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

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL

CASE ANNOTATIONS—THIRD CIRCUIT

This document contains annotations to certain Third Circuit judicial opinions that involve issues related to the federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate some relevant authorities involving the federal sentencing guidelines. The document is not comprehensive and does not include all authorities needed to apply the guidelines correctly. Instead, it presents authorities that represent Third Circuit jurisprudence on selected guidelines and guideline issues. The document is not a substitute for reading and interpreting the actual *Guidelines Manual* or researching specific sentencing issues; rather the document serves as a supplement to reading and interpreting the *Guidelines Manual* and researching specific sentencing issues.

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

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Brown, 578 F.3d 221 (3d Cir. 2009). The Third Circuit vacated and remanded the defendant's sentence because the district court failed to distinguish whether the significantly above guideline sentence was the product of a departure or a variance. The court explained: "We expressly distinguish between departures from the guidelines and variances from the guidelines.... Departures are enhancements of, or subtractions from, a guidelines calculation based on a specific Guidelines departure provision. These require a motion by the requesting party and an express ruling by the court. . . . Variances, in contrast, are discretionary changes to a guidelines sentencing range based on a judge's review of all the § 3553(a) factors and do not require advance notice... District courts should be careful to articulate whether a sentence is a departure or a variance from an advisory Guidelines range."

United States v. Lofink, 564 F.3d 232 (3d Cir. 2009). The Third Circuit reaffirmed its well established three-step sentencing procedure which it first set forth in *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006), *viz*., 1) a calculation of the guidelines; 2) including a formal ruling on any departure motions, and; 3) consideration of the relevant §3553(a) factors. In *Lofink*, the district court failed to formally address the defendant's departure motion but rather incorporated the analysis into a consideration of the § 3553(a) factors. The Court of Appeals found this procedure inconsistent with the sentencing procedure established in *Gunter* reasoning that: "because the Guidelines still play an integral role in criminal sentencing, . . . we require that the entirety of the Guidelines calculation be done correctly, including rulings on Guidelines departures. Put another way, district courts must still calculate what the proper Guidelines sentencing range is, otherwise the Guidelines cannot be considered properly at *Gunter's* third step."

United States v. Gunter, 462 F.3d 237 (3d Cir. 2006). The Third Circuit set forth the following three-step post-*Booke*r sentencing procedure that district courts must employ:

> (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker.*
>
> (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force.
>
> (3) Finally, they are required to exercise their discretion by considering the relevant § 3553(a) factors.

B. Burden of Proof

United States v. Ali, 508 F.3d 136 (3d Cir. 2007). The district court employed a reasonable doubt standard to determine the amount of loss in a fraud case and the Third Circuit reversed. The Court of Appeals reiterated: "as before *Booker*, the standard of proof under the guidelines for sentencing facts continues to be preponderance of the evidence." The Third Circuit overruled *United States v. Kikumura*, 918 F.3d 1084 (3d Cir. 1990), where the court had held that a heightened clear and convincing evidence standard had to be applied in situations where guideline enhancements are so substantial as to be "the tail that wags the dog." The *Ali* court held that the due process concerns that had compelled its holding in *Kikumura* are no longer applicable to the advisory guideline system created by the Supreme Court's holding in *Booker*. Consequently, calculation of the appropriate guideline range, which is the first step in the post-*Booker* sentencing process, may be based upon a preponderance of the evidence.

C. Confrontation Rights

United States v. Robinson, 482 F.3d 244 (3d Cir. 2007). The Third Circuit held that "the Confrontation Clause does not apply in the sentencing context and does not prevent the introduction of hearsay testimony at a sentencing hearing." The court noted, however, that not "any and all hearsay testimony" may be introduced at sentencing, but rather, "hearsay statements must have some minimal indicium of reliability beyond mere allegation."

D. Acquitted Conduct

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008). The Third Circuit rejected defendant's argument that the use of acquitted conduct in determining his applicable guideline range violated due process. The defendant was convicted of conspiring to structure transactions as well as nine substantive structuring counts and acquitted on five substantive structuring counts. The acquitted counts were considered as relevant conduct by the district court. The

Third Circuit held: "The counts of conviction determined [defendant's] statutory sentencing exposure, and the district court was free to consider relevant conduct, including conduct resulting in acquittal, that was proved by a preponderance of the evidence in determining [defendant's] sentence within the original statutory sentencing range. We therefore reject [defendant's] Due Process challenge to use of acquitted conduct in determining his sentence."

E. Prior Convictions

United States v. McKoy, 452 F.3d 234 (3d Cir. 2006). The court rejected the appellant's argument that the mandatory language of 18 U.S.C. § 3553(f) forces sentencing courts to apply the guidelines and thus violates *Booker* and stated that "*Booker* is inapplicable to situations in which the judge finds only the fact of the prior conviction."

United States v. Ordaz, 398 F.3d 236 (3d Cir. 2005). The court held that *Almendarez-Torres* still controls and does not require a jury to find the fact of a prior conviction.

F. *Ex Post Facto*

United States v. Pennavaria, 445 F.3d 720 (3d Cir. 2006). The court rejected the appellant's argument that application of an advisory guidelines scheme violates the *ex post facto* Clause for two reasons: "First, the Supreme Court in *Booker* clearly instructed that both of its holdings should be applied to all cases on direct review. Second, [the appellant] had fair warning that . . . his sentence could be enhanced based on judge-found facts as long as the sentence did not exceed the statutory maximum."

United States v. Veshio, 174 F. App'x. 63 (3d Cir. 2006). The court rejected the appellant's argument that increasing his sentence beyond the maximum sentence available when he committed his offense based on an advisory guidelines scheme violated the Ex Post Facto Clause because the guideline calculation when the appellant committed the crime would have been the same as it was on the date he was sentenced.

II. Departures

United States v. Jackson, 467 F.3d 834 (3d Cir. 2006). The court rejected a defendant's argument that the district court erred when, in calculating the guideline range, it did not include a requested downward departure. The defendant argued that the district court had simply failed to rule on the motion - which would have required resentencing because a full guidelines calculation is required. The court held that the district court, although it never said so on the record, had declined to depart downward, and that there was no appellate jurisdiction to review that decision. The court deduced this from the government's argument at sentencing that the defendant's "acceptance was not extraordinary enough to deserve a departure," which the court said "was enough for the [district judge] to have recognized the *possibility* of a departure" (emphasis in original).

United States v. Cooper, 437 F.3d 324 (3d Cir. 2006). The court joined the First, Sixth, Eighth, Tenth, and Eleventh Circuits in declining to review a district court's decision to deny a request for a downward departure.

III. Specific 3553(a) Factors

A. Unwarranted Disparity

1. Fast Track

United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009). The Third Circuit held that "under the logic of *Kimbrough*, it is within a sentencing judge's discretion to consider a variance from the Guidelines on the basis of a fast-track disparity." Defendant pleaded guilty to having illegally re-entered the United States after having been previously deported. At sentencing he argued that the district court should vary from the advisory guideline range because, *inter alia*, of the disparity created by fast track program which was not available in his district. The district court held that such a consideration is impermissible based on the Third Circuit's prior ruling on this issue in *United States v. Vargas*, 477 F.3d 94 (3d Cir. 2007). The court of appeals held, however, that *Vargas* was decided prior to *Kimbrough* and under *Kimbrough*'s analytic reasoning, "a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and that such a variance would be reasonable in an appropriate case." The Court further stated that "[t]o justify a reasonable variance by the district court, a defendant must show at the outset that he would qualify for fast-track disposition in a fast-track district."

2. Co-defendants

United States v. Charles, 467 F.3d 828 (3d Cir. 2006). The court rejected a defendant's argument that his sentence created unwarranted disparity because three other defendants sentenced in the same district for the same offense were not sentenced at the top of the range. The court noted the dissimilarity of one of the cases, and the roughly comparable sentences in the two other cases. Furthermore, the court held that a mere similarity between cases would not be enough to reverse a sentence for disparity: "…[W]e will tolerate statutory sentencing disparities so long as a judge demonstrates that he or she viewed the Guidelines as advisory and reasonably exercised his or her discretion after applying the three-step sentencing process…."

United States v. Parker, 462 F.3d 273 (3d Cir. 2006). "We have concluded that Congress's primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing rather than uniformity among co-defendants in the same case. . . . Therefore, a defendant cannot rely upon § 3553(a)(6) to seek a reduced sentence designed to lessen disparity between co-defendants' sentences. … Although § 3553(a) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so.

So long as factors considered by the sentencing court are not inconsistent with those listed in § 3553(a) and are logically applied to the defendant's circumstances, we afford deference to the court's 'broad discretion in imposing a sentence within a statutory range.'"

B. Rehabilitation

United States v. Manzella, 475 F.3d 152 (3d Cir. 2007). "It is the policy of the United States Congress, clearly expressed in law, that defendants not be sent to prison or held there for a specific length of time for the sole purpose of rehabilitation. Instead, that legitimate goal of sentencing is to be accomplished through other authorized forms of punishment."

United States v. Lloyd, 469 F.3d 319 (3d Cir. 2006). The court rejected a defendant's argument that the district court failed to adequately consider his post-conviction rehabilitation. It held that the propriety of considering this factor is different post-*Booker* than under the guidelines' policy statement in §5K2.19, which bars its consideration even when the rehabilitation is extraordinary. Nevertheless, the court said that it would be an "unusual" case where such efforts could be considered.

IV. Forfeiture

United States v. Leahy, 438 F.3d 328 (3d Cir. 2006) (*en banc*). "[E]ven after *Booker*, the Sixth Amendment's trial by jury protection does not apply to [criminal] forfeiture. . . .." *Booker* does not apply to orders of restitution under the Mandatory Victims Restitution Act and Victim and Witness Protection Act.

V. Restitution

United States v. Leahy, 438 F.3d 328 (3d Cir. 2006) (*en banc*), Sec. IV.

VI. Reasonableness Review

A. General Principles

United States v. Hoffecker, 530 F.3d 137 (3d. Cir. 2008). This case provides an illustration of a district court systematically considering all potential § 3553(a) sentencing factors in the context of a complicated fraud case. Defendant and one partner formed a Bahamian corporation and set up various Bahamian bank accounts with the object of defrauding investors in physical commodities (e.g. precious metals, gasoline and heating oil) which were supposedly stored in non-existent storage facilities owned by defendant's corporation. The venture was entirely fraudulent but promoted itself via slick brochures that were disseminated by mass-mailings to the defendant's customers/targets. On appeal, the defendant alleged that the district court failed to give meaningful consideration to § 3553(a) sentencing factors. The Third Circuit

affirmed holding that the district court articulated valid reasons for the sentence imposed as reflected in the 135 page transcript of the sentencing hearing.

United States v. Wise, 515 F.3d 207 (3d Cir. 2008). The Third Circuit stated that an appellate court's role in reviewing the propriety of a criminal sentence is two-fold. First, the appellate court must ensure that the district court committed no significant procedural error in arriving at its sentence such as improperly calculating the Guideline range, treating the Guidelines as mandatory, or failing to consider § 3553(a) factors. Second, once satisfied that the district court has not committed any significant procedural error, the appellate court must consider the substantive reasonableness of the sentence, whether it falls within or outside the Guideline range. These inquiries by the appellate court are to be conducted under a deferential abuse of discretion standard. Here, defendant's guideline range was 272-319 months and the district court imposed a 319 month sentence. Third Circuit concluded that because the district court's sentence fell within a broad range of possible sentences that could be considered reasonable in light of § 3553 (a) factors, no abuse of discretion could be found.

United States v. Colon, 474 F.3d 95 (3d Cir. 2007). "The fact is that when a court sentences post-*Booker* and views all of the § 3553(a) factors the guidelines range is simply one factor for it to consider in arriving at the sentence. The guidelines range may suggest the imposition of a certain sentence of which the court should be aware but other factors may point to a higher or lower sentence. Consequently, so long as the court takes each of the factors into account in sentencing, it may impose a sentence in excess of the top of the range, provided the sentence is within the statutory range and is reasonable."

United States v. Lloyd, 469 F.3d 319 (3d Cir. 2006). The court rejected a defendant's argument that a sentence was substantively unreasonable because it was longer than necessary. The court noted that, although it had not adopted a presumption of reasonableness for within-guidelines sentences, it had held that a within-guidelines sentence was more likely to be reasonable than one outside the guidelines range. The Court stated further that appellants bear the burden of demonstrating unreasonableness.

United States v. Severino, 454 F.3d 206 (3d Cir. 2006). The court agreed with the Eighth Circuit that a sentencing judge may consider extraordinary acceptance of responsibility in varying from the guidelines range.

B. Standard of Review

United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (*en banc*). The Third Circuit set forth the standard of review for sentencing decisions as follows: "The abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries. . . if the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided."

United States v. Grier, 475 F.3d 556 (3d Cir. 2007) (*en banc*). The Third Circuit stated: "[W]e believe that the discussion in *Booker* regarding the Jury Trial Clause of the Sixth Amendment applies with equal force to the Due Process Clause of the Fifth Amendment. Once a jury has found a defendant guilty of each element of an offense beyond a reasonable doubt, he has been constitutionally deprived of his liberty and may be sentenced up to the maximum sentence authorized under the United States Code without additional findings beyond a reasonable doubt. Despite the excision of subsection (e) of 18 U.S.C. § 3742, this Court will continue to review factual findings relevant to the Guidelines for clear error and to exercise plenary review over a district court's interpretation of the Guidelines. A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed. A sentence imposed as a result of a clearly erroneous factual conclusion will generally be deemed 'unreasonable' and, subject to the doctrines of plain and harmless error, will result in remand to the district court for resentencing."

C. Procedural Reasonableness

United States v. Merced, 603 F.3d 203 (3d Cir. 2010). It is procedural error when the sentencing judge does not fully articulate its basis for disagreement with the government's argument that a below-guideline sentence would create unwarranted sentencing disparity. In this case the district court imposed a sentence of 60 months, varying from the career offender guideline range of 188-235 months. The district court stated that it reserved career offender status for "violent, significant drug deals" and that defendant's offense involved street level drug dealing. The sentencing judge failed to mention § 3553(a)(6), the need to avoid unwarranted sentencing disparity, in his explanation. The Third Circuit held that although the district court was free to vary from the career offender guideline based on policy disagreements, it must provide a "reasoned, coherent, and sufficiently compelling explanation of the basis for the . . . disagreement." The case was remanded and the sentencing judge was directed to consider whether its "sentence may have created a risk of unwarranted disparities between Merced and similarly situated recidivist crack cocaine dealers."

United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008). Because the district court did not specifically address all colorable arguments raised by the defendant (*e.g.*, his difficult childhood and the crack/powder disparity as it related to him), it did not meet the *Gunter* standard requiring consideration of all § 3553(a) factors, and, the case was remanded for consideration of the previously neglected arguments. The court reiterated that a mere blanket recitation by the district court that it had "considered all of the § 3553(a) factors" is not sufficient "if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit (provided it has a factual basis)." On the other hand, the court also noted that a district court "need not discuss every argument made by a litigant if an argument is clearly without merit. Nor must a court discuss and make findings as to each of §3553. . . factors if the record makes clear the court took the factors into account in sentencing."

United States v. Langford, 516 F.3d 205 (3d Cir. 2008). The defendant appealed his bottom-of-the-range sentence for bank robbery and brandishing a firearm during a crime of violence on grounds that the district court improperly calculated his criminal history category. The court concluded that the guideline range was erroneously calculated. The court discussed the three-step sentencing process mandated by its earlier decision in *Gunter*, noting that a district court that improperly calculates the guideline range "fails to discharge its duties under step one" of the test. The court emphasized that the guideline range represents the "natural starting point" for the sentencing determination and that "[a] correct calculation, therefore, is crucial to the sentencing process and result." The court further held that proper calculation of the guideline range is necessary to a court's analysis of several of the other factors it is required to consider under § 3553(a). Accordingly, the matter was remanded for resentencing.

United States v. Charles, 467 F.3d 828 (3d Cir. 2006). "[A] district judge who merely states that he has 'carefully considered' all § 3553(a) factors has not met his or her burden for demonstrating reasonableness in sentencing." The court rejected a defendant's argument that the parsimony clause of § 3553(a), requiring a sentence sufficient but not greater than necessary to achieve the purposes of sentencing, demanded an explanation from the sentencing court of why a low-end sentence would not have been sufficient in his case. The court rejected this argument, characterizing it as attempting to "flip the reasonableness requirement on its head."

United States v. Cooper, 437 F.3d 324 (3d Cir. 2006). The court held that "[t]o determine if the court acted reasonably in imposing the resulting sentence, we must first be satisfied the court exercised its discretion by considering the relevant factors. . . . In addition to ensuring a trial court considered the § 3553(a) factors, we must also ascertain whether those factors were reasonably applied to the circumstances of the case. In doing so, we apply a deferential standard, the trial court being in the best position to determine the appropriate sentence in light of the particular circumstances of the case. . . .[I]t is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable. . . . Although a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range, a within-guidelines sentence is not necessarily reasonable *per se*. . . .[W]e [do not] find it necessary, as did the Court of Appeals for the Seventh Circuit . . . to adopt a rebuttable presumption of reasonableness for within-guidelines sentences." (citations omitted). The court has jurisdiction to review sentences for reasonableness under § 3742(a)(1) because an unreasonable sentence would be a violation of law.

D. Substantive Reasonableness

United Stated v. Lopez-Reyes, 589 F.3d 667 (3d Cir. 2009), *cert. denied* 130 S. Ct. 2362 (2010). The defendant pleaded guilty to having illegally re-entered the United States after having been previously deported and was sentenced to 46 months' imprisonment, the low end of the applicable guideline range. On appeal, defendant argued 1) that the district court failed to apprehend its authority under *Kimbrough* to categorically vary from the immigration guideline based on policy disagreements, and 2) his sentence was substantively unreasonable because the 16-level enhancement at §2L1.2(b)(1)(A)(ii), applicable when the defendant was previously

deported after sustaining a felony conviction for a crime of violence, overstates the gravity of the offense. The Third Circuit rejected both of those arguments. The court held that while the district court may have varied from the reentry guideline, it has previously "made clear [that] *Kimbrough* does not require a district court to reject a particular Guidelines range where that court does not, in fact, have disagreement with the Guideline at issue." The Third Circuit held that the district court "was aware of the discretionary nature of the Guidelines and its authority to impose a sentence outside of the prescribed range. . . . [but it] had no obligation to exercise that discretion in favor of [defendant]." Similarly, the Third Circuit rejected the defendant's challenge to the substantive reasonableness of the immigration guidelines.

United States v. Lychock, 578 F.3d 214 (3d Cir. 2009). The Third Circuit found the district court's analysis to be so "procedurally flawed" as to result in a substantively unreasonable sentence. Lychock pled guilty to possessing child pornography. His guideline range was 30-37 months. In imposing a sentence of probation, the district court stated that it did not believe that sentencing this defendant to prison would deter others who are drawn to internet pornography from engaging in that conduct. The district court also noted Lychock's age (37), acceptance of responsibility, desire to seek psychological treatment and lack of criminal history as reasons supporting the downward variance. The Court of Appeals stated that as a procedural matter, the district court erred by failing to address the Government's argument regarding the need to avoid sentencing disparity. The district court also relied too heavily on characteristics such as defendant's age and lack of criminal history which were common to the majority of child pornography offenders. Lastly, the Court of Appeals held the district court failed to sufficiently explain its policy disagreements with the Guidelines and stated that "such a disagreement is permissible only if a District Court provides sufficiently compelling reasons to justify it."

United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009). The Court of Appeals vacated and remanded the defendant's substantially below guideline sentence because district court refused to issue a subpoena to the defendant's treating psychologist and failed to properly consider all of the 3553(a) factors resulting in a sentence that was both procedurally and substantively unreasonable. The defendant pleaded guilty to possession of child pornography, he was 18 at the time the offense was committed and 20 at the time of sentencing. Defendant had a substantial history of physical and developmental disabilities which were the subject of three psychological reports submitted by the defense, all indicating that he made substantial strides during therapy, presented a very low risk of recidivism and that the offense likely resulted from his emotional immaturity. Defendant's treating psychologist was a contract therapist for Pretrial Services whose contract could have been jeopardized had he testified on behalf of the defendant at sentencing. The district court denied the defendant's request to subpoena the psychologist to testify at sentencing, however, two other therapist did testify on defendant's behalf. Defendant's original guideline range was 135 to 168 months, the statutory maximum was 120 months which became the guideline range pursuant to §5G1.1(a). The district court imposed a sentence of 6 years. The Court of Appeals held that although the sentence was below the guideline range, a number of procedural errors, including the failure to issue the subpoena, inadequate consideration of the history and characteristics of the defendant and an overemphasis on the nature of the offense led to a substantively unreasonable sentence.

United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (*en banc*). The Court of Appeals affirmed as reasonable the district court's variance to a below guideline sentence of probation with the conditions of home confinement and community service, restitution and the statutory maximum fine of $250,000, in a tax evasion case. Tomko, the owner of a plumbing contracting company, pleaded guilty to tax evasion for having had several subcontractors perform work on his multimillion dollar personal residence and bill the work to his company. The resulting tax deficiency was $228,557. Application of the guidelines produced a range of imprisonment of 12-18 months and a fine range of $3,000-$30,000. The district court imposed a below guideline sentence of probation based on Tomko's negligible criminal history, record of employment, community ties, extensive charitable works and the fact that 300 employees of his company would lose their jobs if he were imprisoned. The district court also imposed a fine above the guideline range based on Tomko's substantial wealth. The Third Circuit held that even though some of its members felt that the sentence should have included some prison, the district court's sentence could not be said to be substantively unreasonable because no discernable abuse of discretion was found.

E. Plain Error / Harmless Error

United States v. Hill, 411 F.3d 425 (3d Cir. 2005). The court joined other circuits in holding that the government demonstrates harmless error when the district court clearly indicates that it would have imposed the same sentence if the guidelines were not binding.

United States v. Davis, 407 F.3d 162 (3d Cir. 2005). The court held that when appellants sentenced pre-*Booker* fail to preserve the sentencing issue, the court will review for plain error. When the court is unable to ascertain whether the district court would have imposed a different sentence under an advisory framework, prejudice can be presumed and resentencing is appropriate.

F. Waiver of Right to Appeal

United States v. Lockett, 406 F.3d 207 (3d Cir. 2005). A defendant waives the right to appeal his sentence under *Booker* when he voluntarily and knowingly enters into a plea agreement in which he waives the right to appeal.

VII. Revocation

United States v. Bungar, 478 F.3d 540 (3d Cir. 2007). The defendant appealed a sentence of 60 months imprisonment imposed for violations of the defendant's supervised release. The applicable guideline range was 21-27 months; the statutory maximum was 60 months. The district court, "expressing concern over Bungar's continuing abuse of illegal drugs in spite of having received a significant [substantial assistance] downward departure at sentencing in 1997 [and] emphasiz[ing] Bungar's long history of offenses that included causing the deaths of two people and allegedly assaulting his girlfriend," imposed the statutory maximum. On appeal, the

defendant argued that the sentence was unreasonable because it was more than twice as long as the guideline range and that it "represents additional punishment for his . . . convictions, rather than a sanction for the breach of trust occasioned by his violations of supervised release." The Third Circuit joined a number of other circuits in holding that, post-*Booker*, the reasonableness standard of review continues to apply to sentences imposed upon revocation. It then held that the district court's sentence was reasonable, noting that the district court considered the factors described in section 3553(a) and the Chapter 7 policy statements and reasonably determined that the sentence was a proper sanction for the defendant's breach of trust.

VIII. Retroactivity

Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005). "*Booker* does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date *Booker* issued."

In re Olopade, 403 F.3d 159 (3d Cir. 2005). *Booker* is not retroactively applicable to cases on collateral review.

IX. Crack Cases

United States v. Russell, 564 F.3d 200 (3d Cir. 2009). The Third Circuit vacated and remanded defendant's sentence because the district court erroneously believed that it could not categorically reject the crack-powder differential on policy grounds. The district court based its decision on prior Third Circuit law which had been effectively overruled by the Supreme Court's decisions in *Kimbrough v. United States*, 552 U.S. 85 (2007) and *Spears v. United States*, 129 S. Ct. 840 (2009), holding that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.

United States v. Wise, 515 F.3d 207 (3d Cir. 2008). Defendant's guideline range was 294 to 346 months and the district court imposed a 324 month sentence. The defendant appealed, asserting, among other things, that the district court committed procedural error by erroneously treating the guideline range for his crack offense as mandatory. The Third Circuit held that the district court's remarks indicated that it understood that it could consider the crack/powder disparity as part of its consideration of the § 3553(a) factors. Moreover, the district court's statements at sentencing were consistent with existing Third Circuit precedent and with the Supreme Court's decision in *Kimbrough*. "Read as a whole, the Court's remarks at sentencing show that it understood that it could sentence [defendant's] outside the Guidelines range but chose not." *Id*. at 222. Accordingly, the Third Circuit affirmed.

X. Miscellaneous

United States v. Coleman, 451 F.3d 154 (3d Cir. 2006). "[While the] argument that the Feeney Amendment unconstitutionally allows the President to control sentencing might have

been persuasive while the Guidelines were still mandatory, it is misplaced under the now-advisory system. Regardless of the composition of the Commission, the Guidelines it promulgates do not control sentencing; the Guidelines' recommended range may be modified or disregarded by a district court upon consideration of the other sentencing factors Congress has identified in § 3553(a)."

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Orr, 312 F.3d 141 (3d Cir. 2002). The district court did not err in applying the four-level enhancement in §2B3.1(b)(2)(D) based on the defendant's having "otherwise used" a "dangerous weapon" during the robbery of a credit union. The defendant contended on appeal that the dismantled pellet gun he had used was not a "dangerous weapon" and that he had not "otherwise used" the pellet gun, but had simply brandished it. The Third Circuit disagreed, finding that Application Note 1(d) of §1B1.1 clearly indicates that objects that appear to be dangerous weapons are to be considered dangerous weapons for purposes of the §2B3.1 enhancement. The appellate court further held that the defendant's actions in pointing the gun at the head of a credit union employee and demanding money constituted more than brandishing and satisfied the "otherwise used" requirement of the enhancement.

United States v. Diaz, 245 F.3d 294 (3d Cir. 2001). The district court erred in retroactively applying an amendment to §§1B1.1 and 1B1.2, which overturned case law that had permitted courts to use multiple count cases to select a guideline based on factors other than conduct charged in the offense of conviction which carries the highest offense level. Although the Commission had characterized the amendment as "clarifying," its characterization was not binding on the court, nor was it entitled to substantial weight. The Third Circuit found the amendment effected a substantive change in the law and could not be retroactively applied.

§1B1.2 Applicable Guidelines

See United States v. Boggi, 74 F.3d 470 (3d Cir. 1996), §2B3.2.

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

United States v. Abrogar, 459 F.3d 430 (3d Cir. 2006). Defendant's participation in a discharge of oil into international waters could not properly be considered relevant conduct under §1B1.3 in relationship to defendant's conviction for failure to keep accurate records inside U.S. territorial waters in the context of §2Q1.3.

Jansen v. United States, 369 F.3d 237 (3d Cir. 2004). The district court erred in considering a quantity of drugs the defendant possessed for personal use in determining his guideline range pursuant to §2D1.1. The defendant was convicted by a jury of drug possession with the intent to distribute and the jury did not make a finding as to whether drugs found in the defendant's pants were possessed with the intent to distribute. The district court included that quantity in its calculation. The Third Circuit determined the defendant's possession of the drugs in his pants was for personal use and did not constitute relevant conduct under §1B1.3 because mere possession of those drugs was not part of the same course of conduct or common scheme or plan under subsection (a)(2) as the offense of possession with the intent to distribute. The court stated the crime of possession for personal use is qualitatively very different from the crime of possession with the intent to distribute and merits a significantly different level of punishment.

Watterson v. United States, 219 F.3d 232 (3d Cir. 2000). The district court erred when it considered relevant conduct in determining that the applicable guideline was §2D1.2, instead of §2D1.1, for a defendant who pled guilty to conspiracy to distribute cocaine and marijuana, but who did not stipulate to and was not convicted of distribution in or near schools. Although the conspiracy operated within 1,000 feet of a school zone, the defendant was not charged with or convicted of conspiracy to distribute controlled substances in or near a school zone. The Court found the district court erred in considering relevant conduct in determining which offense guideline section should be applied. According to §1B1.1(a), the district court should first select the applicable guideline section to the offense of conviction, and should only then apply relevant conduct factors.

§1B1.4 <u>Information to be Used in Imposing Sentence</u>

United States v. Baird, 109 F.3d 856 (3d Cir. 1997). The district court did not err in departing upward and in considering in connection with the upward departure the conduct underlying counts dismissed as part of a plea agreement. The defendant contended that such consideration was improper. The appellate court disagreed, and held that the guidelines offer sentencing courts considerable leeway as to the information they may consider when deciding whether to depart from the guideline range. Section 1B1.4 specifically states that in determining whether a departure is warranted, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant . . . ." Moreover, with respect to conduct underlying dismissed counts, commentary to §1B1.4, when read in conjunction with the commentary to §1B1.3, indicates that considering such conduct is appropriate. Therefore, conduct not formally charged or not an element of the offense can be considered at sentencing. If such information can be considered in determining the applicable guideline range under §1B1.3, then such information can be considered in determining whether to depart from that sentencing range under §1B1.4. In addition, the court cited to *United States v. Watts*, 519 U.S. 148 (1997), in which Supreme Court held that a sentencing court is permitted to consider even acquitted conduct.

§1B1.8 Use of Certain Information

United States v. Baird, 218 F.3d 221 (3d Cir. 2000). The district court erred in considering self-incriminating material in calculating the defendant's sentence when the government had agreed that the information would not be used against him if he pled guilty. The defendant, a former police officer, pled guilty to a Hobbs Act robbery, conspiracy to violate civil rights, and obstruction of justice. The defendant and the government agreed that information furnished by him would be admitted against him "if [he] failed to plead guilty." Although he fabricated evidence to exculpate a co-conspirator, he later aided the government in obtaining incriminating evidence against him and also pled guilty to obstruction of justice. The district court concluded the defendant's attempts to shield the co-conspirator caused the agreement to "self destruct," and therefore, §1B1.8 was never triggered. The district court departed upward because of the defendant's "extraordinary disruption" of the system. The Third Circuit found that Application Note 1 states self-incriminating information "shall not be used to increase the defendant's sentence above the applicable guideline range" if there is an agreement pursuant to §1B1.8. The Court disagreed with the district court and found an agreement existed that incriminating information would not be used against the defendant, even in his sentencing, if he pled guilty. The Court further found although the defendant did breach the agreement by providing inaccurate information, it was cured when the government accepted a guilty plea for obstruction of justice. The Court reversed and remanded for resentencing.

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

United States v. Flemming, 617 F.3d 252 (3d Cir. 2010). Even though the defendant qualified as a career offender, *Mateo* (see *infra*) did not apply and the defendant was eligible for a sentence reduction under § 3582(c)(2). In this case the sentencing judge originally determined under §4A1.3 that the career offender enhancement overstated the defendant's criminal history and then sentenced him under the crack cocaine guidelines *rather* than under the career offender guideline. The Third Circuit determined it agreed with the First, Second, and Fourth Circuits that when a sentencing judge grants a departure from the career offender guideline based on §4A1.3 under a pre-2003 edition of the guidelines, the defendant is eligible for a sentence reduction under § 3582.

United States v. Doe, 564 F.3d 305 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009). The Third Circuit held that the defendants, convicted of crack offenses, could not receive the benefit of the reduction in base offense levels provided by Amendment 706 because their applicable Guideline ranges were the statutory mandatary minimums pursuant to §5G1.1(b), even though the effect of the retroactive Amendment would have reduced their otherwise applicable guideline ranges under §2D1.1. John Doe's original guideline range was 151-188, but, was elevated to the mandatory minimum of life by application §5G1.1(b). Based on his substantial assistance, the Government filed motions pursuant to 18 U.S.C. § 3553(e) and §5K1.1 and he received a sentence of 84 months. Similarly, Jane Doe's range under the drug guideline was 121-151, but, raised to 20 years based on the mandatary minimum. Her cooperation resulted in a sentence of

41 months. Both defendants filed 18 U.S.C. §3582(c)(2) motions seeking reductions under Amendment 706. The district court denied the motions. In affirming, the Court of Appeals held that § 3582(c) creates a jurisdictional bar to sentence modifications unless the reduction is consistent with applicable policy statements issued by the Sentencing Commission. Section 1B1.10(a)(2) requires that the amendment have the effect of lowering the applicable guideline range in order for a reduction to be permissible. The Court of Appeals held that the "applicable guideline range" for each defendant was that provide in §5G1.1(b), *viz*., the mandatory minimum, and therefore Amendment 706 did not did not lower the range. The Court also rejected the defendants' argument that §1B1.10(a)(2) was rendered advisory by *United States v. Booker*.

United States v. Sanchez, 562 F.3d 275 (3d Cir. 2009), *cert. denied*, 130 S.Ct. 1053 (2010). The Court of Appeals held that a defendant sentenced pursuant a binding plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(C), later remembered as Rule 11(c)(1)(C), is not eligible for a retroactive sentence reduction under Amendment 706 because the sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" as required by 18 U.S.C. § 3582(c)(1), as the sentence was "based on" the binding plea agreement.

United States v. Mateo, 560 F.3d 152 (3d Cir. 2009). The Third Circuit held that Amendment 706, which lowered the base offense level for certain crack cocain offenses, is not applicable to defendants sentenced as career offenders pursuant to §4B1.1(b). Mateo's original base offense level under §2D1.1 was 28, based on the amount of crack involved in the offense. However, because he qualified as a career offender, his base offense level was elevated to 34 by operation of §4B1.1(b). Although the effect of Amendment 706 would have been to lower Mateo's base offense level determined under the drug guideline to a level 26, his career offender status remained unchanged and, therefore, his base offense level remained at 34. Since the Amendment did "not have the effect of lowering the defendant's applicable guideline range" as required by §1B1.10(a)(2), he was not entitled to a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), and the district court properly denied his motion seeking such relief. *See also United States v. Lewis*, 2010 WL 1998810 (3d Cir., May 20, 2010).

§1B1.11 <u>Use of Guideline Manual in Effect at Sentencing</u>

United States v. Griswold, 57 F.3d 291 (3d Cir.1995). The district court did not err by using the "one book rule" of §1B1.11(b)(2) to sentence the defendant. The circuit court held that §1B1.11(b)(2) was binding on the court, and that the district court was correct to refuse to mix and match provisions from different versions of the guidelines. The defendant argued that the district court violated the mandate of §1B1.11(a) which requires application of the guidelines in effect on the date that the defendant is sentenced (1993 version). However, because the use of the amended version of §2K2.1 would violate the *ex post facto* clause, the district court, under §1B1.11(b)(2), applied the guidelines in effect at the time the offense was committed (1990 version). The Third Circuit, in affirming the district court's application of the "one book rule," held that this case was directly on point with the holding in *United States v. Corrado*, 53 F.3d

620 (3d Cir. 1995). In *Corrado*, the Third Circuit joined the majority of the courts of appeals in holding that district courts may not mix and match provisions from different versions of the guidelines in order to tailor a more favorable sentence.

United States v. Corrado, 53 F.3d 620 (3d Cir. 1995). The district court did not err in sentencing the defendant pursuant to the entire guidelines manual in effect at the time he committed his offense without reference to the additional one-level reduction for acceptance of responsibility available in the manual in effect at the time of sentencing. The Third Circuit held that in adopting §1B1.11(b)(2), the Commission "effectively overruled" *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992) and *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), insofar as those opinions conflict with the codification of the one-book rule.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

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

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000). The district court did not err in finding that the Presentence Report (PSR) provided the defendant with the required notice of an upward departure pursuant to §5K2.8 and Application Note 5[1] to §2A3.1. The defendant and codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming that although he had been given notice of a possibility of an upward departure, he had not been given notice there would actually be an upward departure in his sentence. The district court found the language in the PSR, located underneath the heading "Factors that May Warrant Departure" that stated, "According to §2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice.

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

United States v. Hayward, 359 F.3d 631 (3d Cir. 2004). The defendant's conviction was affirmed, but his sentence was remanded to the district court for re-sentencing. The defendant was convicted of violating 18 U.S.C. § 2423(a), transportation of a minor with intent to engage in criminal sexual activity. On appeal, defendant argued that he should have been sentenced for criminal sexual contact under §2A3.4, instead of for attempted criminal sexual abuse under

[1] Note 5 was redesignated as Note 6 effective November 1, 2000.

§2A3.1. More specifically, the defendant claimed that the evidence supported only a sentence under §2A3.4 for criminal sexual contact. The Third Circuit noted that the corresponding guideline for a violation of 18 U.S.C. § 2423(a) is §2G1.1, under which the sentencing judge may select among §2A3.1 (Criminal Sexual Abuse), §2A3.2 (Statutory Rape), or §2A3.4 (Abusive Sexual Contact); the sexual abuse offenses are treated more seriously than the sexual contact offenses. In the instant case, the court noted that there was no evidence of skin-to-skin contact between the defendant and the victim, consequently the defendant should have been sentenced to sexual contact, and not sexual abuse. The court noted that the facts supported a sentence for abusive sexual contact under §2A3.4. Accordingly, the court reversed and remanded for re-sentencing pursuant to the sexual contact provisions of 18 U.S.C. § 2423(a) and §2A3.4.

§2A6.1 Threatening or Harassing Communications

United States v. Cothran, 286 F.3d 173 (3d Cir. 2002). The district court was correct in finding that §2A6.1, the guideline applicable to threatening or harassing communications, was "most analogous" to the defendant's crime of conveying a false threat about explosives on an airplane. The circuit court rejected the defendant's argument that §2K1.5, the guideline applicable to possessing dangerous weapons on an aircraft, should have applied.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Loss Issues (§2B1.1(b)(1))

United States v. Ali, 508 F.3d 136 (3d Cir. 2007). Defendant was convicted on 23 counts of conspiracy to commit mail fraud, wire fraud, conspiracy to commit theft concerning programs receiving federal funds, and aiding and abetting theft concerning programs receiving federal funds. The trial court committed several procedural errors. First, the trial court erred in applying a reasonable doubt standard in making its preliminary calculation of the defendant's guideline offense level. Second, the trial court erred in failing to make a finding of the exact §2B1.1 loss amount. The Third Circuit held that loss amount is a specific offense characteristic and, as such, must be found by a preponderance of the evidence.

United States v. Tupone, 442 F.3d 145 (3d Cir. 2006). The court decided that the loss derived by the defendant's fraudulent receipt of worker's compensation benefits was the difference between the amount of benefits the defendant actually obtained and the amount the government intended him to receive. The court cited §2B1.1, comment. (n.3(F)(ii)), which states that the loss in government benefits cases is equal to the amount of benefits obtained that were not "intended" by the government to be obtained by a given recipient.

United States v. Himler, 355 F.3d 735 (3d Cir. 2004). The defendant pled guilty to passing fraudulent checks, a violation of 18 U.S.C. § 513(a). The defendant fraudulently bought a condominium in Greensburg, Pennsylvania, by tendering false checks in the amount of $195,000. At sentencing, the district court found that the defendant intended to cause a loss of between $120,000 and $200,000 pursuant to §2B1.1 (b)(1)(F), and ordered restitution to the victim in the amount of $193,833, the amount paid for the condominium, to be offset by the amount of the future sale of the condominium. On appeal, the defendant argued that the district court erred in finding that he intended to cause a loss of between $120,000 and $200,000 when he tendered the counterfeit checks and thereby erred in applying a ten-level enhancement under the sentencing guidelines; and that the district court was not entitled to order the restitution that it did. The Third Circuit upheld the district court's decision and concluded that there was ample evidence for the district court to find that the defendant intended a loss between $120,000 and $200,000: first, while not dispositive, there was the face value of the checks themselves, equaling $195,000. Second, there was the defendant's continued silence and even affirmative acts to perpetuate the fraud in the face of mounting questions about the authenticity of those checks.

Victim Table (§2B1.1(b)(2))

United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009). The Third Circuit held that the term "victim" as used in §2B1.1(b)(2), containing an enhancement for number of victims, means only those who actually suffer pecuniary harm as a result of the offense. Kennedy was employed by a nonprofit agency that managed the financial affairs of elderly clients. In that capacity, she stole in excess of $50,000 from 34 individual accounts. The funds were promptly returned by the agency and its insurer. The district court applied a two level enhancement under §2B1.1(b)(2)(A), finding that there were more than 10 victims. The Court of Appeals reversed and held that there were only two victims as defined in the guideline, *viz*., the agency and its insurer. The Court reasoned that this result was compelled by the plain language of the commentary which defines "victim" as "any person who sustained any part of the actual loss" and "actual loss" as pecuniary harm. However, the Court held that application of the vulnerable victim adjustment in §3A1.1(b)(1) was proper since the definition there is broader and encompasses conduct that constitutes relevant conduct pursuant to §1B1.3.

Means of Identification (§2B1.1(b)(10))

United States v. Hawes, 523 F. 3d 245 (3d Cir. 2008). The 'identity theft" enhancement at §2B1.1(b)(9)(C)(i)[2] is not properly applied unless the offense behavior "involved the sort of 'breeding' of means of identification that is targeted by the enhancement." Because the defendant's misuse of a specific form of identifying information (a name and an address), while used to perpetrate a fraud, was not used to assume another person's identity, it did not merit imposition of the identity theft enhancement. The broad interpretation urged by the government would involve establishing a rule likely to "produce absurd or unintended results."

[2] Redesignated as §2B1.1(b)(10), effective November 1, 2004, by amendment 665.

United States v. Newsome, 439 F.3d 181 (3d Cir. 2006). The court applied a two-level sentencing enhancement, referencing §2B1.1(b)(9)(C)(i), for unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification when the defendant took an existing means of identification (personal and bank account information), duplicated it, and assembled it with coconspirator's photograph to create an altered hybrid means of identification. The defendant's argument that "means of identification" did not include fraudulent driver's licenses created by the defendant was rejected.

§2B3.1 Robbery

United Stated v. Thomas, 327 F.3d 253 (3d Cir. 2003). The district court correctly applied a two-level enhancement for making a "threat of death" in connection with a robbery. It was uncontested that the defendant handed a bank teller a note reading: "Do exactly what this says, fill the bag with $100s, $50s and $20s, a dye pack will bring me back for your ass, do it quick now. Truely yours." The district court applied a two-level enhancement pursuant to §2B3.1(b)(2)(F), which applies "if a threat of death was made" in connection with the robbery. Before 1997, the guideline at issue required an "express threat of death." In 1997, the Sentencing Commission modified the guideline by omitting the word "express." The Third Circuit noted that the amendment broadened the guideline rather than narrowed it. *See United States v. Day,* 272 F.3d 216 (3d Cir. 2001). The court noted further that in determining whether a threat was a "threat of death,' the focus was on the reasonable response of the victim to the threat.

See United States v. Orr, 312 F.3d 141 (3d Cir. 2002), §1B1.1.

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

United States v. Mussayek, 338 F.3d 245 (3d Cir. 2003). The defendant was found guilty of conspiracy to commit extortion and interstate travel in aid of racketeering. On appeal, the defendant raised an issue of first impression, whether, in order for the base offense level for conspiracy to commit extortion to be enhanced under 2B3.2(b)(1), a threat must be communicated to the victim. The defendant argued that the purpose of the guideline was to punish more severely those who placed their victims in fear of, for instance, death or serious bodily injury, and accordingly urged that an enhancement for the content of a threat made little sense if the threat was not communicated. The Third Circuit affirmed the district court's application of the enhancement. Having reviewed the various application notes of §2B3.2, the court noted that whether the particular intended victims were aware of the threat was immaterial to the determination of whether a particular threat may be the basis for enhancing a sentence under the guideline. The court found no reason to limit the meaning of the term "threat" as used in §2B3.2(b)(1) to statements communicated to intended victims. The defendant's offense clearly involved an express or implied threat of death, bodily injury, or kidnapping, §2B3.2(b)(1), and accordingly the district court did not err in applying the threat enhancement.

United States v. Boggi, 74 F.3d 470 (3d Cir. 1996). Upon the Government's appeal, the appellate court remanded the case for the district court to resentence the defendant using guideline §2B3.2 instead of §2C1.1. The appellate court agreed that the district court erred in applying §2C1.1 to determine the base offense level of the extortion counts. The district court applied §2C1.1 to these offenses over the government's objection that §2B3.2 should ordinarily be applied to a threat to cause labor problems. In agreeing with the government's position, the appellate court noted that section 2B3.2's commentary states that the guideline applies to situations in which the "threat . . . to injure a person or physically damage property, or any comparably serious threat" may be inferred from the circumstances or the reputation of the person making the threat. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. Based upon these distinctions, the appellate court found that it was error for the district court to apply §2C1.1.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred in interpreting the meaning of "improper benefit conferred" in §2B4.1(b)(1), which refers to the "net value accruing to the entity on whose behalf the individual paid the bribe," rather than the value received by the defendant. The defendant was convicted of 25 counts of mail fraud for kickbacks he paid to meat managers to induce them to buy their meat from the defendant's company. The defendant paid $111,548.21 in kickbacks, and received $500 cash per week from his employer. The district court used the dollar amount of the kickbacks instead of the net value the company gained as a result of the kickbacks. Under §2B4.1, comment. (n.2), the "improper benefit" is "the value of the action to be taken or effected in return for the bribe." The government presented evidence that the defendant's kickbacks induced a grocery store to buy $10,000,000 worth of meat, which gave the meat company a profit of $700,000. The appellate court ruled that the value of the profit should determine the "improper benefit conferred."

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

United States v. Gregory, 345 F.3d 225 (3d Cir. 2003). The defendant pled guilty to passing or attempting to pass counterfeit currency in violation of 18 U.S.C. § 472. The defendant passed counterfeit currency at a casino in Atlantic City and, while questioned by the state trooper, admitted to having a gun in the pocket of his jacket for his protection. During the sentencing hearing, the district court applied the two-level enhancement under §2B5.1(b)(4) for possessing a dangerous weapon in connection with the offense. On appeal, the defendant argued that the enhancement was incorrectly applied because the district court believed that *United States v. Loney*, 219 F.3d 281 (3d Cir. 2000), mandated the §2B5.1 increase whenever a defendant possessed a gun during an "in-person transaction." The Third Circuit agreed and remanded the case for clarification as to whether the sentencing court applied the enhancement for possession of the gun in connection with counterfeiting due to circumstances of the case or due to an erroneous conclusion that the enhancement automatically attached to possession.

Part C Offenses Involving Public Officials

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

United States v. Lianidis, 599 F.3d 273 (3d Cir. 2010). The Third Circuit held that the "benefit received" under §2C1.1(b)(2) is the net value received by defendant minus the "direct costs" associated with the performance of the contract. The defendant paid $155,000 in bribes to an FAA employee to secure government contracts for her computer engineering services company. While the contracts, which paid the defendant a total of $6,783,877, were secured by bribes, the work was legitimate. The defendant received close to $1,047,000 in salary during the contract term. The sentencing judge determined that the "benefit received" under §2C1.1(b)(2) to be between $1,000,000 and $2,500,000 based on two separate theories. First, the district court subtracted direct expenses, such as payroll and taxes, from the total amount received under the contracts. Secondly, the district court used the total salary received as the "benefit received." The court of appeals reversed and held that the district court erred in the method it use to determine the direct costs. The district court excluded certain fixed costs, such as business overhead, and the salary paid to the defendant. The Third Circuit held that the sentencing judge must determine if the overhead or the salaries "can be easily attributed to solely the [government] contracts" before excluding it. The court of appeals also determined that the amount of salary that the defendant received could not serve as a proxy for the "benefit received," but rather should be the "net value" to the defendant's company under the government contract.

See United States v. Boggi, 74 F.3d 470 (3d Cir.1996), §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

Base Offense Level (§2D1.1(a))

Watterson v. United States, 219 F.3d 232 (3d Cir. 2000). The Court of Appeals held that the district court erred in applying the Base Offense Level found at §2D1.2 because the defendant was not charged with or convicted of distributing drugs near a school. The court held that the proper guideline was §2D1.1, because the defendant was convicted of "conspiracy to distribute cocaine and marijuana," in violation of 21 U.S.C. §§ 846 and § 841(a)(1).

Drug Quantity (§2D1.1(a)(5))

United States v. Waters, 313 F.3d 151 (3d Cir. 2002). The Third Circuit upheld the district court's finding that for purposes of the sentencing guidelines, the defendant was

responsible for the distribution of 165 grams of crack. The defendant contended on appeal that of this amount, 27.2 grams should not have been counted as crack because the substance did not contain sodium bicarbonate, the common cutting agent for crack, but instead contained niacinamide (commonly known as Vitamin B). The court noted that Note (D) to §2D1.1(c) (the drug quantity table) states that crack is "usually prepared" with sodium bicarbonate. This note does not mean that for a substance to be considered crack it must be prepared with sodium bicarbonate. Accordingly, "it is not necessary for the government to show that a substance contains sodium bicarbonate in order to demonstrate by a preponderance of the evidence that the drugs in question are crack cocaine."

United States v. Yeung, 241 F.3d 321 (3d Cir. 2001). The district court erred in finding the proper amount of drugs attributable to the defendant was the larger amount that his co-conspirator had negotiated to sell instead of the one ounce of heroin that was actually delivered. The defendant met with an informant who had been instructed by a DEA agent to see if he could buy an ounce of heroin, but the defendant refused to sell only an ounce. After many discussions in which other amounts were discussed, the defendant agreed to sell a single ounce. The district court found the other discussions amounted to an agreement for a larger sale and sentenced the defendant based on that larger amount. The Third Circuit found that an amendment to §2D1.1 at Application Note 12 specified the actual weight delivered rather than the weight under negotiation should be the amount used for calculating a sentence and for sentencing purposes; if a defendant is to be sentenced for a larger quantity than actually delivered, the quantity must have been agreed upon prior to delivery.

Dangerous Weapon (§2D1.1(b)(1))

United States v. Drozdowski, 313 F.3d 819 (3d Cir. 2002). The Third Circuit affirmed the district court's finding that the enhancement in §2D1.1(b)(1) for possession of a dangerous weapon applied to the defendant. The defendant argued that the enhancement was inappropriate because the guns in question had been found unloaded and inaccessible, buried beneath boxes in his father's house. The court, relying on Application Note 3 to §2D1.1, found that it was not "clearly improbable" that the weapons were connected to the defendant's drug offense. In so finding, the court noted that the guns would have been accessible to one who knew where they were, had been located near a desk in which other evidence–including money and records–of the drug conspiracy had been found, and were in a house with other drug paraphernalia. The court noted that the conspiracy had continued for several years and that given this context, it was not "clearly improbable" that at some point during those years the guns found near drug money and records had been used in connection with the drug activity.

United States v. Goggins, 99 F.3d 116 (3d Cir. 1996). The district court did not err when it imposed a two-level enhancement under §2D1.1(b)(1) for possession of a firearm, even though the defendant's 18 U.S.C. § 924(c) conviction for use of a firearm was vacated in light of *Bailey v. United States*, 516 U.S. 137 (1995). The defendant had been convicted of possession with intent to distribute cocaine base (21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)), and of using and

carrying a firearm during a drug offense (18 U.S.C. § 924(c)). The district court vacated the defendant's section 924(c) conviction, but imposed the two-level increase under §2D1.1, concluding that the weapon clearly was present in the bedroom when the police arrested the defendant. The defendant argued that his acquittal on the 18 U.S.C. § 924(c) count should bar the §2D1.1 enhancement. The Third Circuit, joining with the First, Fourth, Sixth, Seventh, and Tenth Circuits, held that "a weapons enhancement under §2D1.1(b)(1) is permissible after an acquittal under section 924(c)(1)." *See United States v. Ovalle-Marquez*, 36 F.3d 212 (1st Cir. 1994); *United States v. Romulus*, 949 F.2d 713 (4th Cir. 1991); *United States v. Barnes*, 49 F.3d 1144 (6th Cir. 1995); *United States v. Pollard*, 72 F.3d 66 (7th Cir. 1995); *United States v. Coleman*, 947 F.2d 1424 (10th Cir. 1991). The Third Circuit followed the reasoning of *Pollard*, 72 F.3d at 68, which stated that guideline section 2D1.1(b)(1) is broader than 18 U.S.C. § 924(c)(1) and encompasses conduct not within section 924(c)(1). Furthermore, the court noted that the standard of proof for the guideline enhancement is less than the burden for a conviction under the statute.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Mundy, 621 F.3d 283 (3d Cir. 2010), *petition for cert. filed* (U.S. Jan. 05, 2011) (No. 10-8325). The district court did not err in applying a two-level enhancement pursuant to §2D1.2(a)(1) where there was no evidence that the defendant who was arrested with more than 500 grams of cocaine within 1,000 feet of a school intended to sell the drugs in that location. The panel relied on *United States v. Rodriguez*, 961 F.2d 1089 (3d Cir. 1992), which held that 21 U.S.C. § 860 "applies to a defendant who possesses drugs within 1,000 feet of a school, even if the defendant intends to distribute them elsewhere."

§2D1.12 Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

United States v. Landmesser, 378 F.3d 308 (3d Cir. 2004). The district court erred in applying the two-level enhancement at §2D1.12(b) for an offense involving an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance where the release did not violate a statute enumerated in the guideline. Application Note 3 to §2D1.12 states subsection (b)(2) applies if the conduct for which the defendant is accountable involved any discharge, emission, release, transportation treatment, storage or disposal violation covered by one of three statutes. Although the district court specifically stated that the release of anhydrous ammonia from the tanks stolen by the defendant was not unlawful with respect to any of the statutes listed in the Application Note, the court nonetheless determined the defendant's conduct was unlawful for purposes of the enhancement. The Third Circuit held that the enhancement applies only if the release of the anhydrous ammonia was a violation of one of the enumerated statutes.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit[3]

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008). Defendant was convicted in a bank fraud case. One of the fraudulently obtained loans involved was secured by pledged real estate. The Court refused to use the value of the pledged property to reduce the defendant's §2F1.1 loss amount because the collateral was tied up in a bankruptcy and the trustee in bankruptcy held a priority position over the victim bank. The Third Circuit held that the trial court acted reasonably inasmuch as any future recovery for the victim from the sale of the pledged property was highly speculative.

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 Prostitution

United States v. Galo, 239 F.3d 572 (3d Cir. 2001). The district court erred in enhancing the defendant's sentence based upon his prior state court convictions. The defendant pled guilty to possession and production of material depicting the sexual exploitation of children. The district court applied the mandatory minimum sentence found in 18 U.S.C. § 2251(d), finding that the defendant's prior state court convictions were "relating to the sexual exploitation of children" and therefore sentenced him to 15 years' imprisonment. The defendant previously had pled guilty in state court to corruption of minors, endangering the welfare of children, and indecent assault. The Third Circuit found that because the state crimes of which the defendant previously had been convicted did not specifically refer to the sexual exploitation of children, the district court could not impose an enhancement based on conduct that resulted in a conviction for those crimes. It is the elements of a given state statute, not the conduct that violates it, that determine if a statute relates to the sexual exploitation of children. In this case, the statutory elements in the state statute were aimed at conduct of *any* nature that tends to corrupt children, not just sexual conduct.

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

United States v. Grober, 624 F.3d 592 (3d Cir. 2010). The Third Circuit affirmed a 60-month sentence in a child pornography case, a downward variance from the otherwise applicable

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

guideline range of 235-293 months under §2G2.2. The appellate court held that the district court did not commit procedural error because the record showed the district court "set forth . . . a sufficiently compelling explanation for its policy concerns about § 2G2.2 and its justifications for imposing a sentence outside the range § 2G2.2 recommended." Citing the Commission's 2009 report on *The History of the Child Pornography Guidelines*, testimony at the sentencing hearing, and the Second Circuit's opinion in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), the panel held that the district court did not commit procedural error when it found that "Grober's case is squarely within the heartland of downloading cases" but that "§2G2.2, the designated guideline for the typical downloading case . . . falls outside of the heartland."

United States v. Thielemann, 575 F.3d 265 (3d Cir. 2009), *cert. denied,* 130 S. Ct. 1109 (2010). Defendant pled guilty to receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2) & (b)(1). The district court initially applied §2G2.2, which carried a base offense level of 22. Because the offense involved encouragement of the molestation of the victim, the district court relied on the cross reference at §2G2.2(c) directing the application of §2G2.1 in specified circumstances. This resulted in a base offence level of 32. On appeal the defendant challenged the use of uncharged relevant conduct to support the cross reference. The Court of Appeals affirmed, holding "the cross-reference and related Guidelines provisions and application notes direct the District Court to do so, and the District Court properly considered [defendant's] involvement in the molestation of the victim."

United States v. Olfano, 503 F.3d 240 (3d Cir. 2007). The defendant pled guilty to receipt of child pornography producing a sentencing range of 188-235 months. He was sentenced to 188 months and, after a re-sentencing because the district court had treated the guidelines as mandatory, was again sentenced to 188 months. In a matter of first impression, the circuit court ruled that the district court did not err in enhancing the defendant's sentence five levels for a "pattern of activity involving the sexual abuse or exploitation of a minor" under §2G2.2(b)(4) in the 2002 Guideline Manual in considering two prior incidents that had occurred when the defendant was a juvenile and approximately fifteen years before the instant offense. The defendant had argued that the incidents did not constitute a pattern because they were too remote in time from the offense. Agreeing with other circuits to address the issue, the court found that there is no temporal nexus necessary to establish a pattern of activity of sexual abuse or exploitation of a minor.

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The district court erred in applying the cross-reference in §2G2.2(c)(1) without considering whether the defendant's purpose for taking a sexually explicit photograph was to create pornographic pictures. The government had argued that the defendant's intent in taking the photographs was irrelevant, even though such a view results in a form of strict liability. The defendant argued that his purpose in taking the pictures was "the memorialization of his love for the girl, which had progressed to sexual intimacy, rather than the photographing of sexually explicit conduct." The record showed that the defendant took approximately 48 pictures of the girl–two of which were sexual in nature. A court must consider the defendant's state of mind in determining whether to apply the cross-

reference in §2G2.2(c)(1) "to ensure that the defendant acted 'for the purpose of producing a visual depiction of [sexually explicit] conduct.'"

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in enhancing the defendant's sentence for his substantial interference with the administration of justice. The defendant, a state legislator, was convicted of perjury before a grand jury. He appealed a three-level enhancement under §2J1.3 (now redesignated as §2J1.2(b)(2)). The district court found that the defendant's perjured testimony caused an unnecessary expenditure of substantial governmental resources (*see* §2J1.2, comment. (n.1)), including the interviewing and grand jury testimony of witnesses. The Third Circuit affirmed.

§2J1.7 Commission of Offense While on Release

United States v. Hecht, 212 F.3d 847 (3d Cir. 2000). The district court did not err in enhancing the defendant's sentence for committing a crime while he was on pretrial release. In 1994, the defendant pled guilty to criminal conspiracy to commit wire fraud and mail fraud and began serving his sentence. The defendant ran a second unrelated fraudulent scheme from 1993 to 1995, and in 1998 he pled guilty to criminal conspiracy to commit wire fraud and mail fraud for his involvement in that scheme. At his sentencing in the second case, the district court applied the three-level enhancement in §2J1.7 because the defendant had committed this offense while on pretrial release for the first scheme. The defendant contended the enhancement could not be applied because he was not given notice at the beginning of his pretrial release in the first case that the commission of a new offense during his release would subject him to an enhanced sentence in the second case. The Third Circuit found that §2J1.7, comment. (backg'd), which states that an enhancement "may be imposed only after sufficient notice to the defendant by the government or the court," simply mandates presentencing notice in the second case, not a prerelease notice in the first case.

Part K Offenses Involving Public Safety

§2K1.5 Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

See United States v. Cothran, 286 F.3d 173 (3d Cir. 2002), §2A6.1.

§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. Lee, 612 F.3d 170 (2010). A prior conviction for reckless endangerment will not qualify as a crime of violence for the purposes of enhancement under §2K2.1(a)(2). Because *Begay v. United States*, 553 U.S. 137 (2008) specifically distinguished crimes involving negligence or recklessness from those involving violence or aggression, a conviction for reckless behavior cannot constitute a crime of violence.

United States v. Johnson, 587 F.3d 203 (3d Cir. 2009). The defendant pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). He was assigned a base offense level of 20 pursuant to §2K2.1(a)(4)(A) because his prior Pennsylvania conviction for simple assault was determined to be a crime of violence by the district court. Defendant argued that because the Pennsylvania simple assault statute included reckless conduct, it cannot be considered a crime of violence under *Begay v. United States*, 553 U.S. 137 (2008). The Third Circuit recognized that the analytical framework that it employed in its prior decision in *United States v. Dorsey*, 174 F.3d 331 (3d Cir. 1999), which held that Pennsylvania simple assault was a crime of violence, had been altered by the *Begay* decision. In applying *Begay*, the Third Circuit began by looking to the statutory language which stated that a person commits simple assault "if he ... (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." *Id*. at 209. The Court noted that the statute criminalizes two distinct classes of conduct, *viz*., intentional and knowing and reckless. With regard to the first class, the Court held that it had "no trouble concluding" that under *Begay*, a violation of this provision constitutes a crime of violence because, *inter alia*, the conduct at issue is purposeful and presents a serious potential risk of physical injury. The Government did not seek to classify a conviction based on reckless conduct as a crime of violence in this appeal. Accordingly, the Court of Appeals remanded the matter for further consideration by the district court. On remand, the district court was directed to consider the materials outlined by the Supreme Court in *Shepard v. United States*, 544 U.S. 13 (2005), *viz*., the charging document, written plea agreement, transcript of the plea collogue and explicit factual findings, to determine of which portion of the simple assault statue applied to the defendant.

Lawful Sporting Purpose or Collection (§2K2.1(b)(2))

United States v. Miller, 224 F.3d 247 (3d Cir. 2000). The Third Circuit upheld the district court's denial of a "lawful sporting purpose" downward adjustment. The defendant pled guilty to selling firearms without a license. The Third Circuit agreed a downward adjustment was not appropriate because when the defendant sold the firearms, he did not *possess* them "solely for a lawful sporting purpose or collection" as required by 2K2.1(b)(2).

Possession in Connection with another Offense (§2K2.1(b)(6))

United States v. Fisher, 502 F.3d 293 (3d. Cir. 2007). Defendant pled guilty to being a felon in possession of a firearm. After conducting an evidentiary hearing, the trial court found that defendant pointed a gun at a law enforcement officer, began to pull trigger, and moved the barrel of the firearm in a menacing fashion. Based upon these factual findings, the trial court applied both a four-level enhancement for possession in relation to another felony offense pursuant to §2K2.1(b)(5)[4] and a six-level increase for creating a risk of serious bodily injury pursuant to §3A1.2(c)(1). The Third Circuit upheld the enhancements, holding that both enhancements could be simultaneously applied, despite the defendant's double-counting argument, because the §2K2.1 enhancement involved the use of a firearm whereas the §3A1.2 enhancement involved a law enforcement victim.

United States v. Navarro, 476 F.3d 188 (3d Cir. 2007). The court concluded that a four level enhancement under §2K2.1(b)(5) is appropriate in a case where the defendant traded crack cocaine for the firearm in question. The underlying drug dealing was determined to be "another felony offense" and the firearm was clearly found to have been "used" in the underlying offense since the drug deal would not have been possible otherwise (citing *Smith v. United States*, 508 U.S. 223 (1993)).

United States v. Lloyd, 361 F.3d 197 (3d Cir. 2004). The defendant pled guilty to two counts: possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d), and conspiracy to violate that provision, in violation of 18 U.S.C. § 371. The defendant was alleged to be part of a drug ring headed by Armando Spataro. Spataro was involved in a dispute with a man named Thomas Learn. Several days later, Spataro and the defendant, along with other members of the drug ring decided that a bomb should be built and placed under the fuel tank of Learn's truck. The scheme did not succeed because Learn's dog alerted him to the presence of the undetonated device under the vehicle. Learn contacted the authorities, who, after disassembling and examining the bomb, concluded that the bomb was "capable of exploding." The district court applied the enhancement at §2K2.1(b)(5) for use or possession of a firearm in the commission of another felony offense. On appeal, the defendant argued that the conduct on which the adjustment was based was essentially the same conduct that formed the basis for the underlying counts to which he had pled guilty. This, he argued, was contrary to the Third Circuit's decision in *United States v. Fenton*, 309 F.3d 825 (3d Cir. 2002), which held that §2K2.1(b)(5) requires "another felony offense," separate and apart from the base offense. The court disagreed with the defendant's interpretation of *Fenton* and affirmed the district court's decision to apply §2K2.1(b)(5) in determining the defendant's sentence.

United States v. Fenton, 309 F.3d 825 (3d Cir. 2002). The district court erred in applying the enhancement in §2K2.1(b)(5) for having used or possessed a firearm in connection with "another felony offense." The defendant was convicted of a felon-in-possession charge based on

[4] Redesignated as §2K2.1(b)(6), effective November 1, 2006, by amendment 691.

his burglary of a sporting goods store in which he stole and thereby possessed firearms. The district court applied the §2K2.1(b)(5) enhancement after finding that the firearms had been possessed in connection with "another felony offense," the burglary. In vacating and remanding this case for resentencing, the Third Circuit held that a state law felony crime "identical and coterminous with the federal crime" cannot be considered "another federal offense" within the meaning of the guideline. In other words, "another felony offense" means "a felony or act other than the one the sentencing court used to calculate the base offense level."[5]

United States v. Loney, 219 F.3d 281 (3d Cir. 2000). The district court did not err in applying a four-level enhancement under §2K2.1 to the defendant's sentence when the defendant had admitted he possessed heroin for purposes of sale, and possessed or used a pistol "in connection with" that felony drug offense. The defendant was convicted of felony drug trafficking, and the district court applied the enhancement based on the defendant's possession of a semi-automatic pistol at the time of his arrest. He maintained he had the gun for personal protection and the government had no evidence tying the gun to his drug trafficking. The Third Circuit held that the phrase "in connection with" should be interpreted expansively. Agreeing with its sister circuits, the Third Circuit stated that §2K2.1 required some relationship between the gun and the felony. It further held that when a defendant has a loaded gun on his person while caught in the middle of a crime that involves drug transactions, a district judge can reasonably infer there is a relationship between the gun and the offense. *See United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir.1996); *United States v. Spurgeon*, 117 F.3d 641, 643-44 (2d Cir. 1997); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996); *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994). *But see United States v. Young*, 115 F.3d 834 (11th Cir. 1997).[6]

Cross Reference (§2K2.1(c))

United States v. Kulick, ____ F.3d ____, 2010 U.S. App. LEXIS 26296 (3d Cir., Dec. 29, 2010). The Third Circuit joined the majority of circuits and held that "§2K2.1(c)(1) cross-referenced conduct must be relevant conduct under §1B1.3." The panel went on to hold that the defendant's dismissed charge for extortion "was not relevant conduct to his unlawful possession of a firearm because the time interval was considerable, there was very little similarity between the offenses, and there was no regularity." Accordingly, the district court's decision to increase the defendant's sentence through the §2K2.1(c)(1) cross reference was clear error. The panel vacated the sentence and remanded for further proceedings.

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[5] *But see* amendment 691. Effective November 1, 2006, §2K2.1, comment (n. 14(B)) provides that the enhancement applies in a case in which the defendant finds and takes a firearm during a burglary, even if the defendant did not engage in any other conduct with the firearm during the course of the burglary.

[6] *See* amendment 691. Effective November 1, 2006, §2K2.1, comment (n. 14(B)) provides that the enhancement applies in a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia.

Upward Departure (§2K2.1, Application Note 16)

United States v. Cicirello, 301 F.3d 135 (3d Cir. 2002). The district court's upward departure based on Application Note 16 to §2K2.1 was reversed. The application note states that an upward departure may be warranted, *inter alia*, for an offense that "posed a substantial risk of death or bodily injury to multiple individuals." The district court had found that such a risk was inherent in the defendant's sale of 22 stolen firearms, which the court characterized as the sale of "a score of lethal concealable firearms on the streets." In reversing, the Third Circuit found that the number of firearms was specifically considered in the guideline, as was the fact that such weapons are generally concealable, and that the offense was within the heartland of §2K2.1 cases.

Part L Offenses Involving Immigration, Naturalization and Passports

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

United States v. Frias, 338 F.3d 206 (3d Cir. 2003). The defendant pled guilty to unlawfully reentering the United States after deportation for a state felony drug trafficking offense for which the defendant was paroled after 11 months on an 11 to 23 month term of imprisonment. The district court imposed a sixteen-level enhancement for prior sentences over 13 months pursuant to §2L1.2(b) because it determined the term "sentence imposed" in subsection (b) means the maximum term in the sentence, not the term actually served. On appeal, the government relied on §4A1.2(b) which defines the term "sentence of imprisonment" as a "sentence of incarceration and refers to the maximum sentence imposed." The Third Circuit agreed that although the Commission cautions against appropriating definitions from other sections, in this case it was appropriate to look to other sections of the Guideline Manual to interpret the term. Because the defendant was not guaranteed release at the end of 11 months, his sentence was functionally equivalent to a sentence of 23 months with eligibility for parole at 11 months.

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. Chau, 293 F.3d 96 (3d Cir. 2002). The district court erred in applying a four-level enhancement in §2Q1.2(b)(4) to a defendant convicted of knowingly violating the Clean Air Act. The specific offense characteristic in §2Q1.2(b)(4) provides for a four-level increase if the "offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Although the defendant's activities may have been in violation of a city permit requirement, the Third Circuit found that under the enforcement procedures of the Clean Air Act there are no penalties for violating a permit. Thus "[b]ecause the Clean Air Act

does not contemplate a permit violation as a basis of enforcement, the §2Q1.2(b)(4) enhancement is not available."

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Bockius, 228 F.3d 305 (3d Cir. 2000). The defendant, a former president of an insurance brokerage firm, pled guilty to wire fraud, foreign transportation of stolen funds, money laundering, and forfeiture, after stealing $600,000 from the firm, wiring it to various places, and fleeing to the Cayman Islands. The district court declined to apply the money laundering guideline on the ground that the defendant's misconduct was not connected with extensive drug trafficking or another serious crime, and further failed to consider whether the guideline should be applied on an alternative basis. Instead, the district court sentenced him under the fraud guideline, because it believed the heartland of cases under §2S1.1 includes only money laundering associated with extensive drug trafficking and serious crimes. The government appealed. Agreeing with other circuit courts, the Court found the district court's conclusion was incorrect, and held §2S1.1 is also intended to apply in typical money laundering cases in which the defendant knowingly conducted a financial transaction to conceal tainted funds or funnel them into additional criminal conduct. *See United States v. Hemmingson*, 157 F.3d 347, 363 (5th Cir. 1998); *United States v. Prince*, 214 F.3d 740, 768 (6th Cir. 2000); *United States v. Ross*, 210 F.3d 916, 928 (8th Cir. 2000).

§2S1.2 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in proceeds of specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. He engaged in a scheme to manipulate the federally funded student loan program by submitting false deferment and forbearance forms to lenders. He argued his case was an atypical one "in which the guideline section indicated for the statute of conviction is inappropriate," and that his conduct as a whole was little more than routine fraud to which money laundering was incidental. However, the Third Circuit found it clear that the defendant used the proceeds of his mail fraud to promote further acts of fraud, and therefore concluded the district court did not err in sentencing him under the money laundering guideline.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. Geevers, 226 F.3d 186 (3d Cir. 2000). The district court refused to apply a three-level reduction for a defendant whose guideline level was based on intended loss. The defendant maintained that because he did not complete the acts necessary to effect the intended loss, he was entitled to the reduction under the attempt guideline. The Court found no error in the district court's consideration that the defendant was only prevented from drawing on his worthless check because the bank closed his account after another bank notified it the check was not backed by sufficient funds. Therefore, the defendant was prevented from even attempting to draw on his worthless check, and it was not error for the court to consider that he would have completed his intended fraud but for the intervention of a third party.

United States v. Torres, 209 F.3d 308 (3d Cir. 2000). The district court found that the defendant did not qualify for a three-level reduction for an incomplete attempt. The defendant opened a money market account in a false company name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third party check. He attempted to withdraw $24,900 but was unsuccessful because the bank suspected the account was fraudulent. He pled guilty to bank fraud. The defendant argued that because his actions to defraud the bank were thwarted by the bank, he was eligible for a three-level reduction for an attempted offense. The Third Circuit noted that he pled guilty to the substantive, completed offense and not to a mere attempt. Further, the Court found with respect to the $24,900 attempted withdrawal that the defendant had "completed all the acts [he] believed necessary," and accordingly affirmed.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997). The district court properly applied the vulnerable victim enhancement to the defendant's sentence pursuant to §3A1.1(b). The appellate court found that the enhancement was appropriate regardless of the fact that the victim was only a passenger in a carjacked vehicle and the crime was not committed with a view to her vulnerability. The defendant, relying on the Sixth Circuit minority position, argued that in order to apply the enhancement properly, the victim must be the actual victim of the offense of the conviction. The appellate court, relying on the majority of circuits, rejected this reasoning and held that the courts should not interpret §3A1.1(b) narrowly but should look to the defendant's underlying conduct to determine whether the enhancement may be applicable. *See also, U.S. v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008).

§3A1.2 Official Victim

See United States v. Fisher, 502 F.3d 293 (3d Cir. 2007), §2K2.1.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). The district court did not err in applying an upward adjustment for the defendant's leadership role in the offense. The defendant, an owner and president of a cosmetology school, pled guilty to engaging in monetary transactions in property derived from specified unlawful activity, mail fraud, student loan fraud, and destruction of property to prevent seizure. The defendant disputed that he was a leader in the fraud and claimed that even if he was a leader in the fraud, he was not a leader in the subsequent money laundering activities. The Third Circuit found that the defendant specifically admitted he exercised a managerial function with respect to the secretarial staff, and the record showed he instructed two staff members to submit fraudulent deferment and forbearance forms and to mail checks on behalf of student borrowers nearing default. The adjustment was therefore proper.

United States v. DeGovanni, 104 F.3d 43 (3d Cir. 1997). The district court erred in enhancing the defendant's sentence as a "supervisor" for purposes of §3B1.1(c) based on his *de jure* position as a squad sergeant in the police department, without any evidence that he actually supervised the illegal activity of the other police involved in the offenses. The defendant pleaded guilty to interference with interstate commerce by robbery and obstruction of justice but asserted that the meaning of "supervisor" as defined by the guidelines was beyond the scope of his activity. He characterized his role as no more than a secondary passive one in the offense. The circuit court agreed and held that, in the context of §3B1.1(c), the two-level enhancement applies only when the "supervisor" is a supervisor in the criminal activity. The case was remanded for resentencing.

§3B1.2 Mitigating Role

United States v. Holman, 168 F.3d 655 (3d Cir. 1999). The defendant pled guilty to possession with intent to distribute cocaine. The total amount of cocaine attributed to the conspiracy was 50 kilograms, and the defendant admitted being a distributor and that 10 kilograms were attributable to him. The district court did not clearly err in finding that a distributor in a conspiracy to distribute ten kilograms is not entitled to a mitigating role adjustment.

United States v. Haut, 107 F.3d 213 (3d Cir. 1997). The district court did not err in finding that the defendants were minimal participants under §3B1.2(a). At the defendants' sentencing for conspiracy to commit malicious destruction of property by means of fire, in

violation of 18 U.S.C. § 371, the district court decreased the defendants' offense levels by four levels based on minimal participation in the offense. The government challenged this finding. The commentary to §3B1.2 states that minimal participants are "among the least culpable of those involved in the conduct of a group." The district court found that the defendants did not have a financial interest in the bar they had burned and did not financially benefit from the arson. The circuit court stated that it was correct to examine the economic gain and physical participation of the defendants, as well as to assess "the demeanor of the defendants and all the relevant information to ascertain [their] culpability in the crime."

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The district court erred in granting the defendant a three-level downward departure based on his mitigating role in an offense of possession of child pornography, 18 U.S.C. § 2252(a)(4). The defendant pleaded guilty to possession of child pornography and the government recommended a 12-month sentence, the bottom of the 12- to 18-month sentencing range. Although a mitigating role reduction was not available to the defendant under §3B1.2 because the offense of possession is a "single person" act that does not involve concerted action with others, the district court departed down from the guidelines by analogy to that guideline. The district court sentenced the defendant to three years' probation, six months of which would be served in home confinement, and a $5,000 fine, citing the Third Circuit's opinion in *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990). The *Bierley* court had permitted a departure based on an analogy to the mitigating role reductions where the defendant, convicted of receipt of child pornography, would have qualified for such a reduction had the other participants in the offense not been undercover agents. The government argued that the district court improperly departed under the holding in *Bierley* because to qualify for a mitigating role reduction, or an analogous departure, the offense must involve more than one participant. The circuit court declined to extend *Bierley* to single actor offenses, agreeing with the government's position.

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

Abuse of Position of Trust

United States v. Thomas, 315 F.3d 190 (3d Cir. 2002). The district court did not err in applying the §3B1.3 enhancement for abuse of a position of trust to the defendant, who was a home aid to her elderly victim. The defendant held a position of trust vis-á-vis her employer in that she was trusted to open the victim's mail and had authority to pay the victim's bills. These tasks demonstrated that the victim had counted upon the judgment and integrity of the defendant, who defrauded the victim by inducing the victim to sign and vouch for checks that the defendant cashed for her own benefit.

United States v. Cianci, 154 F.3d 106 (3d Cir. 1998). The district court did not err in considering uncharged conduct in applying an enhancement for abuse of a position of trust. The defendant was convicted of tax evasion after he used his position as an executive in an electronics firm to devise a scheme involving a shell corporation and falsified documents to

embezzle and sell the company's products. He then concealed income from these sales from the IRS. The district court applied the abuse of trust enhancement based on the trust relationship the defendant had with his employer. The court of appeals held that, even though the defendant's employer was not the victim of the tax evasion, the offense of conviction, the defendant's uncharged criminal conduct toward the company was relevant for purposes of the enhancement. No language in the applicable guideline requires that the victim in the trust relationship be the victim of the offense of conviction. *See also, U.S. v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008); *but see*, *e.g.*, *United States v. Guidry*, 199 F.3d 1150 (10th Cir. 1999)("[A] position of trust must be found in relation top the victim of the offense").

Use of a Special Skill

United States v. Urban, 140 F.3d 229 (3d Cir. 1998). The district court did not err in enhancing the defendant's sentence for use of a special skill. The defendant, who was convicted of possession of an unregistered destructive device (components of a canister grenade) argued that he had received no special training or education. The court of appeals held that it was sufficient that the defendant was self-taught in the construction of the destructive device, using his mechanical background and training and his own research and experimentation.

§3B1.4 Use of a Minor To Commit a Crime

United States v. Pojilenko, 416 F.3d 243 (3d Cir. 2005). The defendant was part of a criminal enterprise that committed various crimes including robbery, extortion, fraud, and drug trafficking. The Third Circuit rejected a §3B1.4 increase for using a minor. The court determined that the record did not support a finding that the defendant committed an affirmative act beyond mere partnership. A co-conspirator recruited and directed the minor before the defendant became involved in the robbery. No other affirmative action was taken by the defendant regarding the minor's participation. The court also ruled that the defendant could not be held accountable for a co-conspirator's reasonably foreseeable use of the minor. The use of the minor enhancement must be based on an individualized determination of each defendant's culpability.

United States v. Thornton, 306 F.3d 1355 (3d Cir. 2002). The district court did not err in applying the §3B1.4 enhancement for using a minor to commit the offense. The defendant, who was convicted of conspiring to distribute crack cocaine, argued that the enhancement should not apply because he had not known that one of his distributors was a minor. The Third Circuit upheld the use of the enhancement, joining two other circuits in holding that §3B1.4 does not include a scienter requirement. *See United States v. Gonzalez,* 262 F.3d 867 (9th Cir.2001); *United States v. McClain*, 252 F.3d 1279 (11th Cir. 2001).

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000). The district court did not err in applying a two-level upward adjustment for the defendant's use of a minor in committing the offense. The defendant pled guilty to conspiracy to distribute and possession with intent to

distribute crack cocaine. He conceded that an individual involved in the conspiracy was not over 18 years of age throughout the course of the conspiracy. However, he argued the district court erred in raising the applicability of the enhancement *sua sponte*, and that it erred in imposing the adjustment, claiming the record lacked "a factual basis for determining that [the juvenile] became part of the conspiracy while still a minor." The Third Circuit found the district court did not err by raising the issue because the parties had been notified and given an opportunity to brief the issues prior to sentencing. Further, the court held the defendant's contention that the record was not clear contradicted his concession before the district court that "[the juvenile] was not over 18 years of age throughout the course of the conspiracy."

Part C Obstruction

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

United States v. Clark, 316 F.3d 210 (3d Cir. 2003). The district court erred in applying the §3C1.1 obstruction of justice enhancement to the defendant because the conduct upon which the enhancement was based was coterminous with the conduct for which he was convicted. The defendant had been convicted of falsely representing himself to be a citizen of the United States by claiming that he had been born in the U.S. Virgin Islands instead of Jamaica. On several different occasions, the defendant made such false representations to representatives of the INS and other federal officials. He then tried to buttress his claim with a counterfeit birth certificate from the Virgin Islands. At sentencing, the district court applied the §3C1.1 enhancement based on the defendant's use of the birth certificate. The Third Circuit held that this conduct was encompassed within the offense of conviction and that accordingly the enhancement was not proper.

United States v. Jenkins, 275 F.3d 283 (3d Cir. 2001). The district court erred in applying the obstruction of justice enhancement in §3C1.1 because the defendant's failure to appear in state court in a case that was related to the federal investigation did not compromise the federal investigation in any way. According to the Third Circuit, the defendant need not be aware of the federal investigation at the time of the obstructive conduct in order for the enhancement to apply. However, "there must be a nexus between the defendant's conduct and the investigation, prosecution, or sentencing of the federal offense," that is, "the federal proceedings must be obstructed or impeded by the defendant's conduct." In this case, that requirement was not met.

United States v. Imenec, 193 F.3d 206 (3d Cir. 1999). The Third Circuit held that §3C1.1 requires a two-level enhancement for obstruction of justice when a defendant fails to appear at a judicial proceeding, state or federal, relating to the conduct underlying the federal criminal charge. The defendant was arrested after selling crack cocaine to undercover Philadelphia police officers and charged in state court. He was ordered to appear in state court for a preliminary hearing. Before the hearing, the court issued a federal arrest warrant for federal drug offenses based on the same events. Federal authorities intended to arrest the defendant when he attended the preliminary hearing but he never appeared in state court. The following year, a federal grand

jury returned an indictment against the defendant. After his arrest a few years later, the defendant pled guilty to conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846, and the court sentenced him to 151 months' imprisonment. In rejecting the defendant's argument that §3C1.1 was inapplicable, the appellate court held that the term "instant offense" in §3C1.1 refers to the criminal conduct underlying the specific offense of conviction and that the term was not limited to the specific offense of conviction itself. The appellate court reasoned that the rationale underlying the obstruction of justice enhancement (*i.e.*, that "'a defendant who commits a crime and then . . . [makes] an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy' the criminal justice process") applies with equal force whether the investigation is being conducted by state or federal authorities. *Id*. at 208 (internal quotations and citations omitted).

United States v. Williamson, 154 F.3d 504 (3d Cir. 1998). The district court did not err in concluding that an upward adjustment for obstruction of justice was mandatory once the court had determined that obstruction had occurred. The defendant argued that the failure of §3C1.1 to include words such as "must" or "shall" renders the guideline ambiguous as to whether the adjustment must follow a determination that the defendant has engaged in obstructive conduct. Under the rule of lenity, this ambiguity must be interpreted in a defendant's favor, the defendant argued. The court of appeals rejected this contention, finding that the logical structure of the guideline clearly commands that the increase be applied following a finding that the defendant willfully obstructed the administration of justice. This holding is consistent with that of all other circuits which have considered the question.

United States v. Kim, 27 F.3d 947 (3d Cir. 1994). The district court did not err in enhancing the defendant's sentence for obstruction of justice pursuant to §3C1.1. The defendant was originally indicted for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841. He argued that his false cooperation related only to the conspiracy count of which he was acquitted; thus the obstruction of justice could not relate to the "instant offense." *See* §3C1.1. Although the circuit court acknowledged that the defendant's false cooperation related to the conspiracy count, that fact alone did not preclude the obstruction of justice from also relating to the possession count. The facts as a whole supported the conclusion that the defendant's conduct affected the "investigation, prosecution, or sentencing" of the possession offense even though the defendant's possession was complete when the government took the drugs.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Cordo, 324 F.3d 223 (3d Cir. 2003). The defendant was convicted of mail fraud and money laundering. The Third Circuit reversed the district court's decision that the defendant's mail fraud and money laundering convictions should not have been grouped under §3D1.2. The Third Circuit noted that the circumstances under which money laundering

charges should be grouped with charges for other related conduct was an issue that was frequently confronted by the district courts, but had been only rarely addressed by the Third Circuit. At issue here was subsection (b) to §3D1.2, which provides that counts involve substantially the same harm when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." The defendant urged that the identifiable victims of both his acts of fraud and money laundering were the same. The government asserted that there were different victims involved: the mail fraud victimized the investors themselves, whereas the money laundering offenses effected only a societal harm. The government asserted further that where the money laundering victims were identical to the victims of the related offenses, the counts should be grouped. The Third Circuit concluded that it could not agree with the district court that the money laundering in the instant case had no identifiable victim. The court held that in this case the acts of money laundering and mail fraud were all "in furtherance of a single fraudulent scheme" to defraud identifiable victims–unsuspecting investors and funeral homes. Thus, grouping under 3D1.2 was required.

United States v. Vitale, 159 F.3d 810 (3d Cir. 1998). The appellate court held that the defendant was not entitled to have his wire fraud and tax evasion offenses grouped for sentencing purposes. The district court refused to group the counts, and used the multi-count rules under §3D1.4 to increase the defendant's base offense level two levels, based on the number of units. The defendant argued that the wire fraud and tax evasion counts should be grouped under §3D1.2(c) because the wire fraud embodies conduct that is treated as a specific offense characteristic of the tax evasion count. The appellate court upheld the district court's decision not to group the offenses, relying on its decision in *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 991). The appellate court noted that if the counts are to be grouped "there would be no accounting in the sentence for the fact that Vitale had evaded taxes, and in effect his conviction on that count would be washed away." *Vitale*, 159 F.3d at 814. The court added that the two-level enhancement to the tax evasion count (raising it from level 21 to 23) cannot affect the offense level of the higher wire fraud charge (level 25). The court stated: "[b]ecause the two-point adjustment to the tax evasion offense level has no significance to and does not in fact adjust the overall sentence, it does not cause the kind of adjustment referred to in §3D1.2(c)." The court concluded that evading taxes on $12 million is patently "significant additional criminal conduct" which would not be punished if the counts were grouped.

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). The appellate court reversed and remanded the defendant's sentence for offenses involving the transportation and distribution of child pornography in interstate commerce in violation of 18 U.S.C. §§ 2252(a)(1), (a)(2), and (a)(4)(B). The district court correctly refused to group the defendant's offenses pursuant to §3D1.2(b) because each count involved different victims. The appellate court held that the primary victims that Congress sought to protect in the various sections of the Protection of Children Against Sexual Exploitation Act were the children, and not just society at large. Section 2252, by proscribing the subsequent transportation, distribution, and possession of child pornography, discourages its production by depriving would-be producers of a market. Therefore, since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted

in the pornographic materials, and because the defendant's four counts of conviction involved different children, the district court correctly concluded that grouping the defendant's offenses pursuant to §3D1.2(b) was inappropriate. Nevertheless, the appellate court reversed the defendant's sentence because it found that the court's application of the five-level increase under §2G2.2(b)(4) for engaging in "a pattern of activity involving the sexual abuse or exploitation of a minor" was inappropriate. The court explained that "sexual exploitation" is a term of art, and that "a defendant who possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed 'involve' such sexual exploitation by the producer." "Section 2G2.2(b)(4) of the guidelines singles out for more severe punishment those defendants who are more dangerous because they have been involved first hand in the exploitation of children."

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Dussan, 2010 WL 1731791 (3d Cir. April 30, 2010). The sentencing judge must properly consider the totality of the situation when determining whether the defendant should receive credit for acceptance of responsibility. While a defendant's failure to withdraw from criminal conduct or associations is an appropriate consideration to make such a determination, the defendant's failure to do so alone may not be enough, and failure to consider other factors is procedural error.

United States v. Williams, 344 F.3d 365 (3d Cir. 2003). The defendant appealed his conviction for carrying a firearm. The government cross-appealed the decision to grant the defendant an offense level reduction under §3E1.1 as to a separate count for bank robbery. The defendant received the acceptance of responsibility reduction for pleading guilty to the bank robbery charge, in spite of the fact that he contested the section 924(c) charge. The government argued that the district court failed to take into account that the defendant denied "relevant conduct" as defined in Application Note 1(a) to §3E1.1, which provides in pertinent part that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The Third Circuit held that the government wrongly treated Application Note 1(a) as establishing a *per se* bar to a reduction for acceptance of responsibility. The court found that even if the defendant "falsely" denied, or frivolously "contested, relevant conduct," the guidelines make clear that this is an "appropriate consideration[ ]" for a court to take into account "in determining whether a defendant qualifies" for the reduction, but not the only consideration. *See* §3E1.1, comment. (n.1(a)) (stating that a court is "not limited to" the listed considerations). The court also explained that it could be argued that the gun activity on which the defendant proceeded to trial was not "relevant conduct" as that term is defined under the guidelines. The court noted that in *United States v. Cohen*, 171 F.3d 796 (3d Cir. 1999), it discussed a situation similar to that presented here, calling it an "unusual situation" where "the defendant has pleaded guilty to some of the charges against him . . . while going to trial on others." *Id*. at 806. The court stated that in

such a case, "the trial judge has the obligation to assess the totality of the situation in determining whether the defendant accepted responsibility.' " Id. at 806. The court in *Williams* therefore concluded that, because the defendant pled guilty to the bank robbery charge, the reduction in his sentence for acceptance of responsibility with regard to that count was not improper, and deferred to the district court.

United States v. Cohen, 171 F.3d 796 (3d Cir. 1999). The district court erred when it awarded the defendant a two-level reduction for acceptance of responsibility, after the defendant was convicted at trial on some charges and then pled guilty to the remaining charges. The government argued that the defendant should not have received the reduction because he went to trial on some of the counts. Under §3E1.1, comment. (n.2), subject to rare exceptions, the adjustment for acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential elements of guilt, is convicted, and only then admits guilt and expresses remorse." The application note does not violate a defendant's right to trial but creates a constitutional incentive for a defendant to plead guilty. The guidelines require the court to group the multiple counts of conviction before determining whether to apply the adjustment for acceptance of responsibility. The determination requires the court to make a "totality" assessment as to whether credit for acceptance of responsibility is appropriate, given the defendant's decision to plead guilty to some of the counts only after being convicted of the other counts.

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996). In this case of first impression, the Third Circuit joined with the First, Fifth, Seventh, Eighth and Eleventh Circuits in holding that a sentencing judge may consider unlawful conduct committed by the defendant while on pretrial release awaiting sentencing, as well as any violations of the conditions of this pretrial release, in determining whether to grant a reduction in the offense level for acceptance of responsibility under §3E1.1. The appellate court noted that §3E1.1, comment. (n.1), sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts under §3E1.1, comment. (n.1(g)). Because courts consider a defendant's post-offense rehabilitative efforts in granting an acceptance of responsibility adjustment, it is consistent to consider the absence of such efforts in denying an adjustment.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Mackins, 218 F.3d 263 (3d Cir. 2000). The district court did not err in holding a prior sentence imposed as a result of an *Alford* plea qualified as a "prior sentence" for purposes of computing the defendant's criminal history category. The defendant pled guilty to

conspiracy to distribute and possession with intent to distribute crack cocaine, and argued there would only be an adjudication of guilt usable in calculating his criminal history if he had acknowledged factual guilt as a result of a guilty plea in his previous conviction, had been found to be factually guilty as a result of a trial, or had acknowledged that the government had sufficient evidence which, if found credible, would support a finding of guilty. Because there must always exist some factual basis for a conclusion of guilt before a court can accept an *Alford* plea, the Third Circuit concluded that the *Alford* plea was an adjudication of guilt and is no different than any other guilty plea for purposes of §4A1.1.

§4A1.2 Definitions and Instruction for Criminal History

United States v. Hines, ____ F.3d ____, 2010 U.S. App. LEXIS 25428 (3d Cir., Dec. 14, 2010). The court rejected the defendant's argument that four prior misdemeanor convictions under New Jersey Statute § 2C:33-2.1(b) should have been excluded from the calculation of his criminal history pursuant to §4A1.2(c)(2) because the convictions were similar to the listed excluded offense of loitering. The court held, "only one [factor]–the degree of punishment Hines received for his violations–suggests that his offenses are 'similar to' loitering."

United States v. Russell, 564 F.3d 200 (3d Cir. 2009). The court rejected the defendant's argument that a misdemeanor marijuana possession conviction should have been excluded from the calculation of his criminal history pursuant to §4A1.2(c)(2) because it was similar to the listed excluded offense of public intoxication. The court stated that "applying the Guidelines' 'common sense approach' to interpreting §4A1.2(c)(2), marijuana possession is not similar to public intoxication. *See also United States v. Dean*, 329 F.App'x 377, 379-80 (3d Cir), *cert. denied*, 130 S. Ct. 426 (2009) ("[W]e reject Appellant's argument that New Jersey's characterization of his marijuana possession offense as a 'disorderly person' offense required the District Court to exclude it from consideration in calculating Appellant's criminal history.")

United States v. Langford, 516 F.3d 205, (3d Cir. 2008). The defendant appealed his bottom-of-the-range sentence for bank robbery and brandishing a firearm during a crime of violence on grounds that the district court improperly calculated his criminal history category. Specifically, the defendant argued that the district court erroneously counted a criminal history point as a result of a petition for adjudication of juvenile delinquency where the defendant was so adjudicated, but the petition was "discontinued" before a sentence was imposed. The court agreed, concluding that a "discontinuation" is not a "sentence" within the meaning of §4A1.2, cmt. n. 7, which provides in relevant part that "for offenses committed prior to age eighteen, only those that . . . resulted in imposition of an adult or juvenile sentence . . . within five years of the defendant's commencement of the instant offense are counted." The court "review[ed] the operations of the Pennsylvania juvenile justice system" and concluded that the juvenile court had not imposed and then suspended a sentence, as the government contended, but rather had declined to impose a sentence at all by "discontinuing" the petition for adjudication of delinquency. The court held that the district court erred in assessing a criminal history point on the basis of this prior adjudication.

United States v. Elmore, 108 F.3d 23 (3d Cir. 1997). The district court did not err in calculating the defendant's criminal history by assessing criminal history points for prior offenses involving harassment and assault and assigning two criminal history points on the basis of an outstanding warrant. The defendant first contends that his prior convictions for harassment and assault should be excluded from his criminal history because the conduct underlying these offenses is similar to disorderly conduct, an offense excluded under §4A1.2(c)(1). The court rejected this argument because the statutory definitions of the offenses at issue are not similar to that of disorderly conduct. With respect to the harassment conviction under Pennsylvania law, the Pennsylvania statute defines harassment as "violent, unruly or offensive behavior directed at an individual" whereas disorderly conduct covers similar types of behavior directed at the public at large. The defendant's conviction for assault involved conviction for a specific statutory offense which the court concluded could not be similar to disorderly conduct. While all criminal activity may justifiably be said to cause public inconvenience, annoyance or alarm, a conviction for a specific crime other than disorderly conduct demonstrates that a defendant has done more than disrupt the peace. The court concluded that comparison of the statutory elements of the two offenses, without an inquiry into the underlying factual similarities, is sufficient to ensure that an offense which is similar to disorderly conduct does not give rise to criminal history points merely because it is designated differently in another jurisdiction. The defendant next argued that he should not have been assigned criminal history points despite the fact that he had a violation warrant outstanding because the Florida law enforcement officials never tried to execute the warrant. The court rejected this argument. The plain language of the guidelines indicates that two points are to be added whenever an outstanding warrant is in existence, regardless of whether it is stale at the time of sentencing.

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

See United States v. Flemming, 617 F.3d 252 (3d Cir. 2010), §1B1.10.

United States v. Grier, 585 F.3d 138 (3d Cir. 2009). The Third Circuit held departures pursuant §4A1.3 are limited to criminal history category, therefore, departures in offense level are not permissible under this provision. Grier was sentenced as a career offender and argued that his criminal history was over-represented by that designation. The district court held that under §4A1.3, it was limited to departing one criminal history category. On appeal, Grier argued that in *United States v. Shoupe*, 35 F.3d 835 (3d Cir.1994), the Court authorized district courts to reduce a career offender's offense level and criminal history category when his career offender status over-represents his criminal history and likelihood of recidivism. The Third Circuit rejected that assertion and held that 2003 amendments to the Guidelines displaced *Shoupe*. The court noted that the 2003 version of §4A1.3 references the term “departure” while the prior version (in effect at the time of *Shoupe*) used the term “departing.” The term “departure” as used in §4A1.3 is defined in the commentary to §1B1.1 to mean “‘assignment of a criminal history category other than the otherwise applicable criminal history category in order to effect a sentence outside the applicable guideline range.’” (quoting §1B1.1 cmt. n. 1(E)). Accordingly, the Court concluded “‘departure’ -as it is used in the current version of §4A1.3—‘means ...

assignment of a criminal history category other than the otherwise applicable criminal history category,' and nothing else."

United States v. Fordham, 187 F.3d 344 (3d Cir. 1999). The district court had authority to depart upward pursuant to §4A1.3 based on the defendant's foreign conviction. The defendant pled guilty to conspiracy to commit money laundering. The defendant's sentence was based on Criminal History Category I. In 1990, the defendant was arrested by Mexican police while carrying 3.7 kilograms of marijuana, which he had intended to transport to the United States. He was convicted and sentenced in Mexico, but his conviction was not counted for purposes of criminal history points, pursuant to §4A1.2(h). The district court found that Criminal History Category I significantly under-represented the seriousness of his criminal history, and departed to Criminal History Category II. The defendant appealed, arguing that the district court erred when it adjusted upward his criminal history category because not only did it lack reliable information concerning the foreign conviction, but the information that it possessed pertained solely to a single offense that was not serious in nature. The appellate court held that although the district court acknowledged that it was not certain whether the Mexican authorities adhered to due process in sentencing the defendant, the district court was within its discretion to hold that the conviction was fair. The court noted that the defendant would have occupied the higher category had the foreign conviction been counted in computing his criminal history category before departure. Therefore, the upward departure was not an abuse of discretion.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Howard, 599 F.3d 269 (3d Cir. 2010). The sentencing judge need not rely only on certified documents as evidence of prior convictions in determining career offender status under §4B1.1. The certified copy of one of the defendant's prior convictions did not indicate whether the defendant was convicted of a misdemeanor or a felony. However, the sentencing judge relied on entries contained in an uncertified Municipal Court Docket to conclude that the conviction had been a felony. The court of appeals affirmed and held: "In satisfying its evidentiary burden to prove career offender status, the government may rely on certified copies of convictions. However, a court may also confirm a defendant's previous convictions by relying on the terms of the plea agreement, the charging document, the transcript of colloquy between judge and defendant, or other comparable judicial records of sufficient reliability."

United States v. Moorer, 383 F.3d 164 (3d Cir. 2004). The district court did not err in determining the defendant was a career offender based on a prior felony conviction for an aggravated assault, even though the sentence was imposed when the defendant was 17 years old. The defendant argued this conviction could not count toward a career offender determination because although he was convicted as an adult, he was sentenced as a juvenile because his sentence was served concurrently with a prior sentence that he was already serving pursuant to a

juvenile adjudication. The Third Circuit determined that the language of §4B1.1(a) states that a prior felony conviction means a prior adult federal or state conviction, regardless of the actual sentence imposed, finding that Application Note 1 clearly defines a prior felony conviction purely in terms of the kind of conviction sustained, not in terms of the sentence imposed.

United States v. Shabazz, 233 F.3d 730 (3d Cir. 2000). The district court did not err in finding a prior state conviction for employing a minor in the distribution of a controlled substance qualified as a predicate controlled substance offense under the career offender provision. The defendant pled guilty to conspiracy to possess heroin with intent to distribute and possessing counterfeit securities with intent to deceive. The Presentence Report determined the defendant had two prior felony convictions that were classified as either crimes of violence or controlled substance offenses under §4B1.1. Because the defendant acknowledged he used a 17-year-old juvenile as a lookout while preparing to sell a large quantity of cocaine, the court found sufficient evidence that he was actually using others, including a juvenile, to facilitate the distribution of the drug.

United States v. Johnson, 155 F.3d 682 (3d Cir. 1998). The district court properly concluded that it lacked authority to allow a downward adjustment for the defendant's minor role in the offense when the career offender provision applied. The defendant argued that he was entitled to the role adjustment based on the facts of the case and the government's stipulation. The court of appeals noted that the sequence of the guideline application instructions in §1B1.1 indicates that downward adjustments are allowed only for acceptance of responsibility after career status is imposed. Section 4B1.1 presupposes that the court has previously calculated the "offense level otherwise applicable," which would incorporate any adjustment for role in the offense. It provides that the court should apply that offense level or the one in the table, whichever is greater. The only exception to the offense level in the table is an adjustment for acceptance of responsibility. Other adjustments are effectively overwritten by the magnitude of the career offender upward adjustment. *See also United States v. Holmes*, 2010 WL 2881510 (3d Cir., July 23, 2010).

§4B1.2 <u>Definitions for Career Offender</u>

United States v. Heilman, 2010 WL 1583097 (3d Cir., April 21, 2010), *cert. denied sub nom.* United Sates v. Napoli, 131 S. Ct. 490 (2010). Post-*Begay*, prior crimes that are merely reckless, or cannot be determined through *Shepard* analysis to exclude recklessness as an element of the offense, cannot be used as an enhancing "crime of violence" for the purposes of the career offender enhancement. In this case the Pennsylvania simple assault statute criminalizes both intentional and reckless conduct and the charging documents available for review under *Shepard* analysis do not clearly indicate that reckless conduct was not the basis for the conviction. Accordingly, the district court erred in relying upon the assault conviction to sentence the defendant as a career offender.

United States v. Stinson, 592 F.3d 460 (3d Cir.), *cert. denied* 131 S. Ct. 114 (2010). The Third Circuit held that the Pennsylvania offense of resisting arrest qualifies as a crime of violence for purposes of the career offender enhancement.

See United States v. Johnson, 587 F.3d 203 (3d Cir. 2009), §2K2.1(a); *see also United States v. Lee*, 612 F.3d 170 (2010), §2K2.1(a).

United States v. Polk, 577 F.3d 515 (3d Cir. 2009). The Third Circuit held that possession of a weapon in prison is not a crime of violence for career offender purposes. Polk was charged with possessing a shank in prison under 18 U.S.C. §1791. The district court, applying longstanding Third Circuit precedent, found the offense to be a career offender predicate. Since Polk had two other predicates in his criminal history, he was sentenced a career offender. The Court of Appeals first held that Supreme Court's analysis in *Begay v. United States*, 553 U.S. 137 (2008), that offenses must involve purposeful, violent, and aggressive conduct to qualify as violent felonies under the Armed Career Criminal Act also applies to the crimes of violence as contemplated in the career offender guideline. Applying the *Begay* analysis, the Third Circuit held that possessing a weapon in prison "cannot properly be characterized as conduct that is itself aggressive or violent, as only the potential exists for aggressive or violent conduct . . . . the offense is a passive crime centering around *possession*, rather than around any overt action . . . . [and] does not, without more[], involve any aggressive or violent behavior."

United States v. Hopkins, 577 F.3d 507 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1912 (2010). The Third Circuit held that defendant's second degree misdemeanor conviction for "unlawfully removing himself from arrest without employing force, threat, deadly weapon or other dangerous instrumentality" in violation of 18 Pa.Cons.Stat.Ann.§ 5121 was not a crime of violence for career offender purposes. Hopkins was convicted of a drug trafficking offense and sentenced as a career offender based, in part, on a prior Pennsylvania misdemeanor conviction for unlawfully removing himself from arrest. On initial appeal, the Third Circuit affirmed the district court's finding that the conviction constituted a crime of violence based on its prior decision in *United States v. Luster*, 305 F.3d 199 (3d Cir. 2002). The Supreme Court remanded for reconsideration in light of *Chambers v. United States*, 129 S.Ct. 687 (2009), which Court held that the crime of failure to report for incarceration should not be classified a violent felony for purposes of the Armed Career Criminal Act. Applying *Chambers* and *Begay v. United States*, 553 U.S. 137 (2008), Third Circuit reversed its initial holding. The Court reasoned:

> We would also conclude that an ordinary case falling within the crime of conviction is not "similar in kind" to the enumerated offenses. As the Supreme Court stressed in *Begay*, "[t]he listed crimes all typically involve purposeful, violent, and aggressive conduct . . . . " If the crime of conviction is materially different in terms of these characteristics, it does not come within the "residuary clause." To be sure, escape from detention is purposeful conduct. Nevertheless, because the escape involved in the crime of conviction is unaccompanied by "force, threat, deadly weapon or other

dangerous instrumentality," we would conclude that it is conduct materially less violent and aggressive than the enumerated offenses.

United States v. Taylor, 98 F.3d 768 (3d Cir. 1996). The district court did not err in designating the defendant as a career offender pursuant to §4B1.1. A 1980 conviction was at issue on appeal. With regard to the 1980 conviction, Count One of the indictment charged the defendant with statutory rape and Count Three charged the defendant with indecent exposure. The appellate court did not need to determine whether statutory rape was a crime of violence *per se* because the counts of conviction specifically alleging conduct creating a "potential risk of physical harm" were sufficient to satisfy the guideline. Finding that the facts alleged in the indecent exposure count clearly demonstrated a potential for serious injury to the victim, the appellate court held that the district court's determination that the defendant was a career offender was correct.

§4B1.4 Armed Career Criminal

United States v. Harvey, 305 F.App'x 859 (3d Cir.), *cert. denied*, 130 S. Ct. 131 (2009). The Third Circuit held that a preliminary hearing transcript may fall with in the scope of acceptable judicial records under Shepard. At sentencing, the district court relied on the transcript from a preliminary hearing in a prior case. At this hearing, the defendant did not contest the fact that the property at issue in his burglary conviction was an occupied structure. Based on this evidence, the district court properly concluded that the prior conviction was a generic burglary under the ACCA.

United States v. Mack, 229 F.3d 226 (3d Cir. 2000). The district court did not err in finding the defendant received adequate notice, for due process purposes, of the government's intent to seek sentencing under the Armed Career Criminal Act. The defendant was convicted of being a felon in possession of a firearm after shooting someone outside a bar. With the application of the armed career criminal enhancement, the defendant received a criminal history of VI, and a total offense level of 34, and was sentenced to 262 months. Without application of the enhancement, his criminal history category would have been IV. After receiving the Presentence Report (PSR) stating he was subject to sentencing under the ACCA, he claimed he did not receive *pretrial* notice that the government intended to seek an enhanced sentence. Agreeing with its sister circuits, the Third Circuit held that pretrial notice was not required under the ACCA, and further found that the defendant received adequate notice for due process concerns. He received actual notice prior to trial by verbal communications with the government, he received notice from the PSR, and he received formal notice ten days before trial.

United States v. Cornish, 103 F.3d 302 (3d Cir. 1997). The government appealed the district court's determination that the defendant's prior third degree robbery conviction was not a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). At sentencing, the district court held that the defendant's prior conviction for third degree robbery in Pennsylvania was not a "violent felony" and, therefore, the defendant did not have the third prior

violent offense necessary for the application of section 924(e)'s enhanced penalty provisions. The appellate court held that the appropriate method for determining whether a particular offense qualifies as a "violent felony" is the categorical approach, which allows the court to look only to the statutory definition of the prior offense, or when necessary, the indictment or information and the jury instructions. The appellate court noted that in *Taylor v. United States*, 495 U.S. 575, 577 (1990), the Supreme Court considered the application of 18 U.S.C. § 924(e), where the issue was whether second-degree burglary under Missouri law qualified as a "violent felony," and held that the meaning of burglary for purposes of section 924(e)(2)(B)(ii) was not dependent on the state's definition of burglary. Rather, the offense will qualify as a violent felony if "its statutory definition substantially corresponds to 'generic' burglary, or the charging papers and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." The appellate court noted two prior Third Circuit cases in which the court found robbery offenses to constitute a violent felony: *United States v. Preston*, 910 F.2d 81 (3d Cir. 1990) (finding criminal conspiracy to commit robbery a violent felony after finding its elements to incorporate the elements of robbery); and *United States v. Watkins*, 54 F.3d 163 (3d Cir. 1995) (finding Pennsylvania robbery conviction a violent felony as it necessarily involved the use or threat of physical force). Based on a literal reading of the statute and the noted case law, the Third Circuit held that, regardless of degree, any conviction under the Pennsylvania robbery statute constitutes a "violent felony." The case was remanded for resentencing to apply 18 U.S.C. § 924(e).

United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996). The district court did not err in determining that the defendant's three Pennsylvania burglary convictions qualified as predicate offenses for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The defendant pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g), and was sentenced under section 924(e) for violating section 922(g) having previously been convicted of three "violent felonies" or "serious drug offenses." The defendant asserted that the Pennsylvania burglary statute was broader than the generic burglary definition in section 924(e) and, therefore, the government had the burden of showing that the trier of fact found all of the elements of generic burglary. For purposes of section 924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining whether the elements of generic burglary were found in the defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions." Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution." The circuit court found the elements of general burglary to be included in the three state burglary convictions and, therefore, enhancement under section 924(e) was proper.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.3 Conditions of Probation

United States v. Pruden, 398 F.3d 241 (3d Cir. 2005). The district court erred in its imposition of mental health treatment, at the discretion of the probation officer, as a condition of the defendant's supervised release for a violation of being a felon in possession of a firearm. The Third Circuit found the condition invalid under §5G1.3 because it was an impermissible delegation of judicial authority.

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in recommending to the Bureau of Prisons that the imprisonment portion of the defendant's sentence be served in a residential program. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed a portion of the sentence in which the court stated it "recommends that the Bureau of Prisons designate . . . [a] Residential Program . . . as the place for service of this sentence." The Third Circuit stated that had the court imposed community confinement, it would have violated the guidelines. However, because it only recommended community confinement, it was not a final order imposed by the court, and therefore the court had no jurisdiction to review the district court's recommendation.

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

United States v. Warren, 338 F.3d 258 (3d Cir. 2003). This was a case of first impression regarding whether a defendant may rely on the Fifth Amendment in refusing to disclose all information and evidence concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan as required in §5C1.2(a)(5). The Third Circuit stated that contrary to the defendant's concern that he was compelled to provide incriminating information to earn a reduction in his or her sentence, the choice confronting the defendant gave rise to no more compulsion than that present in a typical plea bargain. The court concluded that the Safety Valve provision furthered a legitimate government goal and did not impose an unconstitutional condition on defendants seeking its advantages. "The safety valve is not a right; it is a privilege. The Fifth Amendment is not implicated by a defendant's choice between seeking its benefits or embracing silence."

Part D Supervised Release

§5D1.3 **Conditions of Supervised Release**

United States v. Heckman, 592 F.3d 400 (3d Cir. 2010). The Third Circuit vacated two conditions of supervised release imposed by the district court, one for being overbroad and the other as an improper delegation of judicial authority. The defendant was convicted of transporting child pornography and sentenced to 180 months' imprisonment followed by a life term of supervised release. Defendant challenged three of the special conditions of supervised release imposed by the district court, *viz*., 1) a lifetime unconditional restriction on use of a computer; 2) participation in a mental health program for evaluation and/or treatment as directed by the United States probation office, and; 3) a requirement that defendant follow the directions of the probation office regarding any contact with children under the age of 18. The Third Circuit found that the first requirement, an unconditional lifetime computer ban, was "so broad and insufficiently tailored as to constitute plain error" because, *inter alia*, it "involved a greater deprivation of liberty than is reasonably necessary." The court then reviewed the remaining two conditions to determine whether they involved impermissible delegations of judicial authority to the probation office. The Court found that the requirement the defendant participate in mental health treatment at the direction of the probation office did not because, the participation in a mental health program was mandatory and only the details, such as selection and scheduling, were to be set by the probation office. The court held, however, that the restriction on contact with minors was an improper delegation of authority because it delegated full discretion over defendant's contact with minors to the probation office.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution, Fines, Assessments, Forfeitures

United States v. Kones, 77 F.3d 66 (3d Cir. 1996). The district court did not err in concluding that appellant could not be awarded restitution under 18 U.S.C. §§ 3663-3664, the Victim and Witness Protection Act of 1982 (VWPA). The VWPA was amended to allow restitution where a scheme, conspiracy, or pattern of criminal activity was an element of the offense of conviction. Under this provision, a victim is entitled restitution if they are harmed directly by the criminal conduct; "directly" is interpreted to require the harm to be closely related to the underlying scheme. The defendant pleaded guilty to mail fraud counts related to insurance claims for never performed medical services. The appellant, who was one of the patients for whom non-existent medical services were claimed, asserted that she was a "victim" due to malpractice by the defendant in prescribing excessive amounts of drugs to her to further his underlying scheme. Since the conduct alleged by appellant is not proscribed by the mail fraud statute of which the defendant was convicted, the circuit court held that appellant could not be considered a "victim" under the VWPA.

§5E1.2 Fines for Individual Defendants

United States v. Torres, 209 F.3d 308 (3d Cir. 2000). The district court did not err in imposing a fine without making specific findings on the record. The defendant opened a money market account in a false name and deposited a total of $66,262.59 into the account using a stolen U.S. Treasury check and a third-party check. The defendant attempted to withdraw $24,900 but was not successful because the bank suspected the account was fraudulent, and he pled guilty to bank fraud. The district court imposed a $5,000 fine under §5E1.2, within the permissible guideline range of $2,000 to $1,000,000, to be paid in equal monthly installments over his five year period of supervised release. The Third Circuit found that while the district court did not make an explicit finding of the defendant's ability to pay, it implicitly did so when it stated it could impose a fine within the guideline range only if the defendant had the ability to pay that fine, and then imposed a fine within the range. Further, the facts at the district court's disposal in determining the defendant's ability to pay included his young age, his receipt of a high school and associates degree, his ability to speak four languages, and the fact he has held several short-term positions and had served in the Army Reserves. These facts were unchallenged by the defendant, and supported the imposition of the $5,000 fine.

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Cordero, 313 F.3d 161 (3d Cir. 2002). The Third Circuit upheld the district court's decision to base its starting point for substantial assistance departures on the statutory mandatory minimum sentence the defendant would have faced absent the motion. The defendant had been convicted of a narcotics offense that carried a ten year mandatory minimum term of imprisonment. Absent the statutory minimum, the defendant would have faced a guideline range of 63 to 78 months' imprisonment. Based on the government's motion, pursuant to §5K1.1 and 18 U.S.C. § 3553(e) , the district court downwardly departed from the ten year term and sentenced the defendant to a 86 month term. The defendant appealed, arguing that the court should have departed downward from the otherwise applicable guideline range of 63 to 73 months. The Third Circuit rejected this argument, finding that pursuant to §5G1.1(b), the statutorily mandated minimum sentence of ten years "subsumes and displaces the otherwise applicable guideline range and thus becomes the starting point for any departure . . . ."

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Chorin, 322 F.3d 274 (3d Cir. 2003). The defendants were convicted under 21 U.S.C. §§ 841 and 846 and given consecutive sentences. The defendants appealed, arguing the aggregate sentences exceeded the statutory maximum, violating *Apprendi* and the Double Jeopardy Clause. The Third Circuit affirmed the imposition of consecutive sentences, pointing out that the Supreme Court's concern in *Apprendi* was with whether the sentencing court exceeded the statutory maximum sentence authorized for a particular count; it ignores the effect

of consecutive sentencing. The court concluded based on *Apprendi* that the district court's application of §5G1.2(d) did not result in a sentence on any one count above the maximum available on that count. Thus, the district court did not violate *Apprendi*.

United States v. Velasquez, 304 F.3d 237 (3d Cir. 2002). The district court did not abuse its discretion in imposing concurrent rather than consecutive sentences on the defendant's convictions for narcotics conspiracy and using a communications facility. Under the guidelines, the range applicable to the defendant was 292 to 365 months. The primary count of conviction, the narcotics conspiracy, carried a statutory maximum term of imprisonment of 240 months, and the district court sentenced the defendant to that term. On appeal, the government argued that the district court should have sentenced the defendant to a term of 288 months by imposing a consecutive sentence on the communications facility count. The Third Circuit upheld the district court's sentence, holding that the concurrent sentences were authorized by the discretion vested in sentencing courts under 18 U.S.C. § 3584. The court found that §5G1.2, which would seem to require consecutive sentences in such instances, should be read in light of this discretion, particularly where, as in this case, the lesser offense was based on conduct subsumed within the primary offense.

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

United States v. Saintville, 218 F.3d 246 (3d Cir. 2000). The district court did not err in applying §5G1.3 when it sentenced a defendant who was subject to an undischarged term of imprisonment for a separate offense. The defendant pled guilty to illegal entry into the United States following deportation for an aggravated felony. After an indictment was returned for his reentry violation, he was convicted in state court for possession of cocaine with intent to distribute and conspiracy to deliver cocaine. He requested the district court run his sentence for the illegal reentry concurrently with his state sentence. The district court, however, sentenced him to 46 months' imprisonment, the lowest available sentence in the guideline range, with ten months to run concurrently and the remainder to run consecutively to his state sentence. The defendant contends the district court erred because it failed to consider the hypothetical combined sentencing range which would have applied if the United States had prosecuted both the unrelated state charge and the illegal reentry offense in the district court. The Third Circuit agreed with other circuit courts, and found that after §5G1.3 and its commentary were amended in 1995, a sentencing court no longer must make the hypothetical calculation. Because a previous requirement in §5G1.3 that the court run a sentence consecutively, to the extent necessary to achieve a reasonable "incremental" punishment for the instant offense, was deleted in the amendment, the Court found the guideline section no longer ties the newly imposed sentence closely to any undischarged term of imprisonment. *See United States v. Velasquez*, 136 F.3d 921, 923-25 (2d Cir. 1998); *United States v. Mosley*, 200 F.3d 218, 222-25 (4th Cir. 1999); *United States v. Luna-Madellaga*, 133 F.3d 1293, 1294-96 (9th Cir. 1998).

United States v. Dorsey, 166 F.3d 558 (3d Cir. 1999). The district court erred in deciding that only the Bureau of Prisons has authority to grant custody credits. The defendant received a five-year sentence in state prison for a firearms offense. Ten months later, he was sentenced to 115 months in federal court for offenses arising from the same firearms offense. The district court rejected the defendant's argument that he was eligible for credit for the time he had served in state prison. Application Note 2 to §5G1.3(b) (earlier version) authorizes the court to credit the defendant for the ten months he served between the state sentencing and the federal sentencing, which the BOP did not credit toward the federal sentence.

Part H Specific Offense Characteristics

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

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000). The district court did not err in applying a three-level downward departure based on the defendant's charitable activities. The defendant, a state legislator, was convicted of perjury before a grand jury, and the government appealed, claiming the district court abused its discretion in awarding the downward departure. The district court was presented with numerous character witnesses and over 150 letters on behalf of the defendant. The Third Circuit stated that, while the letters that merely reflected the defendant's political duties ordinarily performed by public servants could not form the basis for the departure, the other letters which portrayed other community and charitable activities, and which involved not just the giving of money, but instead involved the giving of time and of one's self, made those activities exceptional. Therefore, a downward departure was warranted.

Part K Departures

§5K1.1 Substantial Assistance to Authorities

United States v. Vazquez-Lebron, 582 F.3d 443 (3d Cir. 2009). The Third Circuit found procedural error in the manner in which the district court addressed a substantial assistance departure under §5K1.1. Defendant's original guideline range was 46 to 57 months, and, the court granted the government's one-level downward motion under §5K1.1, bringing defendant's guideline range to 41 to 51 months. The district court then imposed a sentence of 48 months. The Third Circuit explained that the district court erred because "the sentence reached after granting a departure motion must be less than the bottom of the otherwise applicable Guidelines range." Here, the district court imposed a sentence within the original guideline range despite having departed one level. The court of appeals indicated, however, that had the district court intended to vary upward from the guideline range applicable after the departure, the sentence would have been reviewed for reasonableness. Since the record was silent as to whether a variance was intended, the matter was remanded for resentencing.

United States v. Floyd, 428 F.3d 513 (3d Cir. 2005). The defendant's plea agreement stated that "if the United States believes the defendant has provided 'substantial assistance'... the United States may request the Court to depart below the guideline range . . ." The government elected not to recommend a downward departure because the defendant had already received a substantial benefit from being permitted to plead guilty to a single crime carrying only a 60-month maximum. On appeal the Third Circuit found that the government's explanation for its failure to recommend the downward departure did not meet the good faith requirement because it was based on considerations extraneous to the assistance provided by the defendant. The Third Circuit held that the government breached its promise to consider recommending a downward departure if the defendant provided substantial assistance. The defendant reasonably expected that the government would consider her assistance and, if it was valuable and she did not otherwise violate the agreement, the government would move for a downward departure. The government did not reserve the right not to recommend a departure if the charge bargained for turned out to be more favorable than it had originally anticipated.

United States v. Carey, 382 F.3d 387 (3d Cir. 2004). On appeal the defendant argued that the district court improperly limited her substantial assistance departure based on the sentencing judge's doubts about her credibility. The Third Circuit concluded that the district court could properly consider its reservations about the defendant's truthfulness in determining the extent of its departure. The court determined that there was nothing in the guidelines that requires the judge to disclose in advance such matters as his appraisal of the undisputed material in the PSR or impressions created by the defendant during trial.

See United States v. Cordero, 313 F.3d 161 (3d Cir. 2002), §5G1.1.

United States v. Khalil, 132 F.3d 897 (3d Cir. 1997). The defendant appealed the extent of the district court's downward departure pursuant to the government's §5K1.1 motion. The court of appeals held that it lacked jurisdiction to consider the appeal. Prior to the enactment of the guidelines, a sentence by a federal court within statutory limits was effectively not reviewable on appeal. The Sentencing Reform Act of 1984 allowed a defendant, under limited circumstances, to appeal his sentence. Among other things, it allows a defendant to appeal an upward departure and the government to appeal a downward departure. *See* 18 U.S.C. § 3742. However, the Act does not allow a defendant to appeal from a discretionary downward departure.

United States v. King, 53 F.3d 589 (3d Cir. 1995). The district court erred in basing the extent of its departure pursuant to the government's §5K1.1 substantial assistance motion on its "practice" of granting cooperating defendants a standard three-level departure. The sentencing court must instead make an "individualized qualitative examination" of the defendant's cooperation. The case was remanded for resentencing.

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

Upward Departure

United States v. Holmes, 193 F.3d 200 (3d Cir. 1999). The Third Circuit affirmed the district court's upward departure under §5K2.0 for "extraordinary" abuse of trust. The defendant, a disbarred attorney and accountant, pled guilty to an extensive fraud and forgery scheme and was sentenced to 96 months in prison, restitution of approximately $1.9 million, and a special assessment. The nature of the defendant's fraud was extensive: (1) in representing a client in a protracted business dispute, he fabricated a settlement agreement for a non-existent lawsuit, forged the signatures of opposing parties and judges, and embezzled the client's money, which had been deposited in an escrow account; (2) he forged the signature of a dying neighbor to redeem over $150,000 in bonds; (3) he created a fraudulent low income housing investment venture and spent the investors' money; (4) he embezzled money that clients had given him to pay off their taxes; (5) he prepared a false will and forged the signature of the deceased testator; and (6) he engaged in money laundering. Although the defendant had received enhancements for the amount of loss, §2F1.1(b)(1)(M); more than minimal planning, §2F1.1(b)(2)(A), vulnerable victim, §3A1.1, aggravating role, §3B1.1(a), and abuse of position of trust or use of a special skill, §3B1.3, the district court departed upwards two additional levels pursuant to §5K2.0 based upon Holmes' extraordinary abuse of position of trust because the court believed that two-level enhancement for abuse of trust was insufficient. The Third Circuit affirmed, holding that the district court's decision to depart upward was "not made on a legally impermissible basis" and was "reasonable." It rejected the defendant's argument that §3B1.3 adequately covers abuse of position of trust because nothing in the guidelines suggests that the Sentencing Commission "envisioned multiple acts of abuse of trust to the degree that was present in this case." The Third Circuit also rejected the defendant's argument that his abuse of trust was sufficiently accounted for by the other enhancements he received.

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999). The district court did not err in granting a two-level upward departure based on a combination of factors. The defendant pled guilty to eight counts of fraud arising out of a scheme in which the defendant defrauded people by encouraging them to invest in oil and gas drilling ventures, but then used the investors' money for his personal expenses rather than for the promised purposes. The district court imposed a two-level upward departure, pursuant to §5K2.0 based on a combination of factors that took the case out of the "heartland" of the fraud guideline. The district court identified the following five factors: 1) the defendant's masquerade as a decorated Vietnam combat veteran, a person in the witness protection program, and a government agent on a secret mission; 2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; 3) his attempt to conceal his fraud by faking his own death; 4) his fabricated story about his family having been killed by a drunk driver; 5) the severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case very unusual and justified a two-level departure. The appellate court classified the factors as "unmentioned" by the guidelines, and that the court must therefore consider the structure and theory of both relevant individual guidelines and the guidelines taken as a whole and decide whether the factors are sufficient to take the case out of the guidelines'

heartland. The appellate court examined each of the five factors and concluded that this combination of five unmentioned factors was sufficient to take the case out of the guidelines' heartland. The appellate court noted that §2F1.1, comment. (n.10) states that upward departures may be warranted in cases in which the loss does not fully capture the harmfulness and seriousness of the conduct.

United States v. Nathan, 188 F.3d 190 (3d Cir. 1999). The Third Circuit reversed the district court's upward departure pursuant to §5K2.0 and Application Note 2 to §2T3.1. The defendants were Electrodyne Systems Corporation (ESC), its president, and marketing director. Notwithstanding their six contracts with the government to manufacture electronic component parts in the United States, and not to use foreign parts or manufacturing sites, they contracted with countries in Russia and the Ukraine to build the parts. ESC pled guilty to exporting defense-related items in violation of the Arms Export Control Act (AECA), and making false statements. The president of ESC pled to illegally importing goods into the United States based on his failure to mark the items with the country of origin. ESC's marketing director pled to unlawful introduction of merchandise into United States commerce. The district court departed upwards nine levels in the sentences of the two individual defendants because it determined that the duties evaded by the defendants did not adequately measure the harm they caused. Specifically, the district court found that four aspects of the defendants' conduct rendered this an "atypical" smuggling case: (1) the defendants defrauded the government for their own financial gain; (2) the defendants' actions compromised and may in the future compromise national security; (3) they violated AECA; and (4) they violated the Buy American Act (BAA), which permitted them to gain an unfair financial advantage. The Third Circuit held that (1) the district court incorrectly used the presence of fraud to find the case atypical because smuggling, under 18 U.S.C. §§ 542 and 545, involves some element of fraud; (2) the record indicated that the government agreed that no sensitive information had been revealed and that the defendants' actions did not pose a threat to national security or the safety of the military; (3) AECA is a smuggling offense because its terms specifically refer to the import and export of defense articles and services, *see* 22 U.S.C. § 2778(b)(2); and (4) while a violation of the BAA (a civil statute) could be considered to determine whether the defendants caused harm to "society or protected industries" to an extent not captured by the smuggling guidelines, it alone is insufficient to justify the magnitude of the departure in this case. Therefore, the appellate court reversed the departure.

United States v. Warren, 186 F.3d 358 (3d Cir. 1999). The Third Circuit reversed a district court's upward departure based upon §5K2.0 and Application Note 1 of §2D2.1. The district court departed upward because the drugs were not for personal consumption and because the extraordinary amount of drugs took the case out of the "heartland" of possession cases. The defendant in this case contacted the DEA in Belgium and informed them that he had been offered $15,000 to act as a drug courier. Although federal authorities initially attempted to set up a controlled delivery, they could not do it on the scheduled date of delivery. The defendant was unwilling to postpone the delivery date because he believed it would put him in danger. Upon arriving in the United States, the defendant admitted his drug possession to the Customs inspector, and federal authorities seized over 21,000 tablets of ecstasy. After pleading guilty, the district court departed upward to sentence him to five years of probation instead of the one-year probation term he otherwise would have received. In reversing, the Third Circuit recognized that large quantities of drugs can clearly take a routine

possession case out of the heartland of possession cases to justify an upward departure under §5K2.0. It held, however, that quantity *per se* was insufficient to justify departure but that departure was warranted "only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution for others." *Id.* at 364; *see also* §2D2.1, Application Note 1. The appellate court found that in this case, the evidence was unequivocal that the defendant did not intend anyone to consume the drugs he carried; and moreover, that he intended to turn the drugs over to government agents and did so.

Downward Departure

United States v. Cooper, 394 F.3d 172 (3d Cir. 2005) The court upheld a downward departure based on charitable works as it was determined that the defendant's acts were "not the detached acts of charity one might ordinarily expect from a wealthy business executive. They are, in a very real way, hands-on personal sacrifices, which must have had a dramatic and positive impact on the lives of others."

United States v. Santiago, 201 F.3d 185 (3d Cir. 1999). The district court did not err in finding that the guideline provision authorizing a sentence outside the otherwise applicable guideline range did not authorize a downward departure from a mandated minimum statutory sentence. Instead, the Court agreed with other circuits and found any deviation from the statutory minimum could only be had through the specific procedures established through 18 U.S.C. § 3553(e) or (f).

United States v. Marin-Castaneda, 134 F.3d 551 (3d Cir. 1998). The district court did not err when it decided it did not have authority to depart based on (1) the defendant's willingness to consent to deportation; (2) his age; and (3) the deterrent effect of having been hospitalized after trying to smuggle heroin in his stomach. The court of appeals noted that the defendant was a Colombian national with no colorable basis for contesting deportation. The court held, as a matter of first impression, that a defendant without a nonfrivolous defense to deportation presents no basis for downward departure under §5K2.0 by simply consenting to deportation. The court also held that, due to the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the government. The defendant's age, 67 at the time of sentencing, without more, did not justify a downward departure. Finally, the physical ordeal of being hospitalized after ingesting 90 heroin pellets is inherent in smuggling drugs in this manner, and so could not be considered an unusual characteristic sufficient to take this case out of the heartland.

United States v. Haut, 107 F.3d 213 (3d Cir. 1997). The district court erred in departing downward to mitigate the impact of a jury verdict the judge believed to be incorrect. At sentencing, the district court judge departed six levels down based on the incredibility of the prosecution witnesses and his belief that the defendants should have been found not guilty. Noting that *Koon v. United States*, 518 U.S. 81 (1996), states that a departure factor not mentioned in the guidelines must be examined to determine if it is "sufficient to take the case out of the Guideline's heartland," the circuit court stated that this departure was "categorically inappropriate." Although the district court stated that certain prosecution witnesses were biased, and had the case been a bench trial, he would

have found the defendants not guilty, the district court also found that a judgment of acquittal was not appropriate because the evidence, if believed, did support the verdict. The circuit court noted that the district court may enter a judgment of acquittal if the circumstances of the case make the verdict unsupportable. Fed. R. Crim. P. 29. The circuit court concluded that to affirm the departure taken by the district court would "sap the integrity of both the Guidelines and the jury system."

United States v. Evans, 49 F.3d 109 (3d Cir. 1995). During the presentence investigation the defendant voluntarily revealed his true identity to the probation officer which, because of his criminal history, increased his sentence. The probation officer conceded that he would not have discovered the defendant's true identity if not for the defendant's own admission. Accordingly, the defendant argued that the district court should have departed downward based on his extraordinary acceptance of responsibility, and that the court did not so depart because it mistakenly believed it did not have the authority to do so. The appellate court found the district court's discussion of the departure ambiguous. Therefore, the court considered the issue of whether or not this factor is an appropriate basis for departure. The court held that the disclosure of identity could constitute a "mitigating circumstance" within the meaning of guideline §5K2.0. The appellate court based its holding on the then recent amendment to §5K2.0, which allows a judge to use a broad range of factors to depart as long as those factors promote the statutory purposes of sentencing. The case was remanded for resentencing for the district court to determine whether a downward departure was appropriate.

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

United States v. Jacobs, 167 F.3d 792 (3d Cir. 1999). The district court erred in departing upward in an aggravated assault case based on extreme psychological injury. Although the court found that the victim suffered from post-traumatic stress disorder, mood disorders, depression, anxiety and sleeplessness, the court failed to find that the victim's psychological injury was "much more serious than that normally resulting from commission" of an aggravated assault. The court also failed to provide adequate reasons for the extent of the departure. The Third Circuit remanded the case and suggested that the court use §2A2.2(b) as a guide for making sufficient findings regarding the extent of injury.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Queensborough, 227 F.3d 149 (3d Cir. 2000). The district court did not err in finding the Presentence Report (PSR) provided the defendant with the required notice that it was contemplating an upward departure pursuant to §5K2.8 and Application Note 5 to §2A3.1 [now Application Note 6]. The defendant and a codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched. The defendant pled guilty to aggravated rape and carrying a firearm in relation to a crime of violence. For the aggravated rape, the district court granted an upward departure from a range of 121 to 151 months to 20 years. The defendant objected, claiming that although he had been given notice of a possibility of an upward departure, he had not been given notice that there would actually be an

upward departure in his sentence. The district court found the language in the PSR, located underneath the heading "Factors that May Warrant Departure" which stated, "According to §2A3.1, Application Note 5, 'If a victim was sexually abused by more than one participant, an upward departure may be warranted, *see* §5K2.8 (Extreme Conduct),'" gave the defendant the requisite notice.

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

United States v. Mussayek, 338 F.3d 245 (3d Cir. 2003). The defendant was found guilty of conspiracy to commit extortion and interstate travel in aid of racketeering. On appeal, the defendant argued that the district court erred by not applying a downward departure under §5K2.10. Section 5K2.10 provides that departures may be made where "the victim's wrongful conduct contributed significantly to provoking the offense behavior." First the Third Circuit noted that the key to the viability of a claim for a downward departure for victim provocation appeared to depend on the unique facts of each case regarding whether the requisite provocation existed. The court then noted that the mere fact that the victim's misconduct was a cause of the defendant's offense behavior, in the sense that the offense behavior may not have been committed but for the victim's conduct, was not enough; downward departures were authorized under the guideline only where the victim's misconduct contributed significantly to provoking the defendant's offense behavior. The court also noted courts have also relied heavily on the concept of proportionality, in other words, the necessary provocation only existed if the provoked offense was proportional to the provoking conduct. This reasoning made sense, as it would be exceedingly difficult to apply §5K2.10 to a situation in which the offense behavior was excessively disproportional to the victim's misconduct. The court agreed with the district court that the circumstances in the instant case did not evidence provocation as required by §5K2.10. Finally, the defendant's offense behavior was grossly disproportionate to any provocation on the part of his victims. Accordingly, the district court did not err in holding that this was not the type of situation envisioned by §5K2.10.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The district court did not err in refusing to grant a downward departure under §5K2.10, which authorizes a departure "if the victim's wrongful conduct contributed significantly to provoking the offense behavior." The defendant argued that his "wife's revelation of past infidelity exposed wrongful conduct and was the sole provocation for the fatal stabbing." (The wife/victim had told the defendant that she had between 40 and 50 affairs and shortly thereafter, the defendant stabbed her 16 times.) The district court found that the conduct of the victim did not warrant a departure. Generally, only a victim's violent, wrongful conduct warrants a downward departure. Here there was no danger or perception of danger to the defendant. Even if a victim's "infidelities" could constitute "wrongful conduct" to justify mitigation, the defendant's response in this case was grossly disproportionate to any provocation by the victim.

§5K2.20 Aberrant Behavior (Policy Statement)

United States v. Dickerson, 381 F.3d 251 (3d Cir. 2004). The district court erred in granting a downward departure pursuant to §5K2.20 because it did not adequately address either of two inquiries required for such a finding. The defendant pled guilty to the importation of over 100 grams of heroin and the government appealed a downward departure under §5K2.20 which resulted in a sentence of five years' probation. Application Note 2 lists five considerations that may be relevant to the first inquiry whether the defendant's case is extraordinary. The Third Circuit determined the district court had not made any finding, either explicitly or implicitly, as to the extraordinary nature of the defendant's case compared to other cases involving similar crimes. After an independent review of the record, the court remained unconvinced that the case was extraordinary; although the defendant functioned at a level far lower than her age and suffered from severe bouts of depression, she was able to function in an adult working environment and academic environment; her employment record was not exceptional for someone her age; there were no examples of prior good works to distinguish her from similarly situated defendants; her motivation for committing the crime was financial, a very common motive; and even though she turned herself in, her efforts were not extraordinary enough to support a departure. Further, the second inquiry requires that three prongs of a separate analysis be satisfied, and the defendant failed to satisfy two prongs: that the offense was committed without significant planning, or that the offense was of a limited duration.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Brady, 88 F.3d 225 (3d Cir. 1996). The district court did not err in revoking the defendant's supervised release and sentencing him to 12 months' imprisonment to be followed by a 3-year supervised release term. The defendant was indicted for knowingly, intentionally, and unlawfully possessing cocaine with intent to distribute, and he argued that the district court wrongly applied 18 U.S.C. § 3583(h), which was not in effect when he was originally sentenced. He claimed that this additional punishment for his crime could not have been imposed when he committed that crime, and that it therefore violated the *ex post facto* clause of the Constitution. However, the circuit court rejected the defendant's contention on the grounds that he was not prejudiced by the enactment because the amended subsection (h) did not change the amount of time his liberty would have been restrained. Therefore, the circuit court did not find an *ex post facto* violation and affirmed the decision of the lower court.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Vampire Nation, 451 F.3d 189 (3d Cir. 2006). A defendant is not entitled to advance notice under Rule 32(h) of the sentencing judge's decision to vary from the advisory guidelines range. *See also Irizarry v. United States*, 553 U.S. 708(2008).

United States v. Plotts, 359 F.3d 247 (3d Cir. 2004). Because the defendant was denied the right of allocution at sentencing, the district court's sentence was remanded. The defendant was arrested by the Pennsylvania State Police for violating 18 Pa. Cons. Stat. § 6105, felon in possession of a firearm. Thereafter, the Probation Office filed a petition to revoke the defendant's supervised release, alleging six violations of his release conditions. The district court revoked the defendant's supervised release and sentenced him to 30 months' imprisonment followed by 30 months' supervised release. On appeal, the defendant alleged that the district court erred in denying him the right of allocution at his release revocation hearing before the sentence was imposed. The Third Circuit noted that denying the right of allocution, at least in sentencing hearings, will generally result in resentencing under plain error review. However, the court noted that it had not ruled whether a defendant's right of allocution extended to a revocation hearing. The court noted that the Federal Rules of Criminal Procedure failed to define explicitly the scope of allocution rights. However, the court stated that almost every circuit considering this issue had ruled that allocution must be permitted before imposition of sentence at a supervised release revocation hearing. Finally, the court noted that the denial of the right of allocution was not the sort of isolated or abstract error that it might determine did not impact the fairness, integrity or public reputation of judicial proceedings. The court reversed and remanded the case to the district court for resentencing.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 2259

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). The district court did not err in requiring the defendant to pay restitution of $57,050.96 to cover the victim's in-patient hospital treatment for "suicidal ideation." Congress intended that full restitution to minor victims is warranted when a defendant is convicted of federal child sexual exploitation and abuse offenses. After considering opinions from a licensed social worker and a psychiatrist, the district court found that the defendant's conduct was the proximate cause of the victim's worsening depression that led to the hospitalization. In addition, the victim had never been treated before the incident. Even if the victim had a preexisting mental condition, it was not unreasonable for the district court to conclude that the defendant's actions were a substantial factor in causing additional strain and trauma. The district court did not err in ordering full restitution rather than order nominal periodic payments. The

defendant's higher education suggested that his potential earning capacity precluded a finding of indigence.

18 U.S.C. § 3553

United States v. Kellum, 356 F.3d 285 (3d Cir. 2004). The district court's imposition of the statutory mandatory minimum sentence was affirmed. The defendant pleaded guilty to possession of cocaine base with intent to distribute and carrying a firearm in relation to a drug trafficking offense pursuant to a written plea agreement. The defendant argued that the district court erred by imposing the minimum mandatory sentence because it was unaware that it had authority under 18 U.S.C. § 3553(a) to impose a sentence below the statutory minimum if it believed that the statutory minimum was greater than necessary to achieve the four goals of sentencing. Relying on the language of section 3553(a)(2), the defendant argued that by using the imperative "shall," Congress explicitly precluded district courts from imposing sentences that plainly exceeded that which is necessary to fulfill the four delineated purposes of sentencing. The court noted that the considerations in section 3553(a)(2) were not the only factors that a district court must consider when imposing a sentence.

18 U.S.C. § 3582

United States v. Hoffa, 587 F.3d 610 (3d Cir. 2009). The defendant pleaded guilty to bank robbery. At sentencing his lawyer argued that he should be given a lenient sentence based on his severe health conditions, including hepatitis. In her sentencing memorandum, defense counsel stated: "The circumstances of the offense are also mitigating. Mr. Hoffa was released from prison after serving 20 years, with serious mental and medical problems. His life was a struggle for survival. He was beset by his inability to find housing, his lack of basic necessities, his consuming fear regarding his health and lack of medical care, his struggles with drugs and alcohol, and his difficulty to adjusting to life outside prison." The District Judge used the defendant's need for medical attention, and the fact that he was unable to get it on his own, to impose a sentence at the high-end of the guideline range, 115 months. Defense counsel objected, citing 18 U.S.C. § 3582 which states "imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court found that medical care was not "correction and rehabilitation." The Third Circuit held that the district court was well intended but, "the need of medical care was a principal factor in [defendant's] receiving a sentence of incarceration at the top of the Guideline range," therefore clearly violating § 3582(a). The Court of Appeals stated: "As we have indicated, [*United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007)] held that treatment for drug addiction was rehabilitation within the meaning of § 3582(a). Given the lack of a material distinction between treatment for drug addiction and treatment for liver disease, *Manzella* governs here." Accordingly, the matter was remanded for resentencing.

18 U.S.C. §§ 3582 and 3583

United States v. Doe, 617 F.3d 766 (3d Cir. 2010), *petition for cert. filed* (Nov. 15, 2010) (No. 10-7592). The district court's consideration of the defendant's medical and rehabilitative needs

when revoking supervised release and requiring the defendant to serve the remainder of his sentence was not prohibited by 18 U.S.C. § 3582(a). The panel held that § 3583(e) demonstrates that "Congress intended district courts to consider a defendant's medical and rehabilitative needs in determining whether to revoke supervised release and the duration of imprisonment that is appropriate upon revocation."