

**SELECTED POST-*BOOKER* AND GUIDELINE
APPLICATION DECISIONS FOR THE
SECOND CIRCUIT**



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U.S. SENTENCING COMMISSION GUIDELINES MANUAL

CASE ANNOTATIONS—SECOND CIRCUIT

This document contains annotations to Second Circuit judicial opinions addressing some of the most commonly applied federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent Second Circuit jurisprudence on selected guidelines. The document is not a substitute for reading and interpreting the actual guidelines manual; rather, the document serves as a supplement to reading and interpreting the guidelines manual.

POST-BOOKER (*UNITED STATES V. BOOKER*, 543 U.S. 220 (2005))

I. Harmless Error

United States v. Fuller, 426 F.3d 556 (2d Cir. 2005). The court reviewed the defendant’s *Booker* issue for harmless error because he properly preserved his objection in district court. The court held that the government did not show harmless error when the district court indicated the alternative sentence it would have imposed if the guidelines had not been mandatory.

United States v. Fagans, 406 F.3d 138 (2d Cir. 2005) The court decided that defendant’s objection that *Blakely* rendered the application of the guidelines unconstitutional is sufficient to preserve a *Booker* argument.

II. Departures

United States v. Fuller, 426 F.3d 556 (2d Cir. 2005). “Following *Booker*, on sentencing appeals, we review a district court’s . . . exercise of discretion with respect to departures for abuse of discretion.”

United States v. Valdez, 426 F.3d 128 (2d Cir. 2005). District court's refusal to grant downward departure under advisory sentencing guidelines in sentencing defendant for being a felon in possession of a firearm was not appealable, absent showing of clear evidence of a substantial risk that the court misapprehended the scope of its departure authority.

III. Reasonableness

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). “In considering appellate review of sentences under the now applicable standard of ‘reasonableness,’ we first note that review for ‘reasonableness’ is not limited to consideration of the length of the sentence. If a sentencing judge committed a procedural error by selecting a sentence in violation of applicable law, and that error is not harmless and is properly preserved or available for review under plain error analysis, the sentence will not be found reasonable.” *See also United States v. Avello-Alvarez*,

430 F.3d 543 (2d Cir. 2005). “Because ‘reasonableness’ is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any *per se* rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline.

United States v. Fernandez, 443 F.3d 19 (2d Cir.), *cert. denied*, 127 S.Ct. 192 (2006). “Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’ We recognize that in the overwhelming majority of cases, a [g]uidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances. Nonetheless, we have expressed a commitment to avoid the formulation of *per se* rules to govern our review of sentences for reasonableness. We therefore decline to establish any presumption, rebuttable or otherwise, that a [g]uidelines sentence is reasonable. . . . Although the [g]uidelines range should serve as ‘a benchmark or a point of reference or departure,’ for the review of sentences, as well as for their imposition, we examine the record as a whole to determine whether a sentence is reasonable in a specific case. *See also United States v. Fleming*, 397 F.3d 95 (2d Cir. 2005); *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008).

United States v. Park, 461 F.3d 245 (2d Cir. 2006). The court rejected the defendant's argument that his sentence was unreasonable because of the guidelines' 100:1 difference in crack and powder cocaine sentences. “Just as it would be error for a sentencing judge to impose a non-Guidelines sentence on the basis of a disagreement with Congress's policy judgment regarding the 100:1 ratio . . ., it is not *per se* error for a sentencing judge to adhere to that policy judgment by imposing the sentence recommended by the Guidelines. We therefore hold, . . . that imposition of a Guidelines sentence in a case involving a crack offense does not yield a sentence that is unreasonable merely because the Guidelines adhere to the 100:1 ratio that Congress, in the proper exercise of its policy-making power, has seen fit to adopt.” *See also United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006).

IV. Unwarranted Disparities

United States v. Mejia, 461 F.3d 158 (2d Cir. 2006). The court affirmed a within-guidelines sentence, stating: “Congress expressly approved of fast-track programs without mandating them; Congress thus necessarily decided that they do not create the unwarranted sentencing disparities that it prohibited in Section 3553(a)(6).”

V. Procedural Issues

United States v. Anati, 457 F.3d 233 (2d Cir. 2006). The court held that, due to the similarity between departure analysis and variance analysis, “...the same reasoning that persuaded the Supreme Court to apply the comment opportunity in what is now Rule 32(i)(1)(C) to sua sponte departures under the mandatory Guidelines regime leads to a requirement that a similar

opportunity must be provided counsel to comment on a sentencing judge's intent to impose a non-Guidelines sentence under the advisory Guidelines regime."

United States v. Barrero, 425 F.3d 154 (2d Cir. 2005). The court held that sentencing courts are not free to disregard the safety valve in 18 U.S.C. § 3553(f)(1) because ". . . *Booker* did not alter the content of the [g]uidelines or the requirement that [g]uidelines results be determined according to the terms of the [g]uidelines."

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). "First, the Guidelines are no longer mandatory. Second, the sentencing judge must consider the Guidelines and all of the other factors listed in section 3553(a). Third, consideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. Fourth, the sentencing judge should decide, after considering the Guidelines and all the other factors set forth in section 3553(a), whether (I) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) [*sic*] to impose a non-Guidelines sentence. Fifth, the sentencing judge is entitled to find all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence." See also *United States v. Legros*, 529 F.3d 470 (2d Cir. 2008).

United States v. Fernandez, 443 F.3d 19 (2d Cir.), *cert. denied*, 127 S.Ct. 192 (2006). "A sentencing judge's obligation to consider the advisory [g]uidelines range usually amounts to a duty to take into account a particular recommended sentencing range. If the judge improperly calculates that range, she cannot be said to have genuinely considered it. We therefore ordinarily require a sentencing judge to put her [g]uidelines calculations on the record. We have imposed no similar requirement that a sentencing judge precisely identify either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the § 3553(a) factors along with the [g]uidelines range.

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005). "Judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker*."

United States v. Holguin, 436 F.3d 111 (2d Cir.), *cert. denied*, 126 S. Ct. 2367 (2006). "Facts that permit a higher maximum sentence are treated like conditions of guilt of a crime because they effectively function to create a separate offense."

United States v. Holman, 131 F. Appx. 314 (2d Cir. 2005). The court held that sentencing under the Armed Career Criminal Act does not violate the Sixth Amendment because a factual finding that predicate offenses occurred on separate occasions is the same type of finding as the fact of the conviction itself.

United States v. Martinez, 413 F.3d 239 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1086 (2006). The court rejected the appellant's claim that the district court violated his Sixth Amendment rights to confront witnesses and to a jury trial when the court considered hearsay in imposing his sentence and stated that neither *Booker* nor *Crawford* provide a "basis to question

prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing.”

United States v. Powell, 404 F.3d 678 (2d Cir. 2005). The court stated that the question of what constitutes a separate conviction is a question of law reviewed *de novo*.

United States v. Rattoballi, 452 F.3d 127 (2d Cir. 2006). “The Supreme Court’s decision in *Booker* ‘left unimpaired section 3553(c)’ It is inescapable that § 3553(c)(2) imposes a statutory obligation on the district court to state, in open court, ‘the specific reason for the imposition of a sentence different from’ the advisory [g]uidelines sentence, should it elect to impose a sentence outside the applicable [g]uidelines range. Under the statute, the district court also must set forth its reasons ‘with specificity in the written order of judgment and commitment.’”

United States v. Sheikh, 433 F.3d 905 (2d Cir. 2006). “So long as the facts found by the district court do not increase the sentence beyond the statutory maximum authorized by the verdict or trigger a mandatory minimum sentence not authorized by the verdict that simultaneously raises a corresponding maximum, the district court does not violate a defendant’s Fifth or Sixth Amendment rights by imposing a sentence based on facts not alleged in the indictment.”

United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006). “[D]istrict courts remain statutorily obliged to calculate [g]uidelines ranges in the same manner as before *Booker* and to find facts relevant to sentencing by a preponderance of the evidence.” Also, district courts may still consider acquitted conduct as relevant conduct “as long as the judge does not impose (1) a sentence in the belief that the [g]uidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence under § 841(b) not authorized by the verdict.” The district court, however, is not required to consider acquitted conduct, but should consider the jury’s verdict of acquittal when assessing the weight and quality of the evidence. *See also United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008).

United States v. Williams, 475 F.3d 468 (2d Cir. 2007). The court “clarif[ied] the scope of [its] review when a district court has declined to resentence a defendant upon a *Crosby* remand.” It held that it “review[s] a sentence for reasonableness even after a [d]istrict [court] declines to resentence pursuant to *Crosby*.” It noted, however, that in such appeals, two claims of error would typically be foreclosed: (1) the claim that the original sentence was erroneously imposed because it was imposed under a mandatory regime; and (2) any challenge to a ruling made by the district court that was or could have been adjudicated on the first appeal. The court also noted that the defendant would not be prevented from challenging the procedure used by the district court on the *Crosby* remand.

U.S. v. Williams, 524 F. 3d 209 (2d. Cir. 2008). The District Court committed procedural error requiring remand when it used its sense of what sentence the defendant could have received in state court as its initial benchmark for crafting the sentence imposed. The Second Circuit

relied on *Gall v. United States*, 128 S. Ct. 586, 596 (2007), for the proposition that, “as a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point” for crafting all federal prison sentences. The Second Circuit held: “The displacement of the Sentencing Guidelines ... to conform the sentence to one that would have been imposed (in state court) cannot be reconciled with 18 U.S.C. § 3553(a), which provides that ‘[t]he court, in determining the particular sentence to be imposed, shall consider the Sentencing Guidelines’.”

VI. Ex Post Facto

United States v. Fairclough, 439 F.3d 76 (2d Cir.), *cert. denied*, 126 S. Ct. 2915 (2006). “In short, there was no *ex post facto* problem with the [d]istrict [c]ourt’s application of the remedial holding of *Booker* at sentencing because [the defendant] had fair warning that his conduct was criminal, that enhancements or upward departures could be applied to his sentence under the [g]uidelines based on judicial fact-findings, and that he could be sentenced as high as the statutory maximum of ten (10) years.” *See also United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006).

VII. Pleas and Plea Agreements

United States v. Roque, 421 F.3d 118 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1094 (2006). The court explained that *Booker* does not constitute an independent force that can render the appellant’s plea involuntary.

VIII. Retroactivity

Guzman v. United States, 404 F.3d 139 (2d Cir.), *cert. denied*, 126 S. Ct. 731 (2005). The court decided that *Booker* is not retroactive because it did not establish a watershed rule; the only change resulting from *Booker* is the degree of flexibility courts have in applying the guidelines.

IX. Revocation

United States v. Avello-Alvarez, 430 F.3d 543 (2d Cir. 2005). “The reasonableness standard under which we review a sentencing court’s imposition of supervised release above the otherwise applicable range thus remains unchanged in the wake of *Booker* and *Crosby*.”

United States v. Fleming, 397 F.3d 95 (2d Cir. 2005). The court clarified that the standard for reviewing a sentence imposed after revocation of supervised release is now reasonableness—the court no longer reviews to determine if the sentence is plainly unreasonable. *See also United States v. McNeil*, 415 F.3d 273 (2d Cir. 2005).

X. Waiver of Right to Appeal Sentence

United States v. Morgan, 406 F.3d 135 (2d Cir.), *cert. denied*, 126 S. Ct. 549 (2005). The court explained that the defendant’s inability to foresee subsequently decided cases does not

supply a basis for failing to enforce an appeal waiver. *But see United States v. Hamdi*, 432 F.3d 115 (2d Cir. 2005) (finding that the appellant who received a 24-month sentence did not waive his right to appeal when he agreed to waive the right if the court sentenced him to 21 months or less, even though the plea agreement stated that the defendant’s sentence was governed by the sentencing guidelines).

XI. Forfeiture

United States v. Fruchter, 411 F.3d 377 (2d Cir.), *cert. denied*, 126 S. Ct. 840 (2005). The court held that *Booker* does not apply to criminal forfeitures because there is no previously specified range for forfeitures.

XII. Restitution

United States v. Reifler, 446 F.3d 65 (2d Cir. 2006). The court determined that judicial fact-finding relevant to a restitution order under the Mandatory Victims Restitution Act does not implicate Sixth Amendment rights.

XIII. Miscellaneous

Green v. United States, 397 F.3d 101 (2d Cir. 2005). The court held that neither *Booker* nor *Blakely* applies to cases on collateral review.

United States v. Ministro-Tapia, 470 F.3d 137 (2d Cir. 2006). Defendant was convicted of conspiracy to sell counterfeit social security cards and sentenced to 24 months imprisonment, the bottom of the applicable guidelines range. Defendant’s appeal focused on the “parsimony clause” of 18 U.S.C. §3553(a) and asserts that his sentence was greater than necessary to comport with the requirements of that statute. The Second Circuit affirmed the sentence imposed despite the fact that the sentencing judge did make some equivocal remarks that a non-guideline sentence might provide adequate deterrence. The Second Circuit stated: “For us to hold that a sentence at the bottom of the guideline range is invalid under the parsimony clause, we will require a showing considerably clearer than that presented here of the district court’s belief that, after taking into account the Guidelines and the ‘considered judgment’ that they represent, a lower sentence would be equally effective in advancing the purposes set forth in §3553(a)(2).”

United States v. Selioutsky, 409 F.3d 114 (2d Cir. 2005). “We conclude that the *Booker* rationale requires us to consider subsection 3553(b)(2) to be excised. Both subsections require use of the applicable [g]uidelines range, subject to slightly different departure provisions, and it was the required use of the [g]uidelines that encountered constitutional objections in *Booker*. . . . There is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*. . . . With subsection 3553(b)(2) excised, the applicable sentencing regime for [crimes involving children and sexual offenses] becomes the advisory

[g]uidelines regime specified by the Supreme Court in *Booker*. Under that regime, . . . the sentencing judge must consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable [g]uidelines range and available departure authority. The sentencing judge may then impose either a [g]uidelines sentence or a non-[g]uidelines sentence.

United States v. Kaba, 480 F.3d 152 (2d Cir. 2007). Defendant pleaded guilty to one count of conspiracy to distribute more than one kilogram of heroin pursuant to 21 U.S.C. § 846. She appealed her 72 month sentence of imprisonment on the basis that the trial judge had been at least partially motivated to sentence her severely because of the government's argument that a severe sentence for Kaba would deter others from the West African nation of Guinea from considering drug courier activity. To the extent that the court's sentence was so motivated, Kaba argued, the court had impermissibly based its sentence on her national origin in violation of *United States v. Leung*, 40 F.3d 577 (2d Cir. 1994). Despite the Second Circuit's expressed reservation regarding whether "the district judge harbored any kind of bias toward West Africans in general, or Guineans or Kaba in particular," the case was remanded for re-sentencing in order that "the appearance of justice is better satisfied." This process was required "to assure groups distinguished by their religion, race, national origin or the like that they need not fear that one of their number is being treated adversely because of his membership in that group."

CHAPTER ONE: Introduction and General Application Principles

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Amato, 46 F.3d 1255 (2d Cir. 1995), *cert. denied*, 517 U.S. 1126 (1996). The district court erred in sentencing a defendant convicted of a Hobbs Act conspiracy robbery under §2B3.1. The Second Circuit ruled that although the district court should have applied §2X1.1, the conspiracy guideline, instead of §2B3.1, the robbery guideline, the district court's error did not affect the defendant's sentence because §2X1.1 adopts by cross-reference all of the adjustments of §2B3.1. This ruling modified the Second Circuit's holding in *United States v. Skowronski*, 968 F.2d 242 (2d Cir. 1992). In *Skowronski*, the Second Circuit had ruled that §2B3.1 was applicable to Hobbs Act robbery conspiracies because §2E1.5 assigned Hobbs Act robberies, including robbery conspiracies, to §2B3.1. Section 2X1.1, which is applicable to conspiracies which are not expressly covered by another guideline section, was therefore inapplicable due to §2E1.5. *Id.* at 250. In revisiting this issue, the Second Circuit ruled that the deletion of §2E1.5 from the guidelines eliminates any suggestion that §2B3.1 covers conspiracies, thus making §2X1.1 the applicable section for Hobbs Act conspiracies.

United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995), *cert. denied*, 516 U.S. 1135 (1996). The district court erred in sentencing the defendant for a less severe crime than the crime encompassed by the jury verdict. The jury convicted the defendant of attempting to commit a sexual act by force. 18 U.S.C. § 2246(3). The district judge, characterizing the case as "atypical," calculated the defendant's sentence under the less punitive section for abusive sexual contact (§2A3.4), rather than the guideline for aggravated sexual abuse (§2A3.1). The district

court concluded that fellatio was better defined as sexual contact, rather than a sexual act. The government appealed, and the circuit court agreed with the government that 18 U.S.C. § 2246(a)(2)(B) states that fellatio is a sexual act. In addition, the circuit court held that a district court's decision to sentence based on its view of the evidence rather than the jury's view is reversible error. The circuit court concluded that because "there was sufficient evidence to support the jury verdict, the district court's decision to sentence the defendant for a lesser crime cannot be sustained."

United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996). The district court did not err in applying §2X4.1, misprision of a felony, rather than §2J1.2, obstruction of justice, to defendant's failure to testify at trial. The circuit court stated that although the government offered plausible reasons why the obstruction guideline is more appropriate than the misprision guideline for criminal contempt, the district court judge was entitled to apply the misprision guideline in this case. The court concluded that the sentencing judge's decision in determining which guideline was the most analogous offense guideline in this case was predominately an application of a guideline to the facts, a decision "to which we should give due deference." *See Koon v. United States*, 518 U.S. 81, 134 (1996).

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

United States v. Al-Sadawi, 432 F.3d 419 (2d Cir. 2005). Defendant was convicted of currency smuggling in the amount of \$659,000 in U.S. dollars. The trial court found him liable for that entire amount for sentencing purposes. Defendant argued on appeal that he should not have been held accountable for \$659,000 because that amount was not reasonably foreseeable to him as part of a jointly undertaken criminal activity. The Second Circuit affirmed and pointed out that, because defendant himself brought the \$659,000 to the airport where he was arrested, the district court properly held him accountable pursuant to §1B1.3(a)(1)(A), which makes a defendant responsible for all criminal conduct that he personally commits, aids, or abets. Because the defendant's personal participation justified the sentencing court's determination, "reasonable foreseeability" was irrelevant.

United States v. Bryce, 287 F.3d 249 (2d Cir.), *cert. denied*, 537 U.S. 884 (2002). The district court did not err in its determination that resentencing after remand could take into account relevant conduct that was outside the scope of the original mandate. The Second Circuit held that intervening circumstances not considered by the Court must be weighed as relevant conduct by the district court on remand, even if the relevant conduct leads to an increased sentence. Even though the suspicion of the defendant's involvement in the murder existed at the time of his first sentence, "new evidence that clearly implicates a defendant in a crime can also be considered as intervening circumstances that a judge must consider during resentencing."

United States v. Feola, 275 F.3d 216 (2d Cir. 2001). The district court did not err in allowing relevant conduct for failing to file a federal income tax return to enhance a concurrent sentence on a count of bank fraud. Although the resulting sentence exceeded the statutory

maximum for failing to file a federal income tax return, it did not exceed the statutory maximum for the bank fraud. The court noted that determination of the total tax loss attributable to the offense may include "all conduct violating the tax laws . . . as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."

United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000). The defendant was convicted of tax evasion, mail fraud and conversion. The district court concluded that the fraud and conversion counts could be grouped but that these counts should not be grouped with the tax evasion counts. The Second Circuit reversed. Although the court upheld the district court's finding that the mail fraud and conversion counts were relevant conduct under §1B1.3, the court concluded that fraud, conversion and tax evasion all measure the harm involved by the amount of loss and that the offenses are of the same "general type" as evidenced by the application of the sentencing guidelines. The court thus concluded that tax evasion and fraud and conversion should be grouped under §3D1.2(d).

United States v. Maaraki, 328 F.3d 73 (2d Cir. 2003). The defendant stole 655 calling card numbers with the objective of allowing his associates to use them. The Second Circuit found that the defendant's conduct plainly aided and abetted the subsequent fraudulent uses of the unauthorized devices by his associates, which cost the victims hundreds of thousands of dollars. Given his personal conduct in aiding and abetting the costly calls, the court held that the defendant's accountability for those losses was established under §1B1.3(a)(1)(A), which does not require proof of foreseeability. Accordingly, the court concluded that the district court's calculation of the fraud loss attributable to the defendant was correct.

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court erred in not determining the scope of the defendants' agreement before finding that the conduct of the co-conspirators was reasonably foreseeable to all defendants, as defined in §1B1.3(a)(1)(B). For this guideline section to apply, the court must first make *particularized findings* to determine the scope of the agreement. If the scope covers the conduct in question, then the court must "make a *particularized finding* as to whether the activity was foreseeable to the defendant." *See United States v. Molina*, 106 F.3d 1118, 1121 (2d Cir. 1997).

United States v. Silkowski, 32 F.3d 682 (2d Cir. 1994). The defendant pleaded guilty to theft of public funds in violation of 18 U.S.C. § 641. The district court included as relevant conduct activity for which the applicable statute of limitations had expired. The circuit court found that relevant conduct is to be construed broadly and may include conduct which constitutes a "repetitive behavior pattern of specified criminal activity" even if that behavior pattern exceeds temporal limitations.

United States v. Williams, 247 F.3d 353 (2d Cir. 2001). In sentencing a defendant convicted of possession with the intent to distribute, where there is no conspiracy at issue, the trial court must exclude drug quantities intended for personal use. Drugs possessed for mere

personal use are not relevant to the crime of possession with intent to distribute because they are not part of the same course of conduct, or common scheme as drugs intended for distribution.

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

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not violate the ex post facto clause in sentencing the defendant using the guidelines (1993 version) in effect at the time of his sentence. Where application of the guidelines in effect at sentencing would result in a more severe sentence than the version in effect at the time of the commission of the offense, the ex post facto clause requires use of the earlier version of the guidelines. The circuit court concluded that the 1993 guidelines provision for §2F1.1(b)(1)(m) was not more severe than the 1989 guidelines for §2F1.1(b)(1)(m), so there was no *ex post facto* violation.

United States v. Keller, 58 F.3d 884 (2d Cir. 1995). The defendant argued that the district court failed to credit the time he had served in state prison for armed robbery against his federal sentence for possession of a firearm while a convicted felon. He specifically asserted that his sentence is controlled by an amendment to the sentencing guidelines enacted after the date of his offense, but before he was sentenced. The defendant contended that the guidelines in effect at the time of his sentencing should have been used by the court (1993 guidelines) because they allow for the credit to his sentence. The district court instead applied the 1989 guidelines in effect on the date of the offense, which did not permit sentence credit. The appellate court noted that generally, a sentencing court must use the version of the guidelines in effect at the time of the defendant's sentencing, not at the time of the offense. *See* 18 U.S.C. § 3553(a)(4)(1988); *United States v. Reese*, 33 F.3d 166 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092 (1995). However, when the guidelines are amended after the defendant commits a criminal offense, but before he is sentenced, and the amended provision calls for a more severe penalty than the original one, those guidelines in effect at the time the offense was committed govern the imposition of sentence because the *ex post facto* clause requires that result. *See also United States v. Keigue*, 318 F.3d 437 (2d Cir. 2003).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in determining that §2A1.1 should apply under §2B3.2 because the murder at issue was premeditated and not done in the heat of the moment. Under §2A1.1, "willful, deliberate, malicious, and premeditated killing" is considered to be murder in the first degree.

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001), *cert. denied*, 537 U.S. 847 (2002). The district court did not err in sentencing the defendant under §2A1.1, the guideline for

first-degree murder. The defendant was convicted for crimes surrounding a bombing of the World Trade Center. The Second Circuit held that "the first-degree murder guideline is properly applied to arson resulting in death, even if a defendant did not know or intend that death would result."

Part B Basic Economic Offenses

§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

United States v. Aleskerova, 300 F.3d 286 (2d Cir. 2002). The defendant was convicted of possessing and conspiring to sell stolen artwork. The artwork was originally stolen after WWII from the Bremen Museum and subsequently stolen from the Baku Museum. In a case of first impression, the court looked at whether the loss under §2B1.1 should be measured by the value to the original victim (*i.e.*, the Bremen Museum) or the value to the last victim (*i.e.*, the Baku Museum) where a defendant is in possession of stolen property with a cloud on its title due to an earlier, unrelated theft. In a cross-appeal, the government contends principally that, in sentencing the defendant under §2B1.1, the district court erred in reducing the loss amount by improperly reducing the estimated value of the Bremen drawings due to their initial theft from the Bremen Museum in 1945. The appellate court found that a loss determination that reflects the value of the artwork to the last possessor who operates on the legitimate market is both reasonable and permissible under §2B1.1. The court explained that given the state of uncertainty created by the cloud on the title and the ongoing dispute over which museum could claim legitimate ownership of the drawings, the district court's decision to identify the "victim" as the Baku Museum (the entity directly impacted by the loss due to the chain of theft in which the defendant participated) and not the Bremen Museum (an earlier owner whose claim was uncertain and whose loss, if loss there be, was the fault of a different set of actors) was not clearly erroneous for purposes of §2B1.1. With respect to the determination of value, the appellate court stated that the district court had the authority to exercise its discretion to use an alternative measure for loss that accounted for values of the artwork to the Baku Museum other than its fair market price, such as its value in generating revenue or its replacement cost, if such evidence had been presented.

United States v. Granik, 386 F.3d 404 (2d Cir. 2004). The defendant was involved in a scheme to defraud a jeweler by purchasing jewelry with a counterfeit certified bank check. The court relied on the defendant's plea stipulation to calculate the loss amount. On appeal the defendant argued that the district court erred in calculating the loss amount using a co-conspirator's estimate of the jewelry's \$590,000 "cost," rather than the co-conspirators' estimate of what they would have to pay for the jewelry. The Second Circuit disagreed and, citing circuit precedent, stated that a stipulation in a plea agreement, although not binding, may be relied upon in finding facts relevant to sentencing. Because the defendant's loss amount stipulation was knowing and voluntary, the district court could have properly found loss amount based solely on

the stipulation, if it also considered any other relevant information. There was ample evidence in the record supporting a loss finding of between \$500,000 and \$800,000.

United States v. Kostakis, 364 F.3d 45 (2d Cir. 2004). The government appealed a grant of a downward departure of six offense levels based on the district court's determination that the defendant's conduct was outside the heartland of §2B1.1(b)(8)(B). On appeal, the government asserted that the district court erred both by finding that unsophisticated conduct was outside the heartland of §2B1.1(b)(8) and by finding that the defendant's conduct was unsophisticated. The Court of Appeals found that the district court's departure was impermissible because, as described in the government's proffer, the defendant's conduct appeared to have been rather sophisticated. These falsified entries had numerous technical components, and were made with the purpose of deceiving the Coast Guard. Accordingly, the enhancement for sophisticated conduct should have been applied.

United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007). Defendant was convicted of securities fraud. His guidelines offense level was determined to be level 31, 15 levels of which were attributable to the loss enhancement at §2F1.1(b)(1)(P) of the 1998 Guidelines Manual. Defendant's appeal contended that his sentence was unreasonable because the loss attributed to his conduct was not proven by sufficient reliable evidence. Defendant asserted that part of the shareholder loss attributed to him could just as easily been explained by independent market forces acting upon the price of the stock involved in his fraudulent activity. The Second Circuit stated: "Determining the extent to which a defendant's fraud, as distinguished from market or other forces, caused shareholders' losses inevitably, cannot be an exact science. ... The Guidelines' allowance of a 'reasonable estimate' of loss remains pertinent." Nevertheless, the Second Circuit remanded for a redetermination of the amount of loss incident to which the trial court would make a more detailed analysis of how much of the loss was attributable to defendant's fraud, and how much attributable to independent market forces. The Second Circuit could "see no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of the loss caused by the fraud is a critical determinant of the length of a defendant's sentence." *But see United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006) (holding that in calculating the guidelines offense level with respect to the amount of loss, the district court properly found that the fraud itself, and not the government's disclosure of the fraud, was the cause of the decline in the company's stock price and thus the cause of the shareholder losses).

§2B3.1 Robbery

United States v. Capanelli, 479 F.3d (2d Cir. 2007). Defendant was convicted of conspiring to rob a credit union. He was the "inside man" on the "job", providing his co-conspirators with a sketch of the facility. He did not participate in the robbery and argued on appeal that his lack of participation precluded the sentencing court from applying the five-level enhancement for brandishing a firearm (by a co-conspirator) because there was inadequate proof that he specifically intended that the firearm be used in the crime. The Second Circuit affirmed

the sentence and held: "...it is enough that the defendant was aware that brandishing or possessing firearms was part of the conspiratorial agreement."

United States v. Jennette, 295 F.3d 290, *cert. denied*, 537 U.S. 1076 (2d Cir. 2002). The appellate court affirmed the district court's decision to increase the defendant's offense level pursuant to section 2B3.1(b)(2)(F), which provides a two-level increase to a defendant's offense level for making a "threat of death" during the commission of a robbery, based upon the defendant's statement to the bank teller, "I have a gun." The Court concluded that a reasonable teller, when faced with a bank robber who demands money and states that he has a gun, normally and reasonably would fear that his or her life is in danger.

United States v. Lee, 25 Fed. Appx. 20 25380 (2d Cir. 2001), *cert. denied*, 535 U.S. 955 (2002). The district court properly applied a four-level enhancement under §2B3.1 for serious bodily harm, even without expert medical testimony regarding the victim's condition. The court held that the victim himself was competent to testify about his hospitalization and year-long hearing impairment, both of which individually meet the definition of serious bodily harm as defined in §1B1.1.

United States v. Matthews, 20 F.3d 538 (2d Cir. 1994). The district court erred in applying a four-level increase for the presence of a dangerous weapon that was "otherwise used" in the course of a bank robbery. The circuit court held that pointing a toy gun at robbery victims and making verbal threats constitutes "brandish[ment]", and, as such, merits a five-level increase.

United States v. Velez, 357 F.3d 239 (2d Cir. 2004). The defendant pleaded guilty to two counts of conspiracy to interfere with commerce by robbery. The district court sentenced defendant principally to concurrent terms of 120 months and 63 months. On appeal, he argued that the district court erred by applying the six-level enhancement for an intended loss of \$5,000,000 under §2B3.1(b)(7)(G), as the intended loss was not properly determined. The court found no error in the district court's refusal to apply the three-level reduction under §2X1.1(b)(2). However, it found that the district court's finding that defendant specifically intended to steal a substantial amount was insufficiently grounded in the record to warrant a six-level enhancement under §2B3.1(b)(7)(G). The court noted that Application Note 2 to §2X1.1 states that the only "specific offense characteristics" from the guideline for the substantive offense that apply are those that are determined to have been "specifically intended" or to have "actually occurred." The note goes on to caution that "speculative specific offense characteristics will not be applied." In imposing a sentence under §2X1.1 on a conspiracy conviction, a district court must make appropriate findings of the defendant's intention to cause a loss falling into a particular range delineated by §2B3.1(b) before it may apply an enhancement under that guideline. Therefore, the court vacated the judgment and remanded for resentencing.

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

United States v. Brumby, 23 F.3d 47 (2d Cir.), *cert. denied*, 513 U.S. 896 (1994). The district court properly enhanced the defendant's sentence five levels for a co-conspirator's display

of a deadly weapon. §2B3.2(b)(3)(A)(iii). The defendant argued that the gun was not "displayed" because it was never pointed at the victim. Because the guidelines do not define "display," the circuit court considered the plain meaning of the term and concluded that the removal of the revolver from the defendant's pouch in full view of the victim constituted a "display" of the weapon within the meaning of the §2B3.2.

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in determining that a rival coalition member was a victim as defined in §2B3.2(c)(1) and under the Hobbs Act. The defendants referred to §2B3.2(c)(1) in their argument that the victim at issue must be a direct, and not indirect, victim of the extortionate scheme. The defendants contended that application of §2B3.2(c)(1) in this context must be limited to direct targets of the extortion or innocent bystanders (not rival coalition members) who are killed. The court disagreed and found that for extortion crimes, "a victim' is most reasonably construed to include all persons killed to carry out the extortionate scheme."

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The district court did not err in enhancing the defendant's sentence under §2B3.2 for extortion by threat of force or injury. The defendant was convicted of hostage-taking and conspiring to interfere with commerce by extortion. The court found that the adjustment was appropriate under the rule, which permits an adjustment for a victim's loss or a demand greater than \$50,000. The court stated that the defendant originally demanded \$68,000 in ransom to release the victim found it irrelevant that he ultimately agreed to accept \$5,300. The sentence was in compliance with the table contained in §2B3.2 and was affirmed.

United States v. Guang, 511 F.3 110 (2d Cir. 2007). Defendant appealed on numerous grounds related to both his conviction and his sentence. Among these was his contention that his conviction for extortion by force was improperly enhanced through the application of §2B3.2 (b)(4)(c), which provides for a six-level increase when a victim receives a "permanent or life-threatening bodily injury." The injury in question, a victim's alleged inability to read for long periods as a result of a beating administered during his extortion, was established only by the victim's testimony. The Second Circuit held that "where (as in the instance case) "substantial impairment is not obvious, something more than the generalized and subjective impression of the victim is required in the way of proof." The case was remanded "for consideration of the nature, severity, and likely duration of [victim's] impaired eyesight."

Part D Offenses Involving Drugs

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

United States v. Caban, 173 F.3d 89 (2d Cir.), *cert. denied*, 528 U.S. 872 (1999). The district court did not err by determining the defendant's offense level based on the 50 kilograms of real and sham cocaine the government stocked in a warehouse in a reverse sting operation, even though the government "had in effect predetermined this offense level." The defendant

pled guilty to drug conspiracy and firearms charges. The offense was the result of a sting operation to set up a leader of a ring that robbed drug stash houses. The defendants were caught attempting to steal 5 kilograms of cocaine and 45 kilograms of phony cocaine the government had stocked in a warehouse. On appeal, the defendant argued that the offense level should have been based only on the amount of cocaine that he and the codefendants were reasonably capable of obtaining because the quantity of drugs was dependent on the amount of cocaine supplied by the government. In support of this argument, the defendant relied on commentary to §2D1.1 that addresses a particular reverse sting situation. The Second Circuit found that the district court did not err in finding that the defendant intended to steal 50 kilograms. The defendant knew beforehand that the warehouse would contain at least 50 kilograms; he saw 50 kilograms in the warehouse; and attempted to steal that amount without making any attempt to withdraw from the conspiracy.

United States v. Dallas, 229 F.3d 105 (2d Cir. 2000). The issue on appeal was whether to include six ounces of cocaine when calculating defendant's offense level for conspiring to distribute cocaine, where the defendant agreed to sell the amount but later substituted flour for cocaine. The court found that, pursuant to §2D1.1, comment. (n.12), if the defendant intended to distribute the cocaine and was reasonably capable of doing so, the six ounces are part of the total quantity involved. The defendant originally agreed and intended to sell cocaine, but later that same day he decided to substitute flour for the cocaine. The court held that the original intent, once formed and communicated became part of the conduct underlying the conspiracy and should be included in the guidelines calculation of offense level. Further, the district court's finding that the defendant was reasonably capable of supplying the six ounces, based on the fact that he had provided similar (though slightly lesser) amounts on two prior occasions after a brief delay, was not clearly erroneous.

United States v. Gomez, 103 F.3d 249 (2d Cir. 1997). The circuit court affirmed the district court's sentence based on 125 grams of heroin despite the defendant's argument that he lacked the financial capacity to purchase so much. The defendant was involved in a reverse sting. The defendant argued on appeal that the commentary under §2D1.1 required the sentencing court to consider whether the defendant was reasonably capable of purchasing the amount agreed upon. The court rejected this argument, noting that the language of Application Note 12 clearly indicates that the negotiated quantity is conclusive except where the defendant neither intended nor was able to produce that amount.

United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003). The defendant was charged with conspiracy to import five or more kilograms of cocaine into the United States and other crimes. Before sentencing, the defendant admitted that he lied when he testified at trial, and he provided the government with a full accounting of his role in the crime. The district court denied his motion for a downward adjustment pursuant to §2D1.1(b)(6) on the basis that the defendant's commission of perjury at trial disqualified him from safety valve eligibility as a threshold matter. The appellate court vacated the district court's decision and remanded for resentencing. The court stated that it found no basis for concluding that a defendant's perjury at trial can disqualify him from safety valve eligibility when the defendant is otherwise found to meet the statutory

criteria for relief. The court noted that in *United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999), it held that so long as a defendant makes a complete and truthful proffer at the time of the commencement of the sentencing hearing, he complies with section 3553(f)(5)'s disclosure requirement even if he earlier lied to the government or obstructed its investigation. Accordingly, the court held that a sentencing court may not disqualify a defendant from eligibility for safety valve relief based solely on his commission of perjury at trial when the defendant otherwise fulfills the statutory criteria under 18 U.S.C. § 3553(f)(1)-(5).

United States v. Moreno, 181 F.3d 206 (2d Cir.), *cert. denied*, 528 U.S. 977 (1999). The defendants were convicted of various charges, including a violation of 21 U.S.C. § 846 (conspiracy to violate narcotics laws). The district court found the defendants responsible for over 1.5 kilograms of crack cocaine, and sentenced them to life imprisonment, pursuant to the mandatory minimum required under 21 U.S.C. § 841(b)(1). The district court did not determine the amount of powder cocaine attributable to the defendants. Because it is unclear from the general verdict whether the jury convicted the defendants of conspiring to possess each of the controlled substances, the court must assume that the conviction was for the conspiracy to possess the charged substance that carries the most lenient statutorily required minimum sentence. *See United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998), *cert. denied*, 531 U.S. 968 (2000). The Second Circuit remanded so that the district court could determine the amount of powder cocaine involved in the offense. Because the defendants' relevant conduct includes 1.5 kilograms of crack cocaine, if the court finds that the amount of powder cocaine is greater than 5 kilograms, then the statutory maximum of life imprisonment is still available. If the court finds that between 500 grams and 5 kilograms of powder cocaine was involved in the offense, then the maximum sentence available under 21 U.S.C. § 841(b)(1)(B) will be 40 years' imprisonment.

United States v. Rivera, 293 F.3d 584 (2d Cir. 2002). The district court did not err in its choice of §2D1.1 as the appropriate guideline for determining the guideline range based on the offense level provided. Amendment 591 applies only to the choice of an offense guideline, not to the subsequent selection of a base offense level. The defendant in *Rivera* was convicted of conspiracy to distribute and possession with intent to distribute heroin; therefore, the Second Circuit held that selection of §2D1.1 as the sentencing guideline was appropriate. The defendant argued that the choice of his base offense level was precluded by Amendment 591, which deleted the former Application Note 3 to §1B1.2 that had permitted courts to consider the defendant's actual conduct when selecting the guideline. Since the sentencing court selected the appropriate guideline based on his actual charged offense and not his relevant conduct, there was no error.

United States v. Sampson, 385 F.3d 183 (2d Cir. 2004). The defendant was convicted under New York state law of felony drug offenses, but his convictions were "deemed vacated and replaced by a youthful offender finding" by the New York court. The district court used the youthful offender finding to enhance the mandatory minimum sentence for the defendant. On appeal, the defendant objected to counting this adjudication to enhance his sentence but the Second Circuit disagreed. The court held that the defendant's youthful offender adjudication was properly counted by the district court as "a prior conviction for a felony drug offense that has become final" within the meaning of 21 U.S.C. § 841(b)(1)(A), therefore subjecting the

defendant to a 20 year mandatory minimum sentence. Although the New York courts do not use youthful offender adjudications as predicates for enhanced sentencing, they do not result in “expunged” convictions under the guidelines and do not restrict federal courts from taking them into account.

United States v. Stephenson, 183 F.3d 110 (2d Cir.), *cert. denied*, 528 U.S. 1013 (1999), and *cert. denied*, 533 U.S. 940 (2001). A defendant convicted of a general conspiracy to distribute cocaine and crack is not entitled to resentencing when the offense of conviction does not impact the statutory maximum and the guideline range exceeds the statutory minimum term that would apply if the jury’s verdict had specified that the offense involved crack cocaine. The defendant argued that his minimum sentence should have been based on the 10-year minimum applicable to a cocaine offense for a defendant with a previous felony drug conviction instead of the 20-year minimum sentence applicable to a crack offense for a defendant with a previous felony drug conviction. The defendant’s guideline range of 292-365 months’ imprisonment was higher than either statutory minimum, thus there was no need for resentencing.

United States v. Stevens, 19 F.3d 93 (2d Cir. 1994). The defendant challenged the 100 to 1 equivalency of powder to crack cocaine found in §2D1.1(c), the guidelines Drug Quantity Table, alleging that it has a disparate impact on African-Americans violative of the equal protection component of the Fifth Amendment's Due Process Clause. The Second Circuit joined six other circuits in holding that the equivalency is "rationally related to the legitimate governmental purpose of protecting the public against the greater dangers of crack cocaine." See *United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993) (*per curiam*); *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir. 1992); *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993); *United States v. Galloway*, 951 F.2d 64, 65-66 (5th Cir. 1992) (*per curiam*); *United States v. Turner*, 928 F.2d 956, 959-60 (10th Cir.), *cert. denied*, 502 U.S. 881 (1991); and *United States v. Lawrence*, 951 F.2d 751, 754-55 (7th Cir. 1991).

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001). The district court erred in sentencing the defendant to a sentence beyond the statutory maximum, based on the judge’s findings under a preponderance standard of the amount of drugs involved in the offense, a factor which was not mentioned in the indictment nor presented to the jury. In the instant case, the judge made a finding of the amount of drugs involved, which resulted in a sentencing range of ten years to life under 21 U.S.C. § 841(b)(1)(A). Had there been no such finding, the defendant would have been sentenced to a statutory maximum of 20 years under 21 U.S.C. § 841(b)(1)(C) and §2D1.1. The defendant argued that the amount of drugs involved was an issue of fact that should be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Following *Apprendi*, the court held that because the type and quantity of drugs can raise the defendant’s sentence above the statutory maximum of 21 U.S.C. § 841(b)(1)(C), they are elements of the charged offense and must be charged in the indictment and proved to a jury beyond a reasonable doubt. The court held "following *Apprendi*’s teachings . . . if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then the type and quantity of drugs is

an element of the offense that must be charged in the indictment and submitted to the jury." The court also held that the failure to charge drug type and quantity in the indictment or submit the question to the jury is subject to plain error review, thus overruling *United States v. Tran*, 234 F.3d 798, 806 (2d Cir. 2000). However, the court also held that this would not apply if the sentence imposed is not greater than the statutory maximum for the offense charged in the indictment and found by the jury

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002). The district court erred in imposing a sentence above the maximum for the substance with the lowest range for which there is sufficient evidence to support a conviction. The Second Circuit held that there was sufficient evidence to support a conspiracy to distribute marijuana and thus the maximum sentence was 60 months—the maximum sentence for marijuana under 21 U.S.C. § 841(b)(1)(D). The Second Circuit further held that the error also affected the fundamental fairness of the trial because the defendant had already served more than two years beyond the appropriate maximum sentence. Therefore, the Second Circuit ordered that if the government agreed to resentence under the correct statutory provision, the conviction would be affirmed and the defendant would be released immediately. Absent government consent, the conviction would be vacated and the case remanded for a new trial.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit¹

United States v. Berg, 250 F.3d 139 (2d Cir. 2001). The Second Circuit upheld the district court's refusal to apply the two-level sentence enhancement for violation of judicial process, pursuant to §2F1.1(b)(4)(B). The district court refused to apply the two-level enhancement because there was a lack of evidence of aggravated criminal intent. On appeal, the government argued that the defendant's concealment of assets was an abuse of the bankruptcy process under the standards adopted by other circuits. The appellate court cited the Sentencing Commission's Amendment 597 which requires a two-level enhancement "if the offense involved a . . . (B) a misrepresentation during a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order." The court found that this case did not fit within either of these two categories because there was no evidence that the defendant made a misrepresentation and there was no specific order violated.

United States v. Burns, 104 F.3d 529 (2d Cir. 1997). The district court did not err in calculating the amount of loss under §2F1.1. The defendant was a program manager for Northeast Rural Water Association (NRWA), a nonprofit, federally funded agency. His position was funded by an EPA grant to the National Rural Water Association (National). Subsequent to NRWA and National contracting for the defendant's position, the defendant, while still receiving his federal salary, moved to Massachusetts to attend Harvard's Public Administration Program full-time. With help from his sister, an NRWA employee, the defendant submitted time sheets

¹ Guideline deleted by consolidation with §2B1.1.

indicating full-time work for NRWA while he was attending Harvard. His apartment, furnished with office equipment, was paid for with federal funds. The defendant was convicted of wire fraud, concealment of a material fact and use of a false document. At sentencing, the defendant's offense level was increased by four based on a loss of \$21,186 (\$13,463 for the apartment, travel and per diem, plus \$8,723 for salary loss). The defendant appealed the loss calculation, contending that his obligations to NRWA were fulfilled and that NRWA met all of its contractual obligations with National and, therefore, there was no salary loss. Stating that the evidence did support the fact that the defendant did some work for NRWA while at Harvard, the district court determined loss by taking the number of hours the defendant participated in the Harvard program and multiplied that by a reasonable hourly rate. Noting that the sentencing guidelines state that "the loss need not be determined with precision," the appellate court found the calculation was not clearly erroneous.

United States v. Ferrarini, 219 F.3d 145 (2d Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001). The court concluded that the Sentencing Commission has the legal authority to promulgate a definition of "financial institution," which includes institutions that are not federally insured, even though such a definition is broader than the one offered in the mandate from Congress in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat.183 (directing the Commission to establish guidelines for fraud that "substantially jeopardizes the safety and soundness of a *federally insured financial institution*."") (emphasis added). The appellate court further concluded that premium finance companies, including the company in question, are entities whose financial peril endangers the general public and whose functions are sufficiently bank-like to constitute financial institutions under §2F1.1(b)(7).

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant was convicted of a single count of conspiracy to commit wire fraud. The defendant argued that his sentence was inappropriate because the court incorrectly calculated the amount of loss attributable to his conduct. The defendant claimed that he should have been sentenced at a base offense level of 23, rather than 24, because the evidence did not support a finding that he was responsible for losses totaling \$1,500,000 pursuant to §2F1.1(b)(1). The Second Circuit disagreed, holding that §2F1.1 loss calculations need not be calculated with precision, they need only be reasonable estimates. The fact that the district court relied on "ball-park" figures by co-conspirators was a sound basis for determining the amount of loss involved in the offense.

United States v. Savin, 349 F.3d 27 (2d Cir. 2003). The government appealed defendant's wire fraud sentence, arguing that the sentencing court improperly failed to apply a four-level enhancement under §2F1.1(b)(6)(B)(1995) for an offense that "affected a financial institution" and from which "the defendant derived more than \$ 1,000,000 in gross receipts." The government contended that the district court should have defined "foreign investment company" according to United States federal law and not the law of Luxembourg, the country in which the affected entity was registered and had its principal place of business. The Second Circuit concluded that the Sentencing Commission had the authority to treat "any state or foreign . . .

investment company" as a "financial institution" within the application note under section 2F1.1(b)(6)(B). The application note was therefore valid as it applied to investment companies generally. The court remanded for resentencing for the district court to look to the United States federal law to determine the meaning of "foreign investment company."

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

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

United States v. Weisser, 417 F.3d 336 (2d Cir. 2005). Defendant was convicted on various child pornography and child enticement charges. His appeal challenged the use of §2G2.2 to calculate his guideline range and the 2 level enhancement for use of a computer at §2G2.2(b)(6). Defendant's challenge to the application of §2G2.2 (instead of his preference – §2G2.4) was based on an imaginative grammatical argument, an argument dismissed by the Second Circuit: "Despite their minor difference in punctuation, both §§2G2.2 and 2G2.4(c)(2) require the application of §2G2.2 whenever a defendant is convicted of transporting child pornography." With respect to Defendant's argument that the computer use enhancement should not apply, the Second Circuit joined the Third Circuit in holding that the mere fact that the CD's defendant carried across state lines contained images downloaded from a computer was enough to trigger the computer enhancement.

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

United States v. Demerritt, 196 F.3d 138 (2d Cir. 1999). The defendant was convicted of one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), after he was found in possession of over 700 computer files depicting child pornography. The court upheld the two-level increase for possessing ten or more books, magazines, periodicals, films, video tapes, or "other items" under §2G2.4(b)(2), finding specifically that computer files are "items" within the meaning of the guideline provision. *Id.* at 141. Additionally, the court concluded that it was not double counting to also enhance the defendant's sentence for use of a computer, pursuant to §2G2.4(b)(3), as these enhancements address different harms. Section 2G2.2(b)(2) is meant to address the quantity of pornography possessed, whereas §2G2.4(b)(3) addresses Congress' concern regarding the use of a computer to commit such an offense. *Id.* at 142.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

United States v. Cefalu, 85 F.3d 964 (2d Cir. 1996). The defendant was convicted of criminal contempt for his refusal to testify fully before the grand jury and at the drug conspiracy

trial of a captain in the Gambino family, despite a grant of immunity. The district court sentenced the defendant to 33 months imprisonment pursuant to 18 U.S.C. § 3553(b). Although the government asserted that the Obstruction of Justice guideline was most analogous in this case, and the defendant asserted that the most analogous guideline was Failure to Appear by a Material Witness, the appellate court found no error in the district judge's determination that there was no sufficiently analogous guideline. The appellate court explained that although other guidelines may have fit, it gave deference to the district court's application of the guidelines to the facts, and the sentence was not "plainly unreasonable."

§2J1.2 Obstruction of Justice

United States v. Giovanelli, 464 F.3d 346 (2d Cir. 2006). Defendant was convicted of conspiring to obstruct justice pursuant to 18 U.S.C. §1503. Convictions under §1503 refer to U.S.S.G. §2J1.2(c) refers the offense to §2X3.1 (accessory after the fact). Defendant objected to the cross-reference at §2X3.1 on appeal and argued that because his §1503 conviction was for "endeavoring" to obstruct justice as opposed to actively obstructing justice, the cross-reference should not have been applied. The Second Circuit determined, in a matter of first impression, that it would join four sister Circuits that had already concluded that "...since §2J1.2 'is the only section of the guidelines which covers 18 U.S.C. §1503 (obstruction of justice),' it therefore 'follows logically that endeavoring to obstruct justice, ...is to be included within §2J1.2'."

United States v. Loudon, 385 F.3d 795 (2d Cir. 2004). The defendant's probation officer, after attempting to visit the defendant with no response, received a message on the officer's answering machine stating in part that it was a good idea that the officer left before the defendant got to the door "cause right now I'm not sure what I would have done if I had been put face-to-face with you. You bastard." The Second Circuit upheld an eight level enhancement under §2J1.2(b)(1) for "threatening to cause physical injury...in order to obstruct the administration of justice." The message made no explicit reference to future acts, but the defendant's statement was an implied threat. The court reasoned that the words were intended to discourage the officer from fulfilling his duties as an officer of the court by visiting the defendant again.

Part K Offenses Involving Public Safety

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

United State v. Ahmad, 202 F.3d 588 (2d Cir. 2000). The defendant was convicted of possessing a firearm with an obliterated serial number, four silencers and a sawed off shotgun. At the time these weapons were seized, seven other firearms that the defendant was not prohibited from possessing under federal law were found in his possession. The district court enhanced defendant's sentence four levels based on these firearms under §2K2.1(b)(1). The appellate court reversed, concluding that §2K2.1, Application Note 9, requires that the guns be a part of the underlying offense. The court rejected the government's argument that possession of the additional guns in violation of state law constituted relevant conduct. In order for state

offenses to be considered relevant conduct, the conduct involved must amount to a federal offense lacking only the jurisdictional element.

United States v. Nevarez, 251 F.3d 28 (2d Cir. 2001). The defendant was convicted of illegally selling firearms in violation of 18 U.S.C. § 922(a)(1)(A) and the district court sentenced the defendant under §2K2.1(a)(6) because 1) the PSR stated that “beginning in 1970, the defendant reportedly smoked marijuana and ingested cocaine on an intermittent basis,” and 2) because he had tested positive for cocaine while on bail in this case. The defendant appealed, arguing that he should not be considered a prohibited person because he did not regularly use drugs. The appellate court upheld the district court's determination, noting that the defendant's concession that he used illegal drugs over almost a 30-year period plainly indicated he had a persistent drug problem. The appellate court also rejected the defendant's argument that he should not be considered a prohibited person because there was no connection between his drug use and the crimes to which he pled guilty. Such connection is not a prerequisite for status as a “prohibited person.”

United States v. Ortega, 385 F.3d 120 (2d Cir. 2004). The defendant pled guilty to being a felon in possession of a firearm and received an enhancement under §2K2.1(b)(5) for possession of a firearm “in connection with” a felony distribution of marijuana. The police found a revolver in a coat pocket in the defendant's bedroom closet, along with 235.8 grams of marijuana and \$1050 in cash. The defendant admitted that he had been selling the marijuana to support a heroin habit and that he had purchased a gun earlier because of a threat that someone intended to rob him. The Second Circuit affirmed the enhancement over the defendant's objection. The court concluded that when a defendant claims that he needed a gun for protection, and the gun claimed as protection is found with the drugs he admitted to selling, finding that the gun was used “in connection with” a drug conspiracy is appropriate.

United States v. Roberts, 442 F.3d 128 (2d Cir. 2006). Defendant appealed the trial court's decision to sentence him pursuant to §2K2.1(a)(5) in the 2004 Guidelines Manual which provided an alternative base offense level of 18 for offenses involving “a firearm described in 18 U.S.C. §921(a)(30).” Section 921(a)(30), which pertained to semiautomatic assault weapons, had been repealed before the defendant was sentenced. The Second Circuit reasoned that the Commission could appropriately base an enhancement that alluded to a repealed statute for the purpose of crafting a definition and, accordingly, affirmed.

United States v. Shepardson, 196 F.3d 306 (2d Cir. 1999), *cert. denied*, 528 U.S. 1196 (2000). The district court properly interpreted “prohibited person” as used in §2K2.1(a)(4)(B) to include someone charged by a state felony information. The plain language of Application Note 6 to §2K2.1 provides that a “prohibited person” includes someone who “is under *indictment* for ... a crime punishable by imprisonment for more than one year.” §2K2.1, comment. (n.6) (emphasis added). The Second Circuit rejected the plain language analysis, however, in favor of an examination of the statutory framework behind §2K2.1. Section 2K2.1 applies to convictions of 18 U.S.C. § 922. 18 U.S.C. § 921(a)(14) states that the term “indictment,” as used in section 922, “includes an indictment or *information* in any court under which the crime punishable by

imprisonment for a term exceeding one year may be prosecuted.” Accordingly, the court applied the same definition to Application Note 6.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001). The district court erred by ordering an alien to be deported under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act of 1952, (INA) as an alien convicted of an aggravated felony based on his New York state conviction for operating a vehicle while intoxicated. The Second Circuit held that a felony DWI conviction does not amount to a crime of violence under 18 U.S.C. § 16(b) for purposes of defining an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F) because while "drunk driving involved a serious potential risk of physical injury," it did not involve "use of physical force." See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

United States v. Compres-Paulino, 393 F.3d 116 (2d Cir. 2004). The defendant was convicted of illegal reentry and appealed his sentence. While on state parole, the defendant was deported to the Dominican Republic, illegally reentered the United States, and was later arrested and convicted of additional drug charges. The defendant's parole was revoked because of his additional convictions and he was sentenced to 29 months' imprisonment. The district court used this sentence as a basis for a 16-level enhancement under §2L1.2(b)(1)(A) for a sentence imposed for a drug trafficking offense. The Second Circuit held that the defendant properly received the enhancement under §2L1.2(b)(1)(A), stating that the fact that the 29-month term was imposed after deportation and illegal reentry was irrelevant. The determinative factor was the defendant's felony drug conviction before deportation because an amended sentence, whenever imposed, relates back to the initial conviction.

United States v. Fernandez-Antonia, 278 F.3d 150 (2d Cir. 2002). The district court enhanced the defendant's offense level after determining that his prior conviction for attempted robbery constituted a violent felony under §2L1.2. The defendant argued that the New York statute that defines attempt is overly broad. The defendant argued that there was a significant difference between the federal requirement of a "substantial step" to constitute an attempt and the New York requirement of "dangerous proximity." *Id.* at 162. The Second Circuit disagreed. The Court noted that attempts are generally included in the definition of aggravated felony under the commentary to §2L1.2. Therefore, the court held that the district court did not err in concluding that the 16-level increase was appropriate.

United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997). The district court did not err in enhancing the defendant's sentence on the basis that he had been convicted of an aggravated felony prior to his deportation pursuant to §2L1.2(b)(2). The Second Circuit held that the defendant's 1991 conviction for attempted robbery met the guidelines' definition of a conviction for an aggravated felony.

United States v. Luna-Reynoso, 258 F.3d 111 (2d Cir. 2001). The defendant was convicted of illegal reentry. The district court applied the aggravated felony enhancement under §2L1.2(b)(1)(A) for a predeportation conviction for burglary. The defendant challenged the enhancement on appeal, arguing that burglary was not included in the definition of aggravated felony until after the defendant was convicted of that charge. The Second Circuit affirmed, agreeing with the district court's declaration that when Congress added burglary to the definition of aggravated felony, the new definition was to be used immediately, regardless of when the newly included offenses had been committed. The court stated that the district court correctly applied §2L1.2(b)(1)(A) to the defendant, recognizing his 1987 burglary conviction as a conviction for an aggravated felony as required by 8 U.S.C. § 1101(a)(43)(G). *See also United States v. Ubaldo-Hernandez*, 271 F.3d 78 (2d Cir. 2001).

United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001). In a splintered opinion, the Second Circuit held that a defendant convicted of illegal reentry following deportation must receive a 16-level increase, pursuant to §2L1.2(b)(1)(A), for reentry after commission of an "aggravated felony," even though the defendant was convicted of misdemeanors and sentenced to a suspended term of imprisonment of one year for each misdemeanor in Rhode Island state court. The Immigration and Nationality Act ("INA") defines "aggravated felony" as certain enumerated crimes "for which the term of imprisonment [sic] at least one year." 8 U.S.C. § 1101(a)(43)(F) & (G). The INA states that a "term of imprisonment" includes "the period of incarceration or confinement ordered by the court of law regardless of any suspension of the imposition or execution of the imprisonment or sentence in whole or in part." The Second Circuit reasoned that the INA language indicates that the "actual term imposed is ordinarily the definitional touchstone." Accordingly the enhancement was properly applied.

United States v. Pereira, 465 F.3d 515 (2d Cir. 2006). Defendant was convicted of illegal reentry after having been deported for an aggravated felony. The sentencing court imposed the 16 level enhancement at §2L1.2(b)(1)(A) on the basis of defendant's prior New York state conviction for robbery. Defendant argued on appeal that the 16 level enhancement should not have been applied because the robbery conviction resulted in a youthful offender adjudication. The Second Circuit stated that "...in determining whether a defendant's youthful offender adjudications are classified as adult conviction under the laws of New York, the district court must look to the 'substance' of the minor convictions and not merely how they are labeled by the state." On that basis, the Second Circuit concluded that defendant's "youthful adjudication" for robbery constituted an "adult conviction" for a crime of violence and, as such, properly supported the district court's decision to apply the 16 level enhancement at §2L1.2(b)(1)(A).

United States v. Simpson, 319 F.3d 81 (2d Cir. 2002). The Second Circuit rejected defendant's argument on appeal that the district court erred in imposing an eight-level sentence enhancement under §2L1.2(b)(1)(C), instead of a four-level enhancement under §2L1.2(b)(1)(E). and affirmed the sentence imposed by the district court. It explained that a drug trafficking offense is an "aggravated felony" when it is: (1) an offense punishable under the Controlled Substances Act, and (2) can be classified as a felony under either state or federal law. *See United States v. Pornes-Garcia*, 171 F.3d 142, 145 (2d Cir. 1999); *United States v. Polanco*, 29 F.3d 35, 38 (2d Cir. 1994). Because the crimes for which the defendant was charged under

New York law were also punishable under federal law, the district court correctly treated the defendant's three prior convictions as "aggravated felonies."

Part Q Offenses Involving the Environment

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

United States v. Rubenstein, 403 F.3d 93 (2d Cir. 2005). Defendant hired workers to remove asbestos from a commercial building without receiving Department of Environmental Protection approval. After receiving a "stop work" order from DEP requiring a "scope of work" plan for DEP approval, defendant ignored DEP requirements and had his workers resume removal of the asbestos in derogation of Clean Air Act requirements. Defendant's conduct warranted imposition of the six level enhancement at §2Q1.2(b)(1)(A) for "an ongoing, continuous, or repetitive discharge" because the illegal asbestos removal continued during two one week periods in December 2000 and February 2001.

§2Q2.1 Offenses Involving Fish, Wildlife, and Plants

United States v. Koczuk, 252 F.3d 91 (2d Cir. 2001). The district court improperly departed downward in a case involving defendants who smuggled over \$11 million worth of caviar (*i.e.*, sturgeon roe) without obtaining a permit from Russia. The Second Circuit rejected two of the district court's reasons for departure. First, the district court found that a 15-level enhancement based on the retail value of the smuggled goods overstated the seriousness of the offense because the defendants' conduct did not result in any discernable economic "loss." The appellate court explained that although §2Q2.1(b)(3)(A) instructs the sentencing court to increase the offense level by the corresponding number of levels from the loss table for the fraud guideline in §2F1.1, §2Q2.1(b)(3)(A) is only concerned with the *table* in §2F1.1 and does not incorporate §2F1.1's concept of "loss." Rather, §2Q2.1(b)(3)(A) focuses on the fair market value of the caviar. The Second Circuit also rejected the district court's reason that the crime was outside the heartland of cases concerning offenses involving fish and wildlife. The district court noted that the case was unusual because (1) the importation of sturgeon roe is merely "regulated" and not "prohibited"; and (2) part of the reason for the sturgeon regulation was to assist the Russian economy. The appellate court found these reasons inadequate because the district court failed to "analyze the particular facts of appellants' case and compare them with those of other cases that typically fall within §2Q2.1. Instead, it carved out a general exception to §2Q2.1 for *all cases* involving the illegal importation of sturgeon roe . . . A sentencing court cannot depart downward because it finds that an entire class of offenses, defined by regulation and treaty, is outside the "heartland" of a guideline."

Part R Antitrust Offenses

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

United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995). The defendant was convicted of a Sherman Act violation (§2R1.1), and the district court departed down one level in order to be able to sentence the defendant to probation instead of prison. The government appealed the downward departure, contending that such departure is inconsistent with the deterrence rationale of §2R1.1. The commentary to the antitrust guideline (§2R1.1) reflects the view that to deter potential violators, antitrust offenders should generally be sentenced to prison. The circuit court agreed with the government's position, but held that this case involved mitigating circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b) (1988). The circuit court analogized this situation to departures for extraordinary family situations. *See United States v. Johnson*, 964 F.2d 124, 128 (2d Cir. 1992). "[B]usiness ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate," however, "departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees." The court noted that without the defendant, two companies would likely end up in bankruptcy, and 150-200 employees would lose their jobs. On this basis, the circuit court concluded that the district court's determination that this was an extraordinary case was not in clear error, and affirmed the sentence.

Part S Money Laundering and Monetary Transaction Reporting

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

United States v. Finkelstein, 229 F.3d 90 (2d Cir. 2000). At sentencing, the court concluded that the defendant consciously avoided knowing that the money he laundered was the proceeds of drug activity. The appellate court found that, although proof did not establish that the defendant had actual knowledge of the source of the funds, the conscious avoidance doctrine was applicable at sentencing and the defendant's guideline calculation properly included a three-level enhancement pursuant to §2S1.1(b)(1).

United States v. Moloney, 287 F.3d 236 (2d Cir.), *cert. denied*, 537 U.S. 951 (2002). The district court did not err in calculating the defendant's sentence as if his money laundering promoted an unlawful activity. Under §2S1.1, if the defendant is deemed to have laundered money in promotion of another unlawful activity, his base offense level is higher than if the money laundering is deemed to merely conceal his fraudulent activity. Both the district court and the Second Circuit agreed that the scheme in this case used the purportedly legitimate but actually fraudulently obtained money to attract further investors or investments. This sort of scheme is appropriately sentenced as money laundering in promotion of another illegal activity.

United States v. Napoli, 179 F.3d 1 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2002). The district court did not err in its application of §2S1.1. The defendant argued that his money

laundering offenses should have been grouped with his fraud offenses based on the retroactive application of guidelines Amendment 634. However, the Second Circuit held that Amendment 634 was a substantive change rather than merely a clarification and therefore it could not be applied retroactively.

United States v. Sabbeth, 277 F.3d 94 (2d Cir. 2002). The district court did not err in determining that Application Note 6 to §2S1.1 is substantive and thus cannot be applied retroactively. The court found that because the amended §2S1.1 redefines the calculations for the separate money laundering and underlying offense counts, the note does "far more than simply 'clarify'." Therefore, the court held "because the amendment regarding grouping of money laundering and its underlying offenses is a substantive change to the sentencing guidelines, it cannot apply retroactively to affect Sabbeth's sentence."

Part T Offenses Involving Taxation

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

United States v. Bryant, 128 F.3d 74 (2d Cir. 1997). The defendant argued that the \$600,000 loss attributed to him with respect to unaudited returns was speculative and unfair. The Second Circuit disagreed, holding that the amount of loss attributed to the defendant was reasonable. The court reasoned that the calculation of loss does not require certainty or precision. The court relied, in part, on the commentary to §2T1.1 which states that "the amount of the tax loss may be uncertain," and it envisions that "indirect methods of proof [may be] used . . .". *Id.* at 76. According to Application Note 8 to §2F1.1, estimates may be based upon the approximate number of victims and an estimate of the average loss to each victim. Further, it is permissible for the sentencing court to estimate the loss resulting from his offenses by extrapolating the average amount of loss from known data and applying that average to transactions where the exact amount of loss is unknown.

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The district court erred in not considering the unclaimed but valid deductions that the defendant could have made, but the error was harmless because the defendant could provide no proof that the potential deductions would have been treated as salary - - and hence deductible - - or as non-deductible capital gains.

Part X Other Offenses

§2X3.1 Accessory After the Fact

See United States v. Giovanelli, 464 F.3d 346 (2d Cir. 2006), §2J1.2, p. 20.

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Blount, 291 F.3d 201 (2d Cir. 2002), *cert. denied*, 537 U.S. 1141 (2003). The district court did not err in its analysis that defendant Blount was a manager or supervisor. The Second Circuit held that the record, which showed that Blount was in charge of the day-to-day operations of the drug distribution conspiracy and also that he regularly supervised other members of the conspiracy to make certain that distribution was running smoothly, was sufficient for a finding that he played an aggravating role in the conspiracy.

United States v. Burgos, 324 F.3d 88 (2d Cir. 2003). The defendant challenged a three-level upward adjustment to his base offense level premised on his role as manager or supervisor. The Second Circuit held that the district court erred in concluding that the defendant was a "manager" or "supervisor" of the offense. The court found that the defendant (as broker) was serving his co-conspirator as his co-conspirator (as thief) was serving the defendant. The court stated that a demand that a debtor pay up, or make an advance, does not support an inference that the debtor is a subordinate. If anything, the debtor's nonpayment to the defendant suggests independence.

United States v. Dennis, 271 F.3d 71 (2d Cir. 2001). The district court did not err in allowing the use of special interrogatories on drug quantity determinations and on imposing an enhancement under §3B1.1(b) because the resulting sentence did not exceed the statutory maximum. The court has already upheld the use of special interrogatories on drug quantities to be used in sentencing. *See United States v. Jacobo*, 934 F.2d 411, 416-417 (2d Cir. 1991); *United States v. Campuzano*, 905 F.2d 677, 678 (n.1) (2d Cir.), *cert. denied*, 498 U.S. 947 (1990). In addition, "his [Dennis'] sentence of 168 months was well below the sentence he could have received with no finding of drug quantity whatsoever." The court also rejected the defendant's argument that his sentence was improperly enhanced under §3B1.1. Consistent with previous decisions within the Second Circuit, the court held that *Apprendi* did not affect the district court's authority to determine facts for sentencing at or below the statutory maximum. *See United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 533 U.S. 960 (2001).

United States v. Jimenez, 68 F.3d 49 (2d Cir. 1995), *cert. denied*, 517 U.S. 1148 (1996). The district court erred in failing to enhance the defendant's sentence based on his managerial role. The defendant was convicted of conspiracy to distribute narcotics and was sentenced to 262 months' imprisonment. On appeal, the government argued that the district court was obligated to enhance the defendant's sentence for his aggravating role because it had explicitly found that the defendant was a manager of the drug conspiracy. The circuit court ruled that the language of §3B1.1 "is mandatory once its factual predicates have been established." The circuit court noted that since the district court had explicitly determined that the defendant was a manager or supervisor of a drug organization, an enhancement was required.

United States v. Paccione, 202 F.3d 622 (2d Cir.), *cert. denied*, 530 U.S. 1221 (2000). The defendants were convicted of arson, conspiracy to commit arson, and mail fraud. The court concluded that in addition to the two defendants, three other individuals were knowingly involved in the crime. The court upheld the district court's finding that the defendants were organizers and leaders of criminal activity involving five or more participants in a mail fraud ring also involving arson and conspiracy to commit arson. Specifically, the court held that "a defendant may be included as a participant when determining whether the criminal activity involved 'five or more participants' for purposes of a leadership role enhancement under §3B1.1. This decision is consistent with the rulings on this issue among sister circuits. *See United States v. Hardwell*, 80 F.3d 1471, 1496 (10th Cir. 1996), *cert. denied*, 523 U.S. 1100 (1998); *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990); *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

United States v. Salazar, 489 F.3d 555 (2d Cir. 2007). Defendant received a sentence of imprisonment of 168 months for participating in a conspiracy to distribute 4.8 kilograms of cocaine in violation of 21 U.S.C. § 841. The sentence was based partially on the trial court's determination, by a preponderance of the evidence, that Defendant was a "leader" of the conspiracy pursuant to §3B1.1 (a). Defendant's appeal asserted that the trial judge had erred in applying the leadership enhancement without requiring proof beyond a reasonable doubt that he held that status as purportedly required by the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005). The Second Circuit affirmed and held "... that, notwithstanding *Booker*, because district courts remain statutorily obliged under 18 U.S.C. § 3553 (a) to 'consider' the Guidelines, they remain statutorily obliged to calculate a Guidelines range and to do so in the same manner as they did pre-*Booker*." *See also United States v. Crosby*, 397 F.3d 103, 111-12 (2d Cir. 2005).

§3B1.2 Mitigating Role

United States v. Rivera, 28 Fed. App.55 (2d Cir.), *cert. denied*, 535 U.S. 1071 (2002). The Second Circuit affirmed the district court's refusal to grant the defendant a decrease under §3B1.2(b) for being a minor participant in the criminal activity. The district court found that the defendant packaged the drugs to be distributed and was privy to detailed methods of the operation. The court held that "given Rivera's responsibilities in the conspiracy and her proclaimed intimate knowledge of its operations and personnel, we see no clear error in the court's finding that Rivera did not play merely a minor role."

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001), *cert. denied*, 537 U.S. 847 (2002). The district court refused to grant the defendant a downward departure for playing a "minor" or "minimal" role in the offense for which he was convicted. On appeal the defendant argued that his level of culpability in the crime was less than that of his co-conspirators. Citing *United States v. Ajmal*, 67 F.3d 12, 18 (2d Cir. 1995), the Second Circuit stated that even if the defendant's contention were true, the defendant would have to show that his role was "minor" or "minimal" relative to both his co-conspirators in this crime and to participants in other arson conspiracies leading to death. At trial, evidence established that the defendant not only agreed to the essential

nature of the plan, but was one of the architects of the conspiracy. The role defendant played in the crime did not meet the definitions of "minor" or "minimal" found in §3B1.2. *See United States v. Yu*, 285 F.3d 192 (2d Cir. 2002) (holding that where a defendant's action was not minor compared to an average participant even if it was minor compared to his co-conspirators, he is not generally entitled to a minor role adjustment).

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

United States v. Barrett, 178 F.3d 643 (2d Cir. 1999). The district court found that a vice-president of the sales department of a corporation abused his position of trust by submitting false invoices and check requests to embezzle \$714,000. On appeal, the defendant argued that he did not hold a fiduciary position with his employer because he was involved in sales rather than financial operations. The Second Circuit found that the defendant's position as vice president facilitated his crime because he was able to submit requests for checks without review and had access to records that enable him to create false invoices. His position provided freedom to commit a difficult-to-detect wrong. The Second Circuit also rejected the defendant's assertion that the adjustment was inapplicable because he held no position of trust with the bank. The defendant's relationship with his employer, which had a relationship with the bank, enabled the defendant to commit and conceal his crime. *See also United States v. Crisci*, 273 F.3d 235 (2d Cir. 2001).

United States v. Downing, 297 F.3d 52 (2d Cir. 2002). The defendants, a certified public accountant and a former employee of the same firm, were convicted of conspiracy to commit wire fraud and securities fraud. The appellate court held that the district court properly increased the defendants' base offense level by two pursuant to §3B1.3. The defendants argued that §3B1.3 should not apply to them because the conspiracy never progressed to a stage at which they used their accounting skills in a manner that significantly facilitated the commission or concealment of the offense. Despite the absence of binding precedent in the case law, the court concluded, on the basis of general principles set forth in the guidelines and the approach to similar cases taken by other circuits, that §3B1.3, like most specific offense characteristics, applies to inchoate crimes if the district court determines "with reasonable certainty" that a defendant "specifically intended" to use a special skill or position of trust in a manner that would have significantly facilitated the commission or concealment of the conspiracy.

United States v. Ntshona, 156 F.3d 318 (2d Cir. 1998). The district court enhanced the sentence of the defendant's physician for abuse of a position of trust because she signed false certificates of medical necessity for Medicare reimbursement. On appeal, the defendant argued that an abuse of trust is the essence of the crime of Medicare fraud and therefore already accounted for in the base offense level. Rejecting this argument, the Second Circuit held that a doctor convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under §3B1.3. *See United States v. Rutgard*, 116 F.3d 1270, 1293 (9th Cir. 1997); *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995).

United States v. Nuzzo, 385 F.3d 109 (2d Cir. 2004). The defendant was an inspector for the INS at JFK airport who was later fired because he was recruited by a drug smuggling operation to assist in smuggling cocaine into the United States from Guyana. After his termination he was arrested as he arrived at the airport from Guyana with a suitcase containing 12 kilograms of cocaine. The Second Circuit rejected the application of an abuse of trust enhancement under §3B1.3 because there was insufficient evidence that the defendant used his former position to facilitate the crimes with which he was charged.

United States v. Reich, 479 F.3d 179 (2d Cir. 2007). Defendant was convicted of corruptly obstructing a judicial proceeding in connection with fabricating a bogus court order. Defendant had attempted to convince an adverse party in a civil suit that the Magistrate Judge overseeing that litigation had elected to recuse himself by crafting a fake Order and forging the Magistrate Judge's signature. The sentencing court imposed a two-level enhancement for abuse of a special skill pursuant to §3B1.3. Defendant argued on appeal that the only basis for the charge against him was his use of the fax machine, which, he asserted did not involve his legal skills. The Second Circuit disagreed and detailed defendant's crafting of the forged order as necessarily involving "his special skills as a lawyer." The trial court's imposition of the §3B1.3 enhancement was affirmed.

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

United States v. Lewis, 386 F.3d 475 (2d Cir. 2004). The defendant conspired with others to distribute large amounts of heroin, cocaine, and crack at a housing project. The district court applied the two-level enhancement under §3B1.4 for using a minor to commit an offense. The Second Circuit affirmed the enhancement because the defendant does not need to have actual knowledge that the person committing the offense is a minor, and the use of a minor by one of the defendant's co-conspirators was a reasonably foreseeable act in furtherance of the conspiracy.

Part C Obstruction

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

United States v. Blount, 291 F.3d 201 (2d Cir. 2002), *cert. denied*, 537 U.S. 1141 (2003). The Second Circuit affirmed the district court's application of the adjustment under §3C1.1 for defendant's perjurious testimony. On appeal, the defendant argued that there were discrepancies as to whether he testified that he had never distributed cocaine or whether he had never distributed it in certain contexts. The Second Circuit held that his claim was without merit based on the trial court transcripts.

United States v. Carty, 264 F.3d 191 (2d Cir. 2001). The district court did not err in imposing an obstruction of justice enhancement after the defendant willfully fled to the Dominican Republic and stayed there to avoid sentencing. The defendant claimed that the guideline did not apply because the court did not make a requisite finding that he had the "specific intent to obstruct justice." The Second Circuit held that the defendant's willful

avoidance of a judicial proceeding was inherently obstructive of justice and worthy of a two-level enhancement under §3C1.1. The court held that because the defendant's actions were made in order to avoid sentencing, he acted with specific intent to obstruct justice, making it unnecessary for the court to use the precise words "intent to obstruct justice."

United States v. Cassiliano, 137 F.3d 742 (2d Cir. 1998). On appeal, the defendant challenged the obstruction of justice enhancement to her sentence for conviction of wire fraud. The district court granted the adjustment because of her obstructive conduct in alerting another individual that he was a target of an investigation. The Second Circuit affirmed the district court's enhancement, holding that the defendant's obstructive conduct was willful and that the defendant's own statements acknowledged that she was fully cognizant of the fact that her tips would prevent the further collection of evidence. *See also United States v. Riley*, 452 F.3d 160 (2d Cir. 2006) (upholding enhancement for defendant who repeatedly told his girlfriend to keep his guns away from the authorities, either by concealing them or disposing of them).

United States v. Crisci, 273 F.3d 235 (2d Cir. 2001). The defendant was convicted of bank fraud (18 U.S.C. §1344) and making false statements to federal law enforcement agents (18 U.S.C. §1001). The district court applied the obstruction of justice adjustment. The Second Circuit held that the district court properly applied the adjustment, noting that there does not need to be a specific finding regarding intent to obstruct justice and that the court could rely on the false statements conviction. The court cited Application Note 7, to §3C1.1 in support of its holding.

United States v. Feliz, 286 F.3d 118 (2d Cir. 2002). The district court determined that the defendant's willful attempt to support a false alibi based on the lies of others to the police constituted obstruction of justice under §3C1.1. On appeal, the defendant argued that willful obstruction of justice only includes "unlawful attempts to influence witnesses once formal proceedings have been initiated." The Second Circuit disagreed, noting that §3C1.1 specifically includes obstruction during investigation, prosecution, or sentencing. Citing *United States v. White*, 240 F.3d 127 (2d Cir. 2001), *cert. denied*, 124 S. Ct. 157 (2003), the court held that obstruction of justice may occur both pre- and post-arrest.

United States v. Vegas, 27 F.3d 773 (2d Cir.), *cert. denied*, 513 U.S. 911 (1994). Contrary to the government's argument, *United States v. Dunnigan*, 507 U.S. 87 (1993), and *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993), *cert. denied*, 535 U.S. 932 (2002), do not stand for the assertion that every time a defendant is found guilty, despite his testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, these decisions hold that when the court wishes to impose the enhancement over the defendant's objection, the court must consider the evidence and make findings to establish a willful impediment or obstruction of justice. In this case the district court determined that the evidence of perjury was not sufficiently clear to determine whether perjury had or had not been committed. Therefore an additional penalty for obstruction of justice was not appropriate.

§3C1.2 Reckless Endangerment During Flight

United States v. Morgan, 386 F.3d 376 (2d Cir. 2004). The Second Circuit affirmed a reckless endangerment enhancement under §3C1.2 for throwing a loaded handgun into an area where children were playing. Such conduct created a substantial risk of death or serious bodily injury to those children and to the other bystanders, and was a gross deviation from the standard of care that a reasonable person would exercise in a similar situation.

Part D Multiple Counts

§3D1.1 Procedure for Determining Offense Level on Multiple Counts

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2, p. 33.

§3D1.2 Groups of Closely Related Counts

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The district court erred by grouping the defendant's offenses under §3D1.2(c) rather than under §3D1.2(d). The government claimed that there was error in the grouping of the defendant's mail fraud and tax evasion counts. Essentially the government claimed that the grouping should have been under §3D1.2(c)—which groups offenses that are “closely related”—rather than under §3D1.2(d)—under which crimes are grouped that are of the “same general type.” The Second Circuit held that grouping of offenses is not optional, but rather is required by the guidelines. Section 3D1.2(d) was the appropriate guideline for fraud and tax evasion cases. If there is a choice to be made between guidelines, crimes that fall within a quantifiable harm fall under §3D1.2(d). Finally, the Second Circuit held that this error was a substantial harm to society because the defendant received a much more lenient sentence than would otherwise have been imposed. Therefore, the sentence was vacated and the case remanded.

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

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2, p. 33.

§3D1.4 Determining the Combined Offense Level

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), §3D1.2, p. 33.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Austin, 17 F.3d 27 (2d Cir. 1994). The defendant challenged the district court's refusal to grant a reduction for acceptance of responsibility. The circuit court remanded for resentencing, and held that the district court had no basis to deny the defendant a reduction for acceptance of responsibility when the defendant refused to provide information that was outside the "fruits and instrumentalities" of the offense of conviction. The court held that the refusal to accept responsibility for conduct beyond the offense of conviction may only be used to deny a reduction under §3E1.1 when the defendant is under no risk of subsequent criminal prosecution for that conduct. However, a defendant's voluntary assistance in recovering "fruits and instrumentalities" outside the offense of conviction may be considered as a factor for granting acceptance of responsibility. See *United States v. Oliveras*, 905 F.2d 623, 628-30 (2d Cir. 1990).

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002). The district court did not err in finding that the defendant's post-plea conduct was inconsistent with a finding of acceptance of responsibility. Although the district court agreed that the defendant pled guilty in a timely fashion, his conduct after that plea, including his presence at the Department of Motor Vehicles (the scene of his crimes) and his association with people "from his criminal past" while there were indicative that he continued to engage in criminal behaviors. The Second Circuit held that it will only overturn a district court decision with regard to acceptance of responsibility if the factual determination is without foundation. See also *United States v. McLean*, 287 F.3d 127 (2d Cir. 2002).

United States v. Ortiz, 218 F.3d 107 (2d Cir. 2000). The court concluded that the district court's denial of §3E1.1 adjustment based on defendant's continued and repeated use of marijuana while on pretrial release, after plea, and after being specifically admonished to discontinue use, was not an abuse of discretion.

United States v. Rood, 281 F.3d 353 (2d Cir. 2002). The district court erred in deciding not to award the defendant the three-level decrease available for acceptance of responsibility based on §3E1.1(b). The district court granted the defendant the two-level decrease for acceptance of responsibility based on §3E1.1(a) but refused to grant him the three-level decrease basing its decision on "conduct other than the factors and criteria listed in" the subsection. The Second Circuit held that because §3E1.1(b) delineates specific factors that the defendant must meet in order to qualify for the reduction, if the defendant meets those factors, the sentencing court does not have discretion not to award the reduction.

United States v. Yu, 285 F.3d 192 (2d Cir. 2002). The district court did not err in refusing to grant the defendant an extra point reduction for acceptance of responsibility where the belated plea was not sufficiently timely so as to conserve government resources.

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The district court did not err when it refused to grant the defendant a two-level adjustment for acceptance of responsibility. The court followed the PSR's recommendation against a reduction for acceptance of responsibility because the defendant's statements reflected a lack of recognition that he had committed the crime. The PSR revealed that the defendant stated that the crime had nothing to do with him, that he was paid to do the job, that he was only a "middle person," and that he did not understand how the jury could have convicted him. The court ruled that these grounds were sufficient to deny the adjustment.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Aska, 314 F.3d 75 (2d Cir. 2002). In a case of first impression, the court considered whether it is impermissible double counting to increase a defendant's criminal history points because he was under a sentence when he failed to surrender to serve that sentence. The defendant was convicted of passport fraud. The court ordered him to surrender to serve his sentence, but he failed to do so. The defendant was subsequently arrested and indicted for the crime of failing to report for sentence. The defendant argued that the district court engaged in impermissible double counting by adding two criminal history points under §4A1.1(d) on the ground that his crime of failing to surrender was committed while under a criminal justice sentence, the precise conduct underlying his base offense level. Although this was a matter of first impression for the Second Circuit, the court noted that four other circuits had found the §4A1.1(d) enhancement to be applicable in the analogous situation of a defendant being sentenced for escaping from imprisonment. The Second Circuit held that the Sentencing Commission's intention that the enhancement should apply to the defendant's case was demonstrated by: (1) the unmistakable language of the guidelines, which makes no exception for failure-to-report cases under §4A1.1(d); (2) the Sentencing Commission's statement in its response to FAQs that §4A1.1(d) applies to escape cases; and (3) the guidelines' explanation in §4A1.2(n) and the §4A1.1(d) commentary that failure to report for sentence is to be treated as an escape from that sentence. Accordingly, the appellate court affirmed the sentence imposed by the district court.

United States v. Driskell, 277 F.3d 150 (2d Cir.), *cert. denied*, 537 U.S. 855 (2002). The district court included a prior conviction under the "youthful offender" provisions of New York state law in calculating the defendant's criminal history under §4A1.1. Citing its earlier decision in *United States v. Matthews*, 205 F.3d 544, 548-549 (2d Cir. 2000), the Second Circuit concluded that the defendant's prior offense for attempted murder in the second degree for which the sentence exceeded one year and one month qualified as an "adult conviction" under §4A1.1.

United States v. Lopez, 349 F.3d 39 (2d Cir. 2003). In 1994, defendant was arrested for selling drugs to an undercover agent, fled the United States and was arrested in 2001 while attempting to smuggle drugs into the United States. When sentencing for the 1994 offense, the

district court counted the 2001 offense as a prior sentence under the meaning of §4A1.1(a). The defendant appealed, arguing the 2001 offense came after the 1994 offense and could not be counted as a prior sentence. The court rejected the argument, stating the term "prior sentence" is "not directed at the chronology of the conduct, but the chronology of the sentencing." The defendant was sentenced for the 2001 offense eight months before being sentencing for the 1994 offense.

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

United States v. Green, 480 F.3d 627 (2d Cir. 2007). Defendant pleaded guilty to a felon in possession charge under 18 U.S.C. § 922(g) and was sentenced to 37 months imprisonment. Pursuant to the plea, defendant had stipulated to a prior New York state conviction of "attempted criminal possession of a controlled substance in the third degree." The sentencing court relied on a New York Certificate of Disposition to conclude that defendant's prior was tantamount to possession with intent to distribute rather than simple possession, a conclusion that increased defendant's sentence. Defendant appealed on the basis that the Certificate of Disposition demonstrated only his conviction under a New York statute that prohibits both possession and possession with intent to distribute. Defendant argued that the Certificate of Disposition lacked the requisite accuracy to justify the sentencing court's conclusion that he had participated in a delivery of narcotics. The Second Circuit agreed that the Certificate of Disposition, while not inadmissible, could not support the sentence imposed absent some corroborative testimony from the person who prepared it. The case was remanded with directions that further proceedings be conducted to explore whether the government could produce additional evidence to meet its burden to show the applicability of the enhancement under *United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997).

United States v. Martinez-Santos, 184 F.3d 196 (2d Cir. 1999). To determine whether a prior minor offense is "similar" to an excludable offense listed under §4A1.2(c), a court should use the "multi-factor approach" rather than the "elements" approach. The defendant argued that three of his convictions, including subway fare beating and scalping bus transfer tickets, should not be included in his criminal history score because they were "similar" to the minor offenses listed under §4A1.2(c). The district court stated that the fare beating and transfer scalping offenses "hurt society generally and hence are not victimless crimes." Under §4A1.2(c), certain listed offenses and "offenses similar to them" are excluded from the calculation of criminal history score. After considering other circuits' varying ways of determining whether a certain offense is "similar" to an offense listed in §4A1.2(c), the Second Circuit adopted the Fifth Circuit multi-factor approach enunciated in *United States v. Hardeman*, 933 F.2d 278, 281 (5th Cir. 1999), and directed district courts to use the factors in *Hardeman* "as well as any other factor the court reasonably finds relevant in comparing prior offenses and listed offenses."

United States v. Matthews, 205 F.3d 544 (2d Cir. 2000). The court held that a defendant's prior New York State youthful offender adjudication for possession of a weapon was not "expunged" within the meaning of §4A1.2(j) and thus, the district court properly included it in its calculation of criminal history. The court also distinguished the New York youthful offender statute to a Vermont juvenile statute which provides that the proceedings "shall be

considered never to have occurred, all index references thereto shall be deleted, and the person, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry. *Id.* at 546.

United States v. Morales, 239 F.3d 113 (2d Cir. 2000). The issue on appeal was whether a second-degree New York harassment conviction under is similar to the offenses listed in §4A1.2(c)(1) so as not to be counted in the criminal history calculation. The appellate court held that, when applying the multi-factor test (Martinez-Santos, *supra*) to determine whether a conviction is similar to the listed offense for a statute such as harassment, that applies to a broad range of conduct, the sentencing court must make a fact specific inquiry into the underlying conduct of the conviction when applying the “similar to” test. The appellate court examined the facts of the case and concluded that Morales’ harassment second conviction should be excluded from criminal history computation. The court reasoned that the complainant in the underlying offense (defendant’s girlfriend) had actually started the argument and Morales had hit her in response to her throwing household objects at him. Applying other factors of the multi-factor test, the court found that New York defines harassment as a disorderly persons offense, not an assault. Significantly, the maximum punishment that could have been imposed was 15 days and Morales actually received a conditional discharge. The court noted that the level of culpability is not necessarily greater for harassment than for some of the listed offenses, like resisting arrest, which can include violent conduct. Finally, the court found significant the district court’s conclusion that Morales’ harassment conviction did not indicate a likelihood of recidivism as it was an isolated instance that occurred three years prior to the instant offense.

United States v. Ramirez, 421 F.3d 159 (2d Cir. 2005). Defendant appealed the length of his drug offense sentence, contending that his criminal history score had been incorrectly increased by inclusion of two New York state “conditional discharge” sentences as “times of probation” for purposes of §4A1.2(c)(1)(A). The Second Circuit dismissed defendant’s argument that, because New York state law distinguishes between “conditional discharge” and “probation”, the former cannot constitute probation under the Guidelines. The Second Circuit stated: “The use of probation in other parts of §§4A1.1 and 4A1.2 further confirms our view that the Sentencing Commission used the term in a broad sense, to encompass any sentence that is conditioned on a defendant’s compliance with a prescribed set of requirements, where the offense of conviction provides for the possibility of imprisonment.”

§4A1.3 Departures Based on Inadequacy of Criminal History Category (Policy Statement)

United States v. Harris, 13 F.3d 555 (2d Cir. 1994). The district court did not err in departing upward from Criminal History Category VI (sentencing range of 9-15 months) to impose a sentence of 54 months based on the inadequacy of the defendant's criminal history score. §4A1.3. The record indicated that the defendant had a criminal history score of 27, had 15 prior convictions that were not counted in his criminal history score because they were too old, and cashed stolen money orders less than 7 months after his release from an 8-year sentence for robbery. In a case of first impression, the circuit court addressed the 1992 amendments to §4A1.3. The amendments provide that sentencing courts "should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal

History Category VI until it finds a guideline range appropriate to the case." *Id.* at 558. The circuit court held that the guideline "merely suggest[s] an approach, rather than mandating a step-by-step analysis" and deemed the 12 level departure "reasonable."

United States v. Mishoe, 241 F.3d 214 (2d Cir. 2001). The district court may not depart from career offender guidelines, under §5K2.0, based solely on the fact that one of defendant's priors involved only a "street level" sale of narcotics. *Id.* at 219. However, if the court concludes that the defendant's overall criminal history category overstates the seriousness of his/her criminal history, it may depart under §4A1.3. Factors to consider include: the quantity of drugs involved in defendant's prior offenses, his/her role in the offense, the sentences previously imposed and the amount of time previously served compared to the current sentencing range.

United States v. Simmons, 343 F.3d 72 (2d Cir. 2003). The defendant was found guilty of illegal sexual conduct with a minor and videotaping the conduct, violations of 18 U.S.C. §§ 2423(a) and 2251(a), respectively. The defendant had numerous convictions, all obtained in Canadian courts. The district court, examining each conviction separately, eliminated several older convictions, one for which background information was unavailable, and counted the remaining convictions toward defendant's criminal history category, which was increased from Criminal History Category I to Category IV. On appeal, the defendant argued that foreign sentences were excluded under §4A1.2. The Second Circuit agreed, but upheld the sentence on the grounds that §4A1.3 authorizes departures if reliable information exists that indicates the adequacy of the criminal history category does not reflect the seriousness of the defendant's criminal conduct or likelihood to commit other crimes. The district court had determined that Canadian convictions are very similar to convictions in the United States and were a reliable source of information for a departure under §4A1.3. The Second Circuit affirmed this reasoning.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Boonphakdee, 40 F.3d 538 (2d Cir. 1994). In its cross-appeal, the government asserted that the district judge erred in determining that defendant Francisco was not a "career offender" under §4B1.1. The appellate court agreed, and remanded the case for the district judge to resentence Francisco as a career offender. The district court had concluded that because the defendant's two prior felonies had been consolidated for sentencing, they could not be considered "two prior felony convictions" for purposes of applying §4B1.1. Because the defendant's two prior felonies, were separated by an intervening arrest, the Second Circuit held that they are by definition "not considered related." The court further noted that other circuits had reached the same result. *See United States v. Hallman*, 23 F.3d 821, 825 (3d Cir.), *cert. denied*, 513 U.S. 881 (1994); *United States v. Springs*, 17 F.3d 192, 195-96 (7th Cir.), *cert. denied*, 513 U.S. 955 (1994); *United States v. Gallegos-Gonzalez*, 3 F.3d 325, 327 (9th Cir. 1993).

United States v. Gibson, 135 F.3d 257 (2d Cir. 1998). The district court departed downward from Criminal History Category VI to Criminal History Category I, concluding that

the Career Offender guideline punished the defendant twice by enhancing both his offense level and criminal history category. Upon the government's cross-appeal, the appellate court vacated the sentence and remanded for resentencing, holding that 4B1.1 does not impermissibly “double count.” “Congress, and the Sentencing Commission acting under congressional authority, are generally free to assign to prior convictions in the sentencing calculus whatever consequences they consider as appropriate.”

United States v. Jones, 27 F.3d 50 (2d Cir.), *cert. denied*, 513 U.S. 955 (1994). The district court did not err in concluding that the defendant was a career offender. The defendant challenged the lower court's reliance on a prior conviction which the defendant claimed was obtained in violation of his due process rights. The circuit court relied on *United States v. Custis*, 511 U.S. 485 (1994), in which the Supreme Court held that a defendant can collaterally attack a prior conviction at sentencing only if he was deprived of counsel during the state court proceeding. Since the defendant was represented by counsel on his prior conviction, his claim was meritless.

United States v. Jones, 415 F.3d 256 (2d Cir. 2005). Defendant appealed a sentence characterizing him as a “career offender” pursuant to U.S.S.G. §4B1.1. Defendant’s appeal was based upon the contention that two New York state “youthful offender adjudications” were improperly counted as predicate offenses to support his designation as a “career offender.” The Second Circuit affirmed the district court’s determination that defendant was a “career offender” and noted that to be considered a “youthful offender” under New York law one must first have been convicted as an adult. Because both of defendant’s “youthful offender adjudications” resulted in sentences of over one year in adult prison, the Second Circuit determined that both constituted “prior felony convictions” in the context of U.S.S.G §§4B1.2 and 4B1.1(a).

United States v. Mapp, 170 F.3d 328 (2d Cir.), *cert. denied*, 528 U.S. 901 (1999). The district court found that the defendant was a career offender based on two state robbery convictions for which the defendant was sentenced on the same day to concurrent nine-year terms of imprisonment. The defendant's prior convictions both occurred in May. The first involved a gun-point robbery of an individual as he left a bank. The second robbery occurred the next day and involved a gun-point robbery of several individuals in a parked car. The Second Circuit held that the district court did not clearly err in finding that there was not a close factual relationship between the two offenses because the robberies occurred at separate locations and involved different participants and victims.

United States v. Nutter, 61 F.3d 10 (2d Cir. 1995). The defendant pleaded guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and was sentenced to 188 months' imprisonment. The defendant claimed on appeal that the Sentencing Commission lacked authority to include the crime of conspiracy to commit a controlled substance offense as a predicate for sentencing as a career offender under §§4B1.1 and 4B1.2. The circuit court noted that its decision was controlled by *United States v. Jackson*, 60 F.3d 128 (2d Cir.), *cert. denied*, 516 U.S. 980 (1995) in which the court held that the Sentencing Commission's authority to promulgate §4B1.1 was not confined to 28 U.S.C. § 994(h) but could also be found in 28 U.S.C. § 994(a). A narcotics conspiracy conviction, therefore, could be a predicate for a career criminal

enhancement. Thus, the Sentencing Commission did not exceed its statutory mandate by including conspiracies to commit controlled substance crimes in Application Note 1 to §4B1.1.

United States v. Parnell, ___ F.3d ___, 2008 WL 1808256 (2d Cir. 2008). Defendant was sentenced as a “career offender” pursuant to §4B1.1 after pleading guilty to possessing a firearm in connection with a drug trafficking crime. Defendant argued on appeal that a New York state conviction for second degree burglary could not be used as a “predicate offense” for career offender status because that sentence was “set aside” by the New York court. The Second Circuit held that although convictions that are “set aside” in state courts cannot be the basis of a designation of “armed career criminal” because of a statutory prohibition in the Armed Career Criminal Act, 18 U.S.C. §921(a)(20), no such prohibition exists with respect to using such convictions for “career offender” purposes as long as the punishment resulting from them could have exceeded one year in prison.

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

United States v. Palmer, 68 F.3d 52 (2d Cir. 1995). The defendant was convicted of knowingly possessing firearms and ammunition in interstate commerce by a felon. The district court found that the defendant's previous felony conviction constituted a "crime of violence" within the meaning of §4B1.2 and sentenced the defendant pursuant to §2K2.1(a)(4). The defendant argued on appeal that his previous conviction was not a "crime of violence" within the meaning of §4B1.2. Applying the categorical approach announced in *Taylor v. United States*, 495 U.S. 575, (1990), the circuit court rejected the government's position that a sentencing court may rely on the presentence report for its "crime of violence" determination. Nevertheless, the circuit court concluded that the plea proceeding which included a lucid description of the conduct for which the defendant was convicted and the defendant's on the record agreement to the description of the conduct sufficiently proved that the defendant had been convicted of a crime of violence.

§4B1.3 Criminal Livelihood

United States v. Burgess, 180 F.3d 37 (2d Cir. 1999). The district court properly applied the criminal livelihood enhancement in sentencing the defendant for a passport fraud offense that the defendant engaged in as a livelihood. The defendant admitted that he had established a lifestyle of perpetrating frauds by establishing a false identity, opening accounts in false names, then relocating to another city to repeat the same type of scheme. Although the passport fraud offense by itself is not income producing, the record indicates that the fraudulent passports enabled the defendant to travel anonymously to perpetrate additional bank frauds. The court properly inferred, based in part on the defendant's claim that he made \$3,000 a month and the lack of proof of any other employment, that the defendant obtained his livelihood through this criminal activity.

§4B1.4 Armed Career Criminal

United States v. Moore, 208 F.3d 411 (2d Cir.), *cert. denied*, 531 U.S. 905 (2000). After trial, it was determined that defendant had a previously undiscovered assault conviction, which resulted in application of the ACCA enhancements. The defendant argued that due process required that the government advise him of his exposure to this sentencing enhancement before trial. The court held that there is no constitutional requirement that the defendant be put on notice before trial that a sentencing enhancement under the ACCA may be sought after conviction. The court joined the First and Fourth Circuits, the only other circuits to reach this issue, in so ruling. *See United States v. O'Neal*, 180 F.3d 115, 126 (4th Cir. 1999); *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990).

United States v. Paul, 156 F.3d 403 (2d Cir. 1998). The district court properly sentenced the defendant as an armed career criminal. The defendant argued that certain of his previous convictions were too remote in time to serve as predicate convictions for purposes of the armed career criminal statute, 18 U.S.C. § 924(e). The court of appeals held that there is no temporal limitation on the convictions that may be taken into account in determining whether a defendant is an armed career criminal.

§4B1.5 Repeat and Dangerous Sex Offenders Against Minors

United States v. Phillyss, 431 F.3d 86 (2d Cir. 2005). Defendant appealed the sentence resulting from his conviction for sexual exploitation of a minor (18 U.S.C. §2251). Defendant argued that the 5 level enhancement for being a “repeat and dangerous sex offender against minors” pursuant to §4B1.5(b) was improperly based on unadjudicated sexual activity concerning minors when he himself was a minor. The Second Circuit affirmed application of the enhancement “...because U.S.S.G. §4B1.5(b) does not specifically carve out unadjudicated juvenile conduct from the district court’s consideration...the district court permitted to take into account sexually exploitive conduct that occurred while the defendant was himself a juvenile. This makes sense because the Guideline is aimed at ‘repeat and dangerous sex offenders’ and is intended to aggressively target recidivist exploiters of minors.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.3 Conditions of Probation

United States v. Bello, 310 F.3d 56 (2d Cir. 2002). The defendant was convicted of possession of a gambling device and for credit card theft. The district court imposed a sentence consisting of five years of probation, the first ten months of which were to be spent in home detention. As a condition of probation, the court imposed *sua sponte* a television bar on the defendant during his home detention. The district court explained that the television restriction was designed to force "deprivation and self-reflection," and thus encourage the defendant to conquer a habit of recidivism. The appellate court found that the television bar was not

reasonably related to factors appropriately considered for sentencing purposes, including the defendant's history and circumstances, and the abatement of his criminality. Thus, the imposition of the bar for the stated purpose of promoting self-reflection and remorse exceeded the district court's broad discretion. Accordingly, the appellate court remanded for resentencing.

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant participated in a fraud scheme in which travel agencies sold airline tickets to customers and then failed to remit the proceeds to the airlines. The district court's restitution order instructed the defendant to pay \$1.6 million in restitution and the Second Circuit affirmed, holding that the district court properly considered the defendant's ability to pay. The court concluded that, in light of the facts that the defendant's three children were in parochial school, that he owned several pieces of real estate, he drove at least one Jaguar, and that properties held in his wife's name were "a charade," the defendant had available assets to pay the restitution order in full. The Second Circuit noted that, absent a plea agreement, a sentencing court may award restitution for losses directly resulting from the "conduct forming the basis for the offense of the convictions."

United States v. Peterson, 248 F.3d 79 (2d Cir. 2001). The district court sentenced defendant to a term of probation after a conviction for bank larceny and imposed a series of conditions based on a prior conviction for incest. These conditions included, *inter alia*, the following: (1) restriction of defendant's possession and use of a computer and access to the Internet; (2) sex offender counseling at the direction of the probation officer; (3) third-party notification of prior and instant convictions at the direction of the probation officer; and (4) restricted access to parks and recreational facilities where children congregate. The circuit court struck down a number of conditions and remanded for re-sentencing. The court concluded that the internet prohibition was overly broad and not reasonably necessary to protect the public or the defendant's family as it did not reasonably related to the prior offense, which did not involve a computer. Further, the court found that this condition was an impermissible occupational restriction. The court also held that the defendant could be referred for sex offender counseling but that the condition as imposed was ambiguous. Third-party notification of the defendant's prior incest conviction was found to be an occupational restriction, which restrictions may only be based on the offense of conviction. Finally, while the sentencing court could restrict the defendant from visiting places where children congregate, the Second Circuit held that the condition as imposed was ambiguous and overly broad.

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Lahey, 186 F.3d 272 (2d Cir. 1999). The district court mistakenly believed that it was required to impose a prison sentence of at least one month in sentencing the defendant for a class B felony. The defendant pled guilty to bank fraud. At sentencing, the court remarked that "if permitted by law, I would give him six months home detention." The court stated further that the defendant's unusual family circumstances and responsibilities justified a downward departure. The defendant appealed and asked that the case be remanded for

re-sentencing arguing that neither the statute of conviction (18 U.S.C. § 1341), nor the “B-Felony rule,” (18 U.S.C. § 3561), required the judge to impose a minimum prison term. Because the transcript of the sentencing hearing indicates that the court may not have realized it had the authority to depart, the case was remanded to determine whether the court recognized its authority to depart. If the court did not, then the defendant should be resentenced “in accordance with the court’s proper recognition of the extent of its authority.”

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

United States v. Conde, 178 F.3d 616 (2d Cir. 1999). The district court refused to find the defendant eligible for relief under the safety valve, even after finding the defendant eligible for a reduction for acceptance of responsibility. The appellate court affirmed, holding that the disclosure requirement for the safety valve reduction is different from the disclosure requirement for acceptance of responsibility. The government’s agreement that the defendant qualified for acceptance of responsibility did not bar the government from objecting to application of the safety valve.

United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003). The defendant was convicted of conspiracy to import five or more kilograms of cocaine and related offenses. At his sentencing hearing, the defendant moved for safety valve relief and a corresponding two-level reduction in his base offense level in light of his post-conviction proffer to the government. The government did not oppose the motion and agreed that the defendant had satisfied the requirements of the safety valve. The district court denied the defendant’s motion, stating that even if the defendant was eligible, the decision whether to grant safety valve relief was discretionary. The Second Circuit remanded, holding in the process that a sentencing court could not disqualify a defendant from eligibility for safety valve relief based solely on his commission of perjury at trial, where the defendant otherwise fulfilled the statutory criteria under section 3553(f)(1)-(5). *See also United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999).

United States v. Resto, 74 F.3d 22 (2d Cir. 1996). The district court did not err in refusing to apply the safety valve provision to the defendant even after the court granted him a downward departure from Category III, to Category I, pursuant to §4A1.3. The defendant had four criminal history points, placing him in Criminal History Category III. The defendant argued on appeal that because he was treated as if he had only one criminal history point, "he should be found to come within the specifications of 18 U.S.C. § 3553(f)." The circuit court rejected this argument, and held that "the safety valve provision is to apply *only* where the defendant does not have more than 1 criminal history point."

United States v. Reynoso, 239 F.3d 143 (2d Cir. 2000). In a splintered opinion, the Second Circuit held that the district court properly denied safety valve relief to a defendant who provided the government with objectively false information, even though she subjectively believed the information provided to the government was true. 18 U.S.C. § 3553(f)(5) requires a defendant to prove both that the information he or she provided to the government was objectively true and that he or she subjectively believed that such information was true. The court reasoned that an examination of several dictionaries’ definitions of “truthful” encompasses

both a subjective belief in the truth of information conveyed and the conveyance of true information.

United States v. Smith, 174 F.3d 52 (2d Cir. 1999). The district court erred in finding that the defendant satisfied the disclosure requirement of the safety valve after the defendant repeatedly refused to communicate with the government. The record at sentencing established that the defendant conceded he did not communicate with anyone from the United States Attorney's office. Because the defendant failed to show that he provided sufficient information to his probation officer to comply with §5C1.2(5), the Second Circuit did not decide whether information provided to a probation officer that ultimately assists a prosecutor may satisfy the disclosure requirement.

United States v. Tang, 214 F.3d 365 (2d Cir. 2000). A defendant who provided information to the government but withheld the name of one individual in Hong Kong out of a legitimate fear for the safety of his family did not satisfy the fifth criteria under safety valve statute. There is not a "fear-of-consequences" exception to the safety valve provision.

Part D Supervised Release

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

United States v. Cunningham, 292 F.3d 115 (2d Cir. 2002). The district court did not err in imposing a term of supervised release based on a letter grade determined by the statutory maximum rather than his personal guideline range. The defendant argued that according to 18 U.S.C. § 3559 he should have been assigned a felony letter grade based on the guideline range determined by the sentencing court. However, the Second Circuit disagreed and stated that the language of section 3559 is plain and therefore it was appropriate for the district court to assign him a felony letter grade based on the statutory maximum for his offense of conviction.

United States v. Thomas, 135 F.3d 873 (2d Cir. 1998). The district court erred in sentencing the defendant to nine months home detention, followed by three years of supervised release. "[S]upervised release can never be imposed without an initial period of imprisonment."

§5D1.2 Term of Supervised Release

See United States v. Cunningham, 292 F.3d 115 (2d Cir. 2002), §5D1.1, p. 44.

United States v. Hayes, 445 F.3d 536 (2d Cir. 2006). The defendant was convicted of knowingly transporting child pornography. The district court imposed a sentence of 151 months imprisonment and a lifetime term of supervised release. The defendant challenged the term of supervised release on appeal, arguing that it was unreasonable. Noting that the Guidelines recommend a lifetime term of supervised release for these types of offenses, the Second Circuit concluded that term was reasonable in light of the fact that the defendant had already been convicted of sexually abusing a minor.

§5D1.3 Conditions of Supervised Release

See United States v. Balogun, 146 F.3d 141 (2d Cir. 1998).

United States v. Bok, 156 F.3d 157 (2d Cir. 1998). The district court did not err in ordering the defendant to make payments against his personal income tax liability as a condition of supervised release. The defendant, who had been convicted of tax evasion, argued that the payment order was effectively an order of restitution, which must be authorized by statute. The court of appeals held that 18 U.S.C. § 3583(d) permits the district court to impose as a condition of supervised release “any condition set forth as a discretionary condition in section 3583(b)(1) through (b)(10).” Among the discretionary conditions of probation in section 3583(b) is the requirement that the defendant make restitution to a victim of the offense (but not subject to the limitation of section 3663(a)). Thus, the court of appeals concluded, a plain reading of sections 3583(d) and 3563(b) permits a judge to award restitution as a condition of supervised release without regard to the limitations in section 3663(a).

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999). The defendant was convicted of wire fraud and ordered to pay \$1.6 million in restitution. The Second Circuit held that a condition of the defendant’s supervised release, which subjected the defendant to searches of his person and property by the probation department to secure information related to his financial dealings, was appropriate. The district court noted the defendant’s lack of candor in the past relating to his financial status, including concealing documents and filing false complaints, warranted such searches of his property.

United States v. Handakas, 329 F.3d 115 (2d Cir. 2003). The defendant was convicted of conspiracy to commit mail fraud, conspiracy to launder money, illegally structuring financial transactions to evade reporting requirements, failure to file a currency report, making a materially false representation, and conspiracy to defraud the United States. The defendant’s sentence included, as a condition of supervised release, a prohibition against working on government contracts. On appeal, the defendant, argued that the written judgment was erroneous because it included an occupational condition omitted from the oral pronouncement of his sentence. The Second Circuit concluded a remand was appropriate to allow reconsideration of the non-standard condition of supervised release. The occupational restriction was not a mandatory or standard condition listed in §5D1.3(a) or (c), nor a recommended condition listed in §5D1.3(d). The court noted, however, that the guidelines allow for occupational restrictions at §5D1.3(4)(e) and these restrictions may be appropriate on a case-by-case basis

United States v. Reyes, 283 F.3d 446 (2d Cir.), *cert. denied*, 537 U.S. 822 (2002). The Second Circuit affirmed the district court’s ruling that convicted persons serving a term of supervised release have a diminished expectation of privacy. Furthermore, such expectation of privacy is particularly diminished for this defendant because the terms of his supervised release included a “Standard Condition” recommended by §5D1.3(c)(10), which states that the defendant must allow a probation officer to visit at any time and to seize any contraband in plain view when

he arrives. The Second Circuit also held that federal probation officers are generally charged with overseeing periods of supervised release including “the requirement that the supervisee not commit further crimes.”

United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002), *cert. denied*, 537 U.S. 1157 (2003). The defendant pled guilty to receiving child pornography and the questioned condition was imposed as a special condition of his supervised release. The Second Circuit stated that while it is appropriate for a sentencing court to impose a special condition of supervised release, that condition must be (1) reasonably related to the statutory factors governing the selection of sentences, (2) involve no greater deprivation of liberty than is reasonably necessary for the statutory purposes of sentencing, and (3) be consistent with Sentencing Commission policy statements. *Sofsky*, 287 F.3d at 126. The Second Circuit held, however, that denying the defendant use of a computer or the internet was too great a deprivation of his liberty in relation to his crime. The Second Circuit further noted that the government was free to argue for random checks of the defendant’s hard drive or for some other type of monitoring that could prevent the defendant from using his computer for child pornography.²

United States v. Thomas, 299 F.3d 150 (2d Cir. 2002). The defendant pled guilty to access device fraud. At his sentencing hearing, the defendant was sentenced orally to three years of supervised release but the oral sentence did not contain all of the conditions of the supervised release. On appeal, the defendant challenged five of the conditions of his supervised release that were included in the written judgment, but had not been articulated at his sentencing hearing. The Second Circuit affirmed all but one of the district court's "special conditions." The court found that the third “special” condition of the defendant’s release, prohibiting the defendant from possessing any identification in the name of another person or any matter assuming the identity of any other person, violated Fed. R. Crim. P. 43(a). The court reached this conclusion because the third “special” condition encompassed non-criminal behavior and it did not overlap with any of the mandatory or standard conditions of release.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

See United States v. Bok, 156 F.3d 157 (2d Cir. 1998), §5D1.3. p. 40.

United States v. Giwah, 84 F.3d 109 (2d Cir. 1996). The district court erred in assessing a restitution order requiring the defendant to pay 15 percent of his annual gross earnings to the victims of his fraud because the court failed to consider the factors set forth in 18 U.S.C. § 3664(a). The circuit court remanded the restitution order because the sentencing court failed to

² Effective November 1, 2004, the Commission amended §§5B1.3 and 5D1.3 and added a condition permitting the court to limit the use of a computer or interactive computer service for sex offenses in which the defendant used such items. The Commission promulgated the amendment in response to a circuit conflict regarding the propriety of such restrictions. *See* USSG App. C, amend. 664, identifying *Sofsky*, 287 F.3d 122 as one of the decisions creating the circuit conflict.

consider the financial needs of the defendant and his dependents. On remand, the district court must find whether 15 percent of the defendant's salary is an unduly harsh restitution order. The circuit court noted that the standard of review would have been more deferential if the trial court had provided a rationale reflecting consideration of the factors set forth in section 3664.

United States v. Lussier, 104 F.3d 32 (2d Cir. 1997). The defendant was convicted of various banking crimes and his sentence included a restitution order, which he did not dispute on direct review. The defendant subsequently brought a motion pursuant to 18 U.S.C. § 3583(e)(2) to amend the restitution order. The district court dismissed the defendant's motion for lack of subject matter jurisdiction. The defendant argued on appeal that the restitution order was a condition of his supervised release, and section 3583(e)(2) permitted modification of terms of supervised release. The court of appeals affirmed the district court's ruling that illegality of a restitution order was not grounds for modification under section 3583(e)(2). The court noted that the legality of a condition was not a listed factor for courts to consider under the subsection in deciding whether to modify, reduce or enlarge the terms of supervised release, nor did the context of the provision support the defendant's position. Finally, the court maintained that such an interpretation would disrupt the established statutory scheme governing appellate review of illegal sentencing.

§5E1.2 Fines for Individual Defendants

United States v. Thompson, 227 F.3d 43 (2d Cir. 2000), *cert. denied*, 534 U.S. 903 (2001). The district court properly imposed a \$5,000 fine on a defendant who was convicted of illegal re-entry into the country after his prior felony conviction for bank fraud. Agreeing with the Third, Seventh and Tenth Circuits, the Second Circuit rejected the defendant's argument that he would never be able to pay a fine before he is deported.

United States v. Leonard, 37 F.3d 32 (2d Cir. 1994). The defendant argued that the Commission exceeded its authority in promulgating §5E1.2, which allows the costs of imprisonment to be imposed on the defendant. The appellate court agreed with the Seventh Circuit's reasoning in *United States v. Turner*, 998 F.2d 534 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993), which held that the Commission had the authority to promulgate §5E1.2 because the guideline considers the seriousness of the defendant's offense and deters others. The appellate court agreed with the Seventh Circuit that §5E1.2 is authorized by 28 U.S.C. § 994(c)(3) & (6), which states that the Commission should consider the "nature and degree of the harm caused by the offense" and "the deterrent effect . . . [on] others."

United States v. Sellers, 42 F.3d 116 (2d Cir. 1994), *cert. denied*, 516 U.S. 826 (1995). In addressing an issue of first impression which has split the circuits, the appellate court joined the Seventh and Ninth Circuits in holding that a fine for costs of imprisonment and supervised release may be assessed under §5E1.2(i), without first imposing a punitive fine under §5E1.2(c). See *United States v. Turner*, 998 F.2d 534, 536-37 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993); *United States v. Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993), *cert. denied*, 511 U.S. 1006 (1994). The appellate court interpreted the language of §5E1.2(i) permitting an "additional" fine for costs as an expression of the Commission's intention that a defendant's total fine, including the cost of imprisonment, may exceed the relevant fine range listed in subsection (c). *But see United*

States v. Norman, 3 F.3d 368, 370 (11th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); *United States v. Fair*, 979 F.2d 1037, 1042 (5th Cir. 1992); *United States v. Corral*, 964 F.2d 83, 84 (1st Cir. 1992); *United States v. Labat*, 915 F.2d 603, 606-07 (10th Cir. 1990).

Part G Implementing the Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The defendant's appeal asserted that the district court erred in imposing consecutive sentences. The Second Circuit held that the district court did not err in this case, but also noted that the sentencing court should run sentences consecutively only to the extent necessary to get to the total punishment for the grouped offenses. *See United States v. Blount*, 291 F.3d 201 (2d Cir. 2002) (noting that the sentencing court is required to impose consecutive sentences when necessary to achieve total punishment).

United States v. Cordoba-Murgas, 233 F.3d 704 (2d Cir. 2000). The district court may depart from the guidelines “total punishment” stacking provision, *see* §5G1.2, if it finds there are aggravating or mitigating circumstances not adequately taken into consideration by the sentencing commission. *Id.* at 709. Specifically, a court may depart where findings as to uncharged relevant conduct made by the sentencing court by the preponderance of the evidence standard substantially increase the defendant’s sentence under the guidelines. *Accord United States v. White*, 240 F.3d 127, 137 (2d Cir. 2001).

United States v. White, 240 F.3d 127 (2d Cir. 2001). The appellate court concluded that the guideline concept of total punishment requires a court to impose sentences on separate counts consecutively where the guideline range is higher than the statutory maximum on any one count. The court ruled that the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is inapplicable to a sentencing judge’s decision, required by the guidelines, to run sentences consecutively. Further, “preponderance of the evidence” standard applies when determining relevant conduct under this section for determining “total punishment.” .

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

United States v. Garcia-Hernandez, 237 F.3d 105 (2d Cir. 2000). The defendant was serving a state sentence for a parole violation. The conduct leading to his violation was his illegal reentry into the country. He was then convicted of illegal reentry in district court. The defendant argued that his sentence must run concurrently under §5G1.3(b), which requires concurrent sentences where “the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense” The circuit court held that the defendant’s state sentence was actually a sentence for his original offense (a drug conviction), not the violation conduct of illegal reentry, and therefore was not accounted for in his guideline offense level for illegal reentry. Accordingly,

the district court properly applied §5G1.3(c) (district court has the discretion to run sentence, concurrent, partially concurrent or consecutive).

United States v. Maria, 186 F.3d 65 (2d Cir. 1999). The district court erred in concluding that Application Note 6 to §5G1.3 precluded the court from imposing a concurrent sentence. In sentencing a defendant who commits a federal offense while on probation, parole, or supervised release, a court is not required to impose a sentence consecutive to the term imposed for the violation of probation, parole, or supervised release.

United States v. McCormick, 58 F.3d 874 (2d Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's sentence consecutively to his state sentence. The defendant argued that the sentence should be concurrent because the district court was bound by §5G1.3(c) and Application Note 3 to impose a sentence that most closely approximates the sentence he would have received had he been sentenced at one time for all his offenses. The circuit court stated that while sentencing courts should "consider" the methodology of Note 3 in determining a reasonable incremental punishment, "the commentary's plain language does not make it the exclusive manner in which a court must sentence a defendant serving an undischarged term." *United States v. Lagatta*, 50 F.3d 125, 128 (2d Cir. 1995). The appellate court held that the district court met the requirements of §5G1.3(c) because the judge expressly stated at sentencing that the consecutive sentence would result in a reasonable incremental punishment and the calculations were presented to the court.

United States v. Perez, 328 F.3d 96 (2d Cir.), *cert. denied*, 124 S. Ct. 283 (2003). The defendant raised on appeal whether §5G1.3(a), mandating that certain sentences run consecutively, conflicted with, and was therefore trumped by, 18 U.S.C. § 3584, directing a sentencing court to weigh various factors in deciding whether to impose a concurrent or consecutive sentence. The Second Circuit noted that, although it had not previously addressed this issue, there was no current dispute among the other circuits regarding this question. The courts of appeals that had considered the matter all agreed that §5G1.3(a) and 18 U.S.C. § 3584 did not conflict, and that the consecutive sentence mandate of §5G1.3(a) precluded concurrent sentencing except insofar as the sentencing judge identified grounds for a downward departure. *See United States v. Schaefer*, 107 F.3d 1280, 1285 (7th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998); *United States v. Flowers*, 995 F.2d 315, 316-17 (1st Cir. 1993); *United States v. Gullickson*, 981 F.2d 344, 349 (8th Cir. 1992); *United States v. Shewmaker*, 936 F.2d 1124, 1128 (10th Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991); *United States v. Stewart*, 917 F.2d 970, 973 (6th Cir. 1990); *United States v. Miller*, 903 F.2d 341, 349 (5th Cir. 1990); *United States v. Rogers*, 897 F.2d 134, 137 (4th Cir. 1990); *United States v. Fossett*, 881 F.2d 976, 980 (11th Cir. 1989). The Second Circuit joined its sister circuits in their position on this issue.

United States v. Rivers, 329 F.3d 119 (2d Cir. 2003). The defendant pled guilty to distribution of crack cocaine. The district court sentenced the defendant to 64 months, and ordered the sentence to be served concurrently with defendant's state sentence. Additionally, the district court, *sua sponte* and over the government's objections, adjusted the defendant's sentence pursuant to §5G1.3(b) by deducting the 18 months the defendant had already served in state

prison—leaving the defendant with a total of 46 months remaining to complete his sentence. The government appealed and argued that, because the defendant’s minimum sentence is set by 21 U.S.C. § 841(b)(1)(B), the district court was not authorized under §5G1.3 to adjust the sentence, and that any adjustment for time served would result in a sentence lacking the mandatory minimum prescribed by the statute. The issue on appeal was whether, or to what extent, §5G1.3(b) applied to statute-based mandatory minimum sentences. The Second Circuit noted that several circuits had reviewed this question and rejected the government’s argument. *See United States v. Ross*, 219 F.3d 592, 594 (7th Cir. 2000); *United States v. Dorsey*, 166 F.3d 558, 564 (3d Cir. 1999); *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995); *United States v. Kiefer*, 20 F.3d 874, 876-77 (8th Cir. 1994). The court agreed with its sister circuits. The court held that so long as the total period of incarceration, after the adjustment, is equal or greater than the statutory minimum, the statutory dictate has been observed and its purpose accomplished. In the instant case, the defendant was sentenced to an aggregate period of 64 months, above the minimum sentence mandated by 21 U.S.C. § 841(b)(1)(B). The resulting adjusted sentence the district court imposed for the totality of the conduct amounted to the sentence intended by the statute. Accordingly, the district court’s sentence was affirmed.

United States v. Thomas, 54 F.3d 73 (2d Cir. 1995). The Second Circuit affirmed the district court’s decision requiring the defendant’s sentences to run consecutively. Although the defendant had two prior convictions that were part of the same course of conduct as the present offense, he also had a conviction that was not. Accordingly, the district court correctly imposed consecutive sentences pursuant to §5G1.3(b).

United States v. Whiteley, 54 F.3d 85 (2d Cir. 1995). While on parole for a state murder conviction, the defendant disappeared. He resurfaced in Virginia where he was convicted in federal court for armed bank robbery. After his conviction in Virginia, the defendant was charged and convicted of federal bank robbery in Connecticut. Although the defendant was on escape status when he was convicted in Virginia, the Virginia federal district court incorrectly imposed a federal sentence concurrent to the Connecticut state sentence. The Connecticut federal district court, aware of the Virginia federal district court’s error, decided that the defendant was an escapee when all later federal offenses were committed. Therefore, it applied §5G1.3(a) and imposed consecutive sentences. The Second Circuit determined that the sentencing court misapplied 5G1.3. Because the defendant was subject to multiple undischarged terms of imprisonment, the sentencing court should have determined, for each prior sentence, whether §5G1.3(a), (b) or (c) applied. Section 5G1.3(a) applied to the defendant’s state conviction, thus requiring a consecutive sentence. Section 5G1.3(a) did not, however, apply to the Virginia conviction because the defendant was not on escape status from the Virginia offense when the Connecticut federal offense occurred. Therefore, the district court should have applied §5G1.3(c) to that conviction. Nevertheless, because the Virginia federal district court’s error rendered §5G1.3’s commentary inapplicable, the Connecticut federal district court had full discretion to determine the defendant’s sentence and remand was not necessary.

United States v. Williams, 260 F.3d 160 (2d Cir. 2001), *cert. denied*, 535 U.S. 1006 (2002). Although the district court erred in failing to apply §5G1.3(b) when determining the defendant’s sentence, the decision was upheld because application would not have changed the

defendant's sentence. The defendant argued that the district court should have applied §5G1.3 to credit him for time served on his state conviction. The Second Circuit held that because the state offense was not fully taken into account in the defendant's sentence, his sentence did not have to run concurrently with his state sentence.

Part H Specific Offender Characteristics

§5H1.3 Mental and Emotional Conditions (Policy Statement)

United States v. Brady, 417 F.3d 326 (2d Cir. 2005). The district court granted the defendant a five-level downward departure under §5H1.3 after finding she suffered extraordinary childhood abuse that created a mental or emotional condition that caused her to commit the instant bank fraud. The Second Circuit agreed that the defendant suffered extraordinary childhood abuse as a child, but nonetheless reversed the departure. The evidence was insufficient to support a finding that the extreme abuse suffered by the defendant contributed to her commission of bank fraud, as required by §5H1.3 for a departure. To support a departure there must be a causal connection between the abuse and the criminal conduct. The record provided little support for a finding that the defendant's impaired emotional or mental condition led her to engage in a conspiracy to commit bank fraud.

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

United States v. Herman, 172 F.3d 205 (2d Cir. 1999). The district court's erroneous finding that the defendant had been drug free "for almost two years" could not justify a downward departure for extraordinary rehabilitative efforts. The defendant was convicted of two sales of a small amount of marijuana to undercover agents within 1,000 feet of a school and an unrelated scheme to defraud a health care benefit program. He faced a career offender sentence based on two prior felony convictions. At sentencing, the district court found that the defendant had been "drug free for over two years," despite the record of the colloquy, which showed that it was unclear how long the defendant had been drug free. The district court also failed to make findings to show that the defendant's rehabilitative efforts made it less likely that the defendant would commit future crimes. The case was remanded for further findings and resentencing.

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

United States v. Ekhtator, 17 F.3d 53 (2d Cir. 1994). The defendant entered a plea agreement in which she agreed not to move for a downward departure. Prior to sentencing, defense counsel advised the court that the defendant was a widow with five children, three of whom suffered serious health problems. Pursuant to the plea agreement, counsel did not move for a departure. During the defendant's sentencing, the district court indicated that it wished the law provided him with the authority to grant a departure. On appeal, the government argued that because Second Circuit precedent established that family circumstances could form the basis of a downward departure, *see United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992), and because the district court judge had granted downward departures *sua sponte* in previous cases, the statement

made at the defendant's sentencing merely indicated that the judge chose not to grant the departure. The Second Circuit disagreed, interpreting the statement to mean that the judge believed he lacked the discretion to depart *sua sponte*. The judgment was vacated and the case was remanded for resentencing.

United States v. Galante, 111 F.3d 1029 (2d Cir. 1997). The district court determined that extraordinary family circumstances warranted a downward departure. The government appealed, contending that the defendant faced no more family responsibilities than a typical married defendant with two children and that nothing about these family circumstances was extraordinary. Moreover, the government argued that family circumstances, although not a forbidden basis for departing outside the Guidelines' heartland, are a discouraged basis for departure because the Sentencing Commission has deemed them to be not generally relevant. The circuit court rejected the government's argument and held pursuant to its interpretation of §5H1.6 that a sentencing court can depart under these circumstances when family relationships are deemed "exceptional." See *United States v. Londono*, 76 F.3d 33, 36 (2d Cir. 1996). The circuit court, applying the abuse of discretion standard set forth in *Koon v. United States*, 518 U.S. 81 (1996), looked to the sentencing judge's emphasis on the limited earning capacity of the defendant's wife and her difficulty with the English language, the fact that the defendant was the principal support for his family and had no other family members living in close proximity to help assist them financially. Although the government argued that socio-economic conditions were not to be considered in determining a downward departure, the circuit court held that the policy statement to §5H1.10 does not mean that the economic dependency of a family on a defendant should be irrelevant when determining whether family circumstances are sufficiently extraordinary to allow a downward departure under §5H1.6.

Part K Departures

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

United States v. Brechner, 99 F.3d 96 (2d Cir. 1996). After being charged with tax evasion, the defendant entered into a written cooperation agreement with the government to provide substantial assistance in return for a downward departure under §5K1.1. As part of the terms of that agreement, the defendant promised to provide "truthful, complete, and accurate information." The defendant actively helped the government in a related bribery investigation which led to an arrest. During a debriefing session with the government, however, the defendant falsely denied receiving kickbacks related to his tax fraud scheme. The district court ruled that the government's refusal to file the motion was in bad faith, and granted defendant's motion for specific performance. The Second Circuit applied a standard of review requiring the court to examine "if the government has lived up to its end of the bargain," and whether it acted fairly and in good faith. The cooperation agreement specifically released the government from its obligation to file a §5K1.1 letter if the defendant gave false information. Accordingly, the appellate court vacated and remanded.

United States v. Campo, 140 F.3d 415 (2d Cir. 1998). The district court refused to consider the merits of the government's §5K1.1 motion for a downward departure based on the

defendant's substantial assistance to law enforcement authorities. Because the prosecutor refused to recommend a specific sentence, the government conceded on appeal that the case fell within the limited category of refusals to depart that were reviewable upon appeal. The Second Circuit held that because the district court judge failed to exercise his informed discretion when presented with the §5K1.1 motion, the defendant's sentence was "imposed in violation of the law," 18 U.S.C. § 3742(a)(1). Accordingly, the Second Circuit vacated the judgment of the district court and remanded the case for resentencing to consider the government's §5K1.1 motion. Additionally, the appellate court instructed the lower court that the failure of the U.S. Attorney's office to recommend specific sentences in future cases cannot prevent the court from exercising its own informed discretion in considering §5K1.1 motions.

United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995). The district court refused to conduct an evidentiary hearing to determine whether the government acted in bad faith in refusing to file a §5K1.1 motion in violation of a plea agreement. After sending a written agreement indicating satisfaction with the defendant's assistance, the government then determined that the defendant was not being truthful and decided not to execute the plea agreement that had been previously signed by both the defendant and the government. On appeal, the government argued that no binding plea agreement existed and even if it did, that the defendant had breached it by his conduct. The defendant argued that the district court erred in failing to conduct an evidentiary hearing to determine if the government acted in bad faith. The circuit court ruled that the district court had abused its discretion in failing to consider significant evidence and by failing to take important testimony. *See also United States v. Knights*, 968 F.2d 1483, 1487 (2d Cir. 1992).

United States v. Yee-Chau, 17 F.3d 21 (2d Cir. 1994). The defendant was convicted of drug related charges. The defendant argued that the government acted in bad faith by failing to move for a downward departure, and breached his cooperation agreement. The Second Circuit affirmed, finding that the government's refusal to make the §5K1.1 motion was justified given the fact that the defendant was unwilling to perform when originally requested to do so. The defendant's refusal to perform amounted to a breach of the cooperation agreement and relieved the government of its obligation to file the §5K1.1 motion.

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

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The defendant was convicted for illegally reentering the United States following deportation and was sentenced to 57 months' imprisonment, five years supervised release and a \$50 special assessment. The district court corrected the defendant's sentence six months later and, after departing downward, re-sentenced the defendant to 24 months' imprisonment, two years' supervised release and a \$50 special assessment. The Second Circuit concluded that the court lacked jurisdiction to re-sentence the defendant. The court further concluded that the basis for the downward departure was improper. The circuit court noted its previous decision in *United States v. Polanco*, 29 F.3d 35 (2d Cir. 1994) "left no room for the district court to conclude" that §2L1.2 did not completely account for the circumstances of [the defendant's] drug offense. The circuit court held that the sentencing enhancement applied to the defendant regardless of the underlying facts of the crime. The circuit

court also ruled that the three-year period between the defendant's drug trafficking conviction and deportation was not an appropriate reason for a downward departure.

United States v. Adelman, 168 F.3d 84 (2d Cir. 1999). The defendant pled guilty to 18 U.S.C. § 1001, and was sentenced under §2A6.1 (threatening or harassing communications). The defendant, while extremely intoxicated, made a number of phone calls to the United States Marshall's service to make threats against a federal judge, including one false claim that he had one of the judge's children. The district court found that the defendant's threats affected the judge's three children and supported a four-level upward departure. Thus, the court concluded that the multiple victim factor takes the case out of the heartland of §2A6.1, which does not account for harm to multiple victims. The court fashioned the extent of the departure based on the grouping principles of §3D1.4 by creating a hypothetical count for each of the victims of the threat. The Second Circuit held that the court did not abuse its discretion in using this method.

United States v. Amaya-Benitez, 69 F.3d 1243 (2d Cir. 1995). The defendant was convicted under 8 U.S.C. § 1326(b) for illegally reentering the United States after being deported following a conviction for an aggravated felony. The district court increased the offense level by 16 pursuant to §2L1.2(b)(2), but departed downward on the basis that the prior conviction over-represented the defendant's criminal behavior because of the "questionable basis" for his prior conviction. The government appealed on the ground that the court erred in examining facts underlying the aggravated felony conviction. The circuit court, relying upon two recent Supreme Court decisions, concluded that "a court may not look to the facts underlying a predicate conviction to justify a departure from a guideline imposed sentence on the basis of mitigating or aggravating circumstances surrounding such conviction." *See In Taylor v. United States*, 495 U.S. 575, 602 (1989); *Custis v. United States*, 511 U.S. 485 (1994). The circuit court, applying the reasoning of *Taylor* and *Custis*, concluded that once the court determines that the defendant's conviction encompasses the elements of an aggravated felony under §2L1.2, the court may not inquire further.

United States v. Bala, 236 F.3d 87 (2d Cir. 2000). The court held that "imperfect entrapment" is a possible ground for a downward departure as there is nothing in the guidelines to prohibit consideration of conduct by the government that is not enough to give rise to the defense of entrapment but is nonetheless "aggressive encouragement of wrong doing."

United States v. Bennett, 252 F.3d 559 (2d Cir. 2001), *cert. denied*, 535 U.S. 932 (2002). The district court upwardly departed ten years because the defendant's wife refused to forfeit assets in her name. The circuit held that the refusal of a third party to relinquish assets was not a proper ground for departure because it undermined the third party's statutory rights to contest the forfeiture.

United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir.), *cert. denied*, 531 U.S. 911 (2000). The defendants, who were convicted of illegally reentering the United States, appealed the district court's finding that it did not have the authority to downwardly depart. On appeal, the defendants argued that the court should depart based on the sentencing disparity that resulted from the charging policy of the U.S. Attorney's office in the Southern District of California

versus the policy in the Southern District of N.Y. In the Southern District of California, defendants are offered a plea to two counts of 8 U.S.C. § 1326, with a resulting sentence of 30 months (the maximum statutory exposure). Defendants in the Southern District of California do not face the 20-year statutory maximum under 8 U.S.C. § 1325 and the 16-level guideline enhancement of §2L1.1. The Second Circuit affirmed and held that “noninvidious plea-bargaining practices are not a permissible basis for departure.”

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not err in granting a downward departure based on mitigating circumstances not taken into account by the guidelines and the fact that the loss overstated the seriousness of the defendant's offense. The court characterized the district court's departure as a "discouraged departure"—a departure where the factors in question were considered by the Commission but may be present in such an "unusual kind or degree" as to take the case out of the "heartland" of the crime in question and to justify a departure. See *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). The court ruled that the departure was within the district court's discretion and was reasonable. The court also noted that district courts have a "special competence" in determining if a case is outside the "heartland" as they hear more cases dealing with the guidelines.

United States v. Cawley, 48 F.3d 90 (2d Cir. 1995). The district court departed upward under §5K2.0 (18 U.S.C. § 3553(b)) for defendant's perjury at his supervised release violations hearing. The defendant claimed that the guidelines did not authorize an upward departure for perjury at a hearing on revocation of supervised release. Section 5K2.0 allows an upward departure where "there exists an aggravating circumstance of a kind, or degree not adequately taken into consideration . . ." in formulating the guidelines. The Second Circuit held that "[w]hile the Guidelines for sentencing upon violations of supervised release make no explicit provision for a defendant's perjury at a violation hearing . . . perjury would constitute 'an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration' by the Commission."

United States v. Cornielle, 171 F.3d 748 (2d Cir. 1999). The district court did not err in granting only a limited departure (one level) based on a combination of circumstances including pre-indictment delay and rehabilitation. The defendant was convicted of perjury based on testimony he gave in a civil lawsuit four years earlier. The defendant requested a downward departure based on five grounds, including: (1) pre-indictment delay, (2) post-offense rehabilitation, (3) mitigating role, (4) assistance to the prosecution, and (5) criminal history category's overstatement of seriousness of defendant's criminal history. The court found that based on the facts in the case, a departure was not warranted based on any of the grounds individually. The pre-indictment delay did not violate due process and the court did not find the post-conviction rehabilitation to be extraordinary enough to provide an independent basis for departure. A decision not to depart is only appealable if there is a violation of law, misapplication of the guidelines, or if the court mistakenly believes it lacks authority to depart. There is no violation of law, thus the court's decision was entirely appropriate.

United States v. Delmarle, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 519 U.S. 1156 (1997). The district court departed upward in calculating defendant's sentence for knowingly transporting pictures of minors engaged in sexually explicit conduct based upon the following factors: 1) use of a computer to transfer child pornography for the purpose of soliciting a minor to engage in sexual activity; and 2) under-representation of his criminal history, in that his prior convictions for similar activities were not counted under the guidelines. One conviction was older than the ten-year guideline limit, and one was a foreign conviction. Because the abuse of discretion standard is appropriate in evaluating a court's decision to depart, the circuit court affirmed the lower court's sentence. The lower court is in a better position to evaluate the underlying conduct and to determine whether it was outside the "heartland" considered by the guidelines.

United States v. Fan, 36 F.3d 240 (2d Cir. 1994). The district court did not err in departing upward from the defendant's guideline range for his offense of illegally smuggling aliens into the United States. The district court's first justification for departing upward, the fact that the aliens would have likely spent years in involuntary servitude in the United States to pay for the smuggling fee, was appropriate. The second justification for an upward departure was the fact that "inhumane conditions" existed aboard the "fishing vessel" that transported the aliens. The aliens were forced to live in fish holds for 18 weeks, there was only one bathroom, the life preservers and life rafts were inadequate and order was maintained by the captain brandishing a gun. These factors amply support the contention that "inhumane" conditions existed. Contrary to the defendant's argument, the sentencing judge did not depart upward based on his conclusion that the defendant violated other criminal statutes; the judge did mention the offense level for another crime, but only to determine how far to depart, not whether to depart. Therefore, the departure was affirmed.

United States v. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999). A district court has authority to depart downward based on a defendant's consent to deportation if the defendant presents a colorable, nonfrivolous defense to deportation. The Second Circuit also adopted the First Circuit's reasoning regarding the appropriateness of the grounds for departure. *See United States v. Clase-Espinal*, 115 F.3d 1054, 1058-59 (1st Cir.), *cert. denied*, 522 U.S. 957 (1997). Because the overwhelming majority of alien criminal defendants are deported voluntarily, consenting to the deportation is of "such limited value as to preclude a finding that the consent presents a mitigating circumstance of a kind not adequately considered by the Commission." *Galvez*, 174 F.3d t 259-60 (quoting *Clase*, 115 F.3d at 1059). Thus, the act of consenting to deportation is insufficient grounds for a downward departure unless the defendant presents a nonfrivolous defense to deportation that would substantially assist in the administration of justice. In the instant case, the district court denied the defendant's request for a downward departure, after the government opposed the departure based on the policy of the local United States Attorney's office. The court made comments about the "exclusion of judicial discretion." Because the record was at least ambiguous as to whether the court understood its authority to depart in the absence of the government's consent, the case was remanded.

United States v. Gigante, 94 F.3d 53 (2d Cir. 1996), *cert. denied*, 522 U.S. 868 (1997). Defendants Mangano and Alois received substantial upward departures. They asserted that the extent of the departures was unreasonable, and that the proof of uncharged conduct by a

preponderance of the evidence was not sufficient to support upward departures of such magnitude. The appellate court affirmed the upward departure, holding that the preponderance test continues to govern in "such situations." The appellate court added that "the preponderance standard is no more than a threshold basis for adjustments and departures, and that the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures." *Id.* at 56. The appellate court concluded that the evidence was "compelling" enough to grant an upward departure in this case.

United States v. Kaye, 23 F.3d 50 (2d Cir. 1994). The district court departed upward based on the extent of the victim's financial loss. The defendant's fraud depleted his aunt's liquid assets and left her financially dependent on the good will of others. On appeal, he argued that the departure constituted double counting because his sentence had already been enhanced ten levels based on the amount of the monetary loss under §2F1.1 and the adjustments for abuse of a position of trust and vulnerable victim adequately reflected the harm caused to his aunt. Although the circuit court noted that the fraud guideline considered the kind of harm the victim suffered, the degree of harm caused was not reflected. Since the seriousness of the defendant's conduct was not captured by the offense level determination, the upward departure did not constitute double counting. Moreover, the circuit court concluded that the departure was appropriate because the district court's upward departure reflected the extent of the consequences of the defendant's conduct upon his victim, which was not captured by the applicable Chapter Three adjustments.

United States v. Korman, 343 F.3d 628 (2d Cir. 2003). The defendant was found guilty after a jury trial of participating in two schemes to defraud an investment bank and to launder the proceeds of the fraud. At sentencing, the defendant moved for a downward departure under §5K2.0 based on the assistance he provided to state law enforcement authorities in 1999 after he had been indicted for his involvement in the fraud against the bank. He testified before a state grand jury in connection with a 1972 killing. The defendant's testimony in the grand jury was essential in establishing the identification of the perpetrator. The district court determined that defendant's testimony before the grand jury merited a downward departure from level 26 to level 23 resulting in a range of 57 to 71 months' imprisonment. The government appealed. The Second Circuit stated that providing grand jury testimony in a state prosecution does not remove a case from the heartland of the guidelines. In the defendant's case there was nothing in the record to suggest that defendant's testimony was exceptional in any way such that it would support a departure. The defendant had a basic civic duty not only to testify before the grand jury but to testify truthfully. The defendant's testimony fell among the basic civic duties for which no departure was warranted under the guidelines.

United States v. Londono, 76 F.3d 33 (2d Cir. 1996). The district court granted a downward departure to the defendant to allow the defendant and his wife to try to have a child during the wife's remaining childbearing years. Relying upon §5H1.6, the district court departed from the applicable guideline range of 108 to 135 months to 37 months' imprisonment. The circuit court reversed, holding that although family responsibilities may present such "extraordinary circumstances" as to warrant a downward departure, the departure sought by the defendant would benefit chiefly himself. *Id.* at 36. Incarceration inevitably impacts on family

life and family members. Because "federal prison regulations do not provide for conjugal visits—a fact we assume is known to the Sentencing Commission—the inability to conceive children is therefore incidental to imprisonment." *Id.* The court concluded that district courts should not depart based on purely personal issues of family planning.

United States v. Los Santos, 283 F.3d 422 (2d Cir. 2002). The defendant was discovered by the INS during a routine screening of inmates in a New York state prison. Seven months after he was discovered, he pleaded guilty to his indictment for illegal reentry. The sentencing judge granted the defendant a downward departure to account for the period of incarceration from his initial arrest until his federal sentencing. The Second Circuit held that a sentencing court may not depart under §5K2.0 based on prosecutorial delay that resulted in a missed opportunity for concurrent sentencing unless the delay was “in bad faith or . . . longer than a reasonable amount of time for the government to have diligently investigated the crime.” The court held that the amount of time between when the defendant was found in the country by the INS and the time of his sentencing was not long enough to show bad faith on the part of the government. Thus, when the district court granted the departure, it was in error.

United States v. Luna-Reynoso, 258 F.3d 111 (2d Cir. 2001). The district court refused to grant the defendant a downward departure under §5K2.0 to credit him for time already served in federal custody between the date of his transfer from state custody and the date of his sentencing and the defendant appealed. The Second Circuit upheld the denial, ruling that the district court had no authority to grant such a departure. Section 18 U.S.C. § 3585 governs the date on which a defendant’s sentence commences and the credit he is given for time he has spent in custody, moreover, under section 3585, the Bureau of Prisons administers the credit to be granted a defendant for time he has served in federal custody prior to sentencing, not the sentencing court.

United States v. Mapp, 170 F.3d 328 (2d Cir.), *cert. denied*, 528 U.S. 901 (1999). The district court departed upward from a guideline range of 262 to 327 months imprisonment by imposing a sentence of 450 months based on the three robberies for which the jury was unable to reach a verdict. The court found by clear and convincing evidence that the defendant had participated in the three robberies, one of which involved a shooting. The Second Circuit affirmed, holding that the district court had discretion to consider acquitted conduct. *See also United States v. Watts*, 519 U.S. 148 (1997)

United States v. McCarthy, 271 F.3d 387 (2d Cir. 2001). The district court refused to grant a downward departure because it determined that the nature of the offense conduct was not "atypical." Because the record shows that the district court recognized its authority to depart and chose not to do so, the decision is not reviewable. *See United States v. Piervinanzi*, 23 F.3d 670, 685 (2d Cir.), *cert. denied*, 513 U.S. 904 (1994)

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001), *cert. denied*, 535 U.S. 949 (2002). The district court committed no error when it did not grant defendants a downward departure after using a preponderance of the evidence standard to prove the facts underlying the attribution of a murder. Citing *United States v. Cordoba-Murgas*, 233 F.3d 704, 708-09 (2d Cir. 2000) the court stated that the "preponderance standard applies to fact finding at sentencing even when the

proposed enhancement would result in a life sentence [and] that the district court could consider a departure pursuant to §5K2.0 where there is a ‘combination of circumstances . . . including (i) an enormous upward adjustment, (ii) for uncharged conduct, (iii) not proved at trial, and (iv) found by only a preponderance of the evidence.’” The Second Circuit ruled that the district court appropriately considered the defendants’ requests for a downward departure on this basis and found no error in the district court’s analysis of the applicable burden of proof.

United States v. Nuzzo, 385 F.3d 109 (2d Cir. 2004). The district court awarded a downward departure under §5K2.0 without giving notice to the government. The government appealed asserting that 1) the departure was unjustified; 2) the court failed to provide advance notice that it was contemplating a departure and 3) the district court failed to satisfy the written, specific reasons for departure required by the PROTECT ACT. The Second Circuit agreed with the government and remanded the case. The court instructed that on remand, the district court must adhere to the requirements of the PROTECT Act to state in open court, “with specificity in the written order and judgment,” reasons for imposing a sentence outside the guidelines. The district court’s earlier explanation of its decision to depart was conclusory and did not adhere to the requirements of the PROTECT Act.

United States v. Puello, 21 F.3d 7 (2d Cir. 1994). The defendant pleaded guilty to illegally redeeming \$43,000,000 worth of food stamp coupons and preparing more than 500 fraudulent certificates. The district court found that there had been no “loss” as defined by §2F1.1 and departed upward because the fraud guideline inadequately considered the dollar amount of the fraud and the number of false statements made to perpetuate the crime. The circuit court upheld the district court’s departure, which referred by analogy to the money laundering guideline, §2S1.1, to add 11 levels. The circuit court rejected the defendant’s argument that the court was required to find that his conduct violated the elements of the offense of money laundering before the court could apply that guideline in forming a departure. Sentencing courts are encouraged to consider “analogous guideline[] provisions to determine the extent of departure.” *United States v. Rodriguez*, 968 F.2d 130, 140 (2d Cir.), cert. denied, 506 U.S. 847 (1992).

United States v. Schmick, 21 F.3d 11 (2d Cir. 1994). The defendant argued at his sentencing hearing that a downward departure was warranted based on his age and health and his aberrant criminal activity. The district court explicitly accepted the first two bases and granted a two-level downward departure, but did not address the third. On appeal, the defendant challenged the failure to mention the additional ground as an indication of the court’s perception that it lacked the authority to depart based on aberrant behavior. The court of appeals held that absent evidence in the record that the sentencing court was confused as to its authority to depart based on a particular ground, its acceptance of an alternate departure basis did not indicate that the court misunderstood its authority to depart on the unmentioned ground.

United States v. Sprei, 145 F.3d 528 (2d Cir. 1998). Prior to sentencing, the district court received letters from members of the defendant’s religious community, attesting to the devastating impact a long period of incarceration would have on the defendant’s children, for whom the defendant would not be available to find marriage partners. Marriages are arranged by

the parents in the Hasidic Jewish community. The district court departed based on the consequences to the children's marriage prospects due to the unusual customs of the defendant's community. The Second Circuit reversed, noting that departures for family ties are discouraged and that the defendant's children's circumstances were not very different from the those of other defendants' children—the stigma of their parent's punishment has lessened their desirability as marriage partners. To the extent the circumstances are atypical because the practices of the Bobov Hasidic community place special emphasis on the role of the father, this is an improper basis for departure inasmuch as it treats adherents of one religious sect differently from another.

United States v. Tejada, 146 F.3d 84 (2d Cir. 1998). The district court departed downward on the basis that the defendant's status as a career offender significantly overstated the seriousness of his criminal history. The district court offered several reasons for the conclusion: that the defendant received very light sentences for his career offender predicate offenses; that his codefendant received a much lower sentence; the relatively small quantity of drugs involved; and the defendant's eligibility for deportation after his release from custody. The court of appeals reversed, holding that a downward departure based on prior lenient sentences conflicts with §4A1.3, which states that a prior lenient sentence for a serious offense may warrant an upward departure. Circuit precedent already forbids departures for codefendant disparity and quantity of drugs. Finally, the Second Circuit found that the district court failed to note any extraordinary consequence of the defendant's alienage that would warrant a downward departure; the court of appeals had previously held that deportation alone does not constitute an extraordinary consequence that would justify departure.

United States v. Tropicano, 50 F.3d 157 (2d Cir. 1995). The district court erred in imposing an upward departure under §5K2.0 based on the defendant's criminal history. The appropriate guideline for a departure based on the inadequacy of defendant's criminal history category is §4A1.3. "[A] district court cannot avoid this step-by-step framework [of a §4A1.3 departure] by classifying a departure based on criminal history as [an offense level departure] involving aggravating circumstances under §5K2.0." *United States v. Deutsch*, 987 F.2d 878, 887 (2d Cir. 1993)." The appellate court noted that other circuits "have not adopted so rigid a demarcation . . . and will affirm §5K2.0 departures based on criminal history concerns." *See, e.g., United States v. Schmeltzer*, 20 F.3d 610, 613 (5th Cir.) (§5K2.0 departure affirmed for prior convictions for similar offense), *cert. denied*, 513 U.S. 1041 (1994); *United States v. Nomeland*, 7 F.3d 744, 747-48 (8th Cir. 1993) (§5K2.0 departure affirmed based on extensive violent criminal activity); *United States v. Molina*, 952 F.2d 514, 518-19 (D.C. Cir. 1992) (§5K2.0 departure affirmed based on prior similar offenses). The appellate court stated that the "failure to follow the category-by-category horizontal departure procedure would not matter if the district court had stated on the record an alternative reason other than recidivism for reaching the same result." The case was remanded for resentencing.

United States v. Williams, 65 F.3d 301 (2d Cir. 1995). The defendant was convicted of distributing and possessing with intent to distribute five grams and more of cocaine base. The defendant's guideline range was 130-162 months. At his initial sentencing, the district court departed downward *sua sponte* based on the defendant's desire to attend a drug treatment program, and sentenced the defendant to two concurrent five-year terms of imprisonment

followed by two concurrent ten-year terms of supervised release. The government appealed and the circuit court vacated the sentence, ruling that although it recognized that a defendant's rehabilitative efforts in ending his drug dependence may be a permissible grounds for departure, the defendant's "genuine desire to seek rehabilitative treatment in the future" fell short of the "extraordinary" efforts at rehabilitation that justified a departure. *United States v. Williams*, 37 F.3d 82 (2d Cir. 1994). At resentencing, the district court imposed the same sentence, concluding that the Sentencing Commission could not have considered the particular circumstances of the case, namely that the defendant fit a narrow profile for a selectively available pilot drug treatment program, which in the absence of a downward departure would not be available to him for a significant number of years. The government appealed the sentence a second time. The circuit court ruled that the downward departure was permissible, noting its decision in *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992), holding that rehabilitative endeavors could serve as a basis for downward departure. The circuit court further noted that there was no evidence that the Sentencing Commission had given adequate consideration to a defendant's efforts at drug rehabilitation in formulating the guidelines. The circuit court ruled that the district court had the authority to depart downward to facilitate the defendant's rehabilitation given the atypical facts of the case, which placed it outside the "heartland" of usual cases involving defendants who may benefit from drug treatment. The circuit court limited its ruling, noting that its intent was not to imply that downward departures should be granted automatically to defendants in that situation. The circuit court further held that the departure was not reasonable because it failed to consider unwarranted sentencing disparities because the term of supervised release lacked special conditions to guarantee that the defendant could not withdraw from the program and be released at the end of five years while similar defendants who committed similar crimes would serve another six to nine years. The circuit court held that the risk of unwarranted sentencing disparity would be allayed if the district court were to impose specified special conditions. The circuit court vacated the sentence to allow these special conditions to be added to the defendant's sentence to ensure that the defendant serves at least his guideline minimum sentence if he did not successfully complete the drug program.

United States v. Young, 143 F.3d 740 (2d Cir. 1998). The district court granted a one-level downward departure for stipulated deportation even though the defendant was a naturalized citizen not subject to deportation. The district court reasoned that similarly situated alien defendants routinely received a one-level departure if they stipulated to deportation. The district court concluded that American citizens were essentially penalized for their lawful status because they could not qualify for the reduction. The court of appeals vacated, noting that the defendant was not similarly situated to alien defendants because he would not be deported for his criminal conviction. Thus, it was an improper basis for departure.

§5K2.2 Physical Injury (Policy Statement)

United States v. Jones, 30 F.3d 276 (2d Cir.), *cert. denied*, 513 U.S. 1028 (1994). The district court departed upward based on injury resulting from a drug conspiracy in which the defendant planned for days the shooting of an undercover police officer which resulted in

massive internal injuries. The circuit court affirmed and held that the district court was authorized to depart because the sentencing guidelines did not adequately take into consideration the intentional and indifferent nature of the defendant's acts.

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

United States v. Crispo, 306 F.3d 71 (2d Cir. 2002). The defendant was convicted of one count of attempted extortion and one count of attempted obstruction of justice. The defendant objected to an upward departure of two levels under §§5K2.3 and 5K2.0 for extreme psychological injury and other aggravating circumstances. The defendant argued that he was not given sufficient notice of the district court's intention to upwardly depart from the adjusted offense level due to extreme psychological injury. The court stated that, although the defendant was correct that either the government or the sentencing court must give the defendant prior notice of the grounds that may be used to justify a departure from the guidelines, the defendant overlooked the fact that his presentence report specifically mentioned both the possibility of and the basis for an extreme psychological injury departure. The court concluded that no more notice than this was required. The case was remanded to the district court on other grounds.

United States v. Lasaga, 328 F.3d 61 (2d Cir. 2003). The defendant pled guilty to receipt of child pornography, and possession of child pornography. At the sentencing hearing, the district court departed upward one level under §5K2.3, which allows for upward departure where a victim suffered psychological injury much more serious than that normally resulting from commission of the offense. The Second Circuit stated that §5K2.3 is comprised of two paragraphs. On appeal, the defendant argued that each of the paragraphs set forth a separate prong of the test for an upward departure under §5K2.3. The Second Circuit agreed, and stated that §5K2.3 should be applied as follows: if a district court finds that the factors in the second paragraph of §5K2.3 are met, then the basic standard set out in the first sentence of the first paragraph of this section must also be met. In other words, §5K2.3 requires a finding of comparatively greater harm, relative to a normal or typical injury of the type enumerated in the guideline. In the instant case, the district court did not find that the injury suffered by the victim was any more serious than that normally resulting from the crime, let alone much more serious as §5K2.3 explicitly required. The district court merely found that it had resulted in a substantial impairment. Accordingly, the district court erred in applying an upward adjustment under §5K2.3 without making the additional finding that the victim suffered much more serious harm than would normally be the case. The district court's sentence was vacated and remanded.

United States v. Morrison, 153 F.3d 34 (2d Cir. 1998). In sentencing the defendant for transmitting through interstate commerce threats to injure various persons and transmitting threats with intent to extort money, the district court properly departed upward by 14 levels for the defendant's extreme conduct and for extreme psychological injury to victims. The district court made specific findings regarding the extensive impact the defendant's threats had on the victims' lives, the duration of the threats, and the cruel and heinous nature of the threats. On appeal, the defendant argued that testimony from psychiatric experts was necessary for a departure based on psychological injury. The Second Circuit disagreed and found no error in adding levels for each of the victims and adding levels for "secondary" victims, including the

victims' family and friends, to whom the defendant made additional threats. The departure for extreme behavior was warranted by the nature of the establishments threatened, including a hospital emergency room, a police department, and a medical examining board, which was forced to cancel an exam that affected thousands of physicians.

§5K2.8 Extreme Conduct (Policy Statement)

See United States v. Morrison, 153 F.3d 34 (2d Cir. 1998), §5K2.3, p. 62.

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

United States v. Mussaleen, 35 F.3d 692 (2d Cir. 1994). The defendants were convicted of participating in a scheme to smuggle a Guyanese citizen into the United States. The appellate court held that when a district court departs upward pursuant to §5K2.4 (permitting an upward departure if a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense), the court is not required to also depart downward pursuant to §5K2.10 (permitting a downward departure when the victim's wrongful conduct contributed significantly to provoking the offense), even though the victim "voluntarily entered a network of criminal operatives with the intention that they would transport her illegally." The district court, in its discretion, chose not to depart downward under §5K2.10 and that ruling will not be disturbed.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Carrasco, 313 F.3d 750 (2d Cir. 2002). The defendant pled guilty to illegal reentry following deportation in violation of 8 U.S.C. § 1326. At his sentencing hearing, the defendant contended that he had reentered the United States with the intention of returning to his native country to care for his three children after visiting his ailing father. Based on the record, the district court stated that it was clear the defendant's reentry was not for the purposes of committing future crimes. The district court then granted defendant a downward departure pursuant to §5K2.11 based on lesser harm. On appeal, the government challenged the district court's downward departure. The Second Circuit noted that the district court applied a lesser harm departure because it thought the defendant's conduct did not cause the harm sought to be prevented by the guidelines' 16-level enhancement applicable to reentering aliens who were deported for committing an aggravated felony. *See* §2L1.2. According to the district court, the §2L1.2 enhancement imposed extra punishment in order to deter only those deported aliens who reentered for the purpose of committing further crimes. The Second Circuit stated that section 1326 makes a deported alien's unauthorized presence in the United States a crime in itself and concluded that defendant was not entitled to a lesser harm departure because a deported alien reentering the country illegally, even without intent to commit a crime, has committed the act the statute prohibits.

§5K2.12 Coercion and Duress (Policy Statement)

United States v. Amor, 24 F.3d 432 (2d Cir. 1994). The district court granted a downward departure based on duress, finding that the defendant would not have purchased and altered the firearm but for the threats he received and the shots fired at his vehicle pursuant to §5K2.12. The government argued on appeal that "committed the offense because of" as it is used in §5K2.12 referred to the offense that controlled the defendant's offense level for the entire group of offenses. Since the retaliation count was the controlling offense, and the duress was related only to the firearms count, the government asserted that the departure was erroneous. The Second Circuit rejected this argument because it was a narrow interpretation of "because of." There was a clear nexus between the threats and the defendant's gun acquisition. Even though the retaliation count was not wholly related to the duress, a sufficient causal nexus existed between the original duress and the subsequent retaliation.

United States v. Cotto, 347 F.3d 441 (2d Cir. 2003). Defendant pled guilty to one count of conspiracy to engage in witness tampering/obstruction of justice in violation of 18 U.S.C. §§ 371 and 1512(b)(3). The charging indictment detailed a larger criminal enterprise involving 21 other defendants, accusing them of multiple narcotics conspiracies, murder in furtherance of a racketeering enterprise, assault, firearms crimes, and bank fraud. At sentencing, pursuant to §5K2.12, the district court departed from the 60-month statutory maximum and imposed a sentence of 24-four months. On appeal, the government argued that the district court erred by interpreting "serious coercion" to include the defendant's perception, based solely on her knowledge of Soler's criminal history, that Soler might harm her or her family if she refused to participate in the conspiracy to obstruct the investigation of the murder. The Second Circuit held that the coercion occasioned by a defendant's generalized fear of a third party, based solely on knowledge of that third party's violent conduct toward others rather than on any explicit or implicit threat, was insufficient to constitute the unusual or exceptional circumstances warranting a departure under §5K2.12. In other words, because defendant was never forced to do anything or threatened with harm if she did not comply with Soler's wishes, and was not in possession of information that suggested that merely refusing to associate with Soler would cause him to harm her, her understandable fear in dealing with someone capable of great violence did not amount to exceptional coercion. The judgment of the district court was vacated and the case was remanded for resentencing.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Silleg, 311 F.3d 557 (2d Cir. 2002). The defendant pled guilty to receiving and possessing child pornography. The defendant moved for a downward departure pursuant to §5K2.13, diminished capacity. The district court denied the defendant's motion. At the sentencing hearing, the district court noted that almost every child pornography defendant comes with documented psychological problems. The district court reasoned that such psychological problems were adequately considered by the Sentencing Commission when the Commission adopted the guidelines for child pornography offenses. On appeal, the defendant argued that the district court misapprehended its authority to depart on the basis of diminished capacity in child pornography cases and erred in denying him individualized consideration of his

departure motion. The Second Circuit noted that, after reviewing §5K2.13 and §2G2.2, it found no textual support for the district court's reasoning that the Sentencing Commission had already implicitly considered diminished capacity in developing guidelines for child pornography offenses, thereby rendering departure on that basis impermissible except in extraordinary circumstances. Furthermore, although the court has not specifically addressed whether a diminished capacity departure was available in child pornography cases, other circuits have recognized that such departures are permissible. See *United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997); *United States v. Black*, 116 F.3d 198, 201-01 (7th Cir.), cert. denied, 522 U.S. 934 (1997); *United States v. Goossens*, 84 F.3d 697, 700-02 (4th Cir. 1996); *United States v. Soliman*, 954 F.2d 1012, 1014 (5th Cir. 1992). Accordingly, the court held that, based on the plain language of the guidelines and the views of most other circuits, the diminished capacity of a defendant in a child pornography case may form the basis for a downward departure where the requirements of §5K2.13 are satisfied.

§5K2.20 Aberrant Behavior (Policy Statement)

United States v. Castellanos, 355 F.3d 56 (2d Cir. 2003). After a four-day trial, a jury found the defendant guilty of conspiring to distribute 100 grams or more of heroin. On appeal, the defendant argued that the district court improperly considered the fact that her offense conduct was not spontaneous in denying an aberrant behavior departure under §5K2.20. The Second Circuit noted that a sentencing court may exercise its discretion to depart for aberrant behavior only where the offense is "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." The court stated that spontaneity was not determinative, but it was a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of §5K2.20 has been met.

United States v. Gonzalez, 281 F.3d 38 (2d Cir. 2002). The district court erred in denying the defendant a downward departure based on aberrant behavior because the court misapplied the guidelines, used the wrong legal standard, and mistakenly believed it lacked the authority to depart. The district court specifically sought an element of spontaneity in the defendant's behavior in determining whether his behavior was "of limited duration" as required by §5K2.20. The district court was incorrect in this analysis. The Second Circuit noted that the Sentencing Commission expressly intended to relax the requirements for aberrant behavior. Therefore, the Second Circuit held that the sentencing court should not consider spontaneity in connection with aberrant behavior. Finally, the Second Circuit held that because the sentencing court recognized that the offense of conviction was a "marked deviation from an otherwise law-abiding life," a departure for aberrant behavior would be appropriate.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

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

United States v. Zapatka, 44 F.3d 112 (2d Cir. 1994). The district court applied a guideline different from the one previously endorsed by the prosecution in a letter to the probation department without first giving the defendant reasonable notice of its intention to do so and an opportunity to be heard. The Second Circuit, relying on admonitions contained in §§6A1.2 and 6A1.3, ruled that because the defendant's role in the offense was "reasonably in dispute," she was entitled to advance notice of the district court's choice of guideline.

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. Conte, 99 F.3d 60 (2d Cir. 1996). The district court imposed as a condition of probation the requirement that the defendant report to a probation officer and truthfully respond to questions, and revoked the defendant's probation upon his refusal to answer the probation officer's questions and to allow the officer to enter his home. The Second Circuit rejected the defendant's argument that his Fifth Amendment rights were violated by implementation of these requirements, which were authorized by statute and the guidelines. The court recognized that while a probationer is not entirely deprived of his Fifth Amendment rights, in asserting these rights he runs the risk that his actions will lead to a violation of probation. The argument fails in this particular case for two reasons: 1) a probation revocation proceeding is not itself part of the criminal proceeding and the right against self-incrimination does not attach; and 2) even if the right existed, the defendant waives this right by testifying in his own defense.

United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997). The defendant appealed his revocation of supervised release and sentence of 36 months in prison. The defendant argued that the district court erred by upwardly departing from the guidelines' policy statements without giving him reasonable notice of its intention to do so or its grounds for departing. The Second Circuit disagreed, noting that the district court specifically stated during the hearing that failure to complete a treatment program would result in a possible upward departure. The court, agreeing with the Fifth, Tenth, and Eleventh Circuits, held that the district court was not required to give notice to the defendant before imposing a sentence above the range suggested by Chapter Seven's non-binding policy statements. See *United States v. Mathena*, 23 F.3d 87, 93 (5th Cir. 1994); *United States v. Burdex*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997); *United States v. Hofierk*, 83 F.3d 357, 362 (11th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997). Because these policy statements are merely advisory, the sentencing court is not "departing" from any binding guideline when it imposes a sentence in excess of the range recommended by the Chapter Seven.

United States v. Whaley, 148 F.3d 205 (2d Cir. 1998). The defendant had served a 77-month sentence for a narcotics conviction and 508 days on a conviction under 18 U.S.C. § 924(c). The section 924(c) conviction was subsequently vacated under *Bailey v. United States*, 516 U.S. 137 (1995). The defendant then violated the terms of his supervised release and was sentenced to six months' imprisonment. The Bureau of Prisons credited the defendant with the time already served and released him. The government moved to modify the revocation sentence pursuant to §7B1.3(e), which directs a court revoking supervised release to increase the term of imprisonment by the amount of time the defendant will be credited for official detention. The district court denied the motion, but held that the defendant was not entitled to the credit BOP had granted pursuant to 18 U.S.C. § 3585(b) and ordered the defendant to begin serving his sentence. The court of appeals vacated this order, holding that the district court lacked jurisdiction to determine credits under section 3585(b); only the Attorney General, through BOP, possesses the authority to grant or deny credits. The court of appeals noted that district courts need to be alerted to the existence of applicable prison credits and the need to comply with §7B1.3(e) at revocation proceedings.

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

United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996). The defendant was serving a term of supervised release when he pleaded guilty to sending obscene materials to a minor. The district court revoked the defendant's supervision and imposed an 18 month sentence. The defendant asserted on appeal that the 18-month prison sentence imposed for this violation is "plainly unreasonable." Before reaching the defendant's contentions, the circuit court noted that the Chapter Seven policy statements are "advisory" in nature and may be reviewed on the appellate level. First, the defendant pointed out that the New Jersey state court had imposed only a four-month sentence for the underlying offense involving the obscene material. The circuit court noted that comparison of the sentences is not necessarily dispositive and stated that imposition of imprisonment after revocation was for the "breach of trust" against the district court, rather than as a criminal sanction. The circuit court, however, indicated that the state sentence suggested merely a minimal breach of trust. The defendant also asserted that his actions were without any prurient motive, which the government has conceded, and that he acted to rehabilitate himself while he was on supervised release, as is supported by his probation officer's report. Without reaching the merits of defendant's claim, the circuit court found that the record indicated that the district court may not have realized its authority to sentence the defendant to as little as zero months in prison. Consequently, the circuit court vacated the sentence and remanded the case for resentencing.

United States v. Verkhoglyad, 516 F.3d 122 (2d Cir. 2008). The defendant violated his probation by illegally possessing controlled substances. The district court imposed a sentence of 57 months imprisonment, even though the Chapter Seven policy statements advised a five to 11 month range. The Second Circuit concluded that the sentence was substantively reasonable. The defendant had repeatedly engaged in criminal conduct after being spared incarceration because of his cooperation and the sentence imposed was at the high end of the guideline range for his underlying offense.

United States v. Wirth, 250 F.3d 165 (2d Cir. 2001). The defendant pled guilty to conspiracy to commit fraud in violation of 18 U.S.C. § 371 and was sentenced to 45 months' imprisonment and three years' supervised release. The defendant subsequently violated supervised release by testing positive for narcotics. The district court modified his supervised release to include a drug treatment program, but did not impose a term of imprisonment. The appellate court concluded that the district court was required to sentence the defendant to a term of imprisonment. The appellate court noted that the defendant's case was governed by the pre-1994 version of 18 U.S.C. § 3583(g) because of the Supreme Court's decision in *Johnson v. United States*, 529 U.S. 694 (2000). The pre-1994 version of section 3583(g) states that if a defendant is found by the court to be in possession of a controlled substance, the court must require the defendant to serve at least one-third the term of supervised release in prison. (The post-1994 version of section 3583(g) allows the court to put the defendant in a drug treatment program if available and appropriate instead of prison.) The defendant argued that section 3583(g) should not apply because he admitted only to using cocaine, not to possessing it. The appellate court, joining with seven other circuits, concluded that testing positive for drug use amounts to possession under section 3583(g). Therefore, as the defendant possessed a controlled substance, the appellate court remanded with instructions that the court must sentence the defendant to prison for the revocation.