenced under the 2000, rather than the 2001 version of the guidelines, claiming that under the former version, he would not have been subject to the enhancement. The Fifth Circuit noted that for the 2001 version of §2L1.2, in effect at the time of sentencing, the defendant was subject to the enhancement. Therefore, the court's *ex post facto* analysis rested on whether the defendant would have been subject to the same enhancement under the 2000 version, which was in effect at the time of his offense. The court found that a basis for a 16-level enhancement for an "aggravated felony" pursuant to the 2000 version was an offense described in 26 U.S.C. § 5861. Section 5861 and the Tex. Penal Code § 46.05 were almost identical. In light of subsection (E)(iii) of 8 U.S.C. § 1101(a)(43), as used in the 2000 version, the court concluded that application of the 2001, instead of the 2000 version, was not plain error. The district court's sentence was affirmed.

United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002). The district court improperly characterized the defendant's prior state conviction for injury to a child as a "crime of violence," which resulted in a 16-level enhancement under USSG §2L1.2(b)(1)(A). Section 22.04(a) of the Texas Penal Code, the statute criminalizing injury to a child, does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child. Moreover, there is not a substantial risk that physical force will be used to effectuate the offense because a defendant can be convicted of this crime based upon omissions rather than conscious acts. Accordingly, the offense of injury to a child does not satisfy the definition of "crime of violence" in 18 U.S.C. § 16(a) or (b).

United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001). The district court erred in holding the unlawfully carrying a firearm in an establishment licensed to sell alcoholic beverages was a crime of violence. The Fifth Circuit held that the defendant's prior conviction was not a crime of violence and therefore should not have subjected the defendant to the aggravated felony enhancement. The Texas code under which the defendant was charged characterizes the offense of carrying a firearm in an establishment licensed to sell alcoholic beverages as a third degree felony. The government argued that a crime of violence should be defined by "the nature of the risk of the defendant's conduct." *Hernandez-Neave*, 291 F.3d at 299. However, the Fifth Circuit held that the proper inquiry is not into the defendant's conduct, but rather to the nature of the crime itself. In this instance, the crime of unlawfully carrying a firearm in an establishment licensed to sell alcoholic beverages is completed as soon as the individual steps into the establishment. Since the offense in question does not require any force to complete the crime, it does not constitute a crime of violence and, therefore, does not qualify the defendant for an aggravated felony enhancement.

United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001). The district court erred in enhancing the defendant's sentence based on the finding that a criminal mischief conviction constituted a "crime of violence" or "aggravated felony." The court recognized that they previously held "force," within the definition of "crime of violence," is "synonymous with destructive or violent force." *Id*. at 426; *see United States v. -Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995). However, they further held that

in this instance, graffiti it not the type of destructive force considered in those prior cases, since here there was no substantial risk that the defendant was going to use "destructive or violent force" in the commission of the offense. *Id*. at 427.

United States v. Rivera, 265 F.3d 310 (5th Cir. 2001), *cert. denied*, 534 U.S. 1146 (2002). The district court did not err in characterizing the defendant's prior state conviction of cocaine possession as an "aggravated felony" under the guideline. The court noted that as a matter of statutory construction, the defendant's argument is foreclosed by their decision in *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997). The defendant attempted to raise a "constitutional rule-of-lenity" argument; however, the court held that inasmuch as this is a statutory construction argument, it is foreclosed by *Hinojosa-Lopez*.

United States v. Trejo-Galvan, 304 F.3d 406 (5th Cir. 2002). The district court improperly characterized three prior misdemeanor convictions for driving under the influence as "crimes against the person." The defendant pled guilty to illegal re-entry into the United States in violation of 8 U.S.C. § 1326. The statute does not define "crimes against the person" and no other court has considered the issue. Using a common law definition, the Fifth Circuit held that a "crime against the person" is an "offense that, by its nature, involves a substantial risk that the offender will intentionally employ physical force against another person." The court cited murder, rape, aggravated assault and robbery as examples. Driving under the influence is not a crime against the person because it does not involve a substantial risk that the offender will intentionally use force against another person.

United States v. Urias-Escobar, 281 F.3d 165 (5th Cir.), *cert. denied*, 536 U.S. 913 (2002). The district court did not err in holding that his earlier state conviction was an aggravated felony for the purposes of the sentencing guidelines. The defendant argued that because his earlier state conviction was characterized as a misdemeanor by the state, that conviction by definition could not qualify him for the aggravated felony enhancement. The Fifth Circuit, however, looked to the guidelines commentary for USSG §2L1.2 regarding the aggravated felony enhancement. Because the guidelines commentary states that an aggravated felony is "a crime of violence for which the term of imprisonment [sic] at least one year," *Urias-Escobar*, 281 F.3d at 167, the Fifth Circuit held that a misdemeanor conviction can constitute an aggravated felony for sentencing purposes. The Fifth Circuit further held that in defining an aggravated felony partially by the length of the sentence imposed, Congress was defining a term of art in order to include "all violent crimes punishable by one year's imprisonment, including certain violent misdemeanors." *Id*.

United States v. Valdez-Valdez, 143 F.3d 196 (5th Cir. 1998). The district court did not err in finding that the defendant's deferred adjudication after a guilty plea on Texas state charges was a "prior felony" for the USSG §2L1.2(b)(1) sentence enhancement. The defendant argued that even though he pled guilty to the Texas charge, the deferred adjudication was never converted to a conviction and no adjudication of guilt was ever entered. The court of appeals concluded that the deferred adjudication constituted a prior felony conviction, as the guidelines provide that deferred

adjudications resulting from a finding or admission of guilt are to be considered in computing the criminal history category.

United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) (*en banc*). In 1996, the defendant, a citizen of Mexico, was convicted of intoxication assault in Texas state court. Under the Texas statute, a person was guilty of intoxication assault when that person, "by accident or mistake, while operating an aircraft, watercraft or motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another." TEX. PENAL CODE ANN. § 49.07 (1994). Following his conviction and sentence, the defendant was deported from Texas to Mexico. On June 24, 2001, the defendant was again found in Texas. He pled guilty to being unlawfully present in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2). The base level of the defendant's offense was eight; the PSR recommended a 16-level enhancement pursuant to §2L1.2. On appeal, the court considered whether "the use, attempted use, or threatened use of physical force against the person of another," §2L1.2, Application Note 1(B)(ii)(I), means that the predicate offense requires that a defendant intentionally avail himself of that force and held that it does. The court noted that the overwhelming majority of authority on the plain meaning of "use" contemplates the application of something to achieve a purpose–supplementing the word "force" in place of the indeterminate object "something" in the aforementioned dictionary definition bears out this meaning: "use of force" means "the act of employing force for any . . . purpose," or "to avail oneself of force." The court explained that the meaning of "use of force" is free of ambiguity and that the plain meaning of the word "use" requires intent. The court also considered whether the intentional use of force is an element of the crime of intoxication assault and held that it was not. The court noted that the Texas crime of intoxication assault requires that a prosecutor prove that the defendant (1) by accident or mistake, (2) while operating a motor vehicle in a public place while intoxicated, (3) by reason of that intoxication causes serious bodily injury to another. All that need be proven for a conviction is that an intoxicated driver operated a motor vehicle in a public place that resulted in serious bodily injuries to another. No *mens rea* need be established. The only statutory requirement is that a bodily injury occur and that the injury was causally linked to the conduct of the defendant. Relying on the defendant's conviction and the statutory definition of intoxication assault, the court held that the intentional use of force against the person of another is not a necessary component of the offense.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Mendiola, 42 F.3d 259 (5th Cir. 1994). The circuit court ruled that USSG §2P1.1 does not violate equal protection even though it treats persons convicted of driving while intoxicated in Texas, where the offense is punishable by two years in jail, more harshly than persons convicted for the same offense in states where the maximum penalty is less than one year. The defendant pled guilty to escaping from federal custody, but was ineligible for the offense level reduction provided in USSG §2P1.1(b)(3) because the drunk driving offense for which he was convicted while on escaped status was punishable by a term of one year or more under state law. The defendant

acknowledged that the guideline was subject only to rational basis review, and that there was a legitimate governmental purpose for denying offense level reductions to defendants who commit crimes after escaping from federal custody. He argued, however, that the criteria for denying the reduction–focusing on the maximum penalty allowed, rather than the penalty received–was not a rational means for accomplishing this goal. The circuit court disagreed, concluding that the guideline's focus on maximum possible penalty was rational because it reflected the localized determinations of the seriousness of offenses, and such determinations play a significant role in imposing a sentence for escape from federal custody.

Part Q Offenses Involving the Environment

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

Part S Money Laundering and Monetary Transaction Reporting

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

United States v. McIntosh, 280 F.3d 479 (5th Cir. 2002). The district court did not err in holding that a recent amendment to the sentencing guidelines should not be applied retroactively. The defendant claims that Amendment 634, which became effective after his sentencing, lowers the base offense levels for money laundering convictions and should be applied retroactively. In order for an amendment to be applied retroactively it must be a clarifying amendment and not a substantive amendment. The Fifth Circuit points out that since Amendment 634 amended USSG §2S1.1 and deleted USSG §2S1.2, and because it changes the calculation of base offense levels for money laundering, the amendment is substantive and not merely clarifying. Furthermore, the purpose of Amendment 634 is "to effect substantive changes in the punishments for money laundering offenses based upon the underlying conduct." *McIntosh*, 280 F.3d at 485. The Fifth Circuit cites, as further evidence of the intent of the Sentencing Commission, the fact that Amendment 634 was not listed as one of the amendments to be applied retroactively.

See United States v. Ogle, 328 F.3d 182 (5th Cir. 2003), §1B1.2, p. 1.

United States v. Rodriguez, 278 F.3d 486 (5th Cir.), *cert. denied*, 536 U.S. 913 (2002). The district court did err in basing the defendant's total offense level on the amount of income that he earned rather than on the amount of money that he actually laundered. Although the district court was correct in its finding that under USSG §2S1.1 the defendant's base offense level may be increased if the amount of money laundered is greater than $200,000, the defendant was correct in his assertion that it was error for the district court to increase his sentence based on the amount of money he spent in excess of his reported income. The Fifth Circuit held that under USSG §2S1.1, in order for money to be considered for his offense level, the government must prove by a preponderance of the evidence that the money was laundered. Although additional money might be considered under relevant conduct, the Fifth Circuit held that based on the application notes to USSG §1B1.3, in the case of money laundering, additional money, not proved to have been laundered, cannot be used against the

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

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

defendant. In this case the government merely proved a discrepancy and not that the money was laundered, so the case was remanded for resentencing.

§2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

See United States v. Loe, 262 F.3d 427 (5th Cir. 2001), *cert. denied*, 534 U.S. 1134 (2002), §2T1.1.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Loe, 262 F.3d 427 (5th Cir. 2001), *cert. denied*, 534 U.S. 1134 (2002). The district court did not err in its calculation of the tax loss. The court found that the defendant's argument resembled a sufficiency of evidence claim, and held that the district court did not err in its choice of tax rate, its inclusion of assets such as the defendant's home, and using other payments toward the tax loss calculation.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy

United States v. Cabrera, 288 F.3d 163 (5th Cir. 2002). The district court did not err in attributing the smuggling of 29 immigrants to the defendants for sentencing purposes in accordance with USSG §2X1.1. The defendants were convicted of conspiring to encourage and induce aliens to enter and reside in the United States in violation of 18 U.S.C. § 371. The district court applied a six-level enhancement under USSG §2L1.1 due to the determination that one of the specific offense characteristics listed in USSG §2L1.1 had been established, namely, that the "offense involved the smuggling, transporting, or harboring of [25 to 29] unlawful aliens." The defendants argued that USSG §2X1.1(a) requires the government to adduce evidence sufficient to fulfill a "reasonable certainty" to support this finding. The defendants cited *United States v. Rome*, 207 F.3d 251 (5th Cir. 2000), where the court held that "speculative offense characteristics will not be applied. The defendants argued that the method used by the government to compute the number of aliens they assisted was inaccurate, thereby disallowing the enhancement. The Fifth Circuit disagreed, stating that the reasonable-certainty standard of USSG §2X1.1(a) applies only to conduct that was allegedly intended to occur, not to conduct that did occur, such as the smuggling of immigrants in this case. The Fifth Circuit held that there was sufficient reliable evidence that the method the district court used to calculate the number of immigrants the defendants smuggled was reasonably representative.

United States v. Ogle, 328 F.3d 182 (5th Cir. 2003). The defendant argued that the district court erred in not considering a three-level reduction of his guideline offense level under section

2X1.1(b). The district court reasoned that §2X1.1 did not apply to offenses under 18 U.S.C. § 1956, as the commentary included with section §2X1.1 listed only offenses under 18 U.S.C. §§ 371, 372, and 2271. The appellate court held that the district court erred in not considering the availability of a three-level reduction under §2X1.1(b) because §§1B1.2(a) and 2X1.1 clearly direct that § 2X1.1 shall be applied to attempts, conspiracies, and solicitation unless the specific attempt, conspiracy, or solicitation is expressly covered by the guideline for the substantive offense. *See United States v. Ogle*, 328 F.3d 182 (5th Cir. 2003), §1B1.2, p. 1.

United States v. Virgen-Moreno, 265 F.3d 276 (5th Cir. 2001), *cert. denied*, 534 U.S. 1095 (2002). The district court did not err in increasing the defendant's offense level based on factual findings that he was a leader/organizer of the conspiracy. The court held that the record contained ample evidence of his aggravating role, such as the defendant introducing others into the conspiracy.

§2X3.1 Accessory After the Fact[13]

§2X5.1 Other Offenses

See United States v. Calbat, 266 F.3d 358 (5th Cir. 2001), §2A2.2, p. 5.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Lambright, 320 F.3d 517 (5th Cir. 2003) (*per curiam*). The district court properly increased the defendant's base offense level by two levels because of a vulnerable victim. The defendant was a corrections officer at a Texas state prison and assaulted an inmate, who died as a result. The district court reasoned that the victim was vulnerable because "he was locked in his cell prior to the assault" and "could not protect himself."

§3A1.2 Official Victim

See United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001), *cert. denied*, 534 U.S. 1094 (2002), §3C1.2, p. 34.

United States v. Jones, 145 F.3d 736 (5th Cir.), *cert. denied*, 525 U.S. 988 (1998). The district court did not err in imposing sentence enhancements for both causing bodily injury to a victim

[13]Effective November 1, 2003, the Commission amended §2X3.1 by raising the maximum offense level from 20 to 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense. *See* USSG App. C, Amendment 655.

and assaulting an official victim, based on conduct toward a single victim. While fleeing a bank robbery, the defendant shot at a pursuing officer, who was injured by glass from a windshield shattered by one of the defendant's bullets. The defendant contended that applying both enhancements constituted double counting. The Sixth and Seventh Circuits have rejected the double counting argument because each enhancement applies to different aspects of the same conduct. *See United States v. Swoape*, 31 F.3d 482 (7th Cir. 1994); *United States v. Muhammad*, 948 F.2d 1449 (6th Cir. 1991), *cert. denied*, 502 U.S. 1119 (1992). The Fifth Circuit held that even if it were double counting, it is permissible under the guidelines, since the court has previously held that "double counting is prohibited only if the particular guidelines at issue forbid it." *United States v. Morris*, 131 F.3d 1136, 1140 (5th Cir. 1997), *cert. denied*, 523 U.S. 1088 (1998), and *cert. denied*, 524 U.S. 960 (1998).

United States v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994). The district court correctly enhanced the defendant's sentence for assaulting a law enforcement officer pursuant to USSG §3A1.2(b). The defendant was convicted of conspiracy to distribute and possession with intent to distribute marijuana. He argued that the enhancement was in error because his offense was a victimless crime and Application Note 1 clearly states that the guideline applies to offenses involving the "specified victims." The Fifth Circuit rejected this argument, concluding instead that Application Note 1's reading of subsection (b) is plainly unreasonable and it is in direct conflict with Application Note 5. Whereas Application Note 1 would require the result advocated by the defendant, Application Note 5 specifically explains that subsection (b) "may apply in connection with a variety of offenses that are not by nature targeted against official victims." USSG §3A1.2, comment. (n.5). The court of appeals concluded that this language, on its face, indicates that only Application Note 5 applies to USSG §3A1.2(b). Further, Application Note 5 was added at the same time as subsection (b), whereas Note 1 was not amended when the second subsection was added. Based on this analysis, the Fifth Circuit concluded that the Commission intended that Application Note 1 apply only to subsection (a) and Application Note 5 apply only to subsection (b). This holding is consistent with the Ninth Circuit's decision in *United States v. Powell*, 6 F.3d 611 (9th Cir. 1993).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Boutte, 13 F.3d 855 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). The defendant was convicted of wire fraud, submitting false claims and making false statements to a federal agency. He appealed his conviction and the enhancement of his sentence under USSG §3B1.1 for his role in the offense as an organizer or leader of five or more people. The defendant argued that the other four individuals involved did not count as participants in the criminal activity under the guidelines because they were not charged or convicted with him. The circuit court rejected this argument, holding that the other parties need only to have knowingly participated in some part of the criminal enterprise.

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). The district court did not err in characterizing defendant Faulk as an organizer or leader of a criminal activity. The defendant argued that he was merely a supplier of heroin and not a leader in the conspiracy. The Fifth Circuit held that proof that the defendant supervised only one other participant was sufficient to make him eligible for this enhancement. Furthermore, the Fifth Circuit held that it is possible for there to be more than one organizer or leader of a conspiracy. Therefore, applying the enhancement to the defendant was appropriate since the evidence showed that he had involvement in delivery and supply of heroin as well as recruitment and control of another participant.

See United States v. Godfrey, 25 F.3d 263 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994), p. 14.

United States v. Hare, 150 F.3d 419 (5th Cir. 1998). The district court's finding that the defendant was a leader or organizer of a criminal activity involving at least five participants was not clearly erroneous. Although the defendant urged that testimony showed he sometimes took orders from others, the court of appeals noted that, under the guideline, there can be more than one person who qualifies as a leader or organizer of a criminal association.

United States v. Turner, 319 F.3d 716 (5th Cir.), *cert. denied*, 123 S. Ct. 1939 (2003). The appellate court affirmed the district court's finding that the defendant played a managerial role in the marijuana conspiracy under §3B1.1(c) based on evidence that (1) the defendant directed the activities of a co-conspirator in sending and accepting packages for him concerning his marijuana distribution; (2) the co-conspirator stored marijuana for the defendant; and (3) the defendant paid the co-conspirator for these services. The appellate court held that when the evidence demonstrates that a defendant directed another in his drug trafficking activities, a sentence enhancement under §3B1.1(c) is appropriate. *United States v. Posada-Rios*, 158 F.3d 832, 881 (5th Cir. 1998). The court noted that as the commentary to §3B1.1(c) explains, "there can . . . be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy."

§3B1.2 Mitigating Role

United States v. Atanda, 60 F.3d 196 (5th Cir. 1995). The district court did not err in refusing to grant the defendant a reduction in offense level pursuant to USSG §3B1.2. The defendant pled guilty to conspiracy to defraud the United States by filing false tax claims. The defendant claimed on appeal that the court misapplied USSG §3B1.2 by refusing to consider the defendant's role in the conspiracy and considering instead the fact that he filed a false return in his own name. In a matter of first impression, the Fifth Circuit concluded, "when a sentence is based on an activity in which a defendant was actually involved, USSG §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." *Id*. at 199. *See United States v. Lampkins*, 47 F.3d 175, 180-81 (7th Cir.), *cert. denied*, 514 U.S. 1055 (1995); *United States v. Olibrices*, 979 F.2d 1557, 1561 (D.C. Cir. 1992).

United States v. Leal-Mendoza, 281 F.3d 473 (5th Cir. 2002). The district court did not err in its determination that the defendants did not qualify for a reduction of sentence based on a minor or minimal role. The Fifth Circuit held that since the defendants stipulated that they were paid a large amount of money and also moved a large quantity of drugs, the district court was correct in its determination that the defendants were more than minor or minimal participants.

United States v. Virgen-Moreno, 265 F.3d 276 (5th Cir. 2001), *cert. denied*, 534 U.S. 1095 (2002). The district court did not err in refusing to grant the defendant a minor participant reduction without specific findings on the issue. The defendant relied on *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984), where it was held that the defendant's objection to the description of "notorious drug smuggler" in the PSR required the court to make findings as to any factual inaccuracies. Because the defendant never objected to his role in the PSR nor raised the issue at the hearing, his argument was rejected.

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

United States v. Buck, 324 F.3d 786 (5th Cir. 2003). The defendant argued that the abuse of trust enhancement is inapplicable to fraud convictions because all fraud sentenced under §2F1.1 inherently includes an abuse of trust. The court adopted a portion of the Second Circuit's holding in *United States v. Hirsch*, 239 F.3d 221, 227 (2d Cir. 2001), and upheld the application of the abuse of trust enhancement to a fraud sentence where the defendant employed discretionary authority given by her position in a manner that facilitated or concealed the fraud. The defendant also challenged the determination that she was in a position of trust, arguing that she was not in such a position with respect to the government, the primary victim of the fraud. The appellate court stated that it has never held, however, nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim. The court explained that "To determine whether the position of trust 'significantly facilitated' the commission of the offense, [a] court must decide whether the defendant occupied a superior position relative to all people in a position to commit the offense, as a result of [her] job." *United States. v. Fisher*, 7 F.3d 69, 70-71 (5th Cir. 1993). The appellate court held that the record supported the finding that the defendant abused her position of trust, and accordingly, affirmed the district court's application of the sentence enhancement for abusing a position of trust.

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). The district court did not err in finding that the defendant abused a position of public trust and thereby qualified for a two-level increase of his sentencing score. The defendant was a former police chief who was involved in a drug ring operated out of the home of another. The defendant participated in the drug trafficking while he was still employed as chief of police. The district court held that the defendant qualified for the sentence enhancement because he was transporting marijuana while employed as police chief and was aware of illegal drug trafficking and failed to take action. The Fifth Circuit held that the evidence in the case clearly supported the proposition that the defendant abused his position of public trust and thus the district court's finding was not clearly erroneous.

United States v. Iloani, 143 F.3d 921 (5th Cir. 1998). The district court did not err in enhancing the defendant's sentence for abuse of position of trust. The defendant, a chiropractor, acted in concert with his patients to conduct a fraudulent billing scheme against insurance companies. The enhancement was based on the chiropractor's relationship with an insurance company. The court of appeals compared the case to others in which circuit courts held that defendant physicians occupied positions of trust in their relationship with the government as insurer under Medicare or Medicaid. *See United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997); *United States v. Adam*, 70 F.3d 776 (4th Cir. 1995). The defendant made medical findings and diagnoses and prescribed treatments and medication, then falsely represented to the insurance company that treatments had been rendered. The district court was entitled to conclude that insurance companies usually rely on the honesty and integrity of physicians in their diagnosis and treatment and that the companies must rely on physician's representations that treatments for which the companies are billed were performed.

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

Part C Obstruction

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

United States v. Ahmed, 324 F.3d 368 (5th Cir. 2003). The defendant was the nephew of one of four Pakistani nationals who jumped ship from a vessel which was docked in St. Charles Parish, Louisiana. The defendant picked up the sailors and helped them obtain food and lodging. During FBI questioning, the defendant repeatedly denied any knowledge of the Pakistani sailors. The defendant was convicted of harboring illegal aliens. The defendant claimed that his mere denials of knowing the sailors did not amount to a significant impediment, and therefore, the district court erred in applying the sentence enhancement for obstruction of justice under USSG §3C1.1. The appellate court stated that previously it has held that statements which lead officers on a misdirected investigation do qualify as significant impediments. *See e.g., United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003); *United States v. Smith*, 203 F.3d 884 (5th Cir. 2000); *United States v. Rickett*, 89 F.3d 224 (5th Cir.), *cert. denied*, 519 U.S. 1000 (1996). On the other hand, it noted that other courts have held that statements which do not cause investigators to expend any additional resources on their investigation are not the type of statements which significantly impede the investigation. *See e.g., United States v.* Surasky, 976 F.2d 242 (5th Cir. 1992); *United States v. Griffin*, 310 F.3d 1017 (7th Cir. 2002). The appellate court concluded that there was no evidence that defendant's statements caused the FBI agents to go on a "wild goose chase," or in any other way misled the agents in the sort of manner that has traditionally been the basis for enhancement. Accordingly, it found that the district court clearly erred by enhancing the defendant's offense level for obstruction of justice.

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

United States v. Clayton, 172 F.3d 347 (5th Cir. 1999). The defendant, a chief deputy sheriff, kicked an arrestee in the head while she was lying handcuffed on the ground and then allegedly threatened officers at the scene with dismissal if they revealed what he had done. The government sought an upward adjustment for obstruction of justice for this conduct. The Fifth Circuit held, however, that conduct in the nature of obstruction of justice that occurs before an investigation of an offense begins does not trigger the provisions of USSG §3C1.1. Section 3C1.1 requires that the obstruction occur "during the investigation" of the offense. The Court noted an apparent conflict between the text of the guideline and Application Note 3(i), but resolved that conflict by recognizing the note does not compel the conclusion that all conduct prohibited by the statutes mentioned in the note is covered by the obstruction enhancement. The court also noted that Application Note 1 was recently amended to make clear that USSG §3C1.1 has a temporal element.

United States v. Greer, 158 F.3d 228 (5th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999). A defendant who unsuccessfully feigns incompetence in order to delay or avoid trial and punishment qualifies for an offense level enhancement for obstruction of justice. So long as the obstruction is willful, the enhancement may apply to defendants with psychological problems or personality disorders.

United States v. Johnson, 352 F.3d 146 (5th Cir. 2003). The district court erred in failing to make a finding that defendant procured her sister's testimony. Defendant was indicted for being a felon in possession of a firearm after police officers responded to a call about a domestic disturbance at defendant's home. During the trial, defendant's twin sister testified that she had placed the firearm in a gun case between the mattress and the box spring. A rebuttal witness, however, testified that defendant's twin sister told her that she was going to take the blame for defendant's gun charge. The district court judge determined that the sister perjured herself and that defendant knew her sister lied. As a result, the district court granted the government's motion for a two-level enhancement for obstruction of justice. On appeal, defendant argued that the district court's finding that defendant knew about her sister's perjury was insufficient to support an obstruction of justice adjustment under §3C1.1. Defendant argued that mere knowledge of the falsity of a witness's testimony was not enough to justify the enhancement. The Fifth Circuit stated that upon defendant's objection to the enhancement, the district court was required to make independent findings identifying false testimony that concerned a material matter; that the witness testified with willful intent to provide false testimony; and that the defendant procured the witness's testimony. The court held that the district court made none of these explicit findings and, therefore, it was appropriate to vacate defendant's sentence and remand the case for specific findings.

United States v. Martinez, 263 F.3d 436 (5th Cir. 2001). The district court did not err in applying an obstruction of justice enhancement, even though the reasons used were different than those relied upon by the Fifth Circuit. The record shows that the defendant obtained a false passport in order to evade the authorities and transferred assets prior to his arrest. Because the actions of the defendant constituted attempts to evade the authorities, the court found that the enhancement was not error.

United States v. McCauley, 253 F.3d 815 (5th Cir. 2001). The district court did not err in sustaining the government's objection for obstruction of justice against the defendant based on his alleged perjury at trial. The defendants were convicted of bank fraud and conspiracy to commit bank fraud. At sentencing the district court found that the defendant made pretrial statements that significantly contradicted his trial testimony and applied the two-level enhancement for perjury under USSG §3C1.1. On appeal, the Fifth Circuit disagreed and held that, based on the defendant's statements before and at trial, the district court did not commit clear error in sustaining the government's objection for obstruction of justice against the defendant. *See also United States v. Odiodio*, 244 F.3d 398, 404-05 (5th Cir. 2001), *cert. denied*, 536 U.S. 914 (2002) (upheld sentence enhancements for the defendant who denied possessing a culpable mental state; the record reflected 14 instances of perjury by the defendant denying *mens rea*).

United States v. Searcy, 316 F.3d 550 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1955 (2003). The district court properly applied the obstruction of justice enhancement under USSG §3C1.1 even though the threat was not directly communicated to the intended target. While on pre-trial release, the defendant attempted to retaliate against a confidential informant by getting a third party (who unbeknownst to defendant was also a confidential informant) to "plant" crack cocaine in the informant's residence. The plan fell apart when the defendant could not secure money to purchase crack cocaine. Noting that a conflict exists among circuit courts on the issue, the Fifth Circuit followed the Second, Eighth, Ninth and Eleventh Circuits. It determined that nothing in the guideline or commentary restricts USSG §3C1.1 only to situations in which the defendant directly threatens a witness or communicates the threat to a third party with the likelihood that it will in turn be communicated to the witness. It reasoned that the guideline was intended to encompass attempts to obstruct justice and, thus, covers the actions in this case.

United States v. Wells, 262 F.3d 455 (5th Cir. 2001). The district court did not err in relying on a finding not made at the plea agreement revocation hearing in enhancing the defendant's sentence. Because the enhancement did not affect the sentencing range and the court had already found that any claim of prosecutorial vindictiveness is meritless, any error regarding the enhancement was harmless.

United States v. Wilson, 105 F.3d 219 (5th Cir.), *cert. denied*, 522 U.S. 847 (1997). A defendant may be eligible for the safety valve so long as he personally does not possess the firearm, even if codefendants possess firearms.

§3C1.2 Reckless Endangerment

United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001), *cert. denied,* 534 U.S. 1094 (2002). The district court did not "double count" when it applied enhancements under USSG §§3C1.1 and 3A1.2, based on the finding that the conduct at issue involved two separate times and places. The court held that because the conduct "involved two temporally and geographically separate acts aimed at different victims, two enhancements were appropriate and not prohibited by comment. (n.1) to

§3C1.2." *Id*. at 512; *see also United States v. Rodriguez-Matos*, 188 F.3d 1300, 1312 (11th Cir. 1999), *cert. denied*, 529 U.S. 1044 (2000).

Part D Multiple Counts

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

United States v. Davidson, 283 F.3d 681 (5th Cir. 2002). The district court did not err when it refused to group the defendant's child pornography offenses as a single offense. The defendant received concurrent sentences of 151 months' imprisonment for interstate transportation of child pornography, 60 months for interstate distribution, possession, and receipt of child pornography, and 120 months for possession of an unregistered firearm. The defendant argued that the district court erred by refusing to group his interstate transportation offenses as "closely related counts" into a single offense under USSG §3D1.2. The defendant contended that the amendment to USSG §3D1.2 is clarifying and must be retroactively applied. Amendment 615, effective on November 1, 2001, included the defendant's offense as one for which grouping is mandatory. The Fifth Circuit held that as a substantive amendment to the guidelines, Amendment 615 may not be applied retroactively. The defendant also argued that his offenses should have been grouped under USSG §3D1.2(c). At the time of sentencing, the defendant's offenses were in the case-by-case grouping category. This category "depends on factual and case-specific conclusions. A reviewing court must give 'due deference' to the district court, and respect the informed judgements made by that court." (Citing *United States v. Pope*, 871 F.2d 506, 509 (5th Cir. 1989.) The defendant argued that under *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997), and *United States v. Salter*, 241 F.3d 392 (5th Cir. 2001), his offenses should have been grouped. In *Haltom*, the court required grouping of tax evasion and mail fraud offenses because the mail fraud count embodied conduct that was treated as a specific offense characteristic of the tax evasion counts, while in *Salter* the court required grouping of drug trafficking and money laundering offenses because the drug trafficking offense was used to enhance the money laundering offense. The Fifth Circuit distinguished the defendant's case from *Haltom* and *Salter's*, by noting that unlike the offense conduct in *Haltom* and *Salter*, the defendant's distribution was not being double counted because it was not a specific offense. The Fifth Circuit stated that multiple offenses involving interstate transportation of child pornography may be grouped under USSG §3D1.2(c), but are not required to be so grouped according to *United States v. Ketcham*, 80 F.3d 789 (3d Cir. 1996).

United States v. Runyan, 290 F.3d 223 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002). The district court erred in grouping three of the defendant's four counts of conviction. The Fifth Circuit stated that the district court incorrectly considered count one, sexual exploitation of a child, by itself, while grouping the three remaining counts, receipt, distribution, and possession of child pornography,

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

together. The defendant received a five-level enhancement for "engaging in a pattern of activity involving . . . sexual exploitation of a minor" for the group of offenses. However, the defendant's exploitation offense was "double counted," a practice prohibited under USSG §3D1.2, which provides that counts of conviction must be grouped "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The Fifth Circuit stated that the "double counting" increased Runyan's sentence and remanded the case for resentencing.

United States v. Rice, 185 F.3d 326 (5th Cir. 1999). A defendant's convictions of drug trafficking offenses should be grouped, under USSG §3D1.2, with his convictions of laundering the proceeds of the drug trafficking. Here, the defendant's money laundering sentence was enhanced under USSG §2S1.1(b) on the basis of his knowledge that the money he was laundering was the proceeds of drug trafficking. Accordingly, the defendant's money laundering and drug trafficking counts should have been grouped under USSG §3D1.2(c) which provides that counts should be grouped when one count embodies conduct that is treated as a specific offense characteristic, or other adjustment to, the guideline applicable to another of the counts. In so holding, the court distinguished *United States v. Gallo*, 927 F.2d 815 (5th Cir. 1991), which held that money laundering convictions were not to be grouped with convictions for underlying offenses, because *Gallo* did not address subsection (c) of USSG §3D1.2 and instead relied on *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997), which concerned a defendant who was convicted of fraud and of failing to report the proceeds from the fraud on his income taxes.

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). The district court erred by not grouping the money laundering count with the conspiracy count under USSG §3D1.2(c). The presentence investigation report (PSR) prepared for sentencing did not group the two offenses. Instead, it determined that the base offense level (BOL) for the conspiracy charge was 26, with an adjusted offense level of 30 and the BOL for the money laundering charge was 23, with an adjusted level of 28. Under USSG §3D1.4 the combined offense level determined was 32, less three levels for acceptance of responsibility, resulting in an offense level of 29. The defendant objected to the money laundering count not being grouped with the conspiracy count under USSG §3D1.2 but his objection was overruled. On appeal, the Fifth Circuit determined that the PSR added three levels to the money laundering offense level because the defendant knew that the funds were the proceeds of an unlawful activity involving the distribution of narcotics or other controlled substance. The court found that this was the exact conduct embodied by the drug trafficking count of conviction and held that grouping of these charges was required and that the district court's failure to do so was in error.

§3D1.3 Offense Level Applicable to Each Group of Closely Related Counts

United States v. Martinez, 263 F.3d 436 (5th Cir. 2001). The district court did not err in calculating the offense level under the most serious offense in the group and not under a less serious offense, because the conduct was not atypical or outside the heartland of the guideline. The court noted "we have interpreted the heartland analysis as a permissive basis for exercising discretion to apply

a downward departure, rather than a component of the initial selection of the applicable guideline." *Id*. at 440; *see, e.g. United States v. McClatchy*, 249 F.3d 348, 359-360 (5th Cir.), *cert. denied*, 534 U.S. 896 (2001). Thus, the court will not review a refusal to depart on appeal.

United States v. Messervey, 317 F.3d 457 (5th Cir. 2002). The district court improperly departed upward from a guideline range of 70 to 87 months to a 220-month sentence. The defendant was convicted of mail fraud and money laundering based upon four schemes involving automobiles and artwork. The district court first cited USSG §3D1.3, comment. (n.4), to justify the upward departure because it determined that the four separate schemes were not accounted for because adding the value of all four schemes together resulted in the same penalty as if the defendant had just committed the 1996 art fraud. The Fifth Circuit reversed because the rape-robbery example described in §3D1.3, comment. (n.4), was distinguishable from the instant case. Unlike the guideline example where the robbery would not be considered at all because rape was the most serious charge, here the pecuniary loss of all four frauds were considered. The fact that one scheme was several magnitudes larger than the other schemes does not change the fact that all four schemes were accounted for. Although the district court also indicated that it departed upward for defendant's exploitation of "vulnerable victims," it considered and rejected an enhancement based upon USSG §3A1.1(b) and there is no aggravating circumstance of a kind or degree not contemplated by the guidelines.

§3D1.4 Determining the Combined Offense Level

United States v. Runyan, 290 F.3d 223 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002). The district court erred in grouping three of the defendant's four counts of conviction. The Fifth Circuit stated that the district court incorrectly considered count one, sexual exploitation of a child, by itself, while grouping the three remaining counts, receipt, distribution, and possession of child pornography, together. The defendant received a five-level enhancement for "engaging in a pattern of activity involving . . . sexual exploitation of a minor" in the sentence calculation for the group of offenses. In doing so, the defendant's exploitation offense was "double counted," a practice prohibited under USSG §3D1.2, which provides that counts of conviction must be grouped "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The PSR calculated Runyan's combined offense level under USSG §3D1.4. because the defendant was convicted of multiple counts that were grouped separately. Two offense levels were added pursuant to the formula provided in USSG §3D1.4; had the counts of conviction been properly grouped into a single group, the two-level increase would not have applied. Therefore, the district court incorrectly grouped the defendant's convictions.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[16]

[16]Effective April 30, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language

United States v. Brace, 145 F.3d 247 (5th Cir.), *cert. denied*, 525 U.S. 973 (1998). The district court did not err in refusing to grant the defendant a three-level reduction for acceptance of responsibility. The defendant argued that he fully admitted his factual guilt, but went to trial only to preserve the "legal issue" of entrapment. The court of appeals, rejecting this argument, noted that an entrapment defense is a challenge to criminal intent and, thus, to culpability. The defendant could not, therefore, proceed to trial and still satisfy USSG §3E1.1(a).

United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). The defendant was convicted of conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana. The presentence report recommended an offense level of 26 with no adjustment for acceptance of responsibility and no reduction under the safety valve provision. At sentencing, the defendant continued to blame his involvement in the conspiracy on another defendant until the judge repeatedly warned him that his sentence would not be reduced unless he was willing to accept responsibility for his crime. The defendant at that point admitted his involvement. Additionally, the defendant, during a recess at the sentencing hearing, provided sufficient information to the DEA agent to entitle the defendant to a two-level safety valve reduction. The district court applied both adjustments and the government appealed, arguing that the defendant had not accepted responsibility and also failed to qualify for the safety valve because his cooperation did not occur before commencement of the sentencing hearing. The court vacated the defendant's sentence and held that the district court erred by reducing defendant's offense level for acceptance because acceptance of responsibility within the meaning of the sentencing guidelines was not acceptance if it was a product of repeated warnings by the judge at the sentencing hearing. The court further held that the safety valve reduction was not warranted because the defendant's cooperation did not occur until after the commencement of the sentencing hearing.

United States v. Chung, 261 F.3d 536 (5th Cir. 2001). The district court did not err in refusing to grant a downward adjustment for acceptance of responsibility for actions taken after the defendant obstructed justice. The defendant argued that because an obstruction of justice enhancement is not an automatic denial of an acceptance of responsibility adjustment, his case fits in this line of "extraordinary cases." USSG §3E1.1, comment. 4; *see United States v. Shipley*, 963 F.2d 56, 58 (5th Cir.), *cert. denied*, 506 U.S. 925 (1992). However, the court declined to follow the holding in *United States v. Hopper*, 27 F.3d 378 (9th Cir. 1994), which found the extraordinary case of a defendant "eventually" accepting responsibility after obstructing justice. The court found that the defendant's actions of voluntarily disclosing property and writing an apologetic letter to the court did not make up for his obstructions of justice before trial to warrant a downward adjustment.

United States v. Leal-Mendoza, 281 F.3d 473 (5th Cir. 2002). The district court erred in its refusal to award the defendants a three-level reduction for acceptance of responsibility. The district court did award the defendants a two-level reduction, albeit reluctantly. The district court judge erroneously believed that it was the policy of the court to award a two-level reduction when the

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requiring a government motion.

defendants move for suppression of evidence but do not otherwise challenge the sentence. The judge then refused to grant the third level reduction principally because he was reluctant to give the two levels in the first place. The Fifth Circuit held that any reluctance on the part of the sentencing judge to giving the first two-level reduction cannot affect the third level. Rather the sentencing judge must make an independent inquiry for the three-level determination. *Leal-Mendoza*, 281 F.3d at 475. Essentially the Fifth Circuit held that "a district court cannot find that a defendant 'accepted responsibility' for the purposes of subsection (a) but did not 'accept responsibility' for the purposes of the first prong of the test under subsection (b)." *Id*. at 476. Therefore, according to the Fifth Circuit, the only remaining relevant questions once the defendant has qualified for acceptance of responsibility under subsection (a) are whether the offense level is greater than 16 and whether the acceptance of responsibility was timely. *Id*. The defendants in this case did have offense levels that were greater than 16 and their acceptance was freely given in their first interviews, thus they qualified for the third-level reduction.

United States v. Outlaw, 319 F.3d 701 (5th Cir. 2003). The district court improperly denied the defendant an additional one-level reduction for timely acceptance of responsibility under USSG §3D1.1(b). The defendant was charged with possession with intent to distribute 100 grams or more of PCP and one kilogram or more of a mixture or substance containing a detectable amount of PCP. He moved to suppress the controlled substances and lost. He then pled guilty. The court explained that under USSG §3E1.1(b), a defendant who is awarded the two-level reduction in USSG §3E1.1(a) (and whose base offense level before this award is 16 or greater) *must* be awarded an additional one-level reduction if he *either* timely provides complete information to the government concerning his own involvement in the offense, *or* he timely notifies the authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and the court to allocate its resources efficiently. The district court denied the three-level reduction for acceptance of responsibility solely because of the defendant's decision to file and pursue a motion to suppress. The Fifth Circuit remanded the case for a further explanation of the district court's reason for denying the third level. The court noted that the district court may have determined that the filing of the motion means that the defendant "only reluctantly accepted responsibility and, thus, should not get the full benefit of the three-level reduction." Alternatively, it may instead have found that the defendant strategically waited in providing assistance to the authorities or in notifying the authorities of his intent to plead guilty and, in so doing, required the government to, in essence, fully prepare for trial.

United States v. Pierce, 237 F.3d 693 (5th Cir. 2001). The district court did not commit reversible error in considering the defendant's denial that the individual depicted in a sexually explicit photograph was a minor, when the court refused to grant a downward adjustment for acceptance of responsibility. The defendant's presentence report indicated that the defendant "claimed he pled guilty to the instant offense simply to get a reduced sentence, not because he did anything wrong" and also "denied that he permitted minors to engage in sexually explicit conduct (*i.e.*, posing for sexually explicit photographs)." 237 F.3d 693, 695. The district court, after hearing the defendant's statements, denied the defendant's objections to the PSR and refused to grant the defendant a reduction based on acceptance of responsibility.

United States v. Wheeler, 322 F.3d 823 (5th Cir. 2003) (*per curiam*). The district court erred in denying the defendant the additional one-level reduction for timely acceptance of responsibility on the grounds that the sentencing hearing was rescheduled multiple times at his request, and that he was not prompt in providing the probation office with a statement of acceptance of guilt. The Fifth Circuit reasoned that USSG §3E1.1(b)(2) is limited to government efficiency from the standpoint of the prosecution and the court. Thus, time efficiency for the purpose of any other governmental function, including the time required for the probation office to conduct its presentence investigation, is irrelevant.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Arnold, 213 F.3d 894 (5th Cir. 2000). In determining whether a sentence of less than 13 months occurred during the ten-year period prior to the commencement of the offense of conviction, the court should look to the date on which the previous court announced the sentence and not to the date on which the defendant began serving his sentence. In this case, the defendant was convicted of a federal offense committed in February 1999. He had received a term of two years' probation and a suspended sentence of 90 days. His probation was revoked in September 1989, at which time he began serving the suspended sentence. Under USSG §4A1.2(e)(1), subsection (2), a sentence under 13 months counts as a prior sentence if it was imposed "within ten years of the defendant's commencement of the instant offense." *Id.* at 895.

United States v. Brooks, 166 F.3d 723 (5th Cir. 1999). A ten-year state term in a "special alternative incarceration program (boot camp)," followed by probation, was properly considered by a sentencing court as a prior "sentence of imprisonment" for purposes of determining the defendant's criminal history category under USSG §4A1.1. The defendant argued that because the purpose of the boot camp was rehabilitation rather than punishment, it failed to meet the definition of imprisonment. According to the Fifth Circuit, however, physical confinement is the crucial factor for determining what constitutes imprisonment. The commentary to USSG §4A1.1 explains that "confinement sentences" of over six months qualify as a "sentence of imprisonment" under USSG §4A1.2(b), and it expressly distinguishes types of sentences not requiring round-the-clock physical confinement. The defendant was not free to leave the boot camp and, therefore, his sentence fit the category of incarcerations defined as a "sentence of imprisonment."

United States v. Corro-Balbuena, 187 F.3d 483 (5th Cir. 1999). The defendant was deported three times between 1991 and 1994. In 1994, the defendant was again deported after sustaining a conviction for driving while intoxicated. Afterwards, the defendant again illegally reentered the United States while still under a sentence of probation. The defendant was subsequently convicted of auto theft in April 1995 and sentenced to 140 days' confinement. The defendant claimed that he voluntarily returned to Mexico after completing the 140-day sentence, and he remained there until

November 1997, when for the fifth time he illegally reentered the United States. In 1998, the defendant pled guilty to being found in the United States after deportation. The district court applied two criminal history points under USSG §4A1.1(d) for committing the offense while under a criminal justice sentence. The court ruled that any of the dates on which the defendant illegally reentered the United States after deportation could be used as the start date of the offense, which continued until defendant was found by the INS in January 1998. The Fifth Circuit concurred, finding that any of the multiple prior illegal reentries could be used, either as part of the current offense or as relevant conduct, to support the application of USSG §4A1.1(d).

United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000). Driving while intoxicated constitutes a crime of violence under the "otherwise" clause in USSG §4B1.2. The "very nature of the crime of DWI presents a 'serious risk of physical injury' to others." *Id*. At 264. (*Citing United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995)). In this case the defendant was convicted of unlawful reentry and the defendant's three misdemeanor DWI convictions warranted a four-level increase under USSG §2L1.2.

United States v. Henry, 288 F.3d 657 (5th Cir.), *cert. denied*, 537 U.S. 902 (2002). The district court erroneously included two points in the defendant's criminal history calculation for a prior sentence that was imposed upon an adjudication of guilt for conduct that was part of the offense of conviction. Section 4A1.1 permits a sentencing court to add two criminal history points in its calculation "for each prior sentence of imprisonment" of at least 60 days and not exceeding one year and one month. The rule defines "prior sentence" as "any sentence previously imposed upon adjudication of guilt" if the sentence is "for conduct not part of the instant offense." The defendant's federal conviction for possession of a firearm while under a restraining order and state conviction for criminal trespass had resulted from the same conduct.

United States v. Holland, 26 F.3d 26 (5th Cir. 1994). The district court did not err in including in its criminal history calculation the defendant's state juvenile adjudication. The defendant argued that the juvenile adjudication should not have been included because the state used such adjudications to avoid the taint of criminality. The circuit court disagreed and held that since the defendant's guilt was established at the juvenile proceedings, the adjudication was essentially the same as being convicted of an offense for criminal history purposes.

United States v. Mota-Aguirre, 186 F.3d 596 (5th Cir. 1999). The defendant, a Mexican national, had been sentenced in a Texas court to prison terms for three child indecency offenses but was given an "out-of-the-country" conditional pardon by the state governor. The pardon provided for the defendant's release into the custody of immigration officials for immediate deportation to Mexico and stated that if he returned to the United States illegally, the pardon would be revoked and he would be returned to the state corrections department. The defendant violated this condition and was convicted in federal court of illegal re-entry after deportation. At sentencing, the district court increased his criminal history score by two points by counting his conditional pardon as a "criminal justice sentence" under USSG §4A1.1(d). The Fifth Circuit affirmed reasoning that Texas law generally

classifies parole as a conditional pardon and parole qualifies under USSG §4A1.1(d) as a "criminal justice sentence."

United States v. Robinson, 187 F.3d 516 (5th Cir. 1999). The district court erred in refusing to treat two prior state convictions for delivery of cocaine as related cases. The crimes were temporally and geographically close and factually connected.

United States v. Ruiz, 180 F.3d 675 (5th Cir. 1999). The defendant's conviction for the knowing escape from federal prison camp constituted a "crime of violence" for purposes of career offender guideline.

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

United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Although the defendant's Youth Corrections Act conviction was "set aside," it is not an "expunged" conviction under USSG §4A1.2(j), and is counted in calculating the defendant's criminal history category. The Fifth Circuit joined the First, Sixth, and Eighth Circuits in concluding that Congress did not intend to allow "expungement of the actual records of a [Youth Corrections Act] conviction," and stated that to do otherwise would allow a "person convicted under its auspices to rewrite his life when his handwriting shows that post-conviction activities are criminal in nature." *United States v. Ashburn*, 20 F.3d 1336, 1343 (5th Cir. 1994). *But see United States v. Doe*, 980 F.2d 876, 879-82 (3d Cir. 1992).

See United States v. Cade, 279 F.3d 265 (5th Cir. 2002), §4A1.3, p. 33.

See United States v. Holland, 26 F.3d 26 (5th Cir. 1994), §4A1.1, p. 40.

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). The district court erred by not combining the defendant's prior conviction for tax evasion with his prior federal conviction for drug trafficking under USSG §4A1.2(a)(2) as "related cases." The defendant pled guilty to conspiracy to possess with intent to distribute and money laundering but had two priors for a drug related conviction and for a conviction for tax evasion. The district court assigned three criminal history points for each prior giving him six total points and a criminal history category of III. The defendant objected, arguing that the prior convictions should have been combined as a part of a "common scheme or plan" because the money that the defendant failed to report on taxes was profit from a drug trafficking venture. His objections were overruled. On appeal, the Fifth Circuit determined that "but for the drug trafficking the defendant would not have had the $75,000 and therefore would not have been subject to conviction for tax evasion." *Id* at 396. The court held that these offenses should have been considered part of a "common scheme or plan."

§4A1.3 Adequacy of Criminal History Category

United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994). The district court did not err when it refused to depart downward based on the defendant's community service, good employment record, and potential for victimization. USSG §§ 5H1.5 and 5H1.6 specifically reject community service and employment record as grounds for departure and no authority exists in the Fifth Circuit to allow downward departures on the basis of the defendant's "potential for victimization." In addition, the district court properly refused to depart based on the defendant's status as a first time offender. The guidelines specifically reject first time offender status as a basis for departure because the level of recidivism is adequately reflected by the assignment of Criminal History Category I.

United States v. Cade, 279 F.3d 265 (5th Cir. 2002). The district court erred in departing upward under USSG §4A1.3 based on a determination that the defendant's criminal history category under-represented his criminal history. The Fifth Circuit held that the district court erred in applying the defendant's state sentences both as relevant conduct and as prior sentences. Such double counting is prohibited under the guidelines. The court also states that although USSG §4A1.3 is not limited in its application to the listed factors, prior sentences and relevant conduct are mutually exclusive. Thus, if the guideline specifically states that the court may consider prior sentences, by implication the court may not consider relevant conduct. In this case, the district court explicitly relied upon the defendant's relevant conduct to measure the extent of departure and thus the error was not harmless. The case was remanded for re-sentencing.

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). The district court properly departed upward based upon inadequacy of the defendant's criminal history under USSG §4A1.3(3). The defendant was convicted of knowingly engaging in a sexual act with a seven-year-old victim. The presentence report contained four examples of the defendant's alleged involvement in sexual conduct with minors, and the district court found the testimony of those witnesses to be credible.

United States v. Lee, 358 F.3d 315 (5th Cir. 2004). The district court did not abuse its discretion in departing upward under USSG §4A1.3 at resentencing. Defendant pled guilty to felon in possession of a firearm in violation of 19 U.S.C. § 924(a)(2). During sentencing, the Presentence Report (PSR) concluded the defendant's prior conviction for Unauthorized Use of a Motor Vehicle (UUMV) was a crime of violence and recommended an upward adjustment under USSG §2K2.1. Additionally, the PSR recommended an upward departure pursuant to §4A1.3 because the applicable sentencing range did not reflect the seriousness of defendant's criminal history. The district court judge accepted the §2K2.1 enhancement, but declined to accept the §4A1.3 recommendation and instead sentenced the defendant at the top of the sentencing range of 78 months. Defendant appealed based on *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002), where the court found that simple vehicle theft is not a crime of violence under § 4B1.2(a) and any sentences involving firearms possession by a felon which also included a prior "crime of violence" must have the "crime of violence" determination made in accordance with the definition in §4B1.2(a). The appeals court remanded the case for resentencing. The district court determined that UUMV was not a crime of violence in this case as defined under USSG §4B1.2(B). However, the court departed upward two years under USSG

§4A1.3, resentencing defendant to 65 months. Defendant reappealed, arguing the district court erred when it found the otherwise applicable sentencing range of 33-41 months for a criminal history category of VI did not adequately reflect the seriousness of the defendant's criminal history. On appeal, the court took note that the "PROTECT Act," Pub. L. No. 108-21, 117 Stat. 650 (2003), changed the applicable standard of review for sentencing when making determinations under subsections (3)(A) or (3)(B) of 18 U.S.C. § 3742(e). The court determined that neither of these subsections were at issue in this case, and instead, applied the abuse of discretion standard to review the §4A1.3 upward departure. Defendant argued that his prior offenses were not atypical of a category VI and that the focus should have been the nature of the crimes and not the category number. 18 U.S.C. § 3553(b). Such a departure for criminal history purposes is warranted under §4A1.3 where the seriousness of defendant's criminal history is under-represented. The defendant's record reflects that defendant was a "habitual offender who needs a longer period of incarceration than the 41-month maximum range under the guidelines." Within a 14-year period, defendant committed eight prior convictions, five of which were felonies. The lenient penalties previously imposed did not deter or reform defendant, noting the given 65 months was still below the guideline maximum of 78 months. The district court had looked to the seriousness of the defendant's crimes when making its determination and not just the number of convictions when determining the sentence and as such did not abuse its discretion.

United States v. Rosogie, 21 F.3d 632 (5th Cir. 1994). The district court did not err by adding one offense level for each criminal history point above the 13 points of category VI and assessing four additional levels. This upward departure was appropriate because of the defendant's 23 criminal history points, his 26 different aliases, his 10 convictions in a ten-year period, his incarceration in three different states, and his two deportations. In considering an issue of first impression, the circuit court held that the district court may consider as relevant conduct facts that are the basis of a pending state prosecution. This ruling adopts the holding of *United States v. Caceda*, 990 F.2d 707, 709 (2d Cir.), *cert. denied*, 510 U.S. 918 (1993).

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). The district court did not err in holding that the defendant's criminal history score qualified him as a career offender. The defendant argued that his two prior convictions were related and therefore should not be counted as two separate convictions. The Fifth Circuit held that the district court was correct in counting the defendant's two prior convictions separately since they were entered in two different districts and took place more than a year apart; furthermore, they involved two separate drug distributions to two different individuals.

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

United States v. Golding, 332 F.3d 838 (5th Cir. 2003). The court vacated the sentence imposed by the district court and remanded for resentencing after concluding that the district court

erred by holding that the unlawful possession of a machine gun was not a "crime of violence" under §4B1.2(a). The appellate court held that an offense of unlawfully possessing a machine gun in violation of 18 U.S.C. § 922(o) is a "crime of violence" because it constitutes conduct that presents a serious risk of physical injury to another. With respect to the defendant's argument that "possession" is not "conduct," the court stated that this contention is foreclosed by its decision in *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002), *cert. denied*, 537 U.S. 1221 (2003), in which it recognized that possession, though often passive, constitutes conduct.

United States v. Turner, 349 F.3d 833 (5th Cir. 2003). The district court's sentence was vacated and remanded because defendant's prior conviction of burglary of a building was determined not to be a "crime of violence" for the purposes of §§4B1.2(a)(2) and 2K2.1. On appeal, the issue was what impact the charging instrument should have upon a sentencing court's analysis of whether a prior conviction was a "crime of violence" in a case where the defendant was convicted of a lesser included offense. The Fifth Circuit noted that Application Note 2 to §4B1.2 stated that a court must only look to the conduct for which the defendant was convicted. In the instant case, the defendant pled guilty to a lesser included offense and was neither re-indicted on the lesser count nor charged with the offense for which he was ultimately convicted. Absent a relevant indictment, the court re-examined, under the second prong of §4B1.2(a)(2), the elements of the lesser included offense for which the defendant was convicted. The court concluded that, unless something outside of the indictment or judgment of conviction was considered, defendant's burglary conviction could not be considered a "crime of violence." The court ultimately held that relying on the indictment was inappropriate because the elements of the lesser included offense did not support holding burglary of a building as a "crime of violence" for the purposes of §4B1.2(a)(2) and §2K2.1. Defendant's sentence was vacated and remanded for resentencing.

United States v. Turner, 305 F.3d 349 (5th Cir. 2002). The defendant pled guilty to possession of a firearm by a convicted felon. On appeal, he contends that burglary of a building does not constitute a "crime of violence" for career offender purposes. The court stated that a crime must satisfy two criteria under USSG §4B1.2(a) in order to qualify as a crime of violence. The first is to have "as an element the use, attempted use, or threatened use of physical force against the person of another." It determined that the statutory elements of burglary under Texas state law do not make it a *per se* crime of violence because they do not necessarily involve the use of physical force against the person of another. With respect to the second prong of the test, the court determined that since explosives were not involved, the only question was whether the offense otherwise involves conduct that presents a serious potential risk of physical injury to another. It held that, in addressing this inquiry, the district court must consider only the conduct charged in the court of which the defendant was convicted. It remanded the case because the charging instrument was not part of the record.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Garcia-Ortiz, 310 F.3d 792 (5th Cir. 2002). The defendant pled guilty to illegal re-entry after deportation. His guidelines calculations indicated that he was in Zone C, which made him eligible for a split sentence (*i.e.*, where a portion of his sentence includes imprisonment and another portion includes home detention or community confinement). The Fifth Circuit determined that the permissive wording in USSG §5C1.1(d) gives the district court "virtually complete discretion to impose a split sentence . . ." In fact, the district court's exercise of this discretion is not reviewable unless the district court believed it did not have the discretion, under the guidelines, to award a split sentence based upon the defendant's status as an illegal alien. Because the transcript was ambiguous as to whether the district court was exercising its discretion, the appellate court remanded to permit the district court to reconsider its sentence.

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

United States v. Edwards, 65 F.3d 430 (5th Cir. 1995). The district court did not err by refusing to grant a reduction under USSG §5C1.2 (safety valve). The defendant asserted that the fact that he received a reduction in his offense level based on his acceptance of responsibility under USSG §3E1.1 "suggests that he qualifies" for the USSG §5C1.2 adjustment. The circuit court did not agree, and affirmed the district court's factual determination that the defendant did not satisfy the requirement that he truthfully provide to the government all relevant information. The circuit court concluded that the defendant offered testimony at sentencing which directly contradicted information gathered by the government, and gave conflicting statements regarding the amount of drugs he had received. Thus, the defendant did not satisfy the requirement that he provide truthful information.

United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996). In addressing an issue of first impression in the circuit, the court held that "the defendant has the burden of ensuring that he has provided all the information and evidence regarding the offense to the Government." *Id*. at 146-47. The government appealed the district court's application of the safety valve provision of USSG §5C1.2 to the defendant, who failed to affirmatively provide the government with information regarding the offense. At sentencing, the government argued that the district court should not apply the safety valve provision of 18 U.S.C. § 3553(f) because the defendant had not truthfully provided to the government all information and evidence he had regarding the offense. Noting that the government had never requested any information from the defendant, the district court sentenced the defendant under the safety valve provision. On appeal, the government contended that it did not have the burden of attempting to solicit information from the defendant. The Fifth Circuit agreed. The court held that the language of the safety valve provision indicates that the burden is on the defendant to provide the government with all information and evidence regarding the offense. According to the court, the defendant has the burden of providing this information regardless of whether the government requests such information. *See also United States v. Ivester*, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996) (holding that the burden is on the defendant to demonstrate that he has supplied the government with truthful information regarding the offenses at issue).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996). The district court erred in failing to consider whether the defendant was eligible for the safety valve (§5C1.2). The circuit court held that the district court did not consider the criteria listed in USSG §5C1.2, and mistakenly believed that it was bound by the mandatory minimum sentence set forth in 21 U.S.C. § 841(b))(1)(A). The circuit court vacated the defendant's sentence and remanded for resentencing to determine if the safety valve applied to the defendant.

United States v. Lopez, 264 F.3d 527 (5th Cir. 2001). The district court erred in believing it did not have authority to depart downward below the statutory minimum after granting a reduction under the safety valve guideline. The court found that the language of USSG §5C1.2 specifically allows for a safety valve reduction "*without regard to any statutory minimum sentence*" if the requirements of the guideline are met. *Id*. at 529 (emphasis added); USSG §5C1.2. The court referred to comment. (n.9) of the safety valve guideline and explained that the defendant's entire sentence is exempt from the statutory minimum, "not just that the application of the two-level reduction is exempt from the statutory minimum." *Id*. at 531.

United States v. Rodriguez, 60 F.3d 193 (5th Cir.), *cert. denied*, 516 U.S. 1000 (1995). The district court did not err in refusing to apply the safety valve provision (§5C1.2) of 18 U.S.C. § 3553(f) to the defendant because the defendant did not satisfy all the requirements necessary for the court to apply USSG §5C1.2. In addressing an issue of first impression among the courts of appeals, the circuit court held that a probation officer is not, for purposes of USSG §5C1.2, "the Government." The defendant was able to meet the first four requirements of USSG §5C1.2 because: 1) he did not have more than one criminal history point; 2) he did not use violence or a threat of violence; 3) no serious injury or death resulted; and 4) he was not a leader, supervisor, manager, or organizer. However, the circuit court ruled that the defendant failed to meet part five of USSG §5C1.2 which states that the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense. The government argued that USSG §5C1.2 should not apply because the defendant had spoken only to the probation officer, not the government's case agent. The defendant unsuccessfully argued that his discussion with the probation officer satisfied the requirement to disclose to the government all information that he knows about the criminal offense. The circuit court rejected this argument, noting that a defendant's statements to a probation officer do not assist the government. The probation officer is not the government for purposes of USSG §5C1.2. The district court's decision was affirmed.

United States v. Stewart, 93 F.3d 189 (5th Cir. 1996). In an issue of first impression, the Fifth Circuit held that the information requirement of USSG §5C1.2(5) is constitutional and does not impose cruel and unusual punishment on the defendant. The district court found that the defendant did not provide the government with all the information available to her because the defendant did not identify the other participants in the methamphetamine operation. The defendant argued that USSG §5C1.2(5) is unconstitutional because it subjects herself and her family to violent retaliation by the people she is required to identify and forces her to work as an informant for the government. The court noted that the Fifth Circuit had addressed similar challenges to USSG §3E1.1. In *United States v.*

Mourning, 914 F.2d 699, 707 (5th Cir. 1990), the court held that USSG §3E1.1 was constitutional. The court stated: "[t]o the extent the defendant wishes to avail himself of this provision, any dilemma he faces in assessing his criminal conduct is one of his own making." 93 F.3d at 195-96. Here, the circuit court upheld the constitutionality of USSG §5C1.2(5) stating: ". . . a more lenient sentence imposed [] on a defendant who gives authorities all of the information possessed by the defendant does not compel a defendant to risk his or her family's lives." *Id*. at 196. The court added that a defendant can refuse the option and receive the statutory sentence under the regular sentencing scheme.

United States v. Wilson, 105 F.3d 219 (5th Cir.), *cert. denied*, 522 U.S. 847 (1997). The district court erred in concluding that the safety valve was not available to the defendant because his co-conspirator possessed a firearm during the commission of the offense. The district court ruled that because a firearm was involved in the conspiracy, the defendant failed to meet the requirement that the defendant not possess a firearm in connection with the offense. USSG §5C1.2(2). The defendant contended that the district court erred in concluding that the safety valve provision was unavailable to him because it was his co-conspirator, not he, who possessed the firearm. The circuit court concluded that in determining a defendant's eligibility for the safety valve, USSG §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. The circuit court stated that the commentary to USSG §5C1.2(2) provides: "[c]onsistent with USSG §1B1.3, the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." 105 F.3d at 222 (*quoting* USSG §5C1.2, comment. (n.4)). The appellate court noted that this language mirrors §1B1.3(a)(1)(A), but omits the text of USSG §1B1.3(a)(1)(B) which provides that "relevant conduct" encompasses acts and omissions undertaken in a "jointly undertaken criminal activity." Therefore, as it was the defendant's co-conspirator, and not the defendant himself, who possessed the gun during the conspiracy, the defendant was eligible to receive the benefit of USSG §5C1.2.

Part D Supervised Release

§5D1.1 Imposition of a Term of Supervised Release

United States v. Moreci, 283 F.3d 293 (5th Cir. 2002). The district court committed plain error when it sentenced the defendant to five years of supervised release. The defendant was convicted under 21 U.S.C. § 841(b)(1)(C), which provides that the term of supervised release must be "at least three years." However, the defendant's offense was a Class C felony, for which supervised release may not exceed three years. The Fifth Circuit modified the sentence of supervised release to the statutorily required three-year term. *See also United States v. Rodriguez-Martinez*, 329 F.3d 419 (5th Cir. 2003).

§5D1.3 Conditions of Supervised Release

United States v. Cothran, 302 F.3d 279 (5th Cir. 2002). The district court properly imposed, as a condition of supervised release, a restriction on the defendant from gambling or visiting

gambling establishments while on supervised release. The defendant had been convicted of mail fraud for writing bad checks to his creditors on a closed bank account. The Fifth Circuit upheld the condition of supervised release because the record showed many cash withdrawals from casinos while in such dire financial straits that he had to resort to fraud.

United States v. Paul, 274 F.3d 155 (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2002). The district court did not err in its institution of special terms and conditions of supervised release for the defendant. The defendant pled guilty to a charge of knowingly possessing child pornography and was sentenced under USSG §2G2.2 because the district court found sufficient basis to conclude that the defendant had the intent to traffic in child pornography. The defendant first argued that the special conditions of his supervised release requiring him to "avoid 'direct and indirect contact with minors' [and] . . . avoid places, establishments, and areas frequented by minors" were overly broad. *Paul*, 274 F.3d at 165. He contends that what he is and is not allowed to do is unclear. The Fifth Circuit held that the restrictions were not overly broad and in fact were necessary for the protection of the public. The Court further held that the prohibitions would not be implicated by chance interaction with minors and that it would be impossible for the district court to list all the places where the defendant is and is not allowed to go.

The defendant further argued that the supervised release condition preventing him from using or owning a computer or from accessing the internet is also overly broad. The Fifth Circuit disagreed and held that the condition was reasonably related to his offense and to the need to prevent recidivism and protect the public. The defendant further argued that the supervised release condition that he not possess or use photographic equipment or audio video equipment was not reasonably related to his offense. The Fifth Circuit held that there was sufficient evidence in the record that the defendant had used photographic equipment in furtherance of his crimes. Although the defendant argued that the prohibition would prevent him from exploring his legitimate interests, the Fifth Circuit held that such interests were merely hobbies and therefore were not sufficient incentive compared to the protection of the public. Lastly, the defendant argues that he did not have notice that he would be required to register as a sex offender. However, the Fifth Circuit held that he did have sufficient notice since the guidelines state that such a requirement is a mandatory condition of supervised release under his statute of conviction.

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in ordering the defendant to be deported as a condition of supervised release. The defendant pled guilty to making false statements on immigration documents and education grant applications. The defendant was sentenced to ten months' incarceration and was ordered to be deported as a condition of supervised release. On appeal, he argued that the district court exceeded its authority in ordering him deported under 18 U.S.C. § 3583(d) as a condition of supervised release. In considering an issue of first impression, the circuit court joined the First Circuit in ruling that 18 U.S.C. § 3583(d) does not authorize district courts to order deportation, but instead permits sentencing courts to order that a defendant be surrendered to immigration officials for deportation proceedings as a condition of supervised release. *See United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991) (*per curiam*). The circuit court noted that the language of the statute authorizes district courts to "provide" not "order"

that an alien be deported and remain outside the United States. The fact that Congress even used the verb "order" elsewhere in the statute implies that the choice of the verb "provide" was intentional in this situation. Further, the circuit court recognized Congress's tradition of granting the Executive Branch sole power to institute deportation proceedings. The circuit court noted its unwillingness to conclude that Congress intended to change this tradition through silence. The circuit court held that the district court exceeded its statutory power under section 3853(d) in ordering that the defendant be deported as a condition of supervised release. The court noted that the First and Eleventh Circuits have split on this issue. In *United States v. Chukwura*, 5 F.3d 1420, 1423 (11th Cir. 1993), *cert. denied*, 513 U.S. 830 (1994), the Eleventh Circuit interpreted section 3853(d) to give sentencing courts the power to order deportation as a condition of supervised release. The Eleventh Circuit further held that this authority was not a intrusion upon the Immigration and Naturalization Service's authority to deport resident aliens because the INS retains the power to carry out deportations. *See id*. at 1423.

United States v. Warden, 291 F.3d 363 (5th Cir.), *cert. denied*, 537 U.S. 935 (2002). The district court did not err when it included special conditions of supervised release in its written judgment that were not part of the court's oral pronouncement of the defendant's sentence at his sentencing hearing. Eight days after the district court orally pronounced the defendant's sentence, the court signed a written judgement, which stated that the defendant must undergo drug treatment, as well as sex offender and anger management counseling. The defendant claimed that the district court committed an error by imposing new conditions in its written judgement, namely the costs of these treatments, that were not discussed at the sentencing hearing. The Fifth Circuit cited *United States v. Bull*, 214 F.3d 1275 (11th Cir. 2000), *cert. denied*, 531 U.S. 1056 (2000), which held that where there was no conflict between the oral pronouncement and written judgement in the sentencing of a defendant who was ordered to contribute to the cost of mental health treatment as a special condition of his supervised release, such a change is permissible. The Fifth Circuit also looked to the intent of the district court in sentencing the defendant to the special condition. It concluded that the requirement that the defendant bear the costs of the treatments was clearly consistent with the court's intent to ensure that the defendant received treatment, which the district court expressed at the original sentencing hearing.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001). The district court did not err in ordering the defendant to pay the full amount of his 401K retirement plan to satisfy restitution. Relying on *United States v. Gaudet*, 966 F.2d 959, 964 (5th Cir. 1992), *cert. denied*, 507 U.S. 924 (1993), the court held that while there is a substantial legal argument as to whether such a sentence violates ERISA's anti-alienation provision, the defendant did not object to such at the district court, such an error is not obvious, and does not meet the plain-error standard. Thus, like in *Gaudet*, Calbat is not entitled to relief on this issue.

The district court did not err in deciding not to reduce restitution based on insurance benefits allegedly received by the victim. The court recognized "an order of restitution must be limited to the

loss stemming from the specific conduct supporting the conviction," and thus any compensatory payments reduce the amount of restitution to be paid to the victim. 266 F.3d at 365; *see United States v. Hughey*, 147 F.3d 423, 427 (5th Cir.), *cert. denied*, 523 U.S. 1030 (1998). However, the court went on to note that the defendant has not met his burden of proving that such compensatory or insurance benefits have been paid to the victim. In fact, even if such benefits had been found, the victim's medical bills still exceed the amount of restitution imposed and thus the restitution order itself was not illegal.

The district court did abuse its discretion in not properly considering the defendant's ability to pay when it decided the restitution payment schedule. The court had held in *United States v. Myers*, 198 F.3d 160, 169 (5th Cir. 1999), *cert. denied*, 530 U.S. 1220 (2000), that under MVRA (Mandatory Victims Restitution Act) "the district court [must] consider the 'financial resources of the defendant' in determining the schedule under which the restitution is to be paid. 18 U.S.C. § 3664(f)(2)(A)." *Id*. at 366. The district court did not properly consider the defendant's ability to pay; in fact it recognized that the defendant would not be able to. The court found this especially troubling since payment of restitution was one of the conditions of the defendant's supervised release, and that failure to do so could send him back to prison.

United States v. Onyiego, 286 F.3d 249 (5th Cir.), *cert. denied*, 537 U.S. 910 (2002). The district court erred in including legal fees as part of the amount of restitution a defendant was ordered to pay. The defendants were convicted of crimes related to a conspiracy to traffic stolen airline tickets. One of the defendants was ordered to pay restitution including $22,063.98 in legal fees incurred when the victim had to defend actions instituted by the airlines seeking to collect on stolen tickets. The Fifth Circuit stated that 18 U.S.C. § 3663A gives the mandatory reward of restitution in cases such as this one. The court noted that the Fifth Circuit has previously held that "recovery losses" akin to the losses incurred by a victim attempting to recover stolen property may not be included in a restitution award under Section 3663(b)(1). Therefore, the Fifth Circuit reversed the district court's order.

§5E1.2 Fines for Individual Defendants

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997). The district court's imposition of a $10,000 fine on the defendant was in error. Relying on *United States v. Fair*, 979 F.2d 1037, 1041 (5th Cir. 1992), the defendant asserted that because he is insolvent, the fine was imposed in error. *Fair* states that "when a sentencing court adopts a PSR which recites facts showing limited or no ability to pay a fine the government must come forward with evidence showing that a defendant can in fact pay a fine before one can be imposed." 979 F.2d at 1041. In the case at hand, the district court adopted the PSR findings that indicated the defendant had only $50 in the bank, a monthly income of $1,410, and unsecured debt of $61,399. With $2,879 in necessary living expenses, the defendant would have a monthly net loss of $1,469. The PSR also notes that "it would be difficult" for the defendant to pay. Based on *Fair*, in situations as this, the burden is on the government to provide evidence showing the defendant's ability to pay a fine. Because the government did not do so, the imposition of a fine was in error. The circuit court noted that its decision in *United States v. Altamirano*, 11 F.3d 52 (5th Cir. 1993), is not inconsistent with *Fair* as it merely states that neither the Constitution nor federal law

categorically prohibits the imposition of a fine on a defendant found to be indigent. The circuit court remanded to the district court for specific findings as to the defendant's financial status.

§5E1.4 Forfeiture

United States v. Tencer, 107 F.3d 1120 (5th Cir.), *cert. denied*, 522 U.S. 960 (1997). The district court erred in reducing its forfeiture order, under 18 U.S.C. § 982(a)(1), after five of eleven money laundering counts of conviction were vacated. The defendant was convicted, *inter alia*, of 18 counts of money laundering and assessed a special forfeiture verdict of $1,598,645.18. The district court vacated five counts and the forfeiture verdict related to them. The district court then reduced the forfeiture verdict representing the balance on deposit in the California Federal bank account used in relation to the remaining money laundering counts, from $1,055,395.71 to $700,000. The defendant asserts that the order includes amounts from legitimate activities and should, therefore, be completely reversed. The government contends that the original verdict should be reinstated based on the fact that any legitimate money that may have been in the bank account "involved and `facilitated' the offense by providing a cover for the tainted funds." *Id*. at 1134. The forfeiture statute at issue, 18 U.S.C. § 982(a)(1), states that persons sentenced for a section 1956 conviction shall be ordered to "forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." The appellate court held that the commingling of legitimate and illegitimate funds does not, in and of itself, make the entire account forfeitable. In this case, the appellate court found that the defendant transferred the funds, both legitimate and illegitimate, into the account within a few days to conceal the true nature and source of the proceeds from the underlying mail fraud. The evidence was sufficient for the jury to infer that all of the funds in the account were "involved in" the money laundering and subject to forfeiture pursuant to the mandatory provisions of section 982. The district court was directed to reinstate the jury's original forfeiture award on remand.

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001). The district court erred in imposing a sentence that was more than three times the sentence the defendant would have received under state law. The defendant pled guilty to injury to a child and endangering a child and was sentenced under the guidelines in federal court because the crimes were perpetrated on a United States Air Force base. Despite the federal jurisdiction the district court is subject to the Assimilative Crimes Act ("ACA") which requires the district court to impose a sentence that is "like" the sentence that likely would have been imposed by the state if it had jurisdiction. *Martinez*, 274 F.3d at 900. In the instant case, the statutory maximum penalty for the offenses of conviction, in Texas, was ten years. *Id*. The district court, however, imposed a sentence of 32 years. At issue on appeal is whether the district court erred in imposing consecutive rather than concurrent sentences, thereby increasing the defendant's sentence to three times the state maximum penalty. The Fifth Circuit held that such consecutive sentences were in fact erroneous. Under USSG §5G1.2, the court may impose consecutive sentences as an enhancement of sentence only if the sentence for one offense does not achieve the "total punishment." Because the defendant executed an appeal waiver in the context of her plea agreement, the consecutive sentences imposed by the court were only appealable if they were a departure rather than part of her

original calculated sentence. At issue, therefore was whether enhancements imposed under USSG §5G1.2 are departures or not. The Fifth Circuit held that enhancements in the form of consecutive sentences under USSG §5G1.2 are departures and were therefore subject to appeal by this defendant. The Fifth Circuit went on to hold that the district court did not have the authority to impose consecutive sentences under the guidelines such that the resulting sentence is more than three times the length of the state statutory maximum sentence. In order to avoid the state maximum cap, the government would have to show an overriding federal interest in the increased sentence. The Fifth Circuit held that there was no such overriding interest here.

The government argued that there should be an exception here because of an interest in uniform application of law. However, the Fifth Circuit disagreed and found that the Texas law mandating concurrent sentences "deserves as much deference as does a choice to set the statutory maximum for an individual crime." *Martinez*, 274 F.3d at 909. Therefore, the Texas law mandating concurrent sentencing should control. The Fifth Circuit held that the district court should use the other applicable departures, which the defendant does not appeal, in order to reach the statutory maximum of ten years.

§5G1.3 Imposition of Sentence on Defendant Subject to an Undischarged Term of Imprisonment[17]

United States v. Alexander, 100 F.3d 24 (5th Cir. 1996), *cert. denied*, 520 U.S. 1128 (1997). The district court did not err in holding that the language "should be imposed to run consecutively," found in Application Note 6 to USSG §5G1.3, mandates that the sentence for the defendant's offense of illegal purchase of firearms run consecutively to his undischarged state sentence for attempted murder. The court noted that although paragraph (c) of USSG §5G1.3 is a catch-all provision and is designated a policy statement, both paragraph (c) and Application Note 6 are binding upon the court to the extent that they interpret the guidelines and do not conflict with the guidelines or with any statutory directives. *See Williams v. United States*, 503 U.S. 193 (1992). Such policy statements are binding upon the court because they inform the uniform application of the guidelines. The defendant argued that the language was not mandatory, in that it says "should," as opposed to "shall," and that such an interpretation conflicts with the circuit's prior decision in *United States v. Hernandez*, 64 F.3d 179, 182 (5th Cir. 1995). In rejecting these arguments, the appellate court noted that the word "should" is construed as mandatory, given the absence of any qualifications or reservations. Further, the facts of this case are distinguishable from those in *Hernandez* because the note at issue in that case contained limiting language that the methodology it set forth was meant to "assist the court in determining the appropriate sentence" and need be followed only to "the extent practicable." 100 F.3d at 27 (*quoting* USSG §5G1.3, comment. (n.3)). Because there is no limiting language in this case, nothing in the *Hernandez* case precludes the court from construing this note as mandatory.[18]

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

[18]Note that there is a circuit split on the issue of whether or not Application Note 6 to USSG §5G1.3 is mandatory or permissive. *Compare United States v. McCarthy*, 77 F.3d 522, 539-40 (1st Cir.), *cert. denied*, 519 U.S. 1101

United States v. Hernandez, 64 F.3d 179 (5th Cir. 1995). The district court erred in failing to consider USSG §5G1.3(c) and its methodology, or explain why USSG §5G1.3(c) was not employed in sentencing the defendant. The district court sentenced the defendant to a consecutive 120-month term of imprisonment. The defendant argued that his sentence should be imposed concurrently and not consecutively. The circuit court held that the district court's failure to follow the strictures of USSG §5G1.3, which requires consecutive sentences only "to the extent necessary to achieve a reasonable incremental punishment for the instant offense" amounted to plain error. The circuit court noted that the USSG §5G1.3(c) policy statement is binding on district courts because it completes and informs the application of a particular guideline. The circuit court stated that although the district court maintains discretion to reject the suggested methodology, it must consider the methodology's possible application. If the district court chooses not to follow the methodology, it must explain why the calculated sentence would be impracticable in that case or the reasons for using an alternative method. The circuit court vacated the district court's decision and remanded for resentencing because "the district court did not consider USSG §5G1.3(c), its methodology, or explain why it was not employed." *Id*. at 183.

United States v. Londono, 285 F.3d 348 (5th Cir. 2002). The district court did not err in refusing to make the defendant's federal sentence run consecutively to a state sentence. The defendant claimed that the district court erred when making the choice between consecutive or concurrent sentences by failing to adequately consider the sentencing factors detailed in 18 U.S.C. § 3553. The Fifth Circuit stated that the district court's decision to make the defendant's newly imposed federal sentence run consecutively to his previously imposed state sentence was governed by USSG §5G1.3. Application Note 3 to this guideline requires the court to consider the factors listed in 18 U.S.C. § 3584. Section 3584 directs the court to consider the factors listed in 18 U.S.C. § 3553(a), which consist of seven categories of concern that a district court must take into account when giving a sentence. Section 3553(c) states that at the time of sentence, the court "shall state in open court the reasons for its imposition of the particular sentence." The Fifth Circuit noted its previous holding that the district court need not explicitly mention section 3553, and need only "imply consideration of the section 3553 factors." The Fifth Circuit held that while the district court did not expressly mention section 3584 or section 3553, it did speak with defense counsel extensively about the applicability of USSG §5G1.3(c) and listened to all counsel's arguments about the relevant sentencing factors, eliminating the notion that it committed plain error.

(1996) (holding that Application Note 6's language is mandatory), and *United States v. Goldman*, 228 F.3d 942, 944 (8th Cir. 2000), *cert. denied*, 531 U.S. 1175 (2001) (same), and *United States v. Bernard*, 48 F.3d 427, 430-32 (9th Cir. 1995) (same), *with United States v. Maria*, 186 F.3d 65, 70-73 (2d Cir. 1999) (holding that Application Note 6 uses the word "should" rather than "shall," and is therefore, permissive), and *United States v. Walker*, 98 F.3d 944, 945 (7th Cir. 1996), *cert. denied*, 519 U.S. 1139 (1997) (indicating, *in dicta*, that Application Note 6 creates a "strong presumption in favor of consecutive sentencing"), and *United States v. Tisdale*, 248 F.3d 964, 977-78 (10th Cir. 2001), *cert. denied*, 534 U.S. 1153 (2002) (holding that the plain meaning of the word "should" indicates that it is permissive and not mandatory and that the structure and comments of USSG §5G1.3 also support this conclusion).

United States v. Richardson, 87 F.3d 706 (5th Cir. 1996). The district court did not err in imposing a consecutive sentence in contradiction to the PSR recommendation that USSG §5G1.3 applied and mandated concurrent sentences. The defendant argued that the imposition of a consecutive sentence in this case was an abuse of discretion because the judge failed to consider factors set forth in 18 U.S.C. § 3553(a) required to be considered under 18 U.S.C. § 3584. Although the judge did not explicitly refer to section 3553 in his opinion, he did state orally that he considered "the sentencing objectives of punishment and deterrence." The appellate court accepted this statement as implying a general consideration on the part of the district court of the different factors embodied in section 3553. The statement was not detailed and specific, but it was not so lacking as to evince a disregard of section 3553 factors. Therefore, the district judge did not abuse his discretion in imposing consecutive sentences.

Part H Specific Offender Characteristics

§5H1.5 Employment Record (Policy Statement)

See United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994), §4A1.3, p. 42.

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

See United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994), §4A1.3, p. 42.

§5H1.10 Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

United States v. Stout, 32 F.3d 901 (5th Cir. 1994). The district court's upward departure in sentencing a former judge for tax evasion was not erroneous even though the court included the defendant's socio-economic status as one of six reasons for departing. The circuit court held that the district court's consideration of the defendant's affluent lifestyle and status as a judge, although improper under USSG §5H1.10, was harmless error because the district court relied on four other acceptable factors in its decision to depart. These factors, the circuit court held, were sufficient to justify the departure without consideration of the defendant's socio-economic status.

Part K Departures

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

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

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). The district court did not err in refusing to grant a downward departure to the defendant after an error had been corrected in his presentence report. Initially the government had moved for and the district court had agreed to a ten percent reduction to defendant's sentence under USSG §5K1.1. The Fifth Circuit held that in not renewing its motion for a downward departure after the correction of the presentence report and in fact by arguing for a sentence within the corrected sentencing range, the government rescinded its motion. In doing so, the government removed the authority of the sentencing court to grant the motion, as it could not do so absent a motion from the government. The Fifth Circuit also held that even if the motion was not rescinded, the district court simply denied it upon rehearing in the face of corrections to the presentence report. Finally, the Fifth Circuit held that even if the district court erred in failing to depart once the motion was granted, if the resulting sentence was authorized, any error was harmless.

United States v. Johnson, 33 F.3d 8 (5th Cir. 1994). The district court granted substantial assistance departures to the defendants, but departed down only ten months, as recommended by the government. The district court must exercise its judgment in determining the propriety and extent of a USSG §5K1.1 departure; the government's recommendation is but one factor to be considered by the court. The defendant's argument–that the district court has a duty to conduct an independent inquiry into each defendant's case to determine whether the decision to depart and the extent of the departure is appropriate–is correct. Because it is unclear from the record whether the sentencing court adequately recognized its duty to evaluate independently each defendant's case before making the USSG §5K1.1 determinations, the sentences were vacated and the case remanded.

United States v. Okoli, 20 F.3d 615 (5th Cir. 1994). The government moved for departure below the guidelines sentence pursuant to USSG §5K1.1. However, the district court did not err when it declined to depart downward from the statutory minimum sentence. The circuit court held that it is not necessary for the government to make a separate motion for a downward departure below the statutory minimum under 18 U.S.C. § 3553. However, in this case, there was no evidence that the defendant requested departure below the minimum or that the district court abused its discretion in declining to so depart on its own motion.

United States v. Solis, 169 F.3d 224 (5th Cir.), *cert. denied*, 528 U.S. 843 (1999). Persuaded by the Third Circuit's reasoning in *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 526 U.S. 1077 (1999), the Fifth Circuit held that USSG §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a government motion. Because the government did not bargain away its discretion to refuse to offer a USSG §5K1.1 motion and the defendant did not allege that the government refused to offer the motion

for unconstitutional reasons, the district court was held to have erred by granting a five-level downward departure.[20]

United States v. Underwood, 61 F.3d 306 (5th Cir. 1995). In considering an issue of first impression, the appellate court held that the promulgation of policy statement §5K1.1 was not an ultra vires act of the United States Sentencing Commission. The defendant pled guilty to possession of counterfeit currency. The plea agreement between the defendant and the government provided that the government retained the discretion whether to file a motion for downward departure for substantial assistance pursuant to USSG §5K1.1. The government chose not to file a motion for downward departure and the defendant was sentenced to a term of 24 months' imprisonment. The defendant argued on appeal that the Sentencing Commission exceeded its authority when it promulgated USSG §5K1.1 as a "policy statement" because Congress mandated the creation of a "guideline" in 28 U.S.C. § 994(n). In relevant part, 28 U.S.C. § 994(n) provides that "[t]he Commission shall assure that the Guidelines reflect the general appropriateness of imposing a lower sentence than would be otherwise imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The circuit court noted that Congress's instructions to the Sentencing Commission fall into four general categories: issue guidelines, issue policy statements, issue guidelines or policy statements or implement a certain congressionally determined policy in the guidelines as a whole. The circuit court recognized that the specific language of each subsection of section 994 determines into which of the four categories the instruction falls. After comparing the language in the subsections dealing with "guidelines" and "policy statements," the circuit court ruled that Congress was not mandating the promulgation of a specific guideline for downward departure based on substantial assistance in section 994(n). Rather, Congress was instructing that guidelines as a whole should "reflect" the appropriateness of a downward departure based on substantial assistance. The circuit court went on to address USSG §5K1.1 and its relationship to 18 U.S.C. § 3553(e), and noted its previous ruling in *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993) where the dispositive issue was "whether section 3553(e) and USSG §5K1.1 provide separate and distinct methods of departure or whether they are intended to perform the same function." *Id*. at 72. The Fifth Circuit concluded that

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[20]There is a circuit split on the issue of the appropriate standard of review of a prosecutor's refusal to file a substantial assistance motion. Some circuits hold that relief is warranted *only* when the refusal is based on an unconstitutional motive, and others hold that relief is *also* warranted when the refusal is not rationally related to any legitimate government interest. Compare *United States v. Solis*, 169 F.3d 224, 226 (5th Cir.), *cert. denied*, 528 U.S. 843 (1999) (relief is only granted when refusal is based on unconstitutional motive), *United States v. Bagnoli*, 7 F.3d 90, 92 (6th Cir. 1993), *cert. denied*, 513 U.S. 827 (1994) (same), and *United States v. Nealy*, 232 F.3d 825, 831 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001) (same), with *United States v. Sandoval*, 204 F.3d 283, 286 (1st Cir. 2000), (relief is granted when the refusal is based on "an unconstitutional motive or the lack of a rational relationship to any legitimate governmental objective."), *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996) (relief is granted when the refusal is based on "some unconstitutional reason"), *United States v. Abuhouran*, 161 F.3d 206, 211-12 (3d Cir. 1998), *cert. denied*, 526 U.S. 1077 (1999) (relief is granted when the refusal is based on an "unconstitutional motive" or "was not rationally related to any legitimate government end"), *United States v. LeRose*, 219 F.3d 335, 342 (4th Cir. 2000) (same), *United States v. Egan*, 966 F.2d 328, 332 (7th Cir. 1992), *cert. denied*, 506 U.S. 1069 (1993) (same), *United States v. Cruz Guerrero*, 194 F.3d 1029, 1031 (9th Cir. 1999) (same), *United States v. Duncan*, 242 F.3d 940, 947 (10th Cir.), *cert. denied*, 534 U.S. 858 (2001) (same), and *In re Sealed Case* No. 97-3112, 181 F.3d 128, 142 (D.C. Cir. 1999) (same).

"[b]ased on a combined reading of USSG §5K1.1, section 3553(e) and section 994(n)], . . . there is a direct statutory relationship between USSG §5K1.1 and section 3553(e) of such character to make USSG §5K1.1 the appropriate vehicle by which section 3553(e) may be implemented." *Id*. The circuit court noted that because it had held USSG §5K1.1 to be an appropriate vehicle to implement a statute, by definition, the Sentencing Commission did not exceed the authority given to it by Congress when it enacted USSG §5K1.1.

United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994). The district court did not err in sentencing the defendant based on *ex parte* information. The defendant argued that the government's decision to submit ex parte letters upon which the departure committee based its decision not to file a USSG §5K1.1 motion deprived him of the opportunity to challenge factual inaccuracies. The Fifth Circuit concluded that the defendant waived any right to see the letters because he "failed to petition the district court for access to the letters prior to sentencing." *Id*. at 1297. However, the district court erred in failing to make a factual determination of whether the defendant substantially assisted the government. The defendant argued that a letter submitted by a Department of Justice trial attorney from another district indicated that he substantially assisted the government in the investigation and prosecution of others. He further averred that he was prepared to provide additional assistance but that the government indicated it no longer needed his help. The district court considered the record and found that it was silent as to what quantity and quality of cooperation the parties intended at the time the agreement was entered. Accordingly, the district court was ordered on remand to determine the reasonable expectations of the parties at the time the plea was negotiated.

§5K2.0 Grounds for Departure (Policy Statement)[21]

United States v. Dodson, 288 F.3d 153 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002). The district court did not err in granting an upward departure to a defendant convicted of simple possession of cocaine. The Fifth Circuit reviewed the district court's list of bases for the departure including the quantity of drugs in the defendant's possession, uncounted prior criminal history, the dismissed firearm charge, and the defendant's disregard for the law at the time of arrest and while free on bail. The Fifth Circuit concluded that these factors were sufficient to support the district court's decision to make the departure.

United States v. Froman, 355 F.3d 882 (5th Cir. 2004). The district court did not err in departing upward. Defendant was charged with conspiracy to knowingly transport, receive, and distribute child pornography in interstate commerce via the computer; receipt of child pornography in interstate commerce via computer; and possession of child pornography transported in interstate commerce via computer. At sentencing, the district court gave a two level enhancement under §2G2.1

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

because one of his victims was between ages twelve and sixteen, and a two level enhancement for the fact that defendant was the parent of one of the exploited victims. The district court also granted a motion for an upward departure under §§5K2.0 and 5K2.8 resulting in an offense level of 34 and in a guideline range of 151-180 months. On appeal, defendant challenged the upward departure, arguing that the basis for the upward departure did not place the case outside the "heartland" of cases under §2G2.1, and that the district court failed to notify defendant of its intention to depart upward. The Fifth Circuit noted that the district court was not required to provide notice of the possibility of departure where the opposing party had so moved. The court further stated that defendant's substantive objection to the departure was also unpersuasive. In the instant case, the number of images transmitted and the extent of the distribution of images of defendant's 12-year-old daughter were considered particularly heinous aspects of the crime, and thus placed this case outside the heartland of general child pornography cases. The court noted that the Sentencing Commission had neither forbidden nor discouraged consideration of such factors. The extremity of the conduct was a factor sentencing courts were authorized to consider under §5K2.8. Furthermore, the degrading effect on defendant's daughter from the mass distribution of these images was not contemplated by §2G2.1. The district court's sentence was affirmed.

United States v. Garay, 235 F.3d 230 (5th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001). The appellate court upheld the district court's refusal to depart downward on the basis of defendant's alienage. The district court stated that there was nothing "atypical" about defendant's case that would take it outside the "heartland" of immigration cases to which the guideline applied. The cases upon which defendant relied were noted by the court of appeals as cases which involved aliens convicted of crimes other than immigration cases. The court determined that defendant's status as a deportable alien, as an inherent element of his crime, has already been considered by the Commission in formulating the applicable guideline.

United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000). The appellate court reversed a downward departure based on defendant's history of not abusing any child, of not having an inclination, predisposition, or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, with no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant's case out of the "heartland" of USSG §2G2.4. Consistent with the Second, Eighth, and Ninth Circuits, the court stated that the guidelines had taken into account the varying degrees of the severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court held that the guidelines clearly reflect in USSG §§2G.2.1-2G2.4 consideration of whether, and the degree to which, harm to minors is or has been involved.

United States v. Fonts, 95 F.3d 372 (5th Cir. 1996). The district court did not err in refusing to depart based on the disparity between crack cocaine and powder cocaine. The defendant pled guilty to delivery of crack cocaine and was sentenced to 57 months. The defendant appealed, arguing that the district court erred in refusing to make a downward departure based on the different treatment relating to crack cocaine and powder cocaine offenses and the disparate impact the sentencing

guidelines have on minorities. USSG §5K2.0. The Fifth Circuit, joining with the First, Fourth, Seventh, Eighth, and District of Columbia Circuits, held that a district court can not depart based on the disparity between crack cocaine and powder cocaine. *See United States v. Sanchez*, 81 F.3d 9 (1st Cir.), *cert. denied*, 519 U.S. 878 (1996); *United States v. Ambers*, 85 F.3d 173 (4th Cir. 1996); *United States v. Booker*, 73 F.3d 706 (7th Cir. 1996); *United States v. Higgs*, 72 F.3d 69 (8th Cir. 1995); *United States v. Anderson*, 82 F.3d 436 (D.C. Cir.), *cert. denied*, 519 U.S. 956 (1996). The circuit court noted that granting a downward departure based on the disparity between the penalties for crack cocaine and powder cocaine offenses would be second-guessing Congress's authority. The court stated: "it is not the province of this court to second guess Congress's chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make." 95 F.3d at 374 (*quoting United States v. Cherry*, 50 F.3d 338 (5th Cir. 1995)). The circuit court added: "[t]his court, as well as others, has declined to question the penalties for crack cocaine chosen by Congress, and we refuse to do so in this instance." Thus, the court concluded that the defendant's disparate impact argument must fail. *Id*. at 374.

United States v. Gonzales-Balderas, 11 F.3d 1218 (5th Cir.), *cert. denied*, 511 U.S. 1129 (1994). The district court did not err in refusing to depart downward from life imprisonment. The court concluded that the life sentence was a necessary deterrent given the vast profits the defendant was likely to gain in his role as middle manager in the conspiracy.

United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998). The Fifth Circuit held that the district court did not abuse its discretion when it determined that the defendant's offenses did not fall within the heartland of the money laundering guideline, and instead departed downward by applying the fraud guideline which resulted in lower sentencing range. Defendants in a campaign contribution case were convicted of interstate transportation of stolen property, money laundering, and engaging in a monetary transaction with criminally derived property, and one of them was also convicted of making false statements to a federal agent. The district court determined that the money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime, while present case involved the use of a conduit to conceal the fact that corporate funds were infused into a political campaign. The district court relied in part on the DOJ manual in determining whether the case represented a typical money laundering offense.

See United States v. Lopez, 264 F.3d 527 (5th Cir. 2001), §5C1.2, p. 46.

United States v. McDowell, 109 F.3d 214 (5th Cir. 1997). The district court did not err in departing upward based on the high probability of recidivism and the belief that the defendant would be unable to repay the money he embezzled. The defendant, an employee of a corporation, embezzled over $290,000. The calculated guidelines range was 18-24 months. Upon the third sentencing hearing, the court departed upward, to 39 months, based on two reasons: the high probability of recidivism based on prior extortionist conduct only two months before working for the corporation at issue, and the court's belief that the sentence was too lenient in light of the amount embezzled. With respect to the first basis for departure, the circuit court noted that prior uncharged conduct is addressed

by USSG §4A1.3. The district court found, however, that because of the prior conduct's proximity to the charged offense and its similarity to the conduct underlying the charged offense, the conduct was outside of the "heartland" of cases considered in USSG §4A1.3 and appropriately fell under USSG §5K2.0. Based on *Koon v. United States*, 518 U.S. 81, 92-4 (1996), the circuit court found no clear error in such a departure. With respect to the second basis for departure, the district court reasoned that a sentence in the guidelines range of 18-24 months amounted to the defendant "earning" $145,000 per year. The court questioned the adequacy of such a punishment in light of the defendant's benefit, use and enjoyment of the embezzled money and, therefore, departed upward. Based on the intent of USSG §5K2.0 to allow departures only for a character or circumstance placing the case outside of the "heartland" of cases considered by the Sentencing Commission, the circuit court held that this reasoning could not be upheld. Specifically, the court referred to the commentary of USSG §5K2.0 which states: "[f]or example, dissatisfaction with the available sentencing range or preference for a different sentence that authorized by the guidelines is not an appropriate basis for a departure." The circuit court held that despite this error, remand was not necessary as it found that the sentence imposed by the district court would not have changed absent the improper basis for departure.

United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001). The district court erred in refusing to consider cultural assimilation as a permissible ground for a downward departure. The court recognized that the guidelines allow for certain factors not considered by the Commission to be used as a basis for a departure. *Id.* at 432; *see* USSG Ch. 1, pt. A, intro comment. 4(b). Thus, the court decided that cultural assimilation is a factor not mentioned in the guidelines that is sufficient to allow the case to be taken out of the heartland of the particular guideline.

*United States v. Threadgill***,** 172 F.3d 357 (5th Cir.), *cert. denied*, 528 U.S. 871 (1999). The appellate court affirmed the downward departure (reducing sentences from between 40 percent to 75 percent of presumptive range) based on fact that defendants' money laundering activities "were incidental to the gambling operation" (laundered only $500,000 of $20,000,000 in gross wagers) and that "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities." *Id*. at 376. In the process, the Fifth Circuit expressly abrogated *United States v. Willey*, 57 F.3d 1374 (5th Cir.), *cert. denied*, 516 U.S. 1029 (1995) (departure cannot be justified on finding that the subject crime was a "disproportionately small part of the overall criminal conduct") in light of *Koon*.

United States v. Walters, 87 F.3d 663 *(*5th Cir.*), cert. denied*, 519 U.S. 1000 (1996). The court upheld the departure where the defendant did not personally profit from the money laundering scheme.

United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994). The district court did not err in departing upward from the fine range. The applicable statute provides that when a defendant derives pecuniary gain from the offense or if the crime causes pecuniary loss to a person other than the defendant, the sentencing court has the authority to impose a fine which is the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d). The defendant's challenge to the propriety of the

upward departure presented a question of first impression in the Fifth Circuit. The court of appeals considered the statute governing appellate review and concluded that there was "no distinction between reviews of departures from fine or imprisonment ranges." *Id*. at 1300. Accordingly, because the lower court did not clearly err in finding that the increased fine was necessary to ensure the defendant did not receive financial gain and that the defendant's criminal activity caused pecuniary loss to other persons, the upward departure was not an abuse of discretion.

United States v. Winters, 105 F.3d 200 (5th Cir. 1997), *cert. denied*, 528 U.S. 969 (1999). The sentencing court abused its discretion in calculating the defendant's sentence when it departed downward from the guidelines and classified the defendant's course of criminal conduct as a single aberrant act. The sentencing court also referred to the defendant's steady employment record as a correctional guard at Parchman and the institutional culture within the prison system as reasons to depart from the sentencing guidelines. The appellate court held that the departure was not warranted based on the standard definition of aberrant behavior. The court reasoned that such aberrant behavior requires more than an act which is merely a first offense or "out of character" for the defendant. The court found that the defendant's behavior was not an act of spontaneous and thoughtless conduct because he committed multiple infractions, one in assaulting a prisoner and a second in attempting to coerce a witness into altering his testimony. In addition, the court was reluctant to convert the defendant's conduct into a single act of aberrant behavior when viewed in context of his history of lawful behavior and family support system because the sentencing court reasoning failed to cite the compelling facts necessary to satisfy the very high standard for this type of departure.

United States v. Winters, 174 F.3d 478 (5th Cir.), *cert. denied*, 528 U.S. 969 (1999). A state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the Fifth Circuit. The district court then departed downward, imposing 12-month terms concurrent with each other on the civil rights and obstruction charges and consecutive to the 60-month term for the firearm offense, on both grounds that his status as an officer made him especially susceptible to abuse in prison and on the grounds that the guidelines sentence, which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the Fifth Circuit reversed the downward departures. First, the idea that a mandatory minimum sentence can make a defendant's other convictions too harsh has already been rejected by the Fifth Circuit in *United States v. Caldwell*, 985 F.2d 763 (5th Cir. 1993). That case made clear that the Sentencing Commission had thoroughly considered the interplay of 18 U.S.C. § 924(c)'s sentence provision on the underlying crimes. Since the facts cited by the district court did not serve to take this defendant's case out of the "heartland" of cases covered by the applicable guidelines, no downward departure was warranted. Additionally, no departure was warranted for the defendant's susceptibility to abuse in prison based on his status as a correctional officer. There was no evidence in this case that the defendant was the subject of widespread publicity like the defendants in the *Koon* case. Nor did any other factor exist that made him more susceptible to abuse in prison than any other convicted corrections officer. Accordingly, because the district court articulated no adequate departure factors

and was based only on the district court's preference, the case was remanded for re-sentencing without the benefit of the departures.

§5K2.1 Death

United States v. Davis, 30 F.3d 613 (5th Cir. 1994), *cert. denied*, 513 U.S. 1098 (1995). The district court did not err in departing upward pursuant to USSG §5K2.1. An employee of one of the gas stations the defendant robbed suffered an aneurysm at the base of her brain as a result of the trauma of robbery. The defendant argued that although the employee subsequently died, none of the USSG §5K2.1 factors applied to his case. The circuit court concluded that a USSG §5K2.1 upward departure still may be warranted absent a finding that all the factors exist since "[t]he only mandatory 'language in the section is that the judge must' consider matters that, normally distinguish among levels of homicide, such as state of mind." *Id*. at 615-616 (*quoting United States v. Ihegworo*, 959 F.2d 26, 29 (5th Cir. 1992)). The district court specifically considered the mandatory factors when it concluded that although the defendant did not intend to kill the employee, he should have anticipated that his conduct could result in serious injury or death. The circuit court additionally rejected the defendant's argument that the consecutive sentences he received on the firearms counts adequately accounted for the employee's death.

United States v. Singleton, 49 F.3d 129 (5th Cir.), *cert. denied*, 516 U.S. 924 (1995). The appellate court affirmed the district court's upward departure to a sentence of life imprisonment for a defendant who participated in the killing of the victim of a robbery and carjacking conspiracy. In conducting review for plain error, the appellate court noted that the four-level enhancement for permanent or life threatening injury awarded under USSG §2B3.1(b)(3)(C) did not preclude an upward departure for the death of the victim. *See United States v. Billingsley*, 978 F.2d 861, 865-66 (5th Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993).

§5K2.3 Extreme Psychological Injury

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). The district court properly departed upward based upon the extreme psychological injury suffered by a seven-year-old sexual abuse victim who was forced to squeeze the defendant's "private" and to place his penis in her mouth. The victim's treatment manager testified that the victim will suffer long-term psychological effects, such as lack of trust (especially of adults) that are excessively severe. The doctor indicated that the victim's trauma was the most severe of anybody she had ever worked with. When asked to talk about the incident, the victim became physically ill—crying, vomiting, and fever—which is similar to those suffering from Post Traumatic Stress Disorder.

§5K2.12 Coercion and Duress

See United States v. Lopez, 264 F.3d 527 (5th Cir. 2001), §5C1.2, p. 46.

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

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

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

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

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

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

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.1 Presentence Report (Policy Statement)

United States v. Londono, 285 F.3d 348 (5th Cir. 2002). The district court did not err in accepting the government's evidence that the defendant's California conviction was valid. The defendant claimed that a California conviction he committed as a juvenile should not have been calculated into his criminal history category. The evidence demonstrating the validity of the conviction was its presence in the PSR and the probation officer's testimony that she gathered the information about the conviction from a Texas "rap sheet." The defendant claimed that the rap sheet was unverified and was not the proper place for his juvenile conviction to appear. The Fifth Circuit held that the defendant failed to bear the burden of showing that the information in the PSR "cannot be relied on because it is materially untrue, inaccurate, or unreliable," necessary to successfully challenge the findings of a PSR.

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001). The district court erred in using information about drug quantity contained in a defendant's PSR when the information did not have the requisite indicia of reliability. The defendant cooperated with the government in exchange for a guarantee of use immunity for any information that he provided. The defendant now claims that the quantities of drugs alleged in his PSR were calculated based on information that he provided to the government. The Fifth Circuit held that although the PSR generally provides the requisite indicia of reliability on its own, that is not the case where facts are alleged in the PSR with no apparent basis. Furthermore, the Fifth Circuit held that when use immunity is involved and the defendant questions the source of evidence used against him, the burden is on the government to show that the evidence came from sources other than the defendant. Since the government merely made assertions that the evidence came from sources other than the defendant and had no testimony to back up those assertions, the Fifth Circuit held that the government did not sustain its burden and the case should be remanded for resentencing without the quantities provided by the defendant.

United States v. Williams, 22 F.3d 580 (5th Cir.), *cert. denied*, 513 U.S. 951 (1994). The district court committed harmless error when it considered the defendant's indictment as evidence at the sentencing hearing. The circuit court concluded that because the indictment is merely a charging instrument that does not constitute evidence of guilt, it may not be considered at sentencing. However, the lower court's use of the indictment in its sentencing calculation was harmless because the record contained other reliable data upon which the district court could base its sentencing determination.

Part B Plea Agreements

§6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

United States v. Foy, 28 F.3d 464 (5th Cir.), *cert. denied*, 513 U.S. 1031 (1994). The district court did not err by failing to expressly state its reasons for rejecting the defendant's plea agreement. The circuit court declined to adopt the rulings of its sister circuits that impose such a requirement. *See United States v. Moore*, 916 F.2d 1131 (6th Cir. 1990); *United States v. Miller*, 722 F.2d 562 (9th Cir. 1983); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973); *but see United States v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981). However, where it is not clear that the court did not consider an improper basis in rejecting the agreement, the sentence must be vacated and remanded. Here, the appellate court remanded because it could not determine from the record whether the district court erroneously rejected the plea because defendant would not acquiesce to certain findings of the presentence report.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Mathena, 23 F.3d 87 (5th Cir. 1994). The district court did not err in sentencing the defendant upon revocation of supervised release to a term of imprisonment in excess of the term recommended in the Chapter Seven policy statement. The Fifth Circuit, citing *United States v. Headrick*, 963 F.2d 777 (5th Cir. 1992), upheld the sentence because there are no applicable guidelines for sentencing after revocation of supervised release, and the sentence was not otherwise unlawful or plainly unreasonable. Policy statements contained in the probation and supervised release guidelines are advisory only, and therefore not binding on the district court.

United States v. Moody, 277 F.3d 719 (5th Cir. 2001). The district court did not err in imposing a four-year term of supervised release upon revocation of an original term of supervised release. The Fifth Circuit held that the district court was correct in relying on the original statute under which the defendant was sentenced in order to determine her appropriate sentence now. Since the statute that the defendant was originally sentenced under allowed for a supervised release sentence of at least four years, a sentence of supervised release of four years now is actually at the bottom of the range and is therefore perfectly appropriate.

United States v. Stiefel, 207 F.3d 256 (5th Cir. 2000). The defendant was serving two concurrent two-year terms of supervised release, which followed two concurrent terms of 57 months' imprisonment for bank robbery. The district court revoked the terms of supervised release in part because the defendant failed a drug test and sentenced the defendant to ten months imprisonment and 14 months' supervised release. While serving the second term of supervised release, the defendant

alleged that the revocation sentence was illegal because the court lacked authority to impose a term of supervised release to follow the prison sentence. The district court rejected the defendant's argument, and the defendant did not appeal. The defendant violated the second term of supervised release and the district court imposed 2 concurrent terms of 14 months' imprisonment. The defendant argued that the sentence for the second revocation was illegal because the original revocation sentence was illegal. The Fifth Circuit held that the defendant's claim was barred because he had already litigated the issue. The defendant also argued that the court had no authority under 18 U.S.C. § 3583(e) and (h) to incarcerate the defendant for the second violation because those provisions do not specifically authorize second revocations. The Fifth Circuit held that the provisions permit successive revocations. "[T]he issue under section 3583(e) is not whether a second revocation may occur, but whether the district court, after considering certain factors, believes that revocation is appropriate . . . ." *Id*. at 260.

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

United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994), *cert. denied*, 514 U.S. 1008 (1995). The defendant appealed his sentence upon the mandatory revocation of his supervised release. He asserted that his sentence to 24 months' imprisonment constituted an upward departure, and that the district court erred in considering his need for drug rehabilitation in deciding the length of imprisonment to impose. In addressing an issue of first impression, the appellate court determined that where the revocation is mandatory under the provisions of 18 U.S.C. § 3583(g), the district court "may consider a defendant's rehabilitative needs in determining the length of a sentence of imprisonment upon revocation of supervised release."

See United States v. Mathena, 23 F.3d 87 (5th Cir. 1994), §7B1.3.

ALL CHAPTERS: MISCELLANEOUS AMENDMENTS[25]

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

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

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

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

§§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material;

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

Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) – Conforms departure provision in Application Note 6 of §2G2.1 with Note 12 of §2G1.1.

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

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

APPLICABLE GUIDELINES/*EX POST FACTO*

United States v. Bell, 351 F.3d 672 (5th Cir. 2003). The court retroactively applied the PROTECT Act to a sentencing departure and vacated and remanded the case for resentencing where the district court did not clearly state its reasons for a downward departure. Defendant pled guilty to a violation of 18 U.S.C. § 844(e), using a telephone to convey a false threat to destroy a building with explosives. The district court judge, upon defendant's motion that she suffered from mental health issues, revised the criminal history category down, from VI to IV, making the defendant eligible for probation to prevent an interruption in her medical treatment. After sentencing, the PROTECT Act was enacted. The Act, among other things, established the standard of review for departures to be *de novo*. The government appealed the sentence, noting the court mentioned over-representation of criminal history, not the mental health factor, as its basis of departure. The government also argued that the court failed to provide the statutorily required statement of reasons for the sentence. In determining whether the PROTECT Act applied retroactively to the defendant's sentence, the court characterized the change in the standard of review to be "procedural rather than substantive because it neither increases the punishment nor changes the elements of the offense or the facts that the government must prove at trial," quoting *United States v. Mejia*, 844 F.2d 209, 211 (5th Cir. 1988). Noting that two other circuits also applied the procedural/substantive dichotomy, the court agreed that the *de novo* standard may be applied in the instant case without violating the *ex post facto* clause of the U.S. Constitution. *See United States v. Thurston*, 338 F.3d 50, 72 (1st Cir. 2003), *and see United States v. Hutman*, 339 F.3d 773 (8th Cir. 2003) . Turning to the PROTECT Act, the court stated that it changed the standard of review only in determinations under 18 U.S.C. §§ 3742(e)(3)(A) and 3742(e)(3)(B), leaving the abuse of discretion applicable in all other cases. Subsection 3(A) did not apply in the instant case because a written statement of reasons was provided for the departure. Subsection 3(B) instructs the court of appeal to determine whether a sentence departs from the guidelines based on a factor that does not advance the objectives set forth in 18 U.S.C. § 3553(a)(2), which states in part "the need for the sentence imposed . . . (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." During sentencing, the district judge stated several concerns about the defendant's medical

treatments and a desire not to interrupt them by a term of imprisonment, so the appellate court determined this was a factor on which the departure should be based. The court of appeals, however, determined subsection 3(B) did not apply, making the abuse of discretion, not the *de novo* standard, applicable in the instant case. Applying the abuse of discretion standard, the court found the record to be unclear in identifying the exact factors taken into account during sentencing and what, if any, facts were presented to establish the defendant' s mental state and the medical care needs. Due to the lack of clarity, the court vacated and remanded to the district court for clarification.

See United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir.), *cert. denied*, 124 S. Ct. 271 (2003), §2L1.2, p. 22.

United States v. Thomas, 12 F.3d 1350 (5th Cir.), *cert. denied*, 511 U.S. 1095 (1994). The district court did not err in sentencing the defendants under the amendments to the sentencing guidelines which increased the penalties effective November 1, 1989. The defendants argued that application of the amendments violated the *Ex Post Facto* Clause because of the lack of evidence demonstrating their participation in the conspiracy after November 1, 1989. The circuit court held that conspirators who fail to affirmatively withdraw from the conspiracy will be sentenced under the amendments even if they did not personally commit an act in furtherance of the conspiracy after the amendment's effective date, if it was foreseeable that the conspiracy would continue past that date.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Singleton, 49 F.3d 129 (5th Cir.), *cert. denied*, 516 U.S. 924 (1995). On the government's appeal, the circuit court reversed the district court's dismissal on double jeopardy grounds of a firearms charge brought against defendants who were also charged with armed "carjacking," and remanded the cases for reinstatement of the firearms count. The question is one of first impression in the circuits. The district courts have split on the issue. The circuit court determined that "proof of a violation of [carjacking, 18 U.S.C. §] § 2119 always proves a violation of [18 U.S.C.] § 924(c), and the two statutes fail the Blockburger `same elements' test." *Id*. at 1425. However, "Congress intended for section 924(c)'s five-year sentence to be imposed cumulatively with the punishment for the predicate drug-related or violent crime. Accordingly, section 924(c) clearly indicates Congress's intent to punish cumulatively violations of sections 924(c) and 2119. That clear indication of Congress's intent saves the statutes from the double jeopardy bar even though they fail the Blockburger test." *Id*.

United States v. Witte, 25 F.3d 250 (5th Cir. 1994), *aff'd*, 515 U.S. 389 (1995), *cert. denied*, 519 U.S. 1120 (1997). In addressing an issue of first impression, the circuit court reversed the district court's dismissal of an indictment on double jeopardy grounds because the instant offense had been included as relevant conduct in an earlier proceeding. The circuit court concluded that sentencing for a subsequent cocaine conspiracy would not be unconstitutional because Congress intended that a

defendant may be prosecuted in more than one federal proceeding for different criminal offenses that were part of the same course of conduct. Section 5G1.3(b) "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same court of conduct as the first offense–and sentence him again for all relevant conduct." *Id*. at 260. Section 5G1.3 provides for imposition of a concurrent sentence, and credit for time served, so that the additional punishment is appropriately incremental. In reaching this conclusion, the circuit court distinguished the Tenth Circuit's decision in *United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 503 U.S. 994, *and cert. denied*, 503 U.S. 998 (1992), because that court did not have the benefit of USSG §5G1.3, and expressly rejected as incorrect the Second Circuit's approach in *United States v. McCormick*, 992 F.2d 437 (2d Cir. 1993).

Fifth Amendment—Due Process

United States v. Miro, 29 F.3d 194 (5th Cir. 1994). The district court did not violate the defendant's due process rights. The defendant was visiting Spain at the time the government obtained an indictment charging the defendant with mail fraud and money laundering. He was held in Spanish custody pending extradition. Although the extradition treaty limited prosecution to the mail fraud counts because money laundering was not an offense under Spanish law, the defendant argued that the district court took into account this limitation and sentenced him more harshly. The circuit court disagreed. The doctrine of specialty requires that the defendant be prosecuted only for crimes for which he was extradited. Neither the PSR nor the sentencing judge relied on the money laundering counts for relevant conduct purposes. Although the district court did remark that the consecutive sentencing was imposed in part because of the defendant's fight against extradition, these statements were made in response to the defendant's request for a lenient sentence and were not made in violation of the doctrine of specialty or the defendant's due process rights.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Lujano-Perez, 274 F.3d 219 (5th Cir. 2001). The district court erred in not complying with the admonishment requirements of Fed. R. Crim. P. 11 and thereby invalidating the voluntariness of the defendants' guilty pleas. There was no dispute that the district court failed to comply with Rule 11. The district court failed to meet many of the requirements of Rule 11 regarding guilty pleas. Specifically the defendants challenged the district court's failure to explain the nature of the charge, the right not to plead guilty the right to a jury trial, the right to counsel, and the right against compelled self-incrimination. *Lujano-Perez*, 274 F.3d at 224. The Fifth Circuit held that the elements of the crime of conviction were not discussed with the defendants during the plea hearings. Furthermore, the Fifth Circuit held that recitation of a "factual basis" is no substitute for ensuring that the defendant understands the nature of the charge against him. *Id*. at 225. Finally, the Fifth Circuit stated that "the importance of adhering to *all* Rule 11 requirements cannot be overstated," thus, the Court is

reaffirming the notion that compliance for part of the Rule 11 requirements cannot ever be a substitute for the remaining requirements.

Rule 32

United States v. Chung, 261 F.3d 536 (5th Cir. 2001). The district court did not err on refusing to make findings on untimely objections to the defendant's PSR. The defendant did not show good cause to justify even a minimal discretionary consideration of the objections. The court held that within the context of Rule 32(c)(1), the court is only required "to make findings on timely objections and on objections that it considers in its discretion." *Id.* at 539.

United States v. Myers, 150 F.3d 459 (5th Cir. 1998). The district court erred in failing to provide the defendant with an opportunity to make a statement or speak in mitigation of his sentence, in derogation of the right of allocution in Rule 32. Neither the arguments of defendant's counsel nor the district court's two questions to the defendant regarding the firearms enhancement were sufficient to meet the plain requirements of Rule 32. The court of appeals went on to hold that denial of a defendant's Rule 32 right of allocution is an error requiring automatic reversal, not one which could be deemed harmless.

United States v. Reyna, 331 F.3d 448 (5th Cir. 2003). The Fifth Circuit vacated and remanded the appellant's sentence because the district court denied him the right of allocution pursuant to Rule 32 at sentencing upon revocation of his supervised release. The government argued that *Reyna* waived the right of allocution when, at the revocation hearing, he accepted the court's offer of a 12-month imprisonment term suspended for three years of supervised release. But the circuit court held that because there was a second sentencing hearing, that hearing was required to be conducted in accordance with Rule 32, and concluded that *Reyna* did not waive his right to allocution.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 922

United States v. Shelton, 325 F.3d 553 (5th Cir.), *cert. denied*, 124 S. Ct. 305 (2003). The defendant appealed his conviction for unlawful possession of a firearm following a misdemeanor conviction of domestic violence. The defendant first argued that his prior conviction for misdemeanor assault pursuant to section 22.01(a)(1) of the Texas Penal Code does not constitute a "crime of domestic violence" within the definition of 18 U.S.C. § 922(g)(9) because the Texas misdemeanor assault statute did not contain the element of "the use or attempted use of physical force." The court found that because the defendant's predicate offense of misdemeanor assault required bodily injury, it included as an element the use of physical force. The defendant also argued that the domestic relationship required by section 922(g)(9) must be contained as an element in the predicate offense. However, the court held that section 922(g)(9), in view of the decisions by other circuits and the legislative history, does not require the predicate offense to contain as an element the relationship between the defendant and the victim. The court also rejected the defendant's contention that section 922(g)(9) requires knowledge that it was unlawful to possess a firearm after having been convicted of a misdemeanor crime of violence, because possession of a firearm is active, not passive, conduct.

United States v. Wright, 24 F.3d 732 (5th Cir. 1994). The district court clearly erred in its factual finding that the defendant constructively possessed a weapon for purposes of 18 U.S.C. § 922(g)(1). The district court based its conclusion on the defendant's operation of the automobile, on his attempts to elude the police, and on his furtive movements near the glove compartment. The circuit court acknowledged that mere dominion over a vehicle in which a firearm has been found has been sufficient to find constructive possession. *See, e.g., United States v. Prudhome*, 13 F.3d 147 (5th Cir.), *cert. denied*, 511 U.S. 1097 (1994); *United States v. Knezek*, 964 F.2d 394 (5th Cir. 1992). However, in this case, the court was faced with strong countervailing evidence: (1) the passenger owned the car, (2) the key which unlocked the glove compartment in which the gun was recovered was found in the back seat of the police cruiser where the passenger had been detained by himself, and (3) the passenger was charged with possession of the firearm.

18 U.S.C. § 924(c)

United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998). The district court erred in denying defendant's motion to vacate his conviction, based on a guilty plea, under 18 U.S.C. § 924(c). When the defendant was arrested cooking methamphetamine in the kitchen, agents found a .25 caliber pistol in his wife's purse in the unoccupied living room. The district court concluded that the conviction could not stand on the "use" prong of section 924(c) following the decision in *Bailey v. United States*, 516 U.S. 137 (1995), but upheld the conviction under the "carry" prong. The court of appeals noted that, in the nonvehicular context, the Fifth Circuit has required that the weapon be moved or transported in some manner, or borne on one's person, during and in relation to the commission of the offense. The court held that, although the defendant "carried" the gun when he moved it to his wife's purse, the government failed to show that by its carriage to the purse, the firearm had a "purpose or effect" with respect to the drug offense so as to satisfy the "during and in relation to" part of the statute. The court vacated and remanded the case for entry of a new plea.

18 U.S.C. § 3581

United States v. Jeanes, 150 F.3d 483 (5th Cir. 1998). The district court did not err in denying the defendant's motion to modify or terminate his supervised release term. The defendant moved for the reduction or termination based on time already served in prison on a subsequently vacated section 924(c) conviction. The court of appeals held, first, that the district court had not abused its broad discretion to terminate supervised release under 18 U.S.C. § 3581(e)(1) because it considered the factors listed by the statute in denying the requested relief. The court of appeals also rejected defendant's argument that his time served and good-time credits on the vacated conviction be applied to reduce the term of supervised release. The court noted that imprisonment and supervised release serve very different purposes, that incarceration does nothing to assist a defendant's transition back into society and is, therefore, not a reasonable substitute for a portion of the supervised release term. The court held, however, that a district court may take time served into consideration as one factor among many under the directive of section 3583(e)(1).

21 U.S.C. § 841

United States v. Hass, 150 F.3d 443 (5th Cir. 1998), *cert. denied*, 531 U.S. 812 (2000). The district court erred in applying the enhancement for conviction of a drug felony after two or more convictions for a felony drug offense have become final. The court of appeals stated that, for section 841(b)(1) enhancement purposes, a conviction does not become final until the time for seeking direct appellate review has elapsed. In this instance, the defendant was sentenced for the prior offenses on August 26, 1996. Under Texas law, the time for direct appellate review did not expire until September 26, 1996; thus, the convictions did not become final for enhancement purposes until that time. Because the drug conspiracy ended September 11, 1996, the defendant committed the conspiracy offense before his prior convictions became final.

United States v. Valencia-Gonzales, 172 F.3d 344 (5th Cir.), *cert. denied*, 528 U.S. 894 (1999). A federal defendant's sentence for drug importation is properly keyed to the identity of the drug the defendant was actually carrying rather than the drug he thought he was carrying. Although the statutory scheme requires specific intent to carry a controlled substance, it imposes a strict liability punishment based on which controlled substance, and how much of it, is involved in the offense. The Court relied on *United States v. Strange*, 102 F.3d 356, 361 (8th Cir. 1996), for the proposition that Congress had a rational basis to conclude that there is some deterrent value in exposing a drug trafficker to liability for the full consequences, both expected and unexpected, of his own unlawful behavior in sentencing the defendant. Accordingly, the district court did not err in sentencing the defendant according to the drug he was carrying, heroin, rather than the drug he believed he was carrying, cocaine.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). The district court did not err in imposing sentences for all three defendants. Although the amount of heroin involved in the offense is not stated in their indictments, the sentences imposed by the district court do not exceed the statutory maximum of 20 years. Thus, the Fifth Circuit held that *Apprendi* was not implicated. Defendant Faulk did have an appropriate *Apprendi* challenge to his term of supervised release. Defendant Faulk should have received at most a three-year term of supervised release. The Fifth Circuit stated however that since they were reversing Faulk's sentence on other grounds, the district court would have another opportunity to correct the term of supervised release.

United States v. DeLeon, 247 F.3d 593 (5th Cir. 2001). The defendant was convicted of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, and aiding and abetting the possession of marijuana with intent to distribute. The indictment alleged a drug quantity greater than 100 kilograms of marijuana and the jury was not instructed that it had to find a particular quantity of marijuana beyond a reasonable doubt. The defendant was sentenced to 78 months. On appeal, the defendant argued that his sentence was in violation of *Apprendi* because the indictment did not allege a specific drug quantity and such

lack of specificity should subject him only to the lowest statutory sentencing range of section 841(b)(1)(D) (five-year statutory maximum). The court held that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny. *See also United States v. Slaughter*, 238 F.3d 580, 583 (5th Cir. 2000), *cert. denied*, 532 U.S. 1045 (2001) (holding that drug quantities not expressed in the jury instructions as an element was harmless error and would not lead to a contrary finding as to the drug quantities alleged in the indictment).

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). The district court did not err in sentencing the defendant based on an amount of drugs included in his plea agreement. The defendant pled guilty to conspiracy to distribute and possession with the intent to distribute at least 100 kilograms or more of marijuana. Because the specific amount was sentenced based on an amount of drugs to which he admitted, the Fifth Circuit held that *Apprendi* is not applicable.

United States v. Fort, 248 F.3d 475 (5th Cir.), *cert. denied*, 534 U.S. 977 (2001). The district court did not err in imposing a 21-month sentence because it was within the prescribed five-year statutory maximum for the offense. The defendant pled guilty to possession with intent to distribute approximately 561.2 pounds of marijuana, in violation of 21 U.S.C. § 841(a)(1) and was sentenced to 21 months. On appeal the defendant challenged his sentence and argued that: 1) section 841 was unconstitutional under *Apprendi* because Congress intended the facts that determine the maximum sentence to be sentence enhancements rather than elements; and, 2) his 21-month sentence exceeded the one-year maximum under 21 U.S.C. § 841(b)(4). The court rejected both arguments. The court stated that the issue of the constitutionality of the drug statutes was recently rejected in an earlier Fifth Circuit decision in *United States v. Slaughter*.[26] The court further stated that the one-year maximum sentence applied only to distribution of a "small amount of marijuana for no remuneration" under 21 U.S.C. §§ 841(b)(4). Because the defendant was charged with, and stipulated to, 561.2 pounds of marijuana, the one-year maximum under section 841(b)(4) did not apply but the five-year maximum under section 841(b)(1)(D) did apply. Under section 841(b)(1)(D), the court held *Apprendi* did not invalidate the defendant's sentence. `

United States v. Green, 246 F.3d 433 (5th Cir.), *cert. denied*, 534 U.S. 924 (2001). The district court's error in failing to instruct the jury to find a specific amount of drugs beyond a reasonable doubt was harmless. The defendant was convicted of harboring a fugitive and of a drug trafficking conspiracy involving a fugitive. The defendant was ultimately sentenced to 25 years' imprisonment for the conspiracy conviction and five years for harboring a fugitive, with the two sentences running concurrently. On appeal, the defendant argued that the specific amount of drugs involved in the conspiracy was not submitted to the jury for its determination beyond a reasonable doubt and that the jury was not specifically instructed that drug quantity was an element of the conspiracy offense for which it was required to make a specific finding. The court found it sufficient that the district court

[26]238 F.3d 580, 582 (5th Cir. 2000), *cert. denied*, 532 U.S. 1045 (2001) (held that *Apprendi* did not render federal drug and conspiracy statutes unconstitutional on their face).

explicitly instructed, as part of the first conspiracy element, that the jury must find that the defendant agreed to commit the crime of distribution of the named drugs "as charged in the indictment." The defendant's sentence was affirmed.

United States v. Loe, 262 F.3d 427 (5th Cir. 2001), *cert. denied*, 534 U.S. 1134 (2002). The district court did not commit *Apprendi* error in including relevant conduct because the consideration did not result in a sentence above the statutory maximum.

United States v. McIntosh, 280 F.3d 479 (5th Cir. 2002). The district court did not err in enhancing the defendant's sentence based on his role as an organizer and leader and on the total value of the fraudulently obtained funds. The defendant claimed that such enhancements are in violation of Apprendi because they were not included in his original indictment and were not proved to a jury beyond a reasonable doubt. The Fifth Circuit held, however, that the district court did not violate *Apprendi* because the enhancements did not increase the defendant's sentence above the statutory maximum.

See United States v. McWaine, 290 F.3d 269 (5th Cir.), *cert. denied*, 123 S. Ct. 311 (2002), §2D1.1, p. 12.

United States v. Moreci, 283 F.3d 293 (5th Cir. 2002). There was no *Apprendi* error when the court sentenced a defendant based on an indictment that identified 21 U.S.C. § 841(b)(1)(C) as the applicable statute and "over 50 kilograms" of drugs to the defendant, without an explicit upper range. The defendant argued that under *United States v. Vasquez-Samora*, 253 F.3d 211 (5th Cir. 2001), an indictment that does not specify an amount of drugs cannot serve as the basis for enhancing a sentence even if it references an enhanced statute. The defendant also argued that the wording of the indictment only establishes the lower boundary of the sentencing range and that he could not have known the maximum penalty when he pled guilty. He asserted that the default penalty of section 841(b)(1)(D) must apply. The Fifth Circuit disagreed, stating the defendant accepted responsibility for the 111.2 kilograms of drugs named in the PSR and was informed of the maximum 20-year penalty he was subject to on several occasions. Finally, the sentence imposed did not exceed the statutory maximum permitted by section 841(b)(1)(C). Therefore, *Apprendi* did not affect the defendant's sentence. *See United States v. Moreno*, 289 F.3d 371 (5th Cir. 2002) (court rejected defendant's argument that his indictment failed to sufficiently allege drug quantity); *United States v. Davidson*, 283 F.3d 681 (5th Cir. 2002) (the court's failure to find a specific drug quantity beyond a reasonable doubt was harmless error because the record contained undisputed evidence that the defendant was responsible for the sale of at least 50 grams of crack cocaine).

United States v. Thomas, 246 F.3d 438 (5th Cir. 2001). The district court erred by imposing a sentence beyond the prescribed statutory maximum based upon a drug quantity amount not proven beyond a reasonable doubt. The defendant was one of four defendants convicted of a crack cocaine distribution conspiracy in violation of 21 U.S.C. § 841(b)(1)(C), and sentenced to life imprisonment based on the amount of crack cocaine found by the district court using the preponderance of the

evidence standard. On appeal the defendant argued that her sentence was unconstitutional under *Apprendi* because the amount of crack cocaine determined by a preponderance of the evidence increased the penalty for her crime beyond the prescribed statutory maximum of 20 years. The court agreed with the defendant and held that the defendant's sentence was unconstitutional under *Apprendi* because the drug quantity factor increased the penalty beyond the statutory maximum and as such became an element of the offense to be proven beyond a reasonable doubt.

United States v. Vasquez-Zamora, 253 F.3d 211 (5th Cir. 2001). The district court erred in sentencing the defendant, in violation of *Apprendi*, to a sentence that exceeded the five-year statutory maximum for the offense of conviction and to a supervised release term based on an enhanced penalty that exceeded the three-year statutory maximum for the applicable term of supervised release. Both increases were based on drug quantities not alleged in the indictment and submitted to the jury. The defendant was convicted of possession with intent to distribute marijuana, and conspiracy to possess with intent to distribute marijuana and was sentenced to 65 months on each count to be served concurrently, exceeding the maximum by five months, followed by a 5-year term of supervised release, which exceeded the 3-year maximum by 24 months. On appeal, the court vacated and remanded defendant's sentence and term of supervised release as a violation of *Apprendi* because the drug quantities had not been alleged in the indictment and proven beyond a reasonable doubt.

United States v. Virgen-Moreno, 265 F.3d 276 (5th Cir. 2001), *cert. denied*, 534 U.S. 1095 (2002). The district court did not err in sentencing the defendants under 21 U.S.C. § 841(b)(1)(A) without submitting the issue of drug amount to the jury. The court did note that post-*Apprendi*, they have held that when the government seeks to enhance a sentence under 21 U.S.C. § 841(b)(1)(A), "the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt." *Id*. at 297; *see United States v. Doggett*, 230 F.3d 160, 164-165 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001). The court held that implicit in the conspiracy verdict by the jury was also a finding of the specific amount of drugs involved. Since the jury could not rationally find a different amount, the omission of a specific amount from the jury instructions was harmless. *See United States v. Warden*, 291 F.3d 363 (5th Cir.), *cert. denied*, 537 U.S. 935 (2002) (court rejected defendant's argument that the statute under he was convicted, 21 U.S.C. § 841, is unconstitutional in light of *Apprendi*).

United States v. Wilson, 249 F.3d 366 (5th Cir. 2001). The district court did not err by not requiring the jury to find the monetary amount involved beyond a reasonable doubt. The defendant was convicted of conspiracy to commit money laundering, money laundering, mail fraud, and engaging in monetary transactions involving property derived from a specified unlawful activity. A ten-level enhancement was applied to the defendant's offense level of 23 on the money laundering charge based on the monetary amount of the scheme. The defendant was sentenced to 240 months, in part because of the monetary amount involved. On appeal, the defendant argued that *Apprendi* required the jury to find the monetary amount beyond a reasonable doubt. The court held that because the defendant's statutory maximum of 240 months was not exceeded by the sentence of 240 months, there was no *Apprendi* violation. *See also United States v. Nguyen*, 246 F.3d 52 (1st Cir. 2001) (enhancement

under USSG §2B3.1(b)(2)(C) for possession of a firearm during commission of a robbery did not result in a sentence that exceeded the defendant's statutory maximum).