Selected Post-*Booker* and Guideline Application Decisions for the Second Circuit

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

January 2010

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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.

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

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Rigas, 583 F.3d 108 (2d Cir. 2009). Citing its opinion in *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), the Second Circuit held that *de novo* sentencing is the default rule when a conviction is reversed in part. The court directed that district courts, on remand in a case requiring *de novo* sentencing, should "reconsider the sentences imposed on each count, as well as the aggregate sentence," consider whether the "change in the constellation of offenses of conviction" has altered the "factual mosaic related to those offenses," and, if so, reconsider the sentence imposed on the count or counts affected by the vacatur of the conviction of another count, as well as the aggregate sentence, in light of the sentencing factors in section 3553(a).

United States v. Williams, 524 F. 3d 209 (2d Cir. 2008). The Second Circuit held that 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*, 552 U.S. 38, 49 (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.'"

United States v. Williams, 475 F.3d 468 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1495 (2008). The Second Circuit "clarif[ied] the scope of [its] review when a district court has

declined to resentence a defendant upon a *Crosby* remand."[1] It held that it "review[s] a sentence for reasonableness even after a [d]istrict [c]ourt 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.

United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006). Noting that "[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," the appellate court held that, if the judge improperly calculates that range, the judge "cannot be said to have genuinely considered [the particular recommended sentencing range]." The circuit court noted that, for this reason, it has ordinarily required sentencing judges to put the guidelines calculations on the record.

United States v. Rattoballi, 452 F.3d 127 (2d Cir. 2006), *overruled on other grounds by United States v. Seval*, 293 F. App'x 834 (2d Cir. 2008). The Second Circuit held that "[t]he Supreme Court's decision in *Booker* 'left unimpaired section 3553(c)'" and "[i]t 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." The circuit court noted further that the statute imposed the requirement on the district court that is set forth its reasons "with specificity" in the written order of judgment.

United States v. Barrero, 425 F.3d 154 (2d Cir. 2005). The appellate 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. 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.

[1] A *Crosby* remand refers to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and the Second Circuit utilizes such a remand to afford a sentencing judge the opportunity to determine whether the original sentence would have been materially different if the judge had understood that the guidelines were not then mandatory.

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

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).

Notably, the Second Circuit also indicated that "[i]n one circumstance, however, precise calculation of the applicable Guideline range may not be necessary. Now that the duty to apply the applicable Guidelines range is not mandatory, situations may arise where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies. This leeway should be useful to sentencing judges in some cases to avoid the need to resolve all of the factual issues necessary to make precise determinations of some complicated matters, for example, determination of monetary loss." *See also United States v. Dhafir*, 577 F.3d 411 (2d Cir. 2009) (holding that district court did not need to pigeonhole money laundering case into §2S1.1(a)(2), instead of §2S1.1(a)(1), given the alternative approach endorsed in *Crosby*); *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc) (stating that omission of the guidelines calculation may sometimes be justified and citing *Crosby*), *cert. denied*, 129 S. Ct. 2735 (2009).

B. Burden of Proof

United States v. Martinez, 525 F.3d 211 (2d Cir.), *cert. denied*, 129 S. Ct. 293 (2008). The defendant was convicted of being a felon in possession under 18 U.S.C. §922(g). The district court enhanced defendant's sentence 4 levels under §2K2.1(b)(5) – now §2K2.1(b)(6) – for using the firearm in connection with a separate felony offense for which the defendant was not charged. The defendant contended that his sentence was illegally increased based upon uncharged conduct that had been proven by a mere preponderance of the evidence. In a case of first impression, the Second Circuit held that the facts relevant to a guidelines sentence need not be proven beyond a reasonable doubt, even when the court considers uncharged conduct that constitutes a separate offense, if, where here, the ultimate sentence is not in excess of the maximum statutory term of imprisonment for the charged conduct. *See also United States v. Legros*, 529 F.3d 470 (2d Cir. 2008).

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). The circuit court held that "district 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."

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*." *See also United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008) (holding that, in RICO conspiracy, a sentencing court may consider predicate acts as relevant conduct because their commission need not be proven beyond a reasonable doubt), *cert. denied*, 129 S. Ct. 1648 (2009).

C. Confrontation Rights

United States v. Martinez, 413 F.3d 239 (2d Cir. 2005). The Second Circuit 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. The appellate court 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."

D. Acquitted Conduct

United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005). The Second Circuit held that, post-*Booker*, 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.

E. Ex-Post Facto

United States v. Fairclough, 439 F.3d 76 (2d Cir. 2006). The Second Circuit concluded that there was no *ex post facto* problem with the district court's application 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).

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 178 (2d Cir. 2005). The Second Circuit held that the district court's refusal to grant a downward departure under the advisory sentencing guidelines was not appealable, absent showing of clear evidence of a substantial risk that the court misapprehended the scope of its departure authority.

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast track

United States v. Hendry, 522 F.3d 239 (2d Cir. 2008). The Second Circuit determined that the absence of a fast-track program did not require any adjustment to the defendant's sentence because defendants in fast-track districts were not similarly situated to those in non-fast-track districts. The circuit court also held that sentencing disparities resulting from the existence of fast-track districts are not per se unwarranted.

United States v. Mejia, 461 F.3d 158 (2d Cir. 2006). The circuit 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)."

2. Plea agreement

United States v. Roque, 421 F.3d 118 (2d Cir. 2005). The appellate court held that *Booker* does not constitute an independent force that can render the appellant's plea involuntary. In so doing, the court joined several sister circuits "which have held that pre-*Booker* plea agreements are not void for the intervening change in federal sentencing law occasioned by *Booker*."

B. Parsimony Clause

United States v. Ministro-Tapia, 470 F.3d 137 (2d Cir. 2006). The defendant was convicted of conspiracy to sell counterfeit social security cards and sentenced to 24 months' imprisonment, the bottom of the applicable guidelines range. His appeal focused on the "parsimony clause" of 18 U.S.C. §3553(a), asserting 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)."

IV. Forfeiture

United States v. Fruchter, 411 F.3d 377 (2d Cir. 2005). The circuit court held that *Booker* does not apply to criminal forfeitures because there is no previously specified range for forfeitures in the guidelines.

V. Restitution

United States v. Amato, 540 F.3d 153 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1635 (2009). The appellate court held that, under the Mandatory Victims Restitution Act, attorney fees and accounting costs can qualify as "other expenses incurred during participation in the investigation or prosecution of the offense" that must be awarded as restitution.

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

VI. Reasonableness Review

A. Standard of Review

United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006). The Second Circuit declined to establish any presumption, rebuttable or otherwise, that a within-guidelines sentence is reasonable. The court stated: "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. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Fleming*, 397 F.3d 95 (2d Cir. 2005).

B. Procedural Reasonableness

United States v. Keller, 539 F.3d 97 (2d Cir. 2008). At sentencing, the district court noted the impending change in the guidelines regarding the crack-powder cocaine disparity, but did not acknowledge its discretion to consider this disparity as a basis for imposing a non-

guidelines sentence. The Second Circuit remanded for resentencing because "the record must unambiguously demonstrate that the District Court was aware of its discretion to consider that [the disparity between cocaine base and cocaine powder offenses in the guidelines] might result in a sentence greater than necessary, in order to avoid a remand pursuant to *United States v. Regalado*." In addition, the appellate court held that, "where a record is silent on the district court's understanding of its variance discretion, we can[not] nevertheless assume that the court understood its various sentencing options."

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). The Second Circuit explained that the "reasonableness" standard is not limited to consideration of the length of the sentence, *i.e.*, substantive reasonableness. "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." The court also stated that, "[b]ecause '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." *See also United States v. Avello-Alvarez*, 430 F.3d 543 (2d Cir. 2005).

C. Substantive Reasonableness

United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). The defendant pled guilty to firearms trafficking and was then sentenced above the guideline range for his offense due to the district court's perception that, because of where the defendant committed his offense (New York City), the impact of the offense was greater than had it been committed in another locale. Noting New York's strong firearms laws and the likelihood that guns illicitly transported there would wind up in the hands of criminals, the district court imposed an upward departure. The Second Circuit observed that the district court's action was in tension with the Sentencing Guidelines' purpose of uniformity in sentencing. Nevertheless, the Second Circuit found that the disparity created by the district court's departure was not "unwarranted," but was "based upon objectively demonstrated, material differences" between the impact of the defendant's crime and similar crimes committed by other defendants in other parts of the country. The Second Circuit held that, while the Sentencing Commission's "discrete, institutional strengths" require that departure decisions be subject to close review for "reasonableness," once it is ascertained that a sentence "resulted from the reasoned exercise of discretion, we must defer heavily to the expertise of district judges." In affirming the sentence imposed, the Second Circuit noted that "some departures from uniformity are a necessary cost of the *Booker* remedy."

D. Plain Error / Harmless Error

United States v. Fuller, 426 F.3d 556 (2d Cir. 2005). The district court imposed a sentence styled "in the alternative" – *i.e.*, as the sentence of the court regardless of whether or not the guidelines were mandatory. The Second Circuit reviewed the defendant's *Booker* issue for harmless error because he properly preserved his objection in district court and found that the

court's "in the alternative sentence" was in error and the error was not harmless.

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

E. Waiver of Right to Appeal

United States v. Roque, 421 F.3d 118 (2d Cir. 2005). The Second Circuit held that "an otherwise valid plea agreement and waiver of right to appeal sentence, entered into before [*Booker*] is enforceable even if the parties, at the time they entered into the agreement, erroneously believed that the United States Sentencing Guidelines were mandatory rather than advisory." In so doing, the court joined several sister circuits "which have held that pre-*Booker* plea agreements are not void for the intervening change in federal sentencing law occasioned by *Booker*." *See also United States v. Morgan*, 406 F.3d 135 (2d Cir. 2005) (holding that defendant's inability to foresee subsequently decided cases does not supply basis for failing to enforce appeal waiver).

VII. 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 circuit court clarified that the standard for reviewing a sentence imposed after revocation of supervised release is now reasonableness - the court no longer reviews the sentence to determine whether it is "plainly unreasonable." *See also United States v. McNeil*, 415 F.3d 273 (2d Cir. 2005).

VIII. Retroactivity

Guzman v. United States, 404 F.3d 139 (2d Cir. 2005). The Second Circuit held 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.

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

IX. Crack Cases

United States v. Samas, 561 F.3d 108 (2d Cir.), *cert. denied*, 129 S. Ct. 1931 *and* 130 S. Ct. 184 (2009). On appeal, the defendant argued that the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), cast doubt on the mandatory sentencing scheme in 21 U.S.C. § 841(b) which punishes crack cocaine more severely. The Second Circuit rejected

this argument, holding that *Kimbrough* bore upon the discretion of district judges to sentence within the maximum and minimum sentencing ranges, and did not disturb the circuit court's precedents rejecting challenges to the constitutionality of the mandatory sentencing scheme in § 841(b).

United States v. Lee, 523 F.3d 104 (2d Cir. 2008). The Second Circuit stated, in dicta, that "[i]t is not apparent to us that the principles set forth in *Kimbrough* have any application to mandatory minimum sentences imposed by statute").

X. Miscellaneous

United States v. Samas, 561 F.3d 108 (2d Cir.), *cert. denied*, 129 S. Ct. 1931 *and* 130 S. Ct. 184 (2009). The defendant argued, *inter alia*, that the introductory language in 18 U.S.C. § 3553(a) conflicts with the mandatory sentencing provisions in § 841(b). The Second Circuit disagreed, stating that although the language in § 3553(a) is "in tension with" statutory minimum sentences, "the very general statute (§ 3553(a)) cannot be understood to authorize courts to sentence below minimums specifically prescribed by Congress. . . ."

United States v. Chavez, 549 F.3d 119 (2d Cir. 2008). Through the operation of statutory minimums, the defendant's conviction subjected him to a total of 50 years' imprisonment. On appeal, the defendant argued that the district court erred "in believing that, in arriving at a reasonable total sentence, it was not authorized to impose a shorter prison term for Count 1 in light of the severe consecutive prison term it was required to impose on Count 2." The Second Circuit affirmed the sentence and stated that, despite the district court's post-*Booker* obligation to impose a reasonable sentence in light of all factors set forth at 18 U.S.C. §3553(a), the court's reasoning in that framework could not contradict the express will of Congress in the statutory sentence structure it had designed.

United States v. Kaba, 480 F.3d 152 (2d Cir. 2007). The defendant, who pleaded guilty to conspiracy to distribute heroin, appealed her sentence of imprisonment on the basis that the court's sentencing decision was motivated by her national origin from the West African nation of Guinea. 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 [the defendant] 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." *But see United States v. Flores Carreto*, 583 F.3d 152 (2d Cir. 2009) (finding that, where defendants' national origin was initially raised by defense counsel in support of sentencing leniency and district court explicitly stated it was not considering national origin in sentencing defendants, record showed that national origin played no adverse role in sentencing decision), *cert denied*, No. 09-7397, 2009 WL 3731906 (U.S. Dec. 7, 2009) *and petition for cert. filed* (Jan. 6, 2010) (No. 09-8482).

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1648 (2009). The Second Circuit joined the First and Sixth Circuits in concluding that §1B1.2(d) was inapplicable in the RICO conspiracy context. The appellate court explained that a RICO conspiracy is not a multi-object conspiracy requiring application of §1B1.2(d); instead, the sole object of the conspiracy is to violate RICO and the predicate acts are relevant merely to establish the charged conduct among members of the conspiracy and do not constitute separate criminal objectives.

United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996). The circuit court held that 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 appellate 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 circuit 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."

United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995). The defendant was convicted by jury of attempting to commit a sexual act by force, in violation of 18 U.S.C. § 2246(3), where the sexual act was fellatio. 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. Amato, 46 F.3d 1255 (2d Cir. 1995). The Second Circuit concluded that the district court erred in sentencing a defendant convicted of a Hobbs Act conspiracy robbery under §2B3.1. However, the circuit court found 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).

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

United States v. Al-Sadawi, 432 F.3d 419 (2d Cir. 2005). The defendant was convicted of currency smuggling in the amount of $659,000. The trial court found him liable for that entire amount for sentencing purposes. The 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. 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 use 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 circuit 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 circuit court concluded that the district court's calculation of the fraud loss attributable to the defendant was correct.

United States v. Bryce, 287 F.3d 249 (2d Cir. 2002). At resentencing after remand, the district court considered new evidence that clearly showed the defendant's involvement in a murder. The Second Circuit held on appeal that intervening circumstances not considered by the court at the first sentencing 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 Second Circuit held that the district court did not err in enhancing a sentence on a count of bank fraud for relevant conduct relating to failing to file a federal income tax return. 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 appellate 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. Mulder, 273 F.3d 91 (2d Cir. 2001). The Second Circuit concluded that 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."

United States v. Williams, 247 F.3d 353 (2d Cir. 2001). The circuit court held that, 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.

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 appellate court upheld the district court's finding that the mail fraud and conversion counts were relevant conduct under §1B1.3, the circuit 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 circuit court thus concluded that the tax evasion, fraud and conversion counts should be grouped under §3D1.2(d).

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.

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range

United States v. Main, 579 F.3d 200 (2d Cir. 2009), *cert. denied*, No. 09-7816, 2010 WL 58811 (Jan. 11, 2010). The defendant pleaded guilty, pursuant to a plea agreement, to distributing and conspiring to distribute five or more grams of crack cocaine. The plea agreement specified that the parties had agreed, pursuant to Fed. R. Crim. P. 11(c)(1)(C), that the appropriate sentence of imprisonment was for a term of not more than 8 years (96 months). The district court, at sentencing, granted the defendant's requests for downward departures, reducing his sentence by 7 months for his extraordinary rehabilitation while in prison and by five months for certain time he had already served, ultimately sentencing the defendant to 84 months' imprisonment. The defendant then moved to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). The motion was denied. On appeal, the Second Circuit held that the district court was without authority to reduce the defendant's sentence under § 3582(c) because his sentence was dictated by his plea agreement, and not the guidelines related to crack cocaine.

United States v. Martinez, 572 F.3d 82 (2d Cir. 2009). The defendant was convicted of

conspiring to distribute and possess with the intent to distribute cocaine and crack cocaine. He was sentenced, however, as a career offender pursuant to §4B1.1. He moved for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2), which the district court denied. On appeal, the Second Circuit held that Amendment 706, the so-called "crack amendment," did not apply to the defendant's case, because his sentence had not been based on a Guidelines range that was subsequently lowered, but rather on §4B1.1.

United States v. Savoy, 567 F.3d 71 (2d Cir.), *cert. denied*, 130 S. Ct. 342 (2009). The Second Circuit joined the majority of other circuits in holding that §1B1.10 is binding on sentencing courts and that "district courts lack the authority when reducing a sentence pursuant to § 3582(c)(2) to reduce that sentence below the amended Guidelines range where the original sentence fell within the applicable pre-amendment Guidelines range." The appellate court relied on the fact that "Congress has made it clear that a court may reduce the terms of imprisonment under § 3582(c) only if doing so is 'consistent with applicable policy statements issued by the Sentencing Commission.'"

United States v. McGee, 553 F.3d 225 (2d Cir. 2009). The defendant was convicted of a crack cocaine offense. He was designated a career offender but was then granted a downward departure on the basis that the career offender designation overrepresented his criminal history. The district court explicitly stated that it was departing from the career offender sentencing range to the level that the defendant would have been in absent the career offender status calculation. When he moved for a reduction in sentence on the basis of Amendment 706, the district court denied the motion. On appeal, the Second Circuit concluded that the defendant was effectively sentenced under the crack cocaine guideline, *i.e.*, while he could have been sentenced based on §4B1.1, he was in fact sentenced under §2D1.1. Therefore, the Second Circuit concluded that he was eligible for a reduced sentence and remanded to the district court.

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

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The circuit court held that the district court did not violate the *ex post facto* clause in sentencing the defendant using the guidelines in effect at the time of his sentence (1993 guidelines). 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. However, the circuit court concluded that, in this case, the 1993 guidelines provision for §2F1.1(b)(1)(m) was not more severe than the 1989 guidelines for §2F1.1(b)(1)(m), and therefore there was no *ex post facto* violation.

United States v. Keller, 58 F.3d 884 (2d Cir. 1995) (superceded on other grounds). The Second Circuit 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. However, where 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). The defendants were convicted of conspiracy to extort by threat of injury or serious damage. Testimony at trial showed that a co-conspirator who was not charged along with the defendants had committed murder during and in furtherance of the conspiracy. In sentencing the defendants, the district court attributed the murder to each of the defendants as relevant conduct. The Second Circuit held that the district court did not err in sentencing the defendants under §2A1.1 for intentional murder. The guideline for extortion (§2B3.2) cross-references §2A1.1 as the appropriate guideline to use "if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111," and the murder at issue was premeditated and not done in the heat of passion.

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001). The defendant was convicted for crimes surrounding a bombing of the World Trade Center. The district court sentenced the defendant under §2A1.1, the guideline for first-degree murder. 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

Loss Issues (§2B1.1(b)(1))

United States v. Byors, 586 F.3d 222 (2d Cir. 2009). The defendant argued that the district court should have offset the loss attributable to his fraud by amounts that represented legitimate investment in his business. Application note 3(E)(i) of § 2B1.1 provides that the loss should be reduced, or offset, by "[t]he money returned, and the fair market value of the property returned and the services rendered, by the defendant . . . to the victim before the offense was detected." The Second Circuit held that Application note 3(E) does not entitle a defendant to an offset against a loss based on business expenses that confer no benefit to the victims.

United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007). The defendant was convicted of securities fraud and the sentencing court enhanced his guidelines offense level pursuant to

§2F1.1(b)(1)(P) of the 1998 Guidelines Manual. On appeal, the 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 circuit court remanded for the sentencing court to make a more detailed analysis of how much of the loss was attributable to the defendant's fraud, and how much was attributable to independent market forces. In addition, citing to the civil shareholder loss calculations as articulated by the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-48 (2005), the Second Circuit indicated that it 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).

United States v. Ebbers, 458 F.3d 110 (2d Cir. 2006). The defendant, CEO of WorldCom, Inc., was convicted of conspiracy, securities fraud, and related counts. At sentencing, his offense level was enhanced by 26 levels for a loss over $100 million and he sought a downward departure on the basis of, *inter alia*, the loss overstating the seriousness of the offense. The district court denied the downward departure and sentenced him to a below-guidelines term of imprisonment of 25 years. On appeal, the defendant challenged the loss amount. The Second Circuit recognized that "[t]he loss to investors who hold during the period of an ongoing fraud is not easily quantifiable because we cannot accurately assess what their conduct would have been had they known the truth," but explained that some estimate must be made for guidelines' purposes and affirmed the district court's calculations because, under any calculation that the district court could have made, the loss surpassed the $100 million threshold for the 26-level enhancement.

United States v. Granik, 386 F.3d 404 (2d Cir. 2004). During the planning of a conspiracy to possess and pass a counterfeit instrument to defraud a jeweler, a co-conspirator estimated the "cost" of the jewelry to be $590,000. In his plea agreement, the defendant stipulated that his offenses involved a "loss or attempted loss" between $500,000 and $800,000. At sentencing, the district court calculated the loss amount as more than $500,000 based on the co-conspirator's statement and on the defendant's stipulation. On appeal, the defendant argued that the district court erred in calculating the loss amount using the co-conspirator's estimate of the jewelry's"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 stipulation was knowing and voluntary and there was other evidence relied upon by the district court to reach the loss calculation.

United States v. Aleskerova, 300 F.3d 286 (2d Cir. 2002). The defendant was convicted of possessing and conspiring to sell artwork stolen from the Baku Museum. In fact, the artwork had been originally stolen after WWII from the Bremen Museum and was only subsequently stolen from the Baku Museum. The district court reduced the loss amount by depreciating the artwork's value because of the earlier, unrelated theft from the Bremen Museum, arriving at a figure of $183,500, where experts on both sides testified that the value of the artwork was between "nil" and several millions. On appeal, the Second Circuit held 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 circuit court further held that, "[g]iven 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." Finally, the appellate court affirmed the district court's loss amount, noting that the loss need to be determined with precision.

Victim Table (§2B1.1(b)(2))

United States v. Abiodun, 536 F.3d 162 (2d Cir.), *cert denied,* 129 S. Ct. 589 (2008). The defendants were involved in a scheme to use stolen credit information. On appeal, one defendant challenged the district court's determination that the criminal activity involved more than 250 victims, which resulted in a six-level enhancement under §2B1.1(b)(2). The Second Circuit held that individuals who have been fully reimbursed for their financial losses may be deemed victims for purposes of this sentencing enhancement; this decision was contrary to the decisions reached by the Sixth and Eleventh Circuits.[2]

Sophisticated Means (§2B1.1(b)(9))

United States v. Kostakis, 364 F.3d 45 (2d Cir. 2004). The defendant falsified log entries to conceal a ship's discharge of oil-contaminated bilge water into international waters. He pleaded guilty to making a materially false statements on a matter within the jurisdiction of the United States, in violation of 18 U.S.C. § 1001. The government urged a six-level enhancement to the defendant's offense level on the basis that a substantial part of the fraudulent scheme was committed from outside the United States, pursuant to the 2002 version of §2B1.1(b)(8)(B) (now, §2B1.1(b)(9)(B)). The district court held that, even if it accepted the government's proffer that a substantial part of the scheme was committed from outside the US, and thus the §2B1.1(b)(8)(B) enhancement would apply, it would grant a six-level downward departure on the basis that §2B1.1(b)(8)(B) contemplates sophisticated conduct and the defendant's conduct was not

[2] The Commission resolved this circuit split, in part, in the guideline amendments effective November 1, 2009, by broadening the definition of "victim" in identify theft cases. Application Note 4(E) to §2B1.1 states that, in a case involving means of identification, "victim" means "any individual whose means of identification was used unlawfully or without authority." §2B1.1, comment. (n.4(E)).

sophisticated, thereby eliminating the effect of the enhancement. On appeal, the Second Circuit held 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, given that falsified entries had numerous technical components and were made with the purpose of deceiving the Coast Guard.

§2B3.1 Robbery

United States v. Capanelli, 479 F.3d 163 (2007). The defendant was convicted of conspiring to rob a credit union. He was the conspiracy's "inside man" and provided his co-conspirators with uniforms and a sketch of the facility. He did not participate in the robbery. The district court applied a five-level enhancement pursuant to §2B3.1(b)(2)(C) for brandishing a firearm. On appeal, the defendant argued that there was inadequate proof that he specifically intended that the firearm be used in the crime. The Second Circuit affirmed the sentence, holding that "it is enough that the defendant was aware that brandishing or possessing firearms was part of the conspiratorial agreement."

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. At sentencing, the district court applied a six-level enhancement, under §2B3.1(b)(7)(G), for an intended loss of $5,000,000, on the basis that the defendant intended to rob a substantial amount of money from armored vehicles and that $5,000,000 was found in the armored vehicles that the defendant intended to rob, although the robbery was never completed. On appeal, the Second Circuit held that the district court's finding that the defendant *specifically intended* to steal a substantial amount was insufficiently grounded in the record to warrant the six-level enhancement. The circuit 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." Therefore, the appellate court held that, 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.

United States v. Jennette, 295 F.3d 290 (2d Cir. 2002). The circuit court affirmed the district court's decision to increase the defendant's offense level pursuant to §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 appellate 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. Matthews, 20 F.3d 538 (2d Cir. 1994). The Second Circuit held that 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.

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

United States v. Guang, 511 F.3 110 (2d Cir. 2007). The defendant argued on appeal that, *inter alia*, 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 by the defendant, 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 [the victim's] impaired eyesight."

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001). Testimony at trial showed that a co-conspirator of the defendants, members of a labor coalition that extorted money and jobs, had murdered a rival coalition member during and in furtherance of the conspiracy. The district court determined that the rival labor coalition member was a victim as defined in §2B3.2(c)(1) and under the Hobbs Act. The defendants argued on appeal 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 Second Circuit 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 defendant was convicted of hostage-taking and conspiring to interfere with commerce by extortion. At sentencing, the district court enhanced the defendant's sentence under §2B3.2, where the defendant originally demanded $68,000 in ransom to release the victim, but ultimately agreed to accept $5,300. An enhancement is permitted under §2B3.2 on the basis that the victim's loss or the demand was greater than $50,000. On appeal, the Second Circuit held that the adjustment was properly applied, finding it irrelevant that the defendant ultimately agreed to accept a lesser amount.

United States v. Brumby, 23 F.3d 47 (2d Cir. 1994). The district court enhanced the defendant's sentence five levels, pursuant to §2B3.2(b)(3)(A)(iii), for a co-conspirator's display of a deadly weapon. On appeal, 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 co-conspirator's pouch in full view of the victim constituted a "display" of the weapon within the meaning of the §2B3.2.

Part D Offenses Involving Drugs

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

Drug Quantity (§2D1.1(a)(5))

United States v. Rivera, 293 F.3d 584 (2d Cir. 2002). The defendant was convicted by jury of conspiracy to distribute heroin, but, consistent with then-current law, the jury did not arrive at a specific drug-quantity, although the indictment had alleged generally one or more kilograms of heroin. The district court chose to sentence the defendant for the conspiracy under offense guideline §2D1.1, since the object of the conspiracy was the distribution of heroin, and arrived at base offense level 36 according to the drug quantity table. After the imposition of a life sentence, the defendant moved to modify his sentence on the basis of Amendment 591, which requires that the initial selection of the offense guideline be based only on the statute or offense of conviction, and not on any judicial findings of actual conduct. The defendant argued that the district court had erred in relying on the drug quantity in arriving at his sentence, but the district court refused to modify his sentence. On appeal, the Second Circuit held that the district court had not erred in choosing §2D1.1 as the appropriate guideline, and that the defendant was confusing the initial choice of the offense guideline with the secondary step of finding the base offense level, which were two separate steps at sentencing, and only the first step was affected by Amendment 591. Because the court's choice of §2D1.1 was based on the statute of conviction, Amendment 591 did not affect the defendant's sentence.

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002). The defendant was charged with conspiracy to distribute both cocaine and marijuana. The jury verdict convicted him generally on this count without specifying the type or quantity of controlled substance underlying the conspiracy charge. At sentencing, the district court found by a preponderance of the evidence that the defendant had conspired to distribute a certain amount of cocaine and sentenced him to 106 months' imprisonment. Notably, the maximum sentence for a conspiracy to distribute marijuana was 60 months' imprisonment. On appeal, the Second Circuit held that the district court's sentence was unconstitutional under the *Barnes* rule, which holds that, where a jury returns a general guilty verdict on a single count of conspiracy involving multiple controlled substances, the district court must sentence the defendant as if convicted of a conspiracy involving only the substance carrying the lowest statutory sentencing range. The appellate court held that because, without a special verdict, the district court had no basis for knowing whether the jury intended to convict on the marijuana conspiracy or the cocaine conspiracy, the sentence in this case was in error.

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001). The district court sentenced the defendant beyond the statutory maximum based on its findings of the amount of drugs involved in the offense, which had neither been mentioned in the indictment nor presented to the jury. The Second Circuit held that, following *Apprendi*, "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 circuit 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. However, the appellate court concluded 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. 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), alleging that it had a disparate impact on African-Americans in violation of the 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."

Safety Valve (§2D1.1(b)(11))

See United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003), §5C1.2.

Application Note 12

United States v. Dallas, 229 F.3d 105 (2d Cir. 2000). The Second Circuit considered whether the district court erred by including six ounces of cocaine when calculating the defendant's offense level for conspiring to distribute cocaine, where the defendant agreed and intended to sell the amount but later substituted flour for cocaine. The appellate court found that, pursuant to §2D1.1, comment. (n.12), if the defendant intended to distribute the drug and was reasonably capable of doing so, then the agreed-upon amount not actually sold was part of the total quantity involved. The circuit 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. Caban, 173 F.3d 89 (2d Cir. 1999). The defendant pleaded 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 fake 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 his co-defendants were reasonably capable of obtaining, since 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 addressing a reverse sting situation. The Second Circuit held that the district court did not err in finding that the defendant intended to steal 50 kilograms, even though the government "had in effect predetermined this offense level." 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. Gomez, 103 F.3d 249 (2d Cir. 1997). The circuit court affirmed the district court's sentence based on the intended purchase of 125 grams of heroin despite the defendant's argument that he lacked the financial capacity to purchase so much. 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 seller (not the buyer) neither intended nor was able to produce that amount.

Part E Offenses Involving Criminal Enterprises and Racketeering

§2E1.1 Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

United States v. Ivezaj, 568 F.3d 88 (2d Cir. 2009). The defendant argued that any aggravating role enhancement should have been based on the conduct alleged in the underlying predicate acts, not on his role in the RICO enterprise as a whole. The Second Circuit disagreed, instead adopting the Seventh's Circuit's position that "a defendant's role adjustment is to be made on the basis of the defendant's role in the overall RICO enterprise." The appellate court stated that the language of the enhancement is clear "that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base [offense level], not for applying the Chapter Three adjustments."

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit[3]

United States v. Amico, 573 F.3d 150 (2d Cir. 2009). Prior to 2001, §2F1.1(b)(7)(B) increased a defendant's base offense level by 4 levels if "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense." In 2001, this Guideline was amended to lower the 4-level increase to a 2-level increase. The Second Circuit joined the Seventh Circuit in holding that this amendment "substantively changes an unambiguous provision and therefore does not apply retroactively."

United States v. Savin, 349 F.3d 27 (2d Cir. 2003). The district court refused to apply a four-level enhancement under §2F1.1(b)(6)(B)(1995) for an offense that "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts," based on a finding that the institution which the defendant defrauded was not a "financial institution" under the law of Luxembourg, where the institution was organized and had its principle place of business. On appeal, the Second Circuit reversed, holding that a "foreign investment company," as that term was defined in Application Note 14 to §2F1.1, included a company located outside the United States that was substantially engaged in the business of investing in securities of other companies, whether or not it was an "investment company" under the law of the jurisdiction where it was

[3] Guideline deleted by consolidation with §2B1.1.

registered and had its principle place of business.

United States v. Berg, 250 F.3d 139 (2d Cir. 2001). The district court refused to apply a two-level enhancement for violation of judicial process, pursuant to §2F1.1(b)(4)(B), on the basis that 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. Upholding the district court's decision not to apply the enhancement, the Second Circuit 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 appellate 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. Ferrarini, 219 F.3d 145 (2d Cir. 2000). The Second Circuit held 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, 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"). 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). The defendant was convicted of conspiracy to commit wire fraud and argued on appeal that he should have been sentenced at a lower base offense level, because the evidence did not support a finding that, pursuant to §2F1.1(b)(1), he was responsible for losses totaling $1,500,000. The Second Circuit disagreed, holding that §2F1.1 loss calculations need not be calculated with precision; instead, 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. Burns, 104 F.3d 529 (2d Cir. 1997). The defendant was a program manager for a non-profit, federally funded agency in Vermont. While still receiving his federal salary, the defendant moved to Massachusetts to attend Harvard's Public Administration Program full-time. He leased an apartment with federal funds and continued to submit time sheets indicating full-time work at the non-profit. At sentencing, the defendant's offense level was increased by four levels based on a loss amount of $21,186, which the district court arrived at by adding $13,463 for the apartment, travel and per diem expenses billed, plus $8,723 for his salary loss. The salary loss was computed by taking the number of hours the defendant participated in the Harvard program and multiplying that amount by a reasonable hourly rate. On appeal, the Second Circuit, noting that the guidelines state that "the loss need not be determined with precision," concluded that the loss calculation was not clearly erroneous.

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

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

United States v. Jass, 569 F.3d 47 (2d Cir. 2009), *cert. denied sub nom*, *Leight v. United States*, No. 09-7516, 2010 WL 155262 (Jan. 19, 2010). In an issue of first impression, the Second Circuit held that using computer images to "desensitize" a child to sexual activity with adults to persuade the child to participate in such activity does not fall within the scope of the enhancement found at §2G2.1(b)(3)(B)(ii). The enhancement provides for a two-level increase when the defendant uses a computer to "solicit participation with a minor in sexually explicit conduct." The court interpreted the enhancement to address "a situation in which one person solicits another person to engage in sexual activities with a minor." Otherwise, the appellate court stated, the phrase "participation with" would be meaningless. Because the defendant in this case did not use the computer to solicit a third party to engage in sex with the minor, the circuit court held that the district court erroneously applied the enhancement.

§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

United States v. Freeman, 578 F.3d 142 (2d Cir. 2009). The defendant was convicted of receipt of child pornography. The district court imposed a four-level enhancement for the possession of images containing sadistic or masochistic conduct, pursuant to §2G2.2(b)(4). The Second Circuit held that, when a district court makes an objective determination that: (1) an image depicts sexual activity involving a minor and (2) the depicted activity would have caused pain to the minor, the district court establishes an adequate basis for the application of the §2G2.2(b)(4) enhancement.

United States v. Weisser, 417 F.3d 336 (2d Cir. 2005). The defendant was convicted on various child pornography and child enticement charges. The district court used §2G2.2 to calculate his guideline range and applied a two-level enhancement for use of a computer pursuant to §2G2.2(b)(6). On appeal, the defendant claimed that he should have been sentenced using §2G2.4 (since consolidated with §2G2.2) and that the computer enhancement should not apply. The Second Circuit rejected both arguments, concluding that both §§2G2.2 and 2G2.4(c)(2) require the application of §2G2.2 whenever a defendant is convicted of transporting child pornography. In addition, the Second Circuit joined the Third Circuit in holding that the mere fact that the CDs 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[4]

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 appellate court upheld a 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. Additionally, the circuit 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.

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 under 18 U.S.C. § 401 for his refusal to testify fully before a grand jury and at a drug conspiracy trial, despite a grant of immunity. A sentencing court is directed, under the guideline for contempt (§2J1.1), to apply §2X5.1 (Other Offenses). The Other Offenses guideline, in turn, directs that, "if the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous guideline," and "if there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b)," which in turn provides that, in the absence of an applicable sentencing guideline, the court should impose an appropriate sentence, with regard to the purposes of § 3553(a) and the sentences for similar offenses and offenders. The district court found that there was no sufficiently analogous guideline for criminal contempt, rejecting the government's assertion that §2J1.2 (Obstruction of Justice) should apply and the defendant's assertion that §2J1.5 (Failure to Appear by Material Witness) should apply.
The Second Circuit 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). The defendant was convicted of conspiring to obstruct justice pursuant to 18 U.S.C. § 1503. Convictions under §1503 are sentenced under §2J1.2(c), which in turn cross-references §2X3.1 (accessory after the fact). The 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

[4] Guideline deleted by consolidation with §2G2.2.

§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 circuit court stated that, while the message made no explicit reference to future acts, it contained an implied threat, because 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

Base Offense Level (§2K2.1(a))

United States v. Roberts, 442 F.3d 128 (2d Cir. 2006). The defendant appealed the district court's decision to sentence him pursuant to §2K2.1(a)(5) of 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 affirmed the district court's application of the enhancement, reasoning that the Commission could appropriately base an enhancement on a repealed statute for the purpose of crafting a definition.

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). At sentencing, the district court applied the base offense level specified in §2K2.1(a)(6) for a defendant who is a "prohibited person" within the meaning of 18 U.S.C. § 922(g), because (1) the PSR stated that "beginning in 1970, the defendant reportedly smoked marijuana and ingested cocaine on an intermittent basis," and (2) the defendant 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. Shepardson, 196 F.3d 306 (2d Cir. 1999). The Second Circuit held that the district court properly interpreted "prohibited person" as used in §2K2.1(a)(4)(B) to include someone charged by a state felony information. At that time, Application Note 6 to §2K2.1 provided that a "prohibited person" included someone who "is under *indictment* for . . . a crime

punishable by imprisonment for more than one year." The Second Circuit examined the statutory framework behind §2K2.1, noting that §2K2.1 applies to convictions under 18 U.S.C. § 922. The appellate court explained that 18 U.S.C. § 921(a)(14), in turn, 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 circuit court applied the same definition to Application Note 6.

Possession in Connection with Another Offence (§2K2.1(b)(6))

United States v. Ortega, 385 F.3d 120 (2d Cir. 2004). The defendant pleaded 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 the defendant's coat pocket, 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, concluding 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.

Number of Firearms (§2K2.1(b)(1))

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 the total number of firearms found in his possession, legal and illegal, under §2K2.1(b)(1). The appellate court reversed, concluding that Application Note 9 (now Note 6) to §2K2.1 requires that the guns be a part of the underlying offense. The circuit 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.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Khung Chang Kang, 225 F.3d 260 (2d Cir. 2000). The district court increased the defendant's offense level under §2L1.1(b)(5) (now §2L1.1(b)(6)) for recklessly creating a substantial risk of death or serious bodily injury to another person. The evidence showed that he had placed aliens on a very small shelf underneath a truck, exposing a substantial part of their bodies either to the road or to the mechanical parts of the truck. The Second Circuit affirmed the enhancement, finding that the facts were enough to support the enhancement and that the fact that the aliens ultimately did not suffer any serious bodily injury was besides the point, given that if they had suffered serious bodily injury, the appropriate enhancement would be

governed by §2L1.1(b)(6) (now §2L1.1(b)(7)).

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

Drug Trafficking Offense (§2L1.2(b)(1)(A)(i))

United States v. Compres-Paulino, 393 F.3d 116 (2d Cir. 2004). The defendant was convicted in state court of sale of a controlled substance, was paroled, and was deported. Upon illegally reentering the United States, he was arrested and convicted of additional drug charges. His state parole was revoked and he was sentenced to 29 months' imprisonment based on his prior drug trafficking conviction. At sentencing for his federal illegal reentry conviction, the district court used the state sentence as a basis for a 16-level enhancement under §2L1.2(b)(1)(A) for a sentence imposed for a drug trafficking offense. On appeal, the Second Circuit upheld the enhancement, finding that any punishment assessed for the probation violation was actually imposed for the underlying drug trafficking conviction.

Crime of Violence (§2L1.2(b)(1)(A)(ii))

United States v. Gamez, 577 F.3d 394 (2d Cir. 2009). The district court determined that defendant's previous conviction for criminal possession of a weapon in the second degree under N.Y. Penal Law § 265.03 was a crime of violence and therefore applied a 16-level increase to his base offense level, pursuant to §2L1.2(b)(1)(A)(ii). The defendant claimed that his offense was not a crime of violence, since the statute under which he was convicted does not include as an element any unlawful use, attempted use, or threatened use of physical force against another, even though he had, in fact, used a firearm to shoot two persons. Reviewing the issue for plain error because the defendant had failed to object at sentencing, the Second Circuit agreed with the defendant, finding that N.Y. Penal Law § 265.03 is not a crime of violence and the defendant should not have been subject to an enhancement for this conviction.

United States v. Pereira, 465 F.3d 515 (2d Cir. 2006). The defendant was convicted of illegal reentry after having been deported for an aggravated felony. The sentencing court imposed a 16-level enhancement pursuant to §2L1.2(b)(1)(A) based on the defendant's prior New York state robbery conviction. On appeal, the defendant challenged the enhancement on the basis that his robbery conviction resulted in a youthful offender adjudication. In upholding the enhancement, the Second Circuit explained that, to determine whether a defendant's youthful offender adjudications should be classified as adult convictions under the laws of New York, a 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 circuit court concluded that the 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 enhancement.

Aggravated Felony (§2L1.2(b)(1)(C))

United States v. Ayon-Robles, 557 F.3d 110 (2nd Cir. 2009). The defendant pled guilty to unlawful reentry, having previously pled guilty to two state felonies of simple possession of a

controlled substance. The district court determined that the defendant could have been prosecuted for felony recidivist possession under federal law, and therefore applied an eight-level sentencing enhancement for a prior aggravated felony pursuant to §2L1.2(b)(1)(C). The Second Circuit held that, because the term "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act ("INA"), the appellate court's previous interpretation of "aggravated felony" as it is used in the INA controlled in the sentencing context as well. Therefore, based on prior case law, the circuit court held that a second simple-possession felony, absent a recidivist finding, is not an aggravated felony for sentencing purposes.

United States v. Simpson, 319 F.3d 81 (2d Cir. 2002). The Second Circuit rejected the defendant's argument on appeal that the district court erred in imposing an eight-level sentence enhancement for a prior aggravated felony conviction, under §2L1.2(b)(1)(C), instead of a four-level enhancement for any other felony under §2L1.2(b)(1)(E). The appellate court 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. 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.

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 an aggravated felony under §2L1.2. The defendant argued that the New York statute that defines attempt is overly broad and contended 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." The Second Circuit disagreed, noting that attempts are generally included in the definition of aggravated felony under the commentary to §2L1.2, and that therefore the district court did not err in applying the enhancement.

Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001). The Second Circuit held that the district court erred by ordering an alien to be deported under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 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. Luna-Reynoso, 258 F.3d 111 (2d Cir. 2001). The defendant was convicted of illegal reentry and, at sentencing, the district court applied the aggravated felony enhancement under §2L1.2(b)(1)(A) for a prior burglary conviction, which had occurred before burglary was included in the definition of aggravated felony. On appeal, the Second Circuit affirmed the enhancement, concluding 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. *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). The defendant was convicted of aggravated reentry following deportation and the district court applied a 16-level enhancement pursuant to §2L1.2(b)(1)(A), for illegal reentry after commission of an aggravated felony, based on the defendant's prior convictions for three misdemeanors in Rhode Island state court that each resulted in a suspended term of imprisonment of one year. Noting that 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 affirmed the enhancement, reasoning that the INA language indicates that the "actual term imposed is ordinarily the definitional touchstone."

United States v. Galicia-Delgado, 130 F.3d 518 (2d Cir. 1997). The defendant was convicted of illegal reentry and the district court calculated his sentence on the basis that his 1991 conviction for attempted robbery met the definition of an aggravated felony. On appeal, the Second Circuit held that the district court did not err in enhancing his sentence pursuant to §2L1.2(b)(2).

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The defendant was convicted of illegal reentry after deportation and, at sentencing, information was presented that he had been previously convicted of an aggravated felony (possession with intent to distribute cocaine), which would normally warrant a 16-level enhancement under §2L1.2(b)(2). The district court refused to apply the enhancement, however, on the basis that the defendant had received the statutory minium sentence for a single cocaine offense in an undisclosed amount. On appeal, the Second Circuit held that the district court erred in not applying the mandatory enhancement, since Congress and the Commission had chosen to include drug trafficking crimes in the definition of aggravated felonies and it was not up to the district courts to determine whether the quantity or nature of the contraband or the severity of the sentence warranted an enhancement. *See also United States v. Polanco*, 29 F.3d 35 (2d Cir. 1994).

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). The defendants hired workers to remove asbestos from a commercial building without receiving Department of Environmental Protection approval. After receiving a "stop work" order from DEP, the defendants ignored the DEP requirements and had his workers resume removal of the asbestos in derogation of Clean Air Act requirements. The Second Circuit affirmed the district court's finding that the 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. However, the circuit court concluded that the district court erred in considering state permitting requirements in imposing a four-level enhancement pursuant to §2Q1.2(b)(2) for an offense involving the disposal of hazardous or toxic substance without a permit.

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

United States v. Koczuk, 252 F.3d 91 (2d Cir. 2001). The district court departed downward in a case involving defendants who smuggled over $11 million worth of sturgeon roe without obtaining a permit from Russia, concluding 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 Second Circuit reversed, explaining 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.

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, based on a finding that the extraordinary hardship to employees that would result from the defendant's imprisonment made it an extraordinary case. The government appealed the downward departure, contending that such departure is inconsistent with the deterrence rationale of §2R1.1. 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. While noting that "business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate," the circuit court explained that, without the defendant, two companies would likely end up in bankruptcy, and 150-200 employees would lose their jobs.

Part S Money Laundering and Monetary Transaction Reporting

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

See United States v. Byors, 586 F.3d 222 (2d Cir. 2009), § 3C1.1.

United States v. Dhafir, 577 F.3d 411 (2d Cir. 2009). The district court grouped and calculated the money laundering charges according to §2S1.1(a)(2), rather than §2S1.1(a)(1). The Second Circuit held that, given the ambiguities in the law regarding which subsection to apply in this case and the Government's contradictory positions at trial and sentencing regarding the source of the money laundering funds, the district court should have considered using the alternative approach endorsed in *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005), whereby a court need not make a precise calculation of the Guideline range in certain difficult cases.

United States v. Moloney, 287 F.3d 236 (2d Cir. 2002). The district court calculated the defendant's sentence based on a finding that 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. The Second Circuit held that this sort of scheme is appropriately sentenced as money laundering in promotion of another illegal activity.

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 circuit 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,'" and cannot retroactively affect the defendant's sentence.

United States v. Finkelstein, 229 F.3d 90 (2d Cir. 2000). At sentencing, the district 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. Napoli, 179 F.3d 1 (2d Cir. 1999). The district court did not err in its application of §2S1.1 notwithstanding the defendant's argument that his money laundering offenses should have been grouped with his fraud offenses based on the retroactive application of guidelines Amendment 634. The Second Circuit held that Amendment 634 was a substantive change rather than merely a clarification and therefore it could not be applied retroactively.

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. Gordon, 291 F.3d 181 (2d Cir. 2002). The circuit court held that the district court erred in not considering the unclaimed but valid deductions that the defendant could have made, but concluded that the error was harmless because the defendant could provide no proof that the potential deductions would have been treated as salary - and hence deductible - instead of non-deductible capital gains.

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 circuit court reasoned that the calculation of loss does not require certainty or precision, relying, in part, on the commentary to §2T1.1 stating that "the amount of the tax loss

may be uncertain," and that "indirect methods of proof [may be] used . . . ." The court noted that, 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, and, moreover, the guidelines allow the sentencing court to estimate the loss resulting from the 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.

Part X Other Offenses

§2X3.1 Accessory After the Fact

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

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.4 Terrorism

United States v. Stewart, 2009 WL 4975286 (2d Cir. Dec. 23, 2009). The district court refused to apply the terrorism enhancement to defendant Yousry's sentence on the basis that this defendant (1) did not himself commit a federal crime of terrorism and (2) did not act with the specific intent to promote a federal crime of terrorism. The application notes to §3A1.4 incorporate 18 U.S.C. § 2332b(g)(5) by reference and § 2332b(g)(5), in turn, defines a "Federal crime of terrorism" as an offense that, *inter alia*, is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. On appeal, the government argued that any motivational requirement for the enhancement could be imputed from his co-conspirators' relevant conduct under §1B1.3(a), asserting that it was "reasonably foreseeable" to Yousry that his co-conspirators' actions were calculated to "influence or affect the conduct of government." The circuit court rejected the argument because §1B1.3 applies to "acts and omissions," while section 2332b(g)(5) describes a motivational requirement (specific intent). Therefore, the appellate court declined to conflate Yousry's acts with his co-conspirators' mental states.

As to defendant Sattar, the district court imposed the terrorism enhancement and, after considering the section 3553(a) factors, imposed a downward variance from the guideline range of life imprisonment to 288 months' imprisonment on the basis that: (1) the terrorism enhancement overstated the seriousness of the offense because Sattar was convicted of conspiracy to murder, not of murder itself; (2) the terrorism enhancement put the defendant in the highest criminal history category without a single criminal history point, thus overstating Sattar's past conduct and future likeliness to recidivate; and (3) he had been under extremely restrictive conditions for 4.5 years and would likely serve his term under conditions more severe than the average federal prisoner. The circuit court affirmed the sentence, finding that the enhancement at §3A1.4 may be applied to a range of defendants with different levels of culpability and the district court has a responsibility under section 3553(a)(6) to avoid unwarranted sentencing disparities among similarly situated defendants. The circuit court also noted that the district court was in the best

position to assess the defendant's history and characteristics and to adjust the individualized sentence accordingly and that it was not unreasonable to consider the severity of Sattar's conditions confinement when determining the sentence.

United States v. Salim, 549 F.3d 67 (2d Cir. 2008), *cert. denied*, 130 S. Ct. 325 (2009). The government appealed the district court's refusal to apply a 12-level enhancement for a "federal crime of terrorism," pursuant to §3A1.4, on the basis that the defendant's conduct was not "transnational." The Second Circuit reversed and held that the definition of "federal crime of terrorism" for purposes of §3A1.4 has the meaning given that term at 18 U.S.C. § 2332b(g)(5). Observing that the statutory definition "encompasses many offenses, none of which has an element requiring conduct transcending national boundaries," the Second Circuit remanded the case for re-sentencing in accord with the opinion.

Part B Role in the Offense

§3B1.1 Aggravating Role

Organizer or Leader (§3B1.1(a))

United States v. Ware, 577 F.3d 442 (2d Cir. 2009). The district court imposed a four-level upward adjustment pursuant to §3B1.1(a), citing to the language of §3B1.1(a) and stating only "I think that this covers this defendant." The Second Circuit held that the court had failed to make specific findings as to why the adjustment applied, as required by *United States v. Espinoza*, 514 F.3d 209 (2d Cir. 2008), and the precedents to which the *Espinoza* case cited. The circuit court noted further that the district court did not satisfy its obligation by adopting the factual statements in the pre-sentence report ("PSR"), because, in this case, the PSR did not contain sufficient facts to support the enhancement.

United States v. Salazar, 489 F.3d 555 (2d Cir. 2007). The defendant was convicted of conspiracy to distribute cocaine and sentenced to 168 months' imprisonment based, in part, on the sentencing court's determination, by a preponderance of the evidence, that he was a "leader" of the conspiracy pursuant to §3B1.1(a). On appeal, the defendant argued that the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), required the sentencing judge to find proof for the leadership enhancement beyond a reasonable doubt. The Second Circuit affirmed the enhancement, holding that courts post-*Booker* were still required to apply a preponderance of the evidence standard when finding facts relevant to the guidelines calculations. *See also United States v. Crosby*, 397 F.3d 103, 111-12 (2d Cir. 2005).

United States v. Paccione, 202 F.3d 622 (2d Cir. 2000). The defendants were convicted of arson, conspiracy to commit arson, and mail fraud and, at sentencing, the district court, in applying a leadership enhancement pursuant to §3B1.1, included the two defendants to find that they were leaders in a crime involving five participants (*i.e.*, three others and the two defendants). The Second Circuit upheld the district court's finding, holding specifically 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." The circuit court noted that its decision was consistent with other sister circuits.

Manager or Supervisor (§3B1.1(b))

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, finding that a demand that a debtor pay up or make an advance does not support an inference that the debtor is a subordinate. The circuit court noted that, if anything, the debtor's nonpayment to the defendant suggests independence.

United States v. Blount, 291 F.3d 201 (2d Cir. 2002). The district court sentenced the defendant as a manager or supervisor. The Second Circuit held that the record, which showed that the defendant 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. Jimenez, 68 F.3d 49 (2d Cir. 1995). The defendant was convicted of conspiracy to distribute narcotics and, at sentencing, the district court explicitly found that the defendant was a manager of the drug conspiracy, but failed to enhance the defendant's sentence for this aggravating role. On appeal, the Second Circuit ruled that the language of §3B1.1 "is mandatory once its factual predicates have been established," so that, once the district court had explicitly determined that the defendant was a manager or supervisor of a drug organization, the enhancement was required.

Miscellaneous

United States v. Dennis, 271 F.3d 71 (2d Cir. 2001). The Second Circuit rejected the defendant's argument that his sentence was improperly enhanced under §3B1.1, given that the final sentence was below the statutory maximum and *Apprendi* did not affect a court's authority to determine facts for sentencing at or below the statutory maximum.

§3B1.2 Mitigating Role

United States v. Salameh, 261 F.3d 271 (2d Cir. 2001). 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 circuit court found that the role the defendant played in the

crime did not meet the definitions of "minor" or "minimal" found in §3B1.2. *See also 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

Abuse of Position of Trust

United States v. Stewart, 2009 WL 4975286 (2d Cir. Dec. 23, 2009). The government appealed Lynn Stewart's sentence and the Second Circuit held, *inter alia*, that the district court failed to adequately articulate why Stewart's actions as a member of the bar did not warrant a punishment greater that it was. On remand, the Second Circuit required that the district court "consider whether Stewart's conduct as a lawyer triggers the special-skill/ abuse-of-trust enhancement under the Guidelines, *see* U.S.S.G. § 3B1.3, and reconsider the extent to which Stewart's status as a lawyer affects the appropriate sentence." The appellate court specifically indicated that it had "specific doubts" that the sentence given to Stewart was reasonable but thought it appropriate to hear from the district court further before deciding the issue.

United States v. Friedberg, 558 F.3d 131 (2d Cir. 2009). The appellate court held that the district court properly applied the abuse-of-trust enhancement in a tax evasion case that was part of a larger scheme to embezzle funds and hide the defendant's income. The circuit court found that the defendant "effectuated the scheme by abusing his position . . . and shielding the illicit income from the government." The circuit court held that uncharged relevant conduct can support an abuse-of-trust enhancement in a tax evasion conviction, and that the abuse of trust inherent in the defendant's embezzlement "victimized both the government and [the organization at which he worked] by depriving them of funds rightfully theirs."

United States v. Nuzzo, 385 F.3d 109 (2d Cir. 2004). The defendant, an inspector for the Immigration and Naturalization Service at JFK Airport, was 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. 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; in other words, his position provided freedom to commit a difficult-to-detect wrong. The circuit court 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. Ntshona, 156 F.3d 318 (2d Cir. 1998). The district court enhanced the defendant's sentence 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.

Use of Special Skill

United States v. Reich, 479 F.3d 179 (2d Cir. 2007). The defendant was convicted of corruptly obstructing a judicial proceeding by fabricating a fake court order in a civil suit; the fake order, on which the defendant had forged a magistrate judge's signature, indicated that the magistrate judge overseeing the litigation had recused himself. The sentencing court imposed a two-level enhancement for abuse of a special skill pursuant to §3B1.3. On appeal, the defendant argued that the only basis for the charge against him was his use of a fax machine, which, he asserted, did not involve his legal skills. The Second Circuit disagreed and affirmed the §3B1.3 enhancement, finding that the defendant's crafting of the forged order had necessarily involving "his special skills as a lawyer."

United States v. Downing, 297 F.3d 52 (2d Cir. 2002). On appeal, 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 conspiracy. The Second Circuit held, 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.

See United States v. Stewart, 2009 WL 4975286 (2d Cir. Dec. 23, 2009).

§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 a two-level enhancement under §3B1.4 for using a minor to commit an offense. The Second Circuit affirmed the enhancement because the defendant did 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. Byors, 586 F.3d 222 (2d Cir. 2009). The defendant was charged with bank fraud and he thereafter attempted to obstruct justice by contacting witnesses. He was then indicted on fraud and money laundering counts. He eventually pleaded guilty to sixteen counts of fraud and money laundering. The district court applied a two-level enhancement for obstruction of justice. On appeal, the defendant argued that the court erred in applying this enhancement because his obstruction of justice related to his underlying fraud offenses and not to the money laundering offenses. Application Note 2(c) of the money laundering guideline, section 2S1.1 states, in relevant part, that: "application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offenses from which the laundered funds were derived." The Second Circuit held, on an issue of first impression, that Application Note 2(C) to section 2S1.1 of the guidelines does not preclude an enhancement for obstruction of justice pursuant to §3C1.1 of the Guidelines where a defendant's obstruction relates to an offense underlying a money laundering offense but not to the money laundering offense itself.

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.

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) and, at sentencing, the district court applied the obstruction of justice adjustment. The Second Circuit, citing Application Note 7 to §3C1.1, held that there need not be a specific finding regarding intent to obstruct justice and that the court could rely on the false statements conviction in support of the obstruction of justice adjustment.

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, 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). At sentencing, the district court enhanced the defendant's sentence for obstruction of justice based on her actions of alerting another individual that he was the target of an investigation. On appeal, the Second Circuit affirmed the 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. Vegas, 27 F.3d 773 (2d Cir. 1994). The sentencing court declined to impose an enhancement for obstruction of justice. On appeal, the government argued that the district court erred because the defendant had testified at trial, his testimony was clearly rejected by the jury verdict of guilt, and therefore the court was obligated to make a finding as to whether he committed perjury on the stand and enhance his sentence accordingly. The Second Circuit rejected the government's argument, holding that neither *United States v. Dunnigan*, 507 U.S. 87 (1993), nor *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993), stood 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; instead, such a hearing only needs to be held when the court wishes to impose the enhancement over the defendant's objection. The circuit court noted that, in this case, the district court determined that the evidence was not sufficiently clear as to whether perjury had been committed, and thus no hearing was necessary.

§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. The circuit court held that 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), §3D1.2.

§3D1.2 Groups of Closely Related Counts

United States v. Hasan, 586 F.3d 161 (2d Cir. 2009). The defendant was convicted of kidnapping, conspiracy to commit kidnapping, and passport fraud. At sentencing, the district court grouped the kidnapping and conspiracy to commit kidnapping counts under §3D1.2, but did not include the passport fraud conviction in this grouping. On appeal, the defendant argued that the three convictions should have been grouped because all three charges arose from a common scheme as a part of "a single criminal episode" pursuant to Application Note 3 to §3D1.2. The Second Circuit rejected this argument, stating that, pursuant to §3D1.2(a)-(b), convictions are grouped only when they involve the same victim and, in this case, the victim of the kidnapping and conspiracy charges were the same two individuals, while "society at large . . . was the victim of [the defendant's] passport fraud."

United States v. Vasquez, 389 F.3d 65 (2d Cir. 2004). The defendant, a prison guard, engaged in unlawful sexual activity with a single inmate on two separate occasions. The district court did not group the sexual offenses against the single inmate, pursuant to §3D1.2(b), which states that counts involve substantially the same harm "when counts involve the same victim and two or more acts or transactions connected by a common criminal objection or constituting a common scheme or plan." On appeal, the defendant argued that the examples provided in Application Note 4 to §3D1.2 indicate that grouping of the same crimes involving the same person is appropriate whenever the crimes do not involve the use of force. The Second Circuit disagreed, holding that the use of force is not a requirement for placing the same crimes against the same person in separate groups. The appellate court reasoned that crimes do not necessarily "involve substantially the same harm" just because force is not used and, moreover, regardless of force, "two episodes of sexual conduct that society has legitimately criminalized occurring with the same person on difference days are not 'substantially the same harm.'"

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002). The district court grouped the defendant's mail fraud and tax counts under §3D1.2(c), under which offenses that are "closely related" are grouped, rather than under §3D1.2(d), under which crimes are grouped that are of the "same general type," resulting in a substantially lower sentence for the defendant. First, the Second Circuit determined that the use of "shall" in §§3D1.1 and 3D1.2 meant that grouping was not optional and thus, once a court had determined that counts meet the requirements in §§3D1.1 and 3D1.2, they must be grouped. Second, while holding that the district court was correct to group the counts, the appellate court overturned the district court's grouping method, holding that §3D1.2(d) was the appropriate guideline for fraud and tax evasion cases, because, if there is a choice to be made between guidelines, crimes that have a quantifiable harm fall under §3D1.2(d). Third, the circuit court found that §3D1.3 sets out two methods for designating the appropriate base offense level, and that §3D1.3(b) creates a unique mechanism for §3D1.2(d) offenses by using the aggregate amount of money or dugs involved in the offenses to set the offense level for the grouped counts.

See United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000), §1B1.3.

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

See United States v. Gordon, 291 F.3d 181 (2d Cir. 2002), §3D1.2.

§3D1.4 Determining the Combined Offense Level

United States v. Vasquez, 389 F.3d 65 (2d Cir. 2004). Noting that "[t]he Guidelines provide a set of grouping rules to guard against the risk that technically distinct but related forms of criminal conduct, capable of being charged in separate counts, do not result in excessive punishment," the Second Circuit cited §3D1.4 as "modulat[ing] the degree of increased punishment by a formula that increases the adjusted offense level by small increments depending primarily on the number of groups."

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

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

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002). The circuit court explained that it will only overturn a district court decision with regard to acceptance of responsibility if the factual determination is without foundation. It affirmed the district court's denial of a downward adjustment for acceptance of responsibility because the evidence supported the conclusion that the fact that the defendant pled guilty in a timely fashion was outweighed by his conduct after that plea, including his presence at the scene of his crimes and his association with people "from his criminal past" while there. *See also United States v. McLean*, 287 F.3d 127 (2d Cir. 2002).

United States v. Rood, 281 F.3d 353 (2d Cir. 2002). The district court granted the defendant a two-level decrease for acceptance of responsibility pursuant to §3E1.1(a), but, notwithstanding that the defendant met the requirements in §3E1.1(b), refused to grant him the additional one-level decrease. The Second Circuit held that the district court erred because, once the defendant meets the factors delineated in §3E1.1(b), the sentencing court does not have discretion not to award the reduction.

United States v. Zhuang, 270 F.3d 107 (2d Cir. 2001). The presentence report (PSR) recommended against a reduction for acceptance of responsibility because the defendant's statements reflected a lack of recognition that he had committed the crime; specifically, the PSR revealed that the defendant stated that the crime had nothing to do with him, he was paid to do the job, he was only a "middle person," and he did not understand how the jury could have convicted him. The Second Circuit affirmed the district court's refusal to grant a reduction based on the PSR's recommendation, ruling that these statements sufficiently reflected a lack of acknowledgment that the defendant's conduct constituted a crime.

United States v. Ortiz, 218 F.3d 107 (2d Cir. 2000). The Second Circuit held 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. Austin, 17 F.3d 27 (2d Cir. 1994). The defendant admitted to the illegal purchase and resale of 36 firearms, but pleaded guilty only to conduct related to five firearms. After the defendant refused to assist with the recovery of the other 31 firearms, the sentencing court denied a sentence reduction for acceptance of responsibility. The Second Circuit remanded for resentencing, holding that the defendant only needed to accept responsibility for the conduct underlying the offense of conviction (*i.e.*, the five firearms).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

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. At 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 Second Circuit rejected this argument, stating the term "prior sentence" is "not directed at the chronology of the conduct, but the chronology of the sentencing."

United States v. Aska, 314 F.3d 75 (2d Cir. 2002). The defendant was convicted of passport fraud and sentenced to prison, but he failed to surrender and thereafter pleaded guilty to failing to report for a sentence. At sentencing for the charge of failing to report, the district court increased the defendant's criminal history score on the basis that his offense of failing to surrender for sentence occurred while he was on the equivalent of escape status from a criminal justice sentence (the sentence imposed for passport fraud for which he had failed to surrender), pursuant to §4A1.1(d). On appeal, the defendant claimed that the district court engaged in impermissible double counting. Agreeing with four other circuit courts that had addressed the matter, 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 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.

United States v. Driskell, 277 F.3d 150 (2d Cir. 2002). The district court included a prior state conviction, for which the defendant was adjudicated a "youthful offender" under New York state law, in calculating the defendant's criminal history score under §4A1.1. Citing its earlier decision in *United States v. Matthews*, 205 F.3d 544 (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.

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

United States v. Green, 480 F.3d 627 (2d Cir. 2007). In a plea agreement, the defendant stipulated to a prior New York state conviction of attempted criminal possession of a controlled substance in the third degree. Relying on the state court certificate of disposition that referenced a subsection of the state criminal code governing intent to distribute, the district court concluded that the prior conviction was for possession with intent to distribute, rather than simple possession. On appeal, the defendant claimed that the subsection referenced on the certificate of disposition could have been a result of human error and claimed that neither his New York

indictment nor the Commitment Order provided any evidence that he was convicted of intent to sell. The Second Circuit agreed that the certificate of disposition, while not inadmissible, could not support the sentence imposed absent some corroborative evidence that the subsection referenced on the certificate represented the actual subsection for the prior conviction, and was not merely a default subsection due to the programming of the state court's computers.

United States v. Ramirez, 421 F.3d 159 (2d Cir. 2005). The 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, holding that "[t]he 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."

United States v. Matthews, 205 F.3d 544 (2d Cir. 2000). The circuit 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 appellate court distinguished the New York youthful offender statute from the 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."

United States v. Morales, 239 F.3d 113 (2d Cir. 2000). At sentencing, the district court ruled that the defendant's prior harassment conviction was not "similar to" the listed offenses in §4A1.2(c)(1), the conviction therefore carried a criminal history point and, because he had one criminal history point for another prior offense, he was ineligible for safety-valve relief. The Second Circuit held that, for a broad offense like harassment, the "similar to" determination requires a fact-specific inquiry and that the facts of the defendant's harassment offense indicated that his prior offense was not clearly more serious that the most relevant of the listed offenses.

United States v. Martinez-Santos, 184 F.3d 196 (2d Cir. 1999). The Second Circuit held that, 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, which "relies on all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." The appellate court also directed district courts to use "any other factor the court reasonably finds relevant in comparing prior offenses and listed offenses."

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

United States v. Simmons, 343 F.3d 72 (2d Cir. 2003). The district court counted several of the defendant's Canadian convictions in determining his criminal history score. 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.

United States v. Mishoe, 241 F.3d 214 (2d Cir. 2001). The Second Circuit held that a 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. However, the appellate court explained that, if the court concludes that the defendant's overall criminal history category overstates the seriousness of his or her criminal history, the district court may depart under §4A1.3. The circuit court listed the following factors to consider: the quantity of drugs involved in the 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. Tejeda, 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, because the defendant received very light sentences for his career offender predicate offenses; his codefendant received a much lower sentence; the quantity of drugs involved was relatively small; and the defendant was eligibility for deportation after his release from custody. The Second Circuit 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. The appellate court noted, moreover, that circuit precedent already forbid 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.

United States v. Harris, 13 F.3d 555 (2d Cir. 1994). The district court departed upward from offense level five to offense level 17, based on a finding that Criminal History Category VI did not adequately represent the seriousness of the defendant's past conduct, which included 15 prior convictions that were not counted in his criminal history score because they were too old and that the defendant had cashed stolen money orders less than 7 months after his release from an 8-year sentence for robbery. On appeal, the Second Circuit noted that the 1992 amendments to §4A1.3 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." However, 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."

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Parnell, 524 F.3d 166 (2d Cir. 2008). The 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. The 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.

United States v. Jones, 415 F.3d 256 (2d Cir. 2005). The defendant appealed a sentence designating his as a career offender pursuant to §4B1.1, arguing that his two New York state youthful offender adjudications were improperly counted as predicate offenses. The Second Circuit affirmed the district court's determination, noting 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 under §§4B1.2 and 4B1.1(a).

United States v. Mapp, 170 F.3d 328 (2d Cir. 1999). The district court sentenced the defendant as 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 and 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. 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 Second Circuit vacated the sentence and remanded for resentencing, holding that §4B1.1 does not impermissibly "double count." The appellate court explained that "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. 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.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. Boonphakdee, 40 F.3d 538 (2d Cir. 1994, *superceded on other grounds as recognized in United States v. Gonzales*, 420 F.3d 111 (2d Cir. 2005). At sentencing, the district court 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. On appeal, the Second Circuit reversed, holding that, because the defendant's two prior felonies were separated by an intervening arrest, they are by definition "not considered related."

United States v. Jones, 27 F.3d 50 (2d Cir. 1994). The defendant challenged the district court's use of a prior conviction to sentence him as a career offender, arguing that the prior conviction had been obtained in violation of his due process rights. Citing *Custis v. United States*, 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, the Second Circuit held that, since the defendant was represented by counsel at his prior conviction, his claim was meritless.

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

United States v. Hurell, 555 F.3d 122 (2d Cir.), *cert. denied*, 130 S. Ct. 60, 130 S. Ct. 62, *and* 130 S. Ct. 64 (2009). Citing its previous opinion that New York's offense of burglary in the third degree is a crime of violence, *United States v. Brown*, 514 F.3d 256 (2d Cir. 2008), the Second Circuit further held that *attempted* burglary in the third degree is also a crime of violence pursuant to Application Note 1 to §4B1.2.

United States v. Savage, 542 F.3d 959 (2d Cir. 2008). The appellate court held that a mere offer to sell does not constitute a "controlled substance offense" as that term is defined in §4B1.2(b).

United States v. Gray, 535 F.3d 128 (2d Cir. 2008). The Second Circuit held that reckless endangerment does not fall within the definition of crime of violence because it does not involve the purposeful conduct as required under §4B1.2(a)(2).

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 applied the criminal livelihood enhancement in sentencing the defendant for a passport fraud offense. On appeal, the defendant challenged the enhancement on the basis that he received no financial gain from the instant crime and there was insufficient evidence that any pattern of criminal conduct yielded the requisite financial gain. The Second Circuit held that the enhancement does not require financial gain, merely that the defendant engaged in a pattern of criminal conduct constituting his livelihood, rather than any legitimate job. The circuit court explained that, although the passport fraud offense by itself was not income producing, the record indicated that the fraudulent passports enabled the defendant to travel anonymously to perpetrate additional bank frauds. The appellate court found that t district 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. Thrower, 584 F.3d 70 (2d Cir. 2009). The Second Circuit joined seven sister circuits in holding that the defendant's conviction for larceny from the person qualifies as a violent felony under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), because it involves conduct presenting a serious potential risk of physical injury to another and it was roughly similar to those offenses enumerated in the Act. Therefore, the defendant was properly sentenced to the statutory minimum term of 15 years' imprisonment based on his three prior violent felonies.

United States v. Mills, 570 F.3d 508 (2d Cir. 2009). The district court found that the defendant's prior Connecticut escape conviction rendered him an armed career criminal. On appeal, the circuit court held that, under *Chambers v. United States*, 129 S. Ct. 687 (2009), the defendant's prior escape conviction was not a violent felony, because the Connecticut escape statute includes both an escape from custody and a failure to return, and the government could not prove that the defendant's escape was from custody, rather than a failure to return.

United States v. Daye, 571 F.3d 225 (2d Cir. 2009). The district court determined that the defendant was an armed career criminal on the basis of three prior Vermont convictions for sexually assaulting a child and a Vermont conviction for escape. The Second Circuit held that,

under *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 1585 (2008),[5] the defendant's three prior convictions for sexually assaulting children constituted violent felonies. However, the circuit court remanded to the district court for it to determine whether, pursuant to *Chambers v. United States*,129 S. Ct. 687, 691-92 (2009),[6] the defendant's escape conviction was an ACCA predicate. Finally, because the district court had not specifically identified which sexual assault convictions were ACCA predicates, the Second Circuit remanded so that the district court could determine if all three previous convictions arose from conduct committed on different occasions, thereby rendering the three convictions sufficient to find the defendant an armed career criminal, even without the escape conviction.

United States v. Darden, 539 F.3d 116 (2d Cir. 2008). The Second Circuit held that convictions under a New York drug offense that carried a maximum sentence of at least ten years at the time of conviction was not a "serious drug offense" under the ACCA because the statutory maximum was amended prior to the federal sentencing to reduce the maximum to less than ten years. The circuit court found that it did not matter that the amendment was not retroactive because "the ACCA instructs courts to defer to state lawmakers' current judgment about the seriousness of an offense as expressed in their current sentencing laws."

United States v. Moore, 208 F.3d 411 (2d Cir. 2000). After trial, it was discovered that defendant had a previous assault conviction, which resulted in the 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. Joining the First and Fourth Circuits, the Second Circuit 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.

United States v. Paul, 156 F.3d 403 (2d Cir. 1998). 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. Holding that the district court properly sentenced the defendant as an armed career criminal, the Second Circuit explained 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. Phillips, 431 F.3d 86 (2d Cir. 2005). The defendant pleaded guilty to a child pornography charge and the district court enhanced his sentence pursuant to §4B1.5(b) on the basis that the defendant had engaged in prohibited sexual conduct with at least two minor victims on separate occasions. In imposing the enhancement, the district court referenced the

[5] *Begay* held that, to determine whether a prior conviction constitutes an ACCA predicate, the crime must be "roughly similar, in kind as well as in degree of risk posed, to the listed crimes of burglary, arson, extortion, and crimes involving the use of explosives."

[6] *Chambers* held that mere failure to report for incarceration, while falling within the broad category of acts encompassed by the term "escape," does not constitute a violent felony.

sexual conduct with the victim in the current case and unadjudicated sexual conduct that had occurred with another child victim when the defendant was a juvenile. The Second Circuit affirmed application of the enhancement, explaining that §4B1.5(b) does not "specifically carve out unadjudicated juvenile conduct from the district court's consideration," and indicating that the purpose of this guideline, to aggressively target recidivist exploiters of minors, meant that a district court should be permitted to take into account sexually exploitive conduct that occurred while the defendant was himself a juvenile.

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, *sua sponte*, imposed a television ban 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 ban 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 ban for the stated purpose of promoting self-reflection and remorse exceeded the district court's broad discretion.

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*: (1) restriction of the 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. On appeal, the Second Circuit struck down the internet prohibition as overly broad, not reasonably necessary to protect the public or the defendant's family, and an impermissible occupational restriction. The circuit court also found the third-party notification provision an impermissible occupational restriction, and held that, while the defendant could be referred for sex offender counseling, the condition as written was ambiguous. 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 defendant pleaded guilty to bank fraud, a class B felony. At sentencing, the court remarked that "if permitted by law, I would give him six months home detention," but instead imposed a term of imprisonment, even though it had also indicated that the defendant's unusual family circumstances and responsibilities justified a downward departure. The Second Circuit remanded to the district court, finding that the district court mistakenly believed that a sentence of imprisonment was required. The circuit court explained that neither the statute of conviction (18 U.S.C. § 1341), nor 18 U.S.C. § 3561 (the "B-Felony rule") required the judge to impose a minimum prison term, and, while the guidelines direct imprisonment, the judge could depart from them if it found aggravating or mitigating circumstances not adequately considered by the Commission.

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

United States v. Jeffers, 329 F.3d 94 (2d Cir. 2003). The defendant was convicted following a jury trial, at which he testified, with conspiracy to import five or more kilograms of cocaine into the United States and other crimes. Before sentencing, the defendant admitted that he had lied when testifying at trial, and he then provided the government with a full accounting of his role in the crime. The district court denied his motion for safety valve relief, pursuant to §2D1.1(b)(6) (now §2D1.1(b)(11) and 18 U.S.C. § 3553(f), on the basis that the defendant's commission of perjury at trial disqualified him from safety valve eligibility as a threshold matter. The Second Circuit vacated the district court's decision and remanded for resentencing, holding 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). *See also United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999).

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. The circuit court held that 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 appellate 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. Tang, 214 F.3d 365 (2d Cir. 2000). The Second Circuit held that 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 requirements for safety valve relief because there is no "fear-of-consequences" exception to the safety valve provision.

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. Smith, 174 F.3d 52 (2d Cir. 1999). The Second Circuit held that 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(a)(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. Gambino, 106 F.3d 1105 (2d Cir. 1997). Noting that the language of the safety valve provision places the burden on the defendant to provide truthful information to the government, the Second Circuit held that "it follows that the burden should fall on the defendant to prove to the court that he has provided the requisite information if he is to receive the benefit of the statute."

United States v. Resto, 74 F.3d 22 (2d Cir. 1996). The district court granted the defendant, who had four criminal history points, a downward departure from Criminal History Category III to Category I, pursuant to §4A1.3. 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."

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 defendant was sentenced to time served and two years' supervised release for conspiracy to commit bank fraud. Because the defendant was not sentenced to more than one year imprisonment and the bank fraud statute was silent as to supervised release, the district court had discretion, but was not required, to impose supervised release, pursuant to §5D1.1(a) and (b). On appeal, the defendant argued that the district court was constrained to impose a maximum of one year supervised release under §5D1.2(a), which authorizes one year for Class E felonies or Class A misdemeanors, whereas the guideline authorizes at least two but not more than three years for Class C or D felonies. The bank fraud conspiracy did not carry a letter grade, but the Second Circuit held that, under 18 U.S.C. § 3559, the maximum term of imprisonment authorized for the conspiracy controls what letter grade is given to the offense. Because five years' imprisonment is the maximum authorized,

the bank fraud conspiracy was a Class D felony, and the district court's imposition of two years' supervised release was permissible under §5D1.2.

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, because "supervised release can never be imposed without an initial period of imprisonment."

§5D1.2 Term of Supervised Release

United States v. Hayes, 445 F.3d 536 (2d Cir. 2006). The defendant was sentenced to 151 months' imprisonment and a lifetime term of supervised release for knowingly transporting child pornography. On appeal, the defendant argued that the term of supervised release was unreasonable. Noting that the guidelines recommend a lifetime term of supervised release for these types of offenses, the Second Circuit concluded that the term was reasonable in light of the fact that the defendant had already been convicted of sexually abusing a minor.

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

§5D1.3 Conditions of Supervised Release

United States v. Reeves, No. 08-2966, 2010 WL 27310 (2d Cir. Jan. 7, 2010). The defendant was convicted of possessing child pornography and the district court imposed, as a condition of supervised release, that the defendant notify the United States Probation Department upon entry into a "significant romantic relationship" and inform the other party to the relationship of his conviction. The Second Circuit vacated the condition because it was unduly vague and not "reasonably necessary" to achieve the objectives of 18 U.S.C. § 3553(a)(2).

United States v. Handakas, 329 F.3d 115 (2d Cir. 2003), *overruled on other grounds in United States v. Rybicki*, 354 F.3d 124 (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. The Second Circuit remanded the sentence to allow reconsideration of the non-standard condition of supervised release, because 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 circuit 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. 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). The defendant pled guilty to receiving child pornography and, as special condition of his supervised release, he was denied the use of a computer or the internet. 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. The Second Circuit held 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 appellate court 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.[7]

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" on the basis that they were, in fact, standard conditions for felony defendants. However, the appellate court found that the "special" condition 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) (requiring the defendant's presence at sentencing), because it encompassed non-criminal behavior and did not overlap with any of the mandatory or standard conditions of release.

United States v. Bok, 156 F.3d 157 (2d Cir. 1998). The district court ordered 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 Second Circuit affirmed the order, holding 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 appellate court concluded, a plain reading of §§ 3583(d) and 3563(b) permits a judge to award restitution as a condition of supervised release without regard to the limitations in § 3663(a).

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[7] 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.

United States v. Balogun, 146 F.3d 141 (2d Cir. 1998). The defendant was convicted of importing heroin into the United States and sentenced principally to 21 months' imprisonment, to be followed by a three-year term of supervised release and exclusion from the United States, with the supervised release to be suspended upon his exclusion and resumed upon his reentry into the United States. The Second Circuit held that, under a proper reading of 18 U.S.C. § 3683(d) and the supervised release provisions in the guidelines, the district court lacked authority to toll the period of supervised release while the deported alien remains outside the United States.

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998). As a condition of supervised release for a defendant convicted of conspiracy to commit wire fraud and ordered to pay $1.6 million in restitution, the district court ordered that the defendant be subject to searches of his person and property by the probation department to secure information related to his financial dealings. The Second Circuit held that this condition was appropriate, because 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.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Pearson, 570 F.3d 480 (2d Cir. 2009). The defendant was convicted of multiple counts of producing, transporting, receiving and possessing child pornography and ordered to pay restitution to the child victims of his crime in the amount of $974,902. The Second Circuit held that a restitution order pursuant to 18 U.S.C. § 2259 may provide for estimated future medical expenses, but found that the district court in this case had not adequately explained its calculation of the restitution amount.

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

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998). 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. The Second Circuit affirmed, holding that the district court properly considered the defendant's ability to pay, including that the defendant's three children were in parochial school, he owned several pieces of real estate, he drove at least one Jaguar, and properties held in his wife's name were "a charade." 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. 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, but 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 § 3583(e)(2) permitted modification of terms of

supervised release. The circuit court affirmed the district court's ruling that illegality of a restitution order was not grounds for modification under § 3583(e)(2), noting that the legality of restitution was not a listed factor for courts to consider under that 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 appellate 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). The Second Circuit held that a 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 was deported.

United States v. Sellers, 42 F.3d 116 (2d Cir. 1994). In addressing an issue of first impression, the Second Circuit 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). 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); *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).

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. 1993), that the Commission had the authority to promulgate §5E1.2 because 28 U.S.C. § 994(c)(3) & (6) authorizes the Commission to consider the "nature and degree of the harm caused by the offense" and "the deterrent effect . . . [on] others," and §5E1.2 considers the seriousness of the defendant's offense and deters others.

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). 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 also 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. White, 240 F.3d 127 (2d Cir. 2001). The Second Circuit held that, because the district court's use of §5G1.2(d) did not result in a sentence on any one count above the maximum statutory sentence available for that count, the district court's imposition of consecutive sentences did not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

United States v. Cordoba-Murgas, 233 F.3d 704 (2d Cir. 2000). The appellate court concluded that a 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. 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.

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

United States v. Perez, 328 F.3d 96 (2d Cir. 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 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. 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 and the district court sentenced him to 64 months' imprisonment, 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 Second Circuit rejected the government's arguments, holding 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.

United States v. Williams, 260 F.3d 160 (2d Cir. 2001). The district court did not apply §5G1.3(b) to this case on the basis that doing so would modify the plea agreement. On appeal, the defendant argued that the sentencing court erred by not running his federal prison term concurrently with any undischarged state prison term, with credit for time served. The appellate court held that district courts are obligated to apply §5G1.3(b) to Fed. R. Crim. P. 11(e)(1)(C) plea bargains that are mute about how the sentence is to interact with an existing undischarged sentence. However, the circuit court found that its application in this case would not have helped the defendant because, in setting his offense level of the instant offense, the district court had not, in fact, treated his prior offense as "relevant conduct."

United States v. Garcia-Hernandez, 237 F.3d 105 (2d Cir. 2000). The defendant was convicted in state court of drug possession and, after serving his sentence, he was paroled and deported. The defendant then illegally reentered the United States; the state revoked his parole; and he was incarcerated in state prison. He was later convicted in federal court for illegally reentering the country. On appeal, he claimed that his federal sentence should have run concurrently with his state sentence pursuant to §5G1.3(b). The Second Circuit, however, held that the defendant's state sentence was actually a sentence for his original offense (drug possession), not for his illegal reentry, and therefore was not accounted for in his guideline offense level for illegal reentry.

United States v. McCormick, 58 F.3d 874 (2d Cir. 1995). The defendant was charged with bank fraud in Connecticut district court and mail fraud in Vermont district court. He was sentenced first in Connecticut court, and, thereafter, sentenced in Vermont district court to 35 months' imprisonment, to run consecutively with the Connecticut sentence. On appeal, the defendant claimed that he should have been sentenced concurrently, because that sentence most closely approximated the sentence he would have received had he been sentenced at one time for all his offenses. The circuit court affirmed the district court's sentencing on the basis that the judge expressly stated at sentencing that the consecutive sentence would result in a reasonable incremental punishment.

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. 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).

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Cutler, 520 F.3d 136 (2d Cir.), *cert. denied*, 129 S. Ct. 512 (2008). The defendant was granted a downward departure on the basis of his age (69) and health (heart condition) because the district court concluded that the Bureau of Prisons would not be able to provide an immediate response should his health decline. On appeal, the Second Circuit found the sentence substantively unreasonable because the evidence did not support the district court's conclusions as to the seriousness of the defendant's health and the BOP's inability to provide treatment.

§5H1.2 Education and Vocational Skills (Policy Statement)

United States v. Barone, 913 F.2d 46 (2d Cir. 1990). The district court departed upward for a defendant on the basis that the guidelines did not adequately cover the circumstances present, where the defendant was a local judge and lawyer. On appeal, the Second Circuit reversed the departure, finding that the Commission provided that a defendant's education may in some instances be relevant, but only where the defendant misused special training in perpetrating his crime. Because there was no evidence that the defendant used his public office or legal training to facilitate the crimes of perjury or tax evasion, the appellate court held that the fact that he held public office did not warrant an upward departure.

§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, holding that 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. The circuit court stated that, to support a departure, there must be a causal connection between the abuse and the criminal conduct, and 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)

See United States v. Cutler, 520 F.3d 136 (2d Cir.), *cert. denied*, 129 S. Ct. 512 (2008), §5H1.1.

United States v. Herman, 172 F.3d 205 (2d Cir. 1999). The defendant faced a career offender sentence based on two prior felony convictions, but the district court granted a downward departure for his extraordinary rehabilitative efforts, finding 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 Second Circuit held that 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, and, moreover, that the district court failed to make findings to show that the defendant's rehabilitative efforts made it less likely that the defendant would commit future crimes.

United States v. Persico, 164 F.3d 796 (2d Cir. 1999). "The standards for a downward departure on medical grounds are strict" and require evidence of medical conditions that the Bureau of Prisons is unable to accommodate.

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

United States v. Cutler, 520 F. 3d 136 (2d Cir.), *cert. denied*, 129 S. Ct. 512 (2008). The district court granted the defendant a downward departure on the basis that he had three children; that his ex-wife's salary was low; that he had contributed monthly child support; and that, if he were incarcerated for a substantial period, one of his children would likely be unable to return to college and his other children who have to move with their mother to her sister's house. On appeal, the Second Circuit overturned the departure, concluding that, while the defendant's ex-wife and children would likely face hardship, "this is true whenever family members are deprived of the company and/or support of a defendant who is incarcerated" and finding that the facts in this case did not sufficiently take it out of the mainstream of family hardships to warrant a downward departure.

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 Hasidic Jewish religious community, attesting to the devastating impact a long period of incarceration would have on the defendant's children, because, in the Hasidic community, parents arrange a child's marriage and the defendant's incarceration would mean he was unavailable to find marriage partners for them. 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 were atypical because the practices of the Bobov Hasidic community place special emphasis on the role of the father, the circuit court held that this was an improper basis for departure inasmuch as it treats adherents of one religious sect differently from another.

United States v. Ekhator, 17 F.3d 53 (2d Cir. 1994). The defendant entered a plea agreement in which she agreed not to move for a downward departure. At sentencing, defense counsel advised the court that the defendant was a widow with five children, three of whom suffered serious health problems, but counsel did not move for a departure. Prior to imposing a sentence, the district court indicated that it wished the law provided him with the authority to grant a departure. On appeal, the Second Circuit remanded the case for resentencing, interpreting the statement to mean that the judge believed he lacked the discretion to depart *sua sponte*.

§5H1.11 Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement).

United States v. Canova, 412 F.3d 331 (2d Cir. 2005). The Second Circuit held that, while §5H1.11 indicates that the named factors are not ordinarily relevant, "it does not bar them absolutely," and in this case, the record plainly demonstrated the "exceptional degree" of the defendant's public service and good works, including his volunteer service with the Marine Corps, his volunteer firefighting, and his acts of everyday valor.

Part K Departures

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

United States v. Johnson, 567 F.3d 40 (2d Cir. 2009). The defendant breached his cooperation agreement. Nonetheless, the government still filed a §5K1.1. letter, moving for a reduction in the defendant's sentence on the basis of his extensive cooperation. The district court, however, enhanced the defendant's sentence, concluding that, by moving for a reduction in sentence, the government had failed to "comply with the purported customary prosecutorial practice of voiding cooperation agreements upon breach by the defendant." The Second Circuit vacated, holding, *inter alia*, that the district court committed procedural error by increasing the defendant's sentence. First, the circuit court indicated that the existence of such a customary practice was unsupported by the record before the district court. Second, "[w]hether [a 5K1.1] letter is merited is confided to the sole discretion of the government, subject only to constitutional limitations," and any customary practice by the government should not constrain a district court from giving proper effect to a 5K1.1 letter where the government decides to submit one notwithstanding any breach by the defendant.

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. 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. Brechner, 99 F.3d 96 (2d Cir. 1996). After being charged with tax evasion, the defendant entered into a cooperation agreement in which he promised to provide "truthful, complete, and accurate information" in return for the government's filing of a §5K1.1 motion. While he actively helped the government in a related bribery investigation which led to an arrest, he falsely denied receiving kickbacks related to his tax fraud scheme. The government refused to file the motion, but the district court ruled that the government's refusal was in bad faith, and granted defendant's motion for specific performance. On appeal, 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. Because the cooperation agreement specifically released the government from its obligation to file a §5K1.1 letter if the defendant gave false information, the Second Circuit vacated and remanded.

United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995). On appeal, the defendant claimed that the district court erred in failing to conduct an evidentiary hearing once the government refused to file a §5K1.1 motion in violation of a plea agreement. The Second Circuit held that the government's refusal to make a §5K1.1 motion necessitated the district court to hold an evidentiary hearing to determine whether the government acted in good faith. *See also United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992).

United States v. Yee-Chau, 17 F.3d 21 (2d Cir. 1994). The defendant was convicted of drug-related charges and, on appeal, he 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)

Upward Departure

United States v. Bennett, 252 F.3d 559 (2d Cir. 2001). The district court upwardly departed ten years because the defendant's wife refused to forfeit assets in her name. The circuit court 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. Cordoba-Murgas, 233 F.3d 704, 708-09 (2d Cir. 2000). The Second Circuit held that the preponderance of the evidence standard applied to fact finding at sentencing even when the proposed enhancement would result in a life sentence, but stated that a 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."

United States v. Mapp, 170 F.3d 328 (2d Cir.1999). The district court departed upward from a guideline range of 262 to 327 months' imprisonment to impose a sentence of 450 months based on three robberies for which the jury was unable to reach a verdict. The district 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. Adelman, 168 F.3d 84 (2d Cir. 1999). The defendant 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 under §5K2.0, because the guideline for threatening communications does not address the harm to multiple victims. The Second Circuit upheld the upward departure.

United States v. Delmarle, 99 F.3d 80 (2d Cir.1996). 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. The circuit court affirmed the district court's sentence, explaining that 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. Gigante, 94 F.3d 53 (2d Cir. 1996). The defendants received substantial upward departures and asserted on appeal that the extent of the departure was unreasonable and unsupported by proof of uncharged conduct by a preponderance of the evidence. 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." The appellate court concluded that the evidence was "compelling" enough to grant an upward departure in this case.

United States v. Tropiano, 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." 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." 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."

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. Fan, 36 F.3d 240 (2d Cir. 1994). The district court departed upward from the defendant's guideline range for his offense of illegally smuggling aliens into the United States,

on the basis, first, that the aliens would have likely spent years in involuntary servitude in the United States to pay for the smuggling fee; and second, that "inhumane conditions" existed aboard the fishing vessel that transported the aliens, including living in fish holds for 18 weeks with only one bathroom, inadequate life preservers and rafts, and the captain's brandishing of a gun. The Second Circuit on appeal found the first reason appropriate and held the evidence amply supported the district court's finding that "inhumane" conditions existed.

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 based on the amount of the monetary loss under §2F1.1 and he had received adjustments for abuse of a position of trust and for a vulnerable victim. The Second Circuit held that, while the fraud guideline considered the kind of harm the victim suffered, the degree of harm caused was not reflected and, 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. 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, and 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."

Downward Departure

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, remanded the case, and 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. 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 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 appellate 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. Title 18, Section 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. Bala, 236 F.3d 87 (2d Cir. 2000). The appellate 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. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999). The defendant pleaded guilty to unlawful reentry after deportation for an aggravated felony. On appeal, he argued that the district court erred in declining to grant his motion for a downward departure on the basis of his willingness to consent to deportation. The Second Circuit vacated and remanded for resentencing, finding that, in exceptional circumstances, a district court has the authority under §5K2.0 to grant a downward departure on the basis of the defendant's consent to deportation even in the absence of the government's consent to the departure.

United States v. Young, 143 F.3d 740 (2d Cir. 1998). The district court granted a downward departure for a 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 and 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.

United States v. Amaya-Benitez, 69 F.3d 1243 (2d Cir. 1995). The defendant was convicted 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 aggravated felony.

The Second Circuit vacated and remanded for resentencing, holding 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." The circuit court concluded that, once a court determines that a defendant's conviction encompasses the elements of an aggravated felony under §2L1.2, the court may not inquire further.

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The Second Circuit held that 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 circuit court characterized the 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. The court ruled that the departure was within the district court's discretion and was reasonable.

United States v. Williams, 65 F.3d 301 (2d Cir. 1995). The district court *sua sponte* granted a downward departure on the basis 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 Second Circuit affirmed, ruling 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 appellate court made clear, however, that it did not intend to imply that downward departures should be granted automatically to defendants in this situation.

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.

Standard of Review

United States v. Zapata, 135 F.3d 844 (2d Cir. 1998). The Second Circuit explained that a district court's decision not to depart from the guidelines is not appealable except where a defendant shows that a violation of law occurred, that the guidelines were misapplied, or that the refusal to depart was based on the sentencing court's mistaken conclusion that it lacked the authority to depart.

§5K2.2 Physical Injury (Policy Statement)

United States v. Reyes, 557 F.3d 84 (2d Cir. 2009). The defendant was convicted of assault resulting in a serious bodily injury in aid of a racketeering activity in violation of 18 U.S.C. § 1959(a)(3). At sentencing, the district court enhanced his sentence under §2A2.2(b)(3)(C) based on the victim's injury and determined that, pursuant to §5K2.2, the extent of the victim's injuries warranted an upward departure from the guidelines range. On appeal, the defendant claimed that the district court impermissibly "double counted" the severity of the victim's injuries. The Second Circuit rejected this argument, noting that the defendant could point to nothing in the guidelines or in statutory law to preclude the application of both a §2A2.2(b)(3)(C) enhancement and a §5K2.2 departure.

United States v. Jones, 30 F.3d 276 (2d Cir. 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. Lasaga, 328 F.3d 61 (2d Cir. 2003). The defendant pled guilty to receipt and possession of child pornography. At sentencing, the district court departed upward one level under §5K2.3 to the child victim, finding that the victim's injury had resulted in a "substantial impairment." On appeal, the Second Circuit held that the district court used the wrong standard and should instead have considered whether the harm to the victim was much more serious than would normally be the case, as required by the second paragraph of §5K2.3.

United States v. Crispo, 306 F.3d 71 (2d Cir. 2002). At sentencing, the district court departed upward under §5K2.3 for extreme psychological injury. On appeal, 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 Second Circuit rejected his appeal, stating 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 had 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.

United States v. Morrison, 153 F.3d 34 (2d Cir. 1998). The defendant was convicted of transmitting through interstate commerce threats to injure various persons and transmitting threats with intent to extort money; his conduct involved threats he had made to a hospital emergency room, a police department, and a medical examining board. At sentencing, the district court departed upward by 14 levels pursuant to §§5K2.3 and 5K2.8. On appeal, the Second Circuit affirmed the upward departure, noting that the court had 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. Moreover, the circuit court found no error with 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, and it concluded that the nature of the establishments threatened also warranted the departure.

§5K2.6 Weapons and Dangerous Instrumentalities (Policy Statement)

United States v. Stephens, 7 F.3d 285 (2d Cir. 1993). The defendant was convicted of possession of stolen mail. The district court imposed an upward departure based on evidence that the defendant knew, during the planning stages of the scheme to possess stolen mail, that a gun was going to be used in the robbery of a mailman. On appeal, the Second Circuit affirmed the upward departure, since it was reasonably foreseeable to the defendant that the gun would be used forcibly to obtain the mail and would create a risk of injury to the mailman.

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

United States v. Leung, 360 F.3d 62 (2d Cir. 2004). The defendant was charged with two counts of passport fraud and the parties negotiated an agreement for the defendant to plead guilty to both offenses. Shortly after the September 11, 2001 terrorist attacks, however, the defendant faked his own death by posing as his own fictional brothers and reporting that he (the defendant) had died in the World Trade Center. At sentencing on the passport fraud convictions, the district court departed upward, pursuant to §5K2.7, by 6 levels on the basis that the defendant's conduct was "egregious" and diverted federal and state resources. The Second Circuit affirmed the departure, noting that §5K2.0 allows for departures where an "unusual constellation of factors exists that removes any sentencing from the 'heartland' cases."

§5K2.8 Extreme Conduct (Policy Statement)

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

§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."

§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 sentencing, the district court granted the defendant a downward departure pursuant to §5K2.11 on the basis of the defendant's testimony that he had only reentered the United States to visit his ailing father and

would be returning to his native country to care for his three children. The court applied the lesser harm departure because it thought that the defendant's conduct did not cause the harm sought to be prevented by the significant enhancement for reentering aliens who were deported for committing an aggravated felony. The Second Circuit reversed, finding that § 1326 makes a deported alien's unauthorized presence in the United States a crime in itself, and holding that a defendant is not entitled to a lesser harm departure since 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. Cotto, 347 F.3d 441 (2d Cir. 2003). At sentencing, the district court departed downward on the basis of the defendant's testimony that she knew of a third party's criminal history and feared the third party might harm her or her family if she refused to participate in a conspiracy to obstruct the investigation of a 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.

United States v. Amor, 24 F.3d 432 (2d Cir. 1994). The defendant was convicted of making, possessing, and failing to register a rifle and of retaliation against a government informant. Since the defendant's retaliation conviction was more serious that the firearm offense, at sentencing, the offense level for the retaliation conviction was controlling. The district court granted a downward departure pursuant to §5K2.12 based on duress, finding that the defendant would not have purchased and altered the rifle but for the threats he received and shots fired at his vehicle. On appeal, the government argued that "committed the offense because of" as it is used in §5K2.12 referred to the offense that controlled the defendant's offense level, *i.e.*, retaliation, and, since duress related only to the firearms count, the departure was erroneous. The Second Circuit rejected this argument because it was a narrow interpretation of "because of" and there was a clear nexus between the threats and the defendant's gun acquisition.

§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. At sentencing, the district court denied the defendant's §5K2.13 motion for diminished capacity, noting that almost every child pornography defendant comes with documented psychological problems and reasoning that such psychological problems were adequately considered by the Sentencing Commission when it adopted the guidelines for child pornography offenses. On appeal, the Second Circuit found no textual support for the district court's reasoning that the Commission had already implicitly considered diminished capacity in developing guidelines for child pornography offenses, and 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 be 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). 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 circuit 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). In determining whether the defendant's behavior was "of limited duration" as required by §5K2.20, the district court specifically required an element of spontaneity in the defendant's behavior. The Second Circuit held that the district court was incorrect in this analysis, noting that the Commission expressly intended to relax the requirements for aberrant behavior by inserting §5K2.20. The appellate court concluded 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 have been 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 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. Whaley, 148 F.3d 205 (2d Cir. 1998). The defendant violated the terms of his supervised release and was sentenced to six months' imprisonment; the Bureau of Prisons credited the defendant with time already served and released him. The government moved to modify the revocation sentence pursuant to §7B1.3(e), and, while the district court denied the motion, it 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 Second Circuit

vacated this order, holding that the district court lacked jurisdiction to determine credits under § 3585(b); only the Attorney General, through BOP, possesses the authority to grant or deny credits.

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, arguing that the district court erred by upwardly departing 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 circuit court, agreeing with the Fifth, Tenth, and Eleventh Circuits, held that district courts are not required to give notice to a defendant before imposing a sentence above the range suggested by Chapter Seven's non-binding policy statements, since these policy statements are merely advisory and therefore courts are not "departing."

United States v. Conte, 99 F.3d 60 (2d Cir. 1996). The district court revoked the defendant's probation upon his refusal to answer his 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.

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

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 eleven month range. The Second Circuit concluded that the sentence was substantively reasonable, because 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 violated his 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, because, under the pre-1994 version of 18 U.S.C. § 3583(g) applicable to the defendant's case, a court must require the defendant to serve at least one-third the term of supervised release in prison if the defendant is found by the court to be in possession of a controlled substance. In addition, the circuit court concluded that testing positive for drug use amounts to possession under § 3583(g).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Gutierrez, 555 F.3d 105 (2d Cir.), *cert. denied*, 129 S. Ct. 2024 (2009). Defendant's initial sentencing hearing resulted in a sentence of 24 months' imprisonment. After

the sentence was pronounced, but before it was formally entered, defense counsel objected that, in violation of Fed. R. Crim. P. 32, he had not been permitted to address the court. The district court acknowledged a "misunderstanding," orally vacated the sentence, and permitted defense counsel to speak on defendant's behalf. After hearing the defense counsel's argument, the district court reinstated the previously-imposed sentence. On appeal, the defendant argued that the manner in which the sentencing hearing was conducted did not afford him a meaningful opportunity to be heard as required by Rule 32. While the Second Circuit agreed that a defendant's opportunity to address the sentencing court must be "meaningful," it concluded that the process observed by the sentencing court in this case "fully complied with its obligations under Rule 32."

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(c)

United States v. Williams, 558 F.3d 166 (2d Cir. 2009). The defendant was convicted of a drug trafficking crime which carried a ten-year mandatory minimum sentence under 21 U.S.C. § 841(c)(1)(A) and possession of a firearm in furtherance of that drug trafficking crime, an offense carrying a five-year mandatory minimum consecutive sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law," under 18 U.S.C. § 924(c)(1)(A)(i). The district court imposed the five-year mandatory minimum consecutive sentence under § 924(c)(1)(A)(i) even though a greater minimum sentence was provided for the predicate drug trafficking crime. Relying on its reasoning in *United States v. Whitley,* 529 F.3d 150 (2d Cir. 2008), the Second Circuit held that the mandatory minimum sentence under § 924(c)(1)(A)(i) is inapplicable where a defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearms offense. Therefore, the circuit court vacated the five-year consecutive sentence and remanded for resentencing.

United States v. Whitley, 529 F.3d 150 (2d Cir. 2008). The defendant was convicted of a Hobbs Act robbery, in violation of 18 U.S.C. § 1951; possession of a firearm that was used during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); and possession of a firearm after having been convicted of at least three violent felonies of serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (the career criminal firearm possession offense). The mandatory minimum sentence for a § 924(c) violation is 10 years' imprisonment, "except to the extent that a greater minimum sentence is otherwise provided . . . by any other provision of law." The mandatory minimum sentence for a career criminal firearm possession offense is fifteen years' imprisonment, pursuant to § 924(c)(1)(A). The district court imposed a consecutive term of 120 months' imprisonment for the § 924(c) offense. On appeal, the Second Circuit held that the "except" clause in § 924(c) "means what it literally says" and concluded, therefore, that the mandatory minimum sentence under § 924(c) is inapplicable where a defendant is subject to a longer mandatory minimum sentence for the career criminal firearm possession violation. Therefore, the circuit court vacated the consecutive term of imprisonment and remanded for resentencing.

21 U.S.C. § 841(b)

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 circuit 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, these adjudications do not result in "expunged" convictions under the guidelines and therefore federal courts are not restricted from taking them into account.

United States v. Stephenson, 183 F.3d 110 (2d Cir. 1999). The defendant was convicted of a general conspiracy to distribute cocaine and crack. He argued on appeal 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 Second Circuit held that the defendant's guideline range of 292-365 months' imprisonment was higher than either statutory minimum, because, regardless of which statutory minimum prison term applied, the guidelines imprisonment range would not be altered; therefore, there was no need for resentencing.

21 U.S.C. § 851(a)(1)

United States v. Morales, 560 F.3d 112 (2d Cir.), *cert. denied*, 129 S. Ct. 2816 (2009). The government cited only the lower of the defendant's two applicable prior-narcotics-felony enhancements before trial, but at sentencing it sought to increase the statutory minimum sentence based on the higher of the defendant's two priors. The defendant stated that he went to trial because he believed, based on the government's statement, that it would only seek a mandatory minimum term of ten years, not the 20-year minimum applicable to his other prior conviction. The district court agreed with the government that the error was clerical and it sentenced the defendant to 20 years in prison. The Second Circuit reversed, agreeing with the Fifth Circuit that the notice requirement in 21 U.S.C. § 851(a)(1) has two purposes: (1) "to allow the defendant to contest the accuracy of the information," and (2) "to allow defendant to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." Accordingly, the appellate court held that "that a prior felony information that, like this one, could mislead a defendant as to the minimum penalty he or she would face after a jury's conviction undermines Congressional intent." The circuit court concluded that a remand is not required in all cases, but, in a case like this one where it seems possible that the defendant's decision to proceed to trial or his trial strategy was adversely affected by the misunderstanding, remand is appropriate.