SELECTED POST-*BOOKER* AND GUIDELINE APPLICATION DECISIONS FOR THE D.C. CIRCUIT

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

November 2008

Disclaimer: Information provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.

TABLE OF CONTENTS

Page

Issues Related to *United States v. Booker*, 543 U.S. 220 (2005). 1
- I. Reasonableness Review. 1
- II. Procedural Requirements. 3
  - A. In General.. 3
  - B. Resolution of Disputed Factual Issues. 4
  - C. Confrontation Right. 4
- III. Acquitted Conduct. 4
- IV. Harmless/Plain Error. 5

CHAPTER ONE: *Introduction and General Application Principles*. 8
- Part B General Application Principles. 8
  - §1B1.3. 8

CHAPTER TWO: *Offense Conduct*.. 10
- Part A Offenses Against the Person. 10
  - §2A4.1. 10
- Part C Offenses Involving Public Officials and Violations of Federal Election Campaign Laws.. 11
  - §2C1.1. 11
- Part D Offenses Involving Drugs. 11
  - §2D1.1. 11
- Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity. 13
  - §2G1.1. 13
- Part J Offenses Involving the Administration of Justice.. 14
  - §2J1.7.. 14
- Part K Offenses Involving Public Safety. 14
  - §2K2.1. 14
- Part L Offenses Involving Immigration, Naturalization, and Passports. 16
  - §2L1.1. 16
- Part S Money Laundering and Monetary Transaction Reporting. 17
  - §2S1.1. 17
- Part T Offenses Involving Taxation. 17
  - §2T1.1. 17

CHAPTER THREE: *Adjustments*. 17
- Part A Victim-Related Adjustments. 17
  - §3A1.2. 17
- Part B Role in the Offense. 18
  - §3B1.1. 18

§3B1.2. 18
§3B1.3. 19
Part C Obstruction.. 20
§3C1.1. 20
Part E Acceptance of Responsibility.. 20
§3E1.1. 20

CHAPTER FOUR: *Criminal History and Criminal Livelihood.* 21
Part A Criminal History. 21
§4A1.2. 21
§4A1.3. 22
Part B Career Offenders and Criminal Livelihood. 22
§4B1.1. 22
§4B1.2. 23

CHAPTER FIVE: *Determining the Sentence.* 24
Part C Imprisonment.. 24
§5C1.2. 24
Part E Restitution, Fines, Assessments, Forfeitures. 25
§5E1.1. 25
Part G Implementing The Total Sentence of Imprisonment. 25
§5G1.3. 25
Part H Specific Offender Characteristics. 26
§5H1.1. 26
§5H1.4. 26
Part K Departures. 26
§5K1.1. 26
§5K2.0. 27
§5K2.7. 27
§5K2.11. 27
§5K2.13. 27

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*.. 28
Part A Sentencing Procedures. 28
Part B Plea Agreements. 28

CHAPTER SEVEN: *Violations of Probation and Supervised Release*. 29
Part B Probation and Supervised Release Violations. 29
§7B1.3. 29

U.S. SENTENCING COMMISSION GUIDELINES MANUAL CASE ANNOTATIONS—D.C. CIRCUIT

This document contains annotations to D.C. 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 D.C. 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.

ISSUES RELATED TO *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)

I. Reasonableness Review

In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008). The D.C. Circuit concluded that the sentencing court's failure to provide a statement of reasons was plain error. It stated:

> The absence of a statement of reasons is prejudicial in itself because it precludes appellate review of the substantive reasonableness of the sentence, thus "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings." A district judge "must adequately explain the chosen sentence to promote the perception of fair sentencing." It is important not only for the defendant but also for "the public to learn why the defendant received a particular sentence." Arbitrary decisionmaking undermines "understanding of, trust in, and respect for the court and its proceedings." We assume Appellant's sentence of eighteen months was not randomly selected, but the absence of any explanation makes it seem so. Thus, a failure to comply with § 3553(c) causes grave institutional harm, as well as simultaneously depriving the defendant of the benefit of our review.

(Citations omitted.)

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). The D.C. Circuit affirmed as reasonable a within-guidelines sentence for conspiracy to commit bribery and fraud. The court stated: "A sentencing court acts unreasonably if it commits legal error in the process of taking the Guidelines or other factors into account, or if it fails to consider them at all. A defendant may also challenge the length of a sentence as unreasonable, although we have held that 'a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness.'" (Citations omitted.) Rejecting the defendant's argument that *Booker* prohibited reliance on facts the judge found by a preponderance of the evidence, the court held that the sentencing court must still "make findings of fact when employing the Sentencing Guidelines in an advisory fashion" and that these facts need not be established beyond a reasonable doubt.

United States v. Edwards, 496 F.3d 677 (D.C. Cir. 2007). A sentence is unreasonable if it "rests on a finding of fact that is clearly erroneous."

United States v. Gardellini, __ F.3d __, 2008 WL 4889971 (D.C. Cir. Nov. 14, 2008). The D.C. Circuit affirmed a sentence of probation for filing a false tax return, rejecting the government's argument that the downward variance was substantively unreasonable under *Booker* and *Gall*. The majority opinion explained: "The central teaching of *Gall* is that the Guidelines are truly *advisory*. Therefore, different district courts can and will sentence differently - differently from the Sentencing Guidelines range, differently from the sentence an appellate court might have imposed, and differently from how other district courts might have sentenced that defendant." It also stated:

> To be sure, it may be considered anomalous that the Supreme Court's chosen remedy for a Guidelines system that gave district judges too much power to find key sentencing facts was to give district judges *even more* discretion and authority. But that's water over the dam. The bottom line is this: District judges now have far more substantive discretion in sentencing than they had pre- *Booker*. Therefore, whether the defendant receives a sentence within, above, or below the Guidelines range, both the Government and defense counsel would be well-advised to understand that it will be an unusual case where an appeals court overturns a sentence as substantively unreasonable - as the post-*Rita*, post-*Gall* case law in the courts of appeals shows.

(Citations omitted.)

United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007). The court remanded for resentencing based on confusion as to which guideline range was used. The court described reasonableness review as follows: "[W]e begin our review by considering whether the sentencing court started its analysis from a properly calculated Guidelines range. If it did, we then review the sentence ultimately imposed 'to ensure that it is reasonable in light of all the sentencing factors that Congress specified in 18 U.S.C. § 3553(a)." Because the court could not tell which guideline range the district court relied on as the starting point, it remanded for resentencing.

United States v. Olivares, 473 F.3d 1224 (D.C. Cir. 2006). The D.C. Circuit stated that reasonableness review "amounts to a two-step process. First, the court determines whether there was legal error," which "encompasses not only incorrect legal interpretations of the Guidelines, but also incorrect applications of the Guidelines to the facts." "Second, in the absence of legal error, the court reviews the overall reasonableness of the district court's sentence 'to ensure that it is reasonable in light of the sentencing factors that Congress specified in [] § 3553(a).'" The defendant argued that the district court erroneously denied him (1) a guideline reduction and (2) a departure, based on the fact that he was a deportable alien, and that the sentence was substantively unreasonable. The court applied its pre-*Booker* standards to review the departure decision, holding that because the district court was aware of its authority to depart but declined

to do so, the matter was not reviewable. This decision, however, did not preclude review of the overall sentence for reasonableness. On the question of reasonableness, the court indicated that the alleged departure grounds were not sufficient to overcome the presumption of reasonableness adopted in this circuit and affirmed the sentence.

United States v. Pickett, 475 F.3d 1347 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 870 (2008). The D.C. Circuit reversed a sentence on the grounds that the district court improperly refused to consider the 100:1 crack/powder ratio in its sentencing determination. The district court imposed a bottom of the guidelines sentence of 121 months for crack distribution over defendant's objection that the 100:1 crack-to-powder ratio created an unwarranted disparity. On appeal, the D.C. Circuit stated that the appropriate approach to reviewing the reasonableness of a guideline sentence "is to evaluate how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a)." The court identified several ways in which it concluded the guideline might fail to accomplish these purposes and concluded it was "beyond doubt that the district court erred in refusing to evaluate whether sentencing [the defendant] in accordance with Guideline § 2D1.1, and its 100-to-1 ratio, would effectuate the purposes of sentencing set forth in § 3553(a)."

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The court held that the district court did not impermissibly apply a presumption of reasonableness to a within-Guidelines sentence. Citing *Gall*, the D.C. Circuit explained that the district court's "statement that it 'think[s]' the range is 'reasonable demonstrates the court's independent judgment that a within-Guidelines sentence in this case was reasonable and appropriate."

United States v. Ventura, 481 F.3d 821 (D.C. Cir. 2007). The district court did not make a specific finding as to the appropriate guideline range because it believed it was not required to do so. Despite arguments that the district court was implicitly relying on a guideline range, the D.C. Circuit reversed. It stated that "sentencing courts remain obligated to calculate and consider the appropriate guidelines range" and remanded for resentencing.

II. Procedural Requirements

A. In General

See In re Sealed Case, No. 076-3132 (D.C. Cir. June 3, 2008), Section I.

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). In imposing sentence, "[t]he district court is not required to refer specifically 'to *each* factor listed in § 3553(a),' nor is it required to 'explain sua sponte why it did not find [a particular] factor relevant to its discretionary decision' if 'a defendant has not asserted the import of [that] factor." (quoting *United States v. Simpson*, 430 F.3d 1177 (D.C. Cir. 2005), *cert. denied*, 2006 WL 985745 (U.S. Apr. 17, 2006)).

United States v. Tabron, 437 F.3d 63 (D.C. Cir. 2006). The district court erroneously enhanced the defendant's sentence based on weapons possessed by codefendants without making explicit findings as to the scope of the conspiratorial agreement. A district court must "make explicit findings as to the scope of a defendant's conspiratorial agreement before holding him responsible for a co-conspirator's reasonably foreseeable acts."

United States. v. Tann, 532 F.3d 868 (D.C. Cir. 2008). Finding that the district court erroneously enhanced the defendant's sentence for abuse of a position of trust, the D.C. Circuit discussed its post-*Booker* standard of review, stating that it continues to apply the due deference standard. It explained: "[W]hen we apply the first step of the two-step process outlined in *Gall* and *Olivares,* we do precisely what we did prior to *Booker* - determine whether the district court correctly calculated the Guidelines range and remand for resentencing if it did not. We therefore see no reason to think *Booker* displaced the congressionally mandated standard of review of a district court's application of the Guidelines to facts." The court also stated that the sentencing court "retains broad discretion to impose a sentence" based on the §3553 factors and, citing *Gall*, that "[t]he advisory Guidelines range is only one such factor."

B. Resolution of Disputed Factual Issues

United States v. McCants, 434 F.3d 557 (D.C. Cir. 2006). The PSR prepared in the case had several highly contested factual issues, none of which were resolved with specific factual findings either at the sentencing hearing or in a promised but unwritten sentencing memorandum. At the close of sentencing, the AUSA asked the court if it adopted the PSR, to which the court replied, "That is correct." On appeal, the circuit held that this interchange did not satisfy the requirement in Fed. Rule of Crim. Pro.32(i)(3)(B) that the court resolve any disputed portion of the PSR and remanded for resentencing.

C. Confrontation Right

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). The defendant argued that he should have been allowed to confront witnesses against him at sentencing. The D.C. Circuit held that the protections of the Sixth Amendment's Confrontation Clause as explained in *Crawford v. Washington*, 541 U.S. 36 (2004), do not apply at sentencing, although any hearsay must still be reliable.

III. Acquitted Conduct

United States v. Brown, 516 F.3d 1047 (D.C. Cir. 2008). The defendant was convicted of one count of being a felon-in-possession of a firearm and acquitted of two offenses, § 924 (c) and possession with intent to distribute PCP. He argued that the court erred in imposing an upward adjustment based on his acquitted conduct, specifically, for possessing a firearm in connection with another felony offense pursuant to § 2K2.1(b)(6). Citing *Dorcely,* in which the D.C. Circuit

held that "consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes," 454 F.3d at 371, the court in *Brown* concluded that the district court was authorized to rely on defendant's acquitted conduct because his sentence did not exceed the statutory maximum allowed.

United States v. Dorcely, 454 F.3d 366 (D.C. Cir.), *cert. denied*, 127 S. Ct. 691 (2006). *Booker* does not change the rule that the district court may consider acquitted conduct in calculating the guideline range. However, restitution could be awarded only based on the amount of loss caused by the offense of conviction.

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The court upheld an upward enhancement based on acquitted conduct, finding that it did not violate the defendant's Fifth or Sixth Amendment rights. The court stated:

> To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence. . . . For those reasons, Congress or the Sentencing Commission certainly could conclude as a policy matter that sentencing courts may not rely on acquitted conduct. But under binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct. That said, even though district judges are not *required* to discount acquitted conduct, the *Booker-Rita-Kimbrough-Gall* line of cases may *allow* district judges to discount acquitted conduct in particular cases - that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate.

(Citations omitted.)

IV. Harmless/Plain Error

See In re Sealed Case, No. 076-3132 (D.C. Cir. June 3, 2008)

United States v. Andrews, 532 F.3d 900 (D.C. Cir. 2008). The D.C. Circuit held that it was not plainly erroneous for the district court to use the guidelines manual in effect at the time of sentencing rather that the version in effect at the time of the crime. The D.C. Circuit rejected the defendant's claim that the ex post facto clause and relevant guideline provision were violated when the district court applied the later manual, which yielded a higher sentence. The court explained that it was not clear when the conspiracy had ended. In addition, it emphasized that neither the D.C. Circuit nor the Supreme Court has "yet determined whether, after Booker, application of a later. . . Manual that yields a higher sentence continues to raise an ex post facto problem." The court found that it did not need to decide the issue because, even if the district court erred, there was no "absolutely clear norm" that the district court failed to follow.

United States v. Ayers, 428 F.3d 312 (D.C. Cir. 2005). Mandatory application of the guidelines was not harmless simply because the district court imposed an identical alternative sentence where (1) the record left doubt as to whether the court considered the other sentencing factors in § 3553(a) and (2) the district court denied the defendant's request to supplement the record with mitigating evidence.

United States v. Booker, 436 F.3d 238 (D.C. Cir. 2006). Where the district court imposed one sentence under mandatory guidelines but stated a lower alternative sentence, the appropriate remedy is to remand for resentencing.

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). "The plain error test does apply to objections that should have been raised at sentencing. Reasonableness, however, is the standard of *appellate* review, not an objection that must be raised upon the pronouncement of a sentence."

United States v. Brown, 449 F.3d 154 (D.C. Cir. 2006). The fact that defendant was sentenced at the high end of the guideline range did not establish that *Booker* error was not harmless where statements by the court indicated a desire to consider factors that were excluded from consideration by the guidelines.

United States v. Branham, 515 F.3d 1268 (D.C. Cir. 2008). The court addressed for the first time the question of how to treat an unobjected-to *Booker* error when the original sentencing judge is no longer available to preside over a remand. It held that "where a defendant did not raise a *Booker*-like objection at his original sentencing, and the record does not reveal whether the now-unavailable sentencing judge would have imposed a materially different sentence under a post- *Booker* regime, the appropriate disposition is to vacate the sentence and remand the case for resentencing."

United States v. Coles, 403 F.3d 764 (D.C. Cir. 2005). A remand is appropriate to determine whether the district court would have imposed a sentence more favorable to the defendant under an advisory guidelines sentencing regime; if the sentencing judge determines that he would have sentenced the defendant differently, the court of appeals will vacate the sentence and remand for resentencing. A remand is not required where a judge imposes a sentence at the statutory maximum and indicates that he would have imposed an even longer sentence if not bound by the guidelines.

United States v. Gillespie, 436 F.3d 272 (D.C. Cir. 2006). "[A]ny error in [the defendant's] mandatory Guidelines sentence was rendered harmless where . . . the district court decided that under an advisory Guidelines scheme it would have sentenced [the defendant] to an identical 'alternative sentence.'"

United States v. Gomez, 431 F.3d 818 (D.C. Cir. 2005). The D.C. Circuit discussed its approach to claims of *Booker* error that were raised for the first time on appeal. "In a *Booker* plain-error case: (1) if the record establishes a reasonable likelihood that the sentence would have been lower, we remand for full resentencing; (2) if the record makes us confident that the sentence would not have been lower, we affirm; and (3) if neither of the above, we grant a limited remand." The court concluded that the appellant demonstrated plain error where the "record as a whole—particularly the district judge's imposition of minimum sentences . . ., his references to the Guidelines' mandatory constraints (particularly as bars to downward departures), and his focus on the defendant's hardship to the near exclusion of her culpability—establishes a reasonable likelihood that he would have imposed a lower sentence had he known the Guidelines were not mandatory."

United States v. Henry, 472 F.3d 910 (D.C. Cir.), *cert. denied*, 128 S. Ct. 247 (2007). Defendants were sentenced at the top end of the guideline range pre-*Booker*. On appeal, the government argued that mandatory application of the guidelines was harmless because the district court had discretion to impose a lower sentence but chose not to do so. The D.C. Circuit rejected this argument and remanded for resentencing: "[A] sentence at the top of the Guidelines range is not, by itself, enough to establish that a *Booker* error was harmless beyond a reasonable doubt."

United States v. Simpson, 430 F.3d 1177 (D.C. Cir. 2005), *cert. denied*, 2006 WL 985745 (U.S. Apr. 17, 2006). Any error in imposing sentence under mandatory guidelines was rendered harmless by an identical alternative sentence based on methodology that "was consistent with the Supreme Court's subsequent decision in *Booker*." *See also United States v. Godines*, 433 F.3d 68 (D.C. Cir. 2006) (same).

United States v. Watson, 476 F.3d 1020 (D.C. Cir. 2007). Following a remand after *Booker*, the district court imposed a sentence of 108 months for felon in possession of a firearm—the same sentence it had originally imposed—based on its belief that the guidelines recommended a sentence between 92 and 115 months and that the statutory maximum was 240 months. On appeal, the government conceded that the statutory maximum was actually 120 months. Despite a presumption of reasonableness, the D.C. Circuit held it was plain error to conclude the statutory maximum was 240 months and remanded for resentencing, reasoning that "the district court's erroneous premise gave it the mistaken impression it was being lenient and the error thus infected [the defendant's] sentence."

Part B General Application Principles

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

United States v. Brown, 516 F.3d 1047 (D.C. Cir. 2008). The defendant was convicted of one count of being a felon-in-possession of a firearm and acquitted of two offenses, § 924 (c) and possession with intent to distribute PCP. He argued that the court erred in imposing an upward adjustment based on his acquitted conduct, specifically, for possessing a firearm in connection with another felony offense. The court concluded that the district court was authorized to rely on defendant's acquitted conduct because his sentence did not exceed the statutory maximum allowed.

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

United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir.), *cert. denied*, 127 S. Ct. 691 (2006). *Booker* does not change the rule that the district court may consider acquitted conduct in calculating the guideline range. However, restitution could be awarded only based on the amount of loss caused by the offense of conviction.

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

United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007). It was no error for the district court to consider counts that had the jury deadlocked: "If it is permissible for a sentencing court

to build a sentence, at least in part, on conduct for which a defendant is charged but acquitted, we find no error in relying on conduct for which [the defendant] was charged but on which the jury deadlocked, provided, as here, the court determined by a preponderance of the evidence that he engaged in the conduct."

United States v. Mellen, 393 F.3d 175 (D.C. Cir. 2004). The district court erred in holding the defendant accountable for the total value of the stolen property that was brought into the house by the defendant's wife. For relevant conduct purposes, the mere transitory presence of stolen property in the defendant's home is insufficient to establish that the defendant agreed to participate in the conspiracy where evidence established that defendant's wife tried to keep him from discovering the stolen goods.

United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995). The district court properly included conduct from two dismissed counts as relevant conduct for sentencing, and erred in including the conduct from a third dismissed count. The defendant pled guilty to one of four counts of fraud, and the government dismissed the other three counts. Two of the dismissed counts involved counterfeit checks, and were properly included by the district court as relevant conduct at sentencing. The other dismissed count involved the defendant's fraudulent use of a credit card. The circuit court noted that conduct from dismissed counts which is part of "the same course of conduct" may be considered when determining a guideline range for the offense of conviction. In determining what constitutes "the same course of conduct," the court must consider several factors including "the degree of similarity of the offenses and the time interval between the offenses." Where the defendant's offense of conviction and the acts offered as relevant conduct can be "separately identified" and are of a different "nature," the conduct will not be considered as part of the same course of conduct. The government must demonstrate a connection between the conduct and the offense of conviction; not between the conduct and other relevant conduct. Because the D.C. Circuit found that the government failed to demonstrate a connection between the credit card fraud and the offense of conviction, the sentence was vacated and the case was remanded.

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008). The court upheld an upward enhancement based on acquitted conduct, finding that it did not violate the defendant's Fifth or Sixth Amendment rights.

United States v. Vizcaino, 202 F.3d 345 (D.C. Cir. 2000). The D.C. Circuit held that, because the defendant had failed to request a downward departure at sentencing, he did not preserve the issue for review on appeal, and the district court did not commit plain error by failing to grant the departure *sua sponte*. The defendant had been indicted for possession with intent to distribute both crack cocaine and powder cocaine. He pled guilty to the powder cocaine charge and took responsibility for some of the crack in exchange for the government dropping the crack cocaine charge. The crack was treated as relevant conduct pursuant to §1B1.3(a)(2) and increased the defendant's sentencing range from 27- 33 months to 121-151 months. At sentencing, the defendant explained that he had entered into the plea agreement to avoid the

mandatory minimum associated with crack cocaine. The district court responded that it was bound by the guidelines and had no grounds on which to depart. On appeal, the defendant for the first time raised the argument that he was entitled to a downward departure under §5K2.0 because the consideration of relevant conduct drastically distorted his sentence. Because he had not raised the argument before the appeal, the D.C. Circuit held that the issue had not been preserved for appeal. Thus, the court reviewed the district court's failure to depart *sua sponte* for plain error. Although other circuits had held that drastic distortion of a sentence due to inclusion of relevant conduct was a grounds for departure under §5K2.0, the D.C. Circuit and the Supreme Court had not ruled on the issue. The D.C. Circuit affirmed the sentence, holding that the district court's failure to depart could not constitute plain error.

United States v. Williams, 216 F.3d 1099 (D.C. Cir. 2000). The defendant motor vehicle inspectors were convicted of receipt of bribes for a scheme to sell inspection sticker to cab drivers. Instead of making a particularized finding to determine when each codefendant actually joined the conspiracy, the district court assumed that each defendant joined as soon as he began working at the inspection station. Thus, the district court held each defendant responsible for all of the illegal proceeds earned the day after they began working at the inspection station despite the fact that there was no evidence that either joined until later in the conspiracy. The D.C. Circuit held that this calculation constituted clear error and recalculated the bribe amounts based on the years each codefendant had been involved. One defendant's bribe amount was reduced by an amount that would not affect his sentence, and the court held that the error as to his sentence was harmless. The other defendant would have received a reduction in his amount by at least $24,000. Because this amount could affect his sentence, the court remanded for further proceedings and re-sentencing.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Yelverton, 197 F.3d 531 (D.C. Cir. 1999). The D.C. Circuit held that the district court did not err by applying an enhancement under §2A4.1(b)(3) for use of a firearm, where the use of the firearm was portrayed in a photo and accompanied by threats of further violence to the kidnap victim's mother to obtain ransom. The guideline definition of a gun being "otherwise used" under §2A4.1 did not amount to discharging but was more than brandishing. The defendant argued that for the enhancement to apply, the gun must be used on the same victim that is being coerced into acting, and that showing the photo to the mother amounted only to "brandishing." The court noted that virtually all of the circuits have held that where a weapon and threats are used to engender fear and facilitate the commission of a crime, the enhancement is warranted even if the target of the threat and the person forced into compliance are not the same. In this case, the gun and the threats "were directed at two different

people in two different locations at two different times." Because the defendant explicitly threatened that the gun would be used to harm her son if she did not comply, the court upheld the enhancement.

Part C Offenses Involving Public Officials and Violations of Federal Election Campaign Laws

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

United States v. Edwards, 496 F.3d 677 (D.C. Cir. 2007). Defendant was a D.C. asbestos inspector who solicited a bribe for a contract. The city ultimately authorized the contractor to implement its plan without paying the bribe, which required a $10,000 payment to save $100,000 on the contract. Under §2C1.1, the "value of . . . the benefit . . . to be received in return for the [bribe]" was the basis for an enhancement. The defendant argued that he received no benefit from the bribe but the court disagreed, reasoning that defendant would not have approved the cheaper plan without the bribe, so the value of the benefit was $100,000.

Part D Offenses Involving Drugs

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

United States v. Carter, 449 F.3d 1287 (D.C. Cir. 2006). "[I]n determining the quantity of drugs attributable to a defendant, the sentencing judge must point to evidence sufficient to support its findings." The D.C. Circuit remanded where the district court enhanced the defendant's sentence based on drug quantities sold by other individuals without first finding that those other individuals were acting in furtherance of a conspiracy with the defendant. The district court also improperly applied an enhancement for leader/organizer without making findings as to the defendant's control or authority over his associates.

United States v. Eli, 379 F.3d 1016 (D.C. Cir. 2004). The district court properly found that the substance distributed by the defendant was crack cocaine, even though the drugs were relatively impure compared to typical crack cocaine and contained substances not usually found in crack cocaine. The drugs were rock-like and smokable, and it was undisputed that the drugs tested positive for cocaine base.

United States v. Goodwin, 317 F.3d 293 (D.C. Cir. 2003). The defendant pled guilty to possession with intent to distribute 500 grams or more of cocaine after buying cocaine from DEA agents. At sentencing, the DEA agent testified that the price of cocaine was more than $26,000/kilo and that the price agreed to by the defendant, $20,000/kilo, reflected a negotiated bulk

discount. On appeal, the defendant argued that the district court erred because the agent set the price artificially low and triggered the court's power to depart pursuant to Application Note 14 of §2D1.1, which allows for a downward departure in a reverse sting if "the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent. . ." The D.C. Circuit noted three ambiguities with the Note. First, it seemed to overlook the conventional notion of price elasticity–the effect on the quantity that a buyer, even one with ample resources, would be willing to buy. Second, the Note's focus on how much a buyer's "available resources" would allow him to purchase could be read to skew the role of a credit transaction, which would allow a buyer to purchase more drugs than if required to pay cash. Finally, the Note said nothing explicit on how a court was to determine whether a purchase increment induced by discount pricing was significant. The court found no clear error in the district court's conclusion that the defendant failed to prove that the agents set a price that was substantially below the market value of the drugs.

United States v. Hinds, 329 F.3d 184 (D.C. Cir. 2003). The defendant was convicted of selling cocaine to an undercover police officer on three occasions. The D.C. Circuit affirmed the sentence, rejecting the defendant's argument that the district court erred because it did not exclude 60.3 grams of crack from the relevant conduct used to calculate his sentence under Application Note 12 of §2D1.1. In order to show that the defendant should have been sentenced pursuant to Application Note 12, the D.C. Circuit stated, the defendant had to establish that he "did not intend to provide" or "was not reasonably capable of providing" the agreed-upon quantity of the controlled substance. The D.C. Circuit rejected the defendant's argument that, but for the request and assistance of the government and its informant, he would have sold powder rather than crack and hence should be subject to the less stringent powder guidelines. Accordingly, it affirmed the sentence.

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

United States v. Young, 247 F.3d 1247 (D.C. Cir. 2001). The D.C. Circuit upheld a sentence imposed in 1991 for conspiracy to manufacture and distribute PCP. In 1998, the defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), which permits a court to reduce a previously imposed sentence if the sentence has subsequently been lowered by the Sentencing

Commission. The defendant argued for a reduction based on Amendment 484, which altered Application Note 1 to §2D1.1 (effective 11/1/93). The defendant's motion was denied because the defendant was not sentenced under Application Note 1 but under Application Note 12, which applies when the quantity of drugs seized does not reflect the seriousness of the offense. The court held that the defendant was sentenced correctly under Application Note 12, considering his capacity to produce pure PCP in addition to the PCP in his possession, and that Amendment 484 would not affect the calculation because a precursor chemical would ordinarily need to be separated out prior to using the controlled substance.

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

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

United States v. Long, 328 F.3d 655 (D.C. Cir. 2003). Sentencing the defendant for four counts of interstate transportation of a minor to engage in criminal sexual activity, and two counts of possession of visual depictions of minors engaged in sexually explicit conduct, the district court applied the cross reference in §2G1.1 and treated §2G2.1 as controlling. On appeal, the defendant argued that the 8-level increase in offense level caused by the cross-reference required clear and convincing proof to show that his offenses included conduct that had as its purpose the production of sexually explicit depictions of the minors. The D.C. Circuit stated that the Supreme Court has noted a divergence of opinion among the circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. *See United States v. Watts,* 519 U.S. 148 (1997).[1] The D.C. Circuit stated that it had noted the split among the circuits on this issue but had declined to require more than the preponderance standard at sentencing. *See United States v. Graham,* 317 F.3d 262 (D.C. Cir. 2003); *United States v. Jackson,* 161 F.3d 24 (D.C. Cir. 1998). Accordingly, the district court did not err by failing to treat the defendant's case as presenting "extraordinary circumstances" that required a heightened standard of proof.

---

[1] The Court noted that the Third and the Ninth Circuit had required clear and convincing evidence for extreme sentencing enhancements. *See United States v. Paster,* 173 F.3d 206 (3d Cir. 1999); *United States v. Jordan,* 256 F.3d 922 (9th Cir. 2001). The other circuits had found that the cases before them did not merit a higher standard. *See United States v. Cordoba-Murgas,* 233 F.3d 704 (2d Cir. 2000); *United States v. Montgomery*, 262 F.3d 233 (4th Cir. 2001), *cert. denied*, 128 S. Ct. 61 (2007); *United States v. Graham,* 275 F.3d 490 (6th Cir. 2001); *United States v. Lewis,* 115 F.3d 1531 (11th Cir. 1997).

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release [2]

United States v. Samuel, 296 F.3d 1169 (D.C. Cir. 2002). The defendant pled guilty to attempting to sell crack and, while on release pending sentencing, he was arrested on another narcotics charge. The court applied a §2J1.7 enhancement, and the defendant objected on the ground that it was barred by *Apprendi*, arguing that a court could not apply the enhancement without first finding that the defendant violated § 3147. The D.C. Circuit found the district court merely sentenced him considering the fact that he committed an offense while on release, just as it would have considered any other specific offense characteristic. The court noted that the Sentencing Commission treated § 3147 as an enhancement provision, rather than an offense, and explained that §2J1.7 merely provided a specific offense characteristic to increase the offense level for the offense committed on release. It also stated the Sentencing Commission's interpretation of its own guideline was binding on the court, unless that interpretation violated the Constitution or a federal statute, or was inconsistent with or a plainly erroneous reading of the guideline. Finally, the court noted that, contrary to the defendant's contention, the district court's application of §2J1.7 neither increased his sentence above the statutory maximum for the drug offenses to which he pled guilty, nor exposed him to the possibility of such an increase. Consequently, the impact of §2J1.7 was limited to determining where, within that statutory maximum, the defendant should be sentenced. Accordingly, the D.C. Circuit concluded that there was no *Apprendi* error. Even if the enhancement were in error, it would at most be harmless error because the defendant's sentence fell below the statutory maximum, and the defendant did not and could not contest the fact that he was on release at the time he committed his second offense.

Part K Offenses Involving Public Safety

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

United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999). The defendant was sentenced on one count of felon-in-possession of a firearm and two counts of assaulting a police officer while armed with a dangerous weapon. On appeal, the defendant challenged upward adjustments under §3A1.2, "official victim," and under §2K2.1(b)(5), possession of a firearm in connection with another felony. The defendant argued that the "official victim" enhancement was unwarranted because he did not cause a "substantial risk of bodily harm" to the officers, and that the second enhancement was unjustified because he did not use his firearm during the assault. The district court found that the defendant attempted to pull his gun from his waistband during the assault

[2] This guideline was deleted and replaced by §3C1.3 effective November 1, 2006.

thereby creating a substantial risk and indicating his intent to use his weapon to facilitate the assault. The court held that both enhancements were justified by the evidence and affirmed.

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

United States v. Thomas, 333 F.3d 280 (D.C. Cir. 2003). The D.C. Circuit affirmed the district court's conclusion that the defendant's escape from an officer constituted a crime of violence within the meaning of §2K2.1(a)(4)(A). The D.C. Circuit first noted that §2K2.1(a)(4)(A) enhanced a defendant's sentence if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of a crime of violence and, pursuant to Application Note 5 to §2K2.1(a)(4)(A), "crime of violence" is given the meaning outlined in §4B1.2(a). While the defendant's prior offense of conviction, escape from an officer, was punishable by more than one year in prison, the issue was whether the offense by its nature presented a serious potential risk of physical injury to another. The court discussed, but was reluctant to adopt, the categorical approach (adopted by the Fourth, Fifth, Sixth and Eighth Circuits), that every offense of escape was a crime of violence because it involved a potential risk of injury. It concluded that it made no difference which approach it adopted because the defendant effected his escape from the person of an officer, and therefore the risk of violence was much more apparent.

United States v. Williams, 350 F.3d 128 (D.C. Cir. 2003). The court affirmed the district court's holding that attempted burglary is a "crime of violence"within the meaning of §2K2.1(a)(2). The defendant argued that the guideline drafters did not intend to include attempt to commit the crimes listed under §4B1.2(a)(2) as "crimes of violence." The defendant also argued that some circuits interpreting "crimes of violence" as used in the Armed Career Criminal Act, which has language identical to §4B1.2(a), had ruled that attempted burglary is not such a crime. *See United States v. Weekley,* 24 F.3d 1125, 1127 (9th Cir. 1994); *United States v. Martinez,* 954 F.2d 1050, 1053-54 (5th Cir. 1992); *United States v. Strahl,* 958 F.2d 980, 986 (10th Cir. 1992). The D.C. Circuit rejected defendant's arguments and joined four other circuits in holding that attempted burglary was a "crime of violence" under §4B1.2. *See United States v. Claiborne,* 132 F.3d 253, 256 (5th Cir. 1998); *United States v. Sandles,* 80 F.3d 1145, 1150 (7th

Cir. 1996); *United States v. Carpenter,* 11 F.3d 788, 791 (8th Cir. 1993); *United States v. Jackson,* 986 F.2d 312, 313 (9th Cir. 1994).

United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004). The defendant, convicted under 18 U.S.C. § 922(g)(1), argued on appeal that the district court erred in calculating his base offense level and that his attorney was constitutionally ineffective by failing to object to this error. The PSR indicated that the defendant was convicted in state court of "robbery" in 1994, an offense for which he received a sentence of 30 to 90 months. Finding that the defendant had sustained a prior felony conviction for a "crime of violence," the court raised his base offense level, pursuant to 2K2.1(a)(4)(A), to 20 (rather than 14 if the previous conviction did not constitute a "crime of violence"). The D.C. Circuit found that the district court erred in adopting the base offense level of 20 without confirming that the defendant's 1994 robbery conviction constituted a "crime of violence." Because the defendant did not object at sentencing, the court reviewed the sentence only for plain error. Under this standard, the defendant was not required to proffer new evidence but he did have to offer some reason to suspect that the district court's error likely resulted in an incorrect sentence. The court concluded that there was nothing before it to suggest any likelihood that the district court would have assigned a different base offense level had it first conducted the proper inquiry into the 1994 conviction. Because the only indications in the sparse record suggested that the sentence would not be reduced, the D.C. Circuit concluded that the defendant did not satisfy his burden of demonstrating a "reasonable likelihood" that the court's error affected his sentence.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

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

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. Kayode, 254 F.3d 204 (D.C. Cir. 2001). The D.C. Circuit held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of §2S1.2. The defendant was convicted on eight charges, including one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The defendant's sentence for this count was calculated under §2S1.2, but she argued on appeal that she should have been sentenced under the fraud or money structuring guideline, §2F1.1. The defendant asserted that §2S1.2 was intended to apply to laundering of proceeds from drug trafficking or serious organized crime, not proceeds from bank fraud, as was the case here. Because laundering funds from bank fraud would not be "atypical" under this guideline, the defendant argued that the court should have departed and used the less severe guideline. The circuit court held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of §2S1.2 and upheld the sentence. The application note to §2S1.2 specifies illegal activity as that covered by 18 U.S.C. § 1956(c)(7) and racketeering. "Racketeering activity" is defined in 8 U.S.C. § 1961(1) as including acts indictable under 18 U.S.C. § 1344, financial institution fraud. Because the court found that the defendant's behavior fell within the heartland of §2S1.2 under the 1998 *Guidelines Manual*, the effect of Amendment 591, effective November 1, 2000, was not considered.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

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

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.2 Official Victim

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

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. McCoy, 242 F.3d 399 (D.C. Cir. 2001). The defendant argued that the two-level enhancement she received for being an "organizer, leader, or manger," pursuant to §3B1.1(c), was inappropriate because, as the PSR reported, those that she directed were "unwitting participants." The court agreed that the participants must have known of the criminal activity in order to be considered criminally responsible participants as required by §3B1.1(c). Therefore, the court remanded for further proceedings with respect to the aggravating role enhancement and affirmed the rest of the sentence.

United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001). Upholding the "organizer or leader" enhancement, the D.C. Circuit held that the court should inquire solely into the number of people involved in determining whether criminal activity is "otherwise extensive" for the purposes of §3B1.1(a). The court found that the defendant was an "organizer or leader" because of evidence that he had decision making authority, recruited others, and claimed a larger share of the proceeds. The court vacated the portion of the sentence based on the "otherwise extensive" finding because the unknowing participants performed ordinary and automatic duties, such as opening credit card accounts, and could not be included under factors set forth in *Carrozzella*.[3]

§3B1.2 Mitigating Role

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2001). The D.C. Circuit upheld the denial of a §3B1.2(b) minor role reduction because the defendant had been involved in phone calls in which he and others "discussed, planned, and arranged" a large drug delivery.

United States v. Olibrices, 979 F.2d 1557 (D.C. Cir. 1992). The D.C. Circuit upheld the denial of a §3B1.2 adjustment. The district court had found that the defendant was responsible only for the quantity of drugs in a single transaction and not the entire amount of drugs distributed by the conspiracy. In addition, the district court determined that the defendant was

---

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

not entitled to a mitigating role adjustment because the defendant was a major participant in the crime of conviction upon which the base offense level was calculated. It stated: "To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme."

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

United States v. Robinson, 198 F.3d 973 (D.C. Cir. 2000). The defendant, president of a school for emotionally disturbed children, was convicted after a jury trial on 11 counts of defrauding the D.C. school system by misappropriating funds and using his position to facilitate bank fraud. The circuit court upheld the district court's sentencing enhancement for abuse of a position of trust based on the defendant's job title and position, control over the finances, managerial discretion, and lack of outside supervision.

United States. v. Tann, 532 F.3d 868 (D.C. Cir. 2008). The D.C. Circuit found that the district court erred in applying an enhancement for abuse of a position of trust to a fraud defendant, agreeing with the defendant that her position in the office was "ministerial." The circuit court stated: "Tann may have occupied a position of trust in the colloquial sense that she was trusted not to use her access for nefarious purposes; in that sense, so is every bank teller who has access to the bank's money and every janitor who cleans an office where desk drawers are left unlocked. Like the bank teller or the janitor, however, Tann did not have a job that required her to exercise professional or managerial discretion, which is the standard set forth in the application note to the Guideline."

United States v. Young, 932 F.2d 1510 (D.C. Cir. 1991). The defendant, convicted of conspiracy to manufacture and distribute PCP, argued on appeal that there was no proof that he abused a "special skill" within the meaning of §3B1.3. The D.C. Circuit agreed and reversed the district court's sentence, noting the lack of evidence that the defendant was a "chemist" in the ordinary sense of the term and rejecting the government's contention that the defendant possessed a "special skill" because the general public does not know how to manufacture PCP. The court stated that neither the criminal statute nor §2D1.1 distinguishes between the manufacture and distribution of PCP, suggesting that Congress and the Sentencing Commission determined that, all other things being equal, those who manufacture PCP and those who distribute it deserve equal sentences. Adoption of the government's position, however, would undermine that principle by resulting in an across-the-board divergence in the sentences for the manufacture and distribution of PCP.

Part C Obstruction

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

United States v. Maccado, 225 F.3d 766 (D.C. Cir. 2000). Affirming the sentencing court's decision, the D.C. Circuit held that §3C1.1 does not require a showing of a substantial effect on the proceedings. The defendant had failed to comply with a court order for a handwriting exemplar but the failure did not delay any scheduled proceeding. On appeal, the defendant argued that he should not have received the obstruction enhancement because his delay had no substantial effect on the investigation or prosecution of his case. In the alternative, the defendant argued that any obstruction was cured by his guilty plea. The court held that refusal to comply with a court order compelling out-of-court conduct would tend to frustrate the judicial process and did not justify the heightened requirement that the proceedings be substantially affected.

United States v. Monroe, 990 F.2d 1370 (D.C. Cir. 1993). The D.C. Circuit held that the district court improperly gave an upward adjustment for obstruction of justice under §3C1.1 for willful failure to appear for her arraignment or to turn herself in. The defendant had presented unrebutted evidence that the letter announcing the arraignment arrived at her address one day after the hearing took place and thus her initial failure to appear could not have been labeled "willful." Regarding defendant's failure to turn herself in, the record indicated that she made affirmative and documented efforts to determine what action was required of her by placing several calls to Pretrial Services.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996). The district court did not err in denying the defendant's request for a two-level reduction under §3E1.1 because he lied about the extent of his wife's participation in his prison escape. Section 3E1.1 Application Note 1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with acceptance of responsibility, but differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category. Although the circuit court doubted that the guidelines create an absolute bar to the reduction, it did not resolve the issue.

United States v. Jones, 997 F.2d 1475 (D.C. Cir. 1993) (*en banc*). After the defendant was convicted at trial, the sentencing court granted a §3E1.1 reduction but did not sentence at the bottom of the guidelines range because the defendant went to trial. The D.C. Circuit distinguished the enhancement of a sentence for going to trial (which would be unconstitutional) and the withholding of leniency in sentencing (which would be constitutional). The dissent stated that, regardless of how the action is characterized, it was unconstitutional for the trial

judge to de facto increase the defendant's sentence because he chose to go to trial rather than plead guilty.

United States v. Kirkland, 104 F.3d 1403 (D.C. Cir.1997). The defendant was convicted by a jury of distributing drugs within 1,000 feet of a school. He appealed the district court's denial of a downward adjustment under §3E1.1 because he had argued to the jury that he had been entrapped. The D.C. Circuit affirmed the district court's refusal to give a reduction for acceptance, stating: "It has been generally held that a defendant's challenge to the requisite intent is just another form of disputing culpability." The court stated that it could think of no hypothetical in which a plea of entrapment was consistent with acceptance of responsibility but, acknowledging a circuit conflict on the issue, stated that "[i]t may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we doubt it."

United States v. Thomas, 97 F.3d 1499 (D.C. Cir. 1996). The defendant appealed the district court's refusal to grant him a two-level downward adjustment for acceptance of responsibility pursuant to §3E1.1. The defendant went to trial, pleading an entrapment defense. The D.C. Circuit noted that Application Note 2 to §3E1.1 states that conviction by trial does not automatically preclude a defendant from consideration for such a reduction, but the application note was not applicable here because the defendant persisted in his entrapment defense from trial through sentencing and offered not one word of remorse, culpability or human error.

United States v. Williams, 86 F.3d 1203 (D.C. Cir. 1996). The defendant argued on appeal that he was entitled to an additional one-level reduction pursuant to §3E1.1(b)(2) for having "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." The district court had determined that the defendant was not entitled to the additional one-level reduction under §3E1.1(b)(2) because his decision to plead guilty was untimely and did not permit the court to allocate its resources efficiently. The D.C. Circuit affirmed, concluding that "[a] defendant does not receive the subsection (b)(2) one-level reduction unless the record manifests that he assisted the government with sufficient timeliness to (1) permit the prosecution to avoid trial preparation *and* (2) permit the court to allocate its resources efficiently."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

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

United States v. McDonald, 991 F.2d 866 (D.C. Cir. 1993). The D.C. Circuit affirmed the district court's decision to include a "set aside" juvenile conviction in the defendant's criminal history. Although §4A1.2(j) provides that sentences for "expunged convictions" are not counted in criminal history, the defendant's juvenile conviction had not been "expunged" but had

been "set aside" pursuant to the D.C. Youth Rehabilitation Act. The D.C. Circuit distinguished between "set aside" and "expunged" convictions, relying on Application Note 10, which provides in pertinent part, "[a] number of jurisdictions have various procedures pursuant to which previous convictions may be set aside . . . Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted." The D.C. Circuit acknowledged that the Ninth Circuit has reached a different conclusion on the issue, but distinguished the California statute because it expressly provides that if a court "set[s] aside" a juvenile's conviction, the youth is "released from all penalties and disabilities resulting from the offense." In contrast, the D.C. Youth Rehabilitation Act contains no such provision.

§4A1.3 Adequacy of Criminal History Category

In re Sealed Case, 199 F.3d 488 (D.C. Cir. 1999). The defendant was sentenced as a Career Offender and appealed, arguing that the court's comments showed it was under the mistaken belief that it lacked the authority to depart under §4A1.3. The D.C. Circuit rejected the defendant's appeal. The district court had commented at sentencing that it wished it could sentence the defendant to less than the guidelines demanded but that a long sentence was needed and there was no alternative. Evaluating the comments in the context of the transcript, the D.C. Circuit concluded that the court did not mean that it could not impose a lower sentence, but rather that it could not do so with a clear conscience.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000). The D.C. Circuit held that counsel's assistance was constitutionally ineffective where, but for counsel's miscalculation of the career offender guideline, there was a reasonable probability that the defendant would not have pled guilty. Defense counsel had miscalculated the career offender guideline and told the defendant that by pleading guilty he would receive a sentence within the range of 188 to 235 months (instead of the actual range of 262 to 327 months). The court conceded that an error in applying the guidelines will not always amount to ineffective assistance of counsel, but added that "familiarity with the structure and basic content of the guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation" (quoting *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992)). Finding that the defendant satisfied both prongs of the *Strickland* test for ineffectiveness: (1) that counsel's performance "fell below an objective standard of reasonableness;" and (2) that there was a "reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have gone to trial" (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)), the D.C. Circuit remanded the case with instructions that the defendant be allowed to withdraw his plea.

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

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

United States v. Adewani, 467 F.3d 1340 (D.C. Cir. 2006); *United States v. Lewis*, 471 F.3d 155 (D.C. Cir. 2006). Escape from an institution is a crime of violence under §4B1.1.

United States v. Curtis, 481 F.3d 836 (D.C. Cir. 2007). A conviction for promoting prostitution of a minor is categorically a crime of violence under §4B1.2(a) because it "involves conduct that presents a serious potential risk of physical injury to another."

United States v. Andrews, 479 F.3d 894 (D.C. Cir. 2007). The district court did not commit plain error in concluding that a prior conviction for sexual abuse of a ward in violation of D.C. Code § 22-3013 was a crime of violence under §4B1.2(a). The court noted that the general approach to such a categorical analysis was to look only at the statutory definition of the crime. However, "if the statutory definition itself does not yield an obvious answer, for example, where it covers both violent and non-violent crimes, we can then look to 'the charging paper and jury instructions' to determine whether a jury was required to find elements supporting the determination that the prior conviction was a crime of violence." Because the statute of conviction could include consensual sex between an officer and victim, the court looked at the jury instructions, which required proof of oral sex. Because it was not obvious that such conduct could never present a serious potential risk of physical injury, the court held that it was not plain error for the district court to treat the prior conviction as a crime of violence.

United States v. Thomas, 361 F.3d 653 (D.C. Cir. 2004). In a case of first impression, the D.C. Circuit determined that escape is a crime of violence. The defendant violated 18 U.S.C. § 751(a) by escaping from a federal facility in 1995 and had another prior felony conviction. The trial court sentenced him pursuant to §4B1.1 as a career offender. The defendant argued that escape did not qualify as a crime of violence because § 751 does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." §4B1.2(a)(1). Unmoved by this argument, the court relied on the "otherwise clause" of §4B1.2(a)(2) to uphold the sentencing enhancement: a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Accepting that an escape *may* occur in the safest way possible, the appeals court stated it was just as likely that the escapist could be confronted by officers sent to apprehend him, leading to injury to the officers or bystanders.

United States v. Williams, 350 F.3d 128 (D.C. Cir. 2003). The defendant pled guilty to unlawful possession of a firearm by a convicted felon and sentenced pursuant to §2K2.1 where the district court determined the defendant's two prior felony convictions satisfied the guidelines' definition of "crime of violence." The defendant argued that one of the prior felony convictions, attempted burglary, was not a crime of violence. The appellate court rejected this argument. Section 4B1.2 specifies that a crime of violence is a crime punishable by more than one year's imprisonment and the crime has (1) "as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) the crime is "burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another." Section 4B1.2, Application Note 1 states that crimes of violence include "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

In re Sealed Case (Sentencing Guidelines' "Safety Valve"), 105 F.3d 1460 (D.C. Cir. 1997). The D.C. Circuit vacated the defendant's sentence for conspiracy to distribute cocaine and remanded for sentencing in accord with the safety valve. The district court denied the safety valve because it found that both the defendant and his brother were "responsible for having a gun to protect the drugs and/or the money that they would get." The D.C. Circuit inferred that the district court must have relied on either co-conspirator liability or constructive possession in finding that the defendant possessed the gun discovered in his brother's car. Based on Application Note 4 to §5C1.2, the D.C. Circuit held that co-conspirator liability cannot establish possession under the guidelines' safety valve. Moreover, it found that the defendant did not constructively possess his brother's gun because nothing in the record suggested that he was anywhere near the gun.

United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000). The defendant, who was convicted of numerous drug charges, argued on appeal that he should have received the benefit of the safety valve and a downward departure for extraordinary family circumstances. The court found that there was ample evidence that the defendant had not been forthcoming or truthful in providing evidence to the government. Because the district court was aware that it had the discretion to grant a downward departure and found it unwarranted, the circuit court upheld that decision.

United States v. Mathis, 216 F.3d 18 (D.C. Cir. 2001). The court upheld the denial of the safety valve for a defendant who met four of the five requirements but had not provided any information to the government. The defendant argued that he had no useful information and that the government had indicated that a debriefing would be futile. Although §5C1.2(5) does not

require that the information provided be useful, there was no disclosure at all on the part of the defendant and the court held that the district court did not clearly err.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir.), *cert. denied*, 127 S. Ct. 691 (2006). Restitution can be based only on losses caused by the offense of conviction.

Part G Implementing The Total Sentence of Imprisonment

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

United States v. Hall, 326 F.3d 1295 (D.C. Cir. 2003). Following convictions in D.C. and Maryland, and while still on probation in Maryland, the defendant was convicted in federal court for unlawful possession of a firearm and ammunition by a convicted felon. The D.C. Circuit upheld the district court's imposition of consecutive sentences. The defendant argued that the district court erroneously relied on Note 6 to §5G1.3 to run his sentence consecutively. The D.C. Circuit held that, while the district court may have erred in thinking that Application Note 6 was the relevant note (as opposed to note 1), a consecutive sentencing was nonetheless required, the defendant suffered no prejudice, and therefore the court did not plainly err.

United States v. Heard, 359 F.3d 544 (D.C. Cir. 2004). The court affirmed the district court's imposition of a consecutive sentence. The defendant first argued that §5G1.3(b) governed because his prior offenses were taken into account by their recitation in the PSR and their discussion at sentencing hearing. The D.C. Circuit noted that the question, however, was not whether those offenses were taken into account in some colloquial sense, but whether they were fully taken into account in the determination of the offense level for the instant offense, as required by the words of the guideline. It concluded that §5G1.3(b) did not apply because the prior offenses were not taken into account as "relevant conduct" in determining his offense level and the consecutive sentences did not otherwise cause him to suffer duplicative punishment. The defendant also argued that, even if §5G1.3(c) was the appropriate provision, the district court erred by declining to exercise its authority to impose a partially concurrent sentence under that subsection. The D.C. Circuit, noting that subsection (c) plainly leaves the decision to the discretion of the district court, held that the court did not abuse its discretion under §5G1.3(c).

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

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Brooke, 308 F.3d 17 (D.C. Cir. 2002). The D.C. Circuit upheld the denial of a downward departure based on his age (82) and physical condition. The court concluded that home confinement would not be effective punishment because the defendant had a history of drug dealing in his home, and that his impairment was not extraordinary.

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

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

Part K Departures

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

In re Sealed Case, 244 F.3d 961 (D.C. Cir. 2001). The D.C. Circuit held that the district court did not err in denying the defendant's motion to compel the government to file a §5K1.1 when the Departure Guideline Committee refused to authorize the filing. The defendant entered into a plea agreement with the government in which he agreed to cooperate and the government agreed to inform the Departure Committee of any assistance that might qualify him for a downward departure. The defendant provided testimony in one case and helped to secure indictments against several other defendants but he refused to testify at the last minute in a second case, allegedly out of fear for himself and his family. After the government informed the Departure Committee about the extent of the defendant's cooperation and recommended that they authorize a §5K1.1 motion for a "modest departure," the Committee refused without offering any reason for its denial. The defendant filed a motion to compel the government to file the motion on the theory that it breached the plea agreement. The district court denied the motion and imposed the sentence with no downward departure. The D.C. Circuit stated that the decision to file the §5K1.1 motion was largely within the government's discretion and, without an explanation from the Committee or an objective standard for definition of "substantial assistance," the court could not presume that the Committee violated the plea agreement.

In re Sealed Case, 204 F.3d 1170 (D.C. Cir. 2000). The D.C. Circuit upheld the court's denial of a departure under §5K2.0, where the defendant argued that his assistance fell outside the "heartland" of §5K1.1.

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

United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994). The district court erred in concluding that it did not have the authority to depart downward based on the likelihood that the defendant would face more severe prison conditions because of his status as a deportable alien. The case was remanded for resentencing and consideration of whether any departure is appropriate.

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

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

§5K2.11 Lesser Harms (Policy Statement)

United States v. Riley, 376 F.3d 1160 (2004). The defendant, convicted of possession of a firearm and ammunition by a convicted felon, was a police chaplain arrested as he was returning from firearms practice at a firing range. He argued that he should receive a departure under §5K2.11 because his conduct did not threaten the harm sought to be prevented by his statutory offense. Section 922(g)(1) seeks to prevent the possession of a firearm for an "unlawful purpose," the defendant posited, while the purpose of his conduct, target practice, was lawful. The court rejected this argument. Section 922(g)(1) sweeps more broadly, the court reasoned, establishing the "criminal line" at possession and not purpose. The mere absence of an unlawful purpose, the court ruled, does not warrant a departure under §5K2.11.

§5K2.13 Diminished Capacity (Policy Statement)

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

United States v. Greenfield, 244 F.3d 158 (D.C. Cir. 2001). The district court's denial of a §5K2.13 downward departure for diminished capacity based upon the defendant's depression did not constitute error. Convicted of drug conspiracy, the defendant argued at sentencing that he suffered from depression, and that his mental state contributed to his commission of the offense. After hearing the expert testimony on the defendant's mental state, the court denied the motion, stating that the testimony "mandates that the court not take into consideration diminished capacity." On appeal, the defendant argued that if drug addiction contributed only in part to the defendant's commission of the crime, then it should not preclude a departure because the defendant's mental state could also have played a role. Because the expert had not provided adequate testimony that the defendant's mental capacity had been significantly diminished, and the district court clearly understood its authority to depart, the court affirmed the district court decision.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007). The defendant claimed that the district court should have allowed him to cross examine witnesses against him at sentencing. The D.C. Circuit held that the protections of the Sixth Amendment's Confrontation Clause as explained in *Crawford v. Washington*, 541 U.S. 36 (2004), do not apply at sentencing, although any hearsay must still be reliable.

Part B Plea Agreements

United States v. Goodall, 236 F.3d 700 (D.C. Cir. 2001). The D.C. Circuit held that a district court can, in its discretion, accept a Rule 11(e)(1)(c) plea agreement stipulating to a sentence below the range assigned by the sentencing guidelines. The plea agreement specified a sentencing range of 57 to 71 months, the government recommended a sentence at the bottom of that range and the PSR recommended a range of 70 to 87 months. The district court, believing it was bound by both the guidelines and the plea agreement, only considered sentences at a range of 70 to 71 months. The circuit court held that, by not considering sentences between 57 and 69 months, the district court had impermissibly altered the plea agreement. While the First and Sixth Circuits held that §6B1.2 restricts a court's discretion under Rule 11(e), the D.C. Circuit joined the remaining circuits in holding that §6B1.2 does not limit the court's otherwise broad discretion under Rule 11. Vacating and remanding the sentence, the D.C. Circuit instructed the district court that, if it intended to accept the plea agreement, it should consider the range of 57 to 71 months, and if it intended to reject the plea agreement in favor of the guideline calculation, the defendant should be allowed to withdraw his plea.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

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