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

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

This document contains annotations to certain Fifth 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 Fifth 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. Duhon, 541 F.3d 391 (5th Cir. 2008). A sentencing court's miscalculation of the guidelines is not reversible error if the court "contemplated" the correct guideline range and stated that, even if the correct range had been applied, it would have imposed the same sentence.

United States v. Warfield, 283 F. App'x 234 (5th Cir. 2008). Pre-*Gall* decisions where the court required "extraordinary circumstances" to justify a sentence outside of the guideline range should be remanded so that the sentencing judge can make an individualized assessment in light of all of the § 3553(a) factors.

United States v. Caldwell, 448 F.3d 287 (5th Cir. 2006). "Even after *Booker*, a [Presentence Report] is presumed to be sufficiently reliable such that a district court may properly rely on it during sentencing."

United States v. Hardin, 437 F.3d 463 (5th Cir. 2006). To survive reasonableness review, the district court must carefully articulate reasons for its sentence: "These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable."

United States v. Tzep-Mejia, 461 F.3d 522 (5th Cir. 2006). "Post-*Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline

sentence." The sentencing court may impose a non-guideline sentence as long as it considers the possible guideline ranges and the other § 3553(a) factors.

B. Burden of Proof

United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2006), *superseded on other grounds as stated in United States v. Rodriguez-Juarez*, 631 F.3d 192 (5th Cir. 2011). "This court reviews the district court's interpretation of the Sentencing Guidelines *de novo* where, as here, the issue has been preserved in the district court."

United States v. Mares, 402 F.3d 511 (5th Cir. 2005). The court requires a sentencing court to carefully consider the guidelines and the § 3553(a) factors. Ordinarily, the sentencing court must determine the applicable guideline range in the same manner as before *Booker*; this process includes finding all facts relevant to sentencing using a preponderance of the evidence standard.

United States v. Martin, 431 F.3d 846 (5th Cir. 2005). Because the Supreme Court has not overruled its decision in *Almendarez-Torres v. United States*, a defendant's prior conviction(s) need *not* be proven beyond a reasonable doubt.

C. Ex Post Facto

United States v. Charon, 442 F.3d 881 (5th Cir. 2006). The district court did not violate the *Ex Post Facto* Clause when, at sentencing, it applied *Booker*'s remedial holding.

United States v. Scroggins, 411 F.3d 572 (5th Cir. 2005). The change from mandatory guidelines to advisory guidelines does not violate the *Ex Post Facto* Clause.

II. Departures

United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009). Post-*Booker*, a sentencing judge must still properly apply departure provisions to avoid procedural error. In this case, the sentencing judge misapplied an upward departure under §4A1.3 for inadequacy of criminal history by increasing the defendant's offense level rather than adapting the defendant's criminal history category to better reflect the impact of the prior offense. Additionally, sentencing courts may *not* use §5K2.0 to address inadequacy of criminal history because §4A1.3 is the proper mechanism to address that concern.

United States v. Pardo-Luengas, 300 F. App'x 276 (5th Cir. 2008). If the sentencing judge imposes an upward variance based partially on the underrepresentation of the defendant's criminal history the court need not calculate that variance using the criteria set forth at §4A1.3.

United States v. Jones, 444 F.3d 430 (5th Cir. 2006). "We are persuaded that *Booker* does not alter the way in which an upward departure is reviewed under § 3742(f)(2) for plain error. The remedial opinion in *Booker* did not sever or excise 18 U.S.C. §3742(f)(3), which directs that a court of appeals 'shall affirm [a] sentence' unless it is 'described in paragraph (1)

or (2)' of § 3553(f). We are to reverse and remand an upward departure from a [g]uidelines range that was 'based on an impermissible factor' only 'if [the court of appeals] determines that the sentence is too high.' The statutory 'too high' requirement is the equivalent of the 'unreasonableness' standard set forth in *Booker*."

United States v. Smith, 440 F.3d 704 (5th Cir. 2006). A guideline sentence that reflects a guideline departure is still reviewed as a guideline sentence.

United States v. Castillo, 430 F.3d 230 (5th Cir. 2005). "[A]fter *Booker*, we continue to review a district court's findings of fact in relation to the Guidelines for clear error."

United States v. Saldana, 427 F.3d 298 (5th Cir. 2005). "[W]e now evaluate the district court's decision to depart upwardly and the extent of that departure for abuse of discretion."

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast Track

United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008). Because any disparity resulting from "fast track" (or other expedited disposition) programs is intended by Congress, such programs do not give rise to "unwarranted" disparities under § 3553(a)(6). *See also United States v. Anguiano-Rosales*, 288 F. App'x 994 (5th Cir. 2008) (stating that circuit precedent forecloses an equal protection argument based on the lack of "fast track" programs in some districts).

United States v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006). The existence of sentencing disparities between differing federal districts resulting from fast-track programs do not render a particular sentence unreasonable: "The refusal to factor in, when sentencing a defendant, the sentencing disparity caused by early disposition [fast-track] programs does not render a sentence unreasonable. Section 3553(a)(6) is but one factor in a list of factors to be considered; moreover, Congress must have thought the disparity [was] warranted when it authorized early disposition programs without altering § 3553(a)(6)."

2. Co-defendants

United States v. Armstrong, 550 F.3d 382 (5th Cir. 2009), *overruled on other grounds by United States v. Balleza*, 613 F.3d 432 (5th Cir. 2010). The court concluded that the proportionality principle of 18 U.S.C. § 3553(a)(6) is satisfied by the sentencing judge's careful consideration of the difference in situations between the defendants. *See also United States v. Rodriguez*, 353 F. App'x 890 (5th Cir. 2009) (when the court articulates individualized reasons for the departure there are no grounds to challenge it for not providing an individualized assessment).

3. Reliance on National Average Sentences

United States v. Willingham, 497 F.3d 541 (5th Cir. 2007). While Sentencing Commission statistics may show a disparity between the average §2G2.2 sentence and the advisory guideline range, there is "no indication that the disparity is unwarranted." National averages are "unreliable" to determine *unwarranted* disparity because they do not reflect the aggravating and mitigating factors that distinguish individual cases. With regard to the reasonableness of a particular defendant's sentence, such statistical evidence from a broad range of cases is "basically meaningless." Thus, a downward departure based upon data demonstrating average sentences lower than the calculated guideline range was clearly erroneous. *See also United States v. Chrisenberry*, 290 F. App'x 719 (5th Cir. 2008) (stating that when the sentencing judge sentences within the guidelines range and the court necessarily gives "significant weight and consideration" to avoiding sentencing disparities, the appellate court's concern with sentencing disparities is reduced to a "minimum").

IV. Forfeiture

United States v. Washington, 131 F. App'x 976 (5th Cir. 2005). The court held that a defendant has no Sixth Amendment right to have a jury decide a disputed forfeiture issue.

V. Restitution

United States v. Garza, 429 F.3d 165 (5th Cir. 2005). "[J]udicial fact-finding supporting restitution orders does not violate the Sixth Amendment."

VI. Reasonableness Review

A. General Principles

United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009). The court stated that "*Gall* and *Kimbrough* clarified sentencing law after *Booker* by allowing district courts to depart from the Guidelines based on disagreements with the Guidelines's policy considerations (*Kimbrough*), and also when circumstances warrant such a move even though the circumstances are not extraordinary (*Gall*)."

United States v. Alonzo, 435 F.3d 551 (5th Cir. 2006). "We agree with our sister circuits that have held that a sentence within a properly calculated [g]uideline range is presumptively reasonable. . . . We . . . decline [however] to find a properly calculated [g]uidelines sentence reasonable *per se*."

B. Procedural Reasonableness

United States v. Camero-Renobato, 670 F.3d 633 (5th Cir. 2012). "We clarify . . . that our decision in [*Mondragon-Santiago*], which perceived procedural unreasonableness in the inadequacy of sentencing reasons, involved not 'giv[ing] *any* reasons for its sentence beyond a bare recitation of the Guideline's calculation.' As we quoted in *Mondragon-Santiago*, the district

court in that case offered only a single sentence about a Guidelines calculation, hence gave no elaboration of sentencing reasons. By contrast, the district court in the instant case entertained lengthy comments from both parties and then elaborated its particularized explanation for a within-guidelines sentence. No more is required." (citations omitted) (last alteration in original).

United States v. Key, 599 F.3d 469 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011). The court held that a sentencing court may, when articulating why it imposed a particular non-guideline sentence, "incorporate into its statement of reasoning" the arguments advanced by the parties. To the extent it allows for meaningful appellate review, a court's reference to "arguments [of the parties] made earlier" and "information in the pre-sentence report" are adequate as a matter of law to satisfy *Booker*/*Gall*'s procedural sentencing requirements.

United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009). The district court failed to adequately explain its reasons for the sentence imposed when, even though the defendant raised various arguments as to why the § 3553(a) factors supported a particular sentence, "[t]he district court did not mention [those] arguments, and the court's statement of reasons did not further illuminate its reasoning." The district court's explanation of the sentence consisted only of its statement that the offense level was 21, that the defendant was in Criminal History Category 3, that the guideline range was 46 to 57 months, and that the defendant was sentenced to 50 months of imprisonment and three years of supervised release.

United States v. Delgado-Martinez, 564 F.3d 750 (5th Cir. 2009). Procedural error includes the improper calculation of the guideline range, treating the guidelines as mandatory, or selecting a sentence based on clearly erroneous facts.

United States v. Tran, 339 F. App'x 423 (5th Cir. 2009). It is not procedural error for the sentencing judge to fail to expressly cite § 3553(a) factors when imposing a within-guideline sentence.

United States v. Betanzos-Centeno, 262 F. App'x 581 (5th Cir. 2008). The "presumption of reasonableness" does not constitute impermissible "mandatory" guidelines, nor does the presumption fail under *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007).

United States v. Gonzales-Medina, 266 F. App'x 339 (5th Cir. 2008). A sentence within the properly calculated guideline range "is entitled to a presumption of reasonableness" when the sentencing judge has properly calculated the range, considered the defendant's arguments, and the defendant has failed to show the sentence is unreasonable. *See also United States v. Stanley*, 281 F. App'x 370 (5th Cir. 2008) (stating that when a sentencing court simply applies the guidelines in a particular case it does not have to give a "lengthy explanation" for its sentence); *United States v. Campos-Maldonado*, 531 F.3d 337 (5th Cir. 2008) (holding that the a district court's decision to sentence the defendant according to the guidelines is entitled to deference and that the resulting within-guidelines sentence is entitled to a presumption of reasonableness).

United States v. Lopez-Salas, 513 F.3d 174 (5th Cir. 2008). While the court held that a prior conviction did not qualify as a "drug trafficking offense" for the purposes of a 16-level

enhancement under §2L1.2, the court noted that its holding "does not preclude the district court from considering [the defendant's] prior . . . conviction for sentencing purposes." The court stated that "[a] defendant's criminal history is one of the factors that a court may consider in imposing a non-Guideline[s] sentence." *See also United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (concluding that the sentencing judge's miscalculation of the enhancement did not effect the non-guideline sentence that was imposed and thus did not require the sentence to be vacated); *But see United States v. Johnson*, 648 F.3d 273 (5th Cir. 2011) (holding that the sentencing court errs by using the defendant's "bare arrest record" to determine the sentence, regardless of whether the sentence imposed is within or outside the guideline range. Circuit precedent "[leaves] room for a court to consider arrests if sufficient evidence corroborates their reliability" but that "without sufficient indicia of reliability," a court may not consider prior arrests when imposing a sentence).

United States v. Newson, 515 F.3d 374 (5th Cir. 2008). "[A] within-guidelines sentence enjoys . . . a rebuttable presumption of reasonableness," even after *Gall* and *Rita.*

United States v. Rodriguez-Rodriguez, 530 F.3d 381 (5th Cir. 2008). In re-affirming a within guideline sentence the court noted that the defendant's argument that "unspecified significant procedural error" occurred is not persuasive when the record reveals that the sentencing judge properly calculated the guidelines, did not treat the guidelines as mandatory, considered section 3353(a) factors, allowed the parties to argue their positions, and adequately explained the chosen sentence. There was no indication that the sentencing court felt that the guidelines "presumptively applied" and therefore committed no procedural error. *See also United States v. Cisneros-Gutierrez*, 517 F.3d 751 (5th Cir. 2008); *United States v. Sanchez*, 294 F. App'x 87 (5th Cir. 2008).

United States v. Sanchez, 277 F. App'x 494 (5th Cir. 2008). Selecting a sentence using "clearly erroneous facts" amounts to reversible procedural error.

United States v. Tisdale, 264 F. App'x 403 (5th Cir. 2008). "[F]ailure to offer any reason whatsoever for rejecting the defendants' § 3553(a) arguments or any explanation for following the guideline range" is procedural error necessitating remand.

United States v. Dock, 426 F.3d 269 (5th Cir. 2005). "After *Booker*, where the sentencing [court] imposes a sentence within a properly calculated guidelines range, we will generally find the sentence reasonable."

C. Substantive Reasonableness

United States v. Rodriguez, 660 F.3d 231 (5th Cir. 2011). "[T]he staleness of a prior conviction used in the proper calculation of a guidelines-range sentence does not render a sentence substantively unreasonable and does not destroy the presumption of reasonableness that attaches to such sentences."

United States v. Rhine, 637 F.3d 525 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1001 (2012). Consecutive non-guideline sentences of 120 months for possession with intent to

distribute cocaine base and 60 months for being felon in possession of a firearm were not substantively unreasonable where the district court explained that the sentence was necessary because of defendant's prior similar drug conduct, where the court discussed each of the § 3553 sentencing factors, and where the sentence was half the statutory maximum for offenses to which defendant pled guilty.

United States v. Herrera-Garduno, 519 F.3d 526 (5th Cir. 2008). In post-*Kimbrough* cases involving upward variances, sentencing courts may vary based "solely on policy considerations, including disagreements with the [g]uidelines" when the guidelines fail to adequately reflect § 3553(a) considerations. *See also United States v. McGehee*, 261 F. App'x 771 (5th Cir. 2008); *United States v. Williams*, 517 F.3d 801 (5th Cir. 2008).

United States v. Lopez-Velasquez, 526 F.3d 804 (5th Cir. 2008). The court held that the defendant's non-guideline sentence, which was more than double the high-end of the guideline range, was substantively reasonable in light of the defendant's criminal history and extensive history of post-deportation re-entry arrests. This history adequately supported the sentencing judge's view that the defendant had "no respect" for the laws of the United States.

United States v. Monjaraz-Reyes, 285 F. App'x 146 (5th Cir. 2008). When a defendant has an "extensive criminal record" an upward departure pursuant to §4A1.3 for more than 30 months above the guideline range is substantively reasonable.

United States v. Rowan, 530 F.3d 379 (5th Cir. 2008). Where a conviction for possession of child pornography yielded an advisory guidelines range of 46 to 57 months, the court's proper calculation of the guidelines and its studied consideration of the sentencing factors allowed for imposition of 60 months probation.

United States v. Salazar-Garcia, 294 F. App'x 92 (5th Cir. 2008). The defendant argued that the guideline sentence for illegal reentry was not empirically grounded, and therefore should not be entitled to deference. The court rejected this argument and deferred to the judgment of the sentencing court. *See also United States v. Castaneda-Velez*, 294 F. App'x 109 (5th Cir. 2008); *United States v. Goodman*, 307 F. App'x 811 (5th Cir. 2009) (rejecting an argument that §2G2.2 has "no empirical support" and finding a properly calculated guideline sentence has a "rebuttable presumption of reasonableness"); *United States v. Varela-Zubia*, 307 F. App'x 843 (5th Cir. 2009) (concluding that the appellate presumption of reasonableness applies to §2L1.2 and rejecting the argument that presumption does not apply to §2L1.2 because the promulgation of §2L1.2 did not take into account "empirical data and national experience").

United States v. Williams, 517 F.3d 801 (5th Cir. 2008). Where a sentencing court enumerates and considers the § 3553(a) factors, appellate review will be deferential so as to allow for a variance some 77% higher than the advisory guideline range. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."

United States v. Armendariz, 451 F.3d 352 (5th Cir. 2006). A mandatory minimum sentence for an Internet sex offense is unreasonable when not accompanied by a term of supervised release.

United States v. Roush, 466 F.3d 380 (5th Cir. 2006). Substantive reasonableness review of defendant's tax evasion sentence compelled reversal of the below-guideline variance because the sentencing court relied on facts not tied to the § 3553(a) factors.

D. Plain Error

United States v. Chavez-Hernandez, 671 F.3d 494 (5th Cir. 2012). The Fifth Circuit held that the district court committed error by applying the 16-level enhancement under §2L1.2(b)(1)(A)(ii) using the defendant's prior conviction for statutory rape under Florida law because that offense included sexual activity with 16- and 17-year-olds. The court of appeals declined to correct the unpreserved error on appeal, however, because (1) defense counsel admitted at the sentencing hearing that the prior crime was actually committed against a 14-year-old; and alternatively, (2) correcting the error would be procedurally unfair because the government could have submitted proof under *Shepard* to support applying the enhancement had defense counsel raised the objection below.

United States v. Mudekunye, 646 F.3d 281 (5th Cir. 2011). The Fifth Circuit found that the district court plainly erred when it incorrectly calculated a guideline range of 78-97 months instead of 63-78 months and sentenced defendant to 97 months, the top of the erroneous range. The majority relied on previous Fifth Circuit precedent which establishes "that absent additional evidence, a defendant has shown a reasonable probability that he would have received a lesser sentence when (1) the district court mistakenly calculates the wrong Guidelines range, (2) the incorrect range is significantly higher than the true Guidelines range, and (3) the defendant is sentenced within the incorrect range." The majority recognized that the incorrect range in this case overlaps with the correct range, but noted that the defendant "was sentenced well outside the one month overlap, 19 months above the correct range."

United States v. Rodriguez-Parra, 581 F.3d 227 (5th Cir. 2009). A defendant's failure to raise a challenge to an enhancement based on a prior sentence of imprisonment, where the prior sentence was actually a suspended sentence, does not constitute plain error because the legal error was not clear and obvious.

United States v. Whitelaw, 580 F.3d 256 (5th Cir. 2009). Though the sentencing court plainly erred by failing to explain its reasons for imposing an above-guideline sentence, the defendant's failure to demonstrate an effect on his substantial rights precluded reversal under plain-error review.

United States v. Sanchez, 527 F.3d 463 (5th Cir. 2008). The court held that, "where, at the time of sentencing there is no guideline in effect for the particular offense of conviction, and the Sentencing Commission has promulgated a proposed guideline applicable to the offense of conviction, the district court's failure to consider the proposed guideline when sentencing a defendant may result in reversible plain error." In this case the defendant received a sentence

nearly twice that of a sentence calculated under the proposed (but not yet enacted) guideline provision. The court deemed this procedural error and a "misapplication of the [g]uidelines."

United States v. Cruz, 418 F.3d 481 (5th Cir. 2005). The court held that the defendant demonstrated plain error when the district court stated that granting the defendant's downward departure motion would require deviating from the guidelines and further stated there was nothing anyone could do to help.

United States v. Mares, 402 F.3d 511 (5th Cir. 2005). The court explained that where the appellant fails to challenge the constitutionality of the guidelines below, the court of appeals will review for plain error. To demonstrate plain error, the appellant must show that the sentencing court would have reached a significantly different result under an advisory sentencing scheme.

E. Harmless Error

United States v. Richardson, 676 F.3d 491 (5th Cir. 2012). The court of appeals held that the district court's error in applying guideline enhancements was harmless "because the district court stated that it had: (1) considered all of the possible guideline ranges that could have resulted if it had erred in applying one or more of the enhancements to [the defendant's] offense level; (2) found all of those resulting ranges to be insufficient in this case; and (3) stated that it would have imposed the same 65-month sentence even if one of those ranges had applied . . . ."

United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2010). "[U]nder the discretionary sentencing regime of *Booker* and progeny, the harmless error doctrine applies only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." To carry this burden, the proponent "must point to evidence in the record that will convince [the court of appeals] that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error." Even when the district court imposes a sentence outside the guidelines range, "an error in its Guidelines calculations may still taint the non-Guidelines sentence" unless the proponent can show, based on the record, that the sentence rested on factors independent of the guidelines. This "is a difficult burden if the district court fails to indicate why it selected a sentence of a particular length."

United States v. Woods, 440 F.3d 255 (5th Cir. 2006). "When a Sixth Amendment claim under *Booker* 'is preserved in the district court by an objection, we will ordinarily vacate the sentence and remand, unless we can say the error is harmless under [R]ule 52(a) of the Federal Rules of Criminal Procedure.'" "[W]here the Government's principal evidence is a sentence at the top of the range determined by the [g]uidelines under a mandatory sentencing regime, the Government has not carried its burden."

United States v. Akpan, 407 F.3d 360 (5th Cir. 2005). The court explained that even though the defendant did not specifically mention the Sixth Amendment, *Apprendi*, or *Blakely* in the district court, his objections during sentencing to the court's determinations about financial losses that were not proven at trial were sufficient to preserve *Booker* argument.

United States v. Pineiro, 410 F.3d 282 (5th Cir. 2005). The court applied the harmless error standard because the defendant objected below. The *Apprendi*-based objection to the Presentence Report's drug-quantity calculations was sufficient to preserve a *Booker* claim because the challenge was based on the same constitutional violation addressed by both cases.

United States v. Saldana, 427 F.3d 298 (5th Cir. 2005). The court found that the government demonstrated harmless error where the sentencing court "stated that, in the event that the *Booker* decision should hold the federal sentencing guidelines unconstitutional, the court would sentence him to the same amount of imprisonment and supervised release permitted under the substantive statutes."

United States v. Thibodaux, 147 F. App'x 405 (5th Cir. 2005). The court held that an objection that the amounts of loss and restitution were overstated or unsupported does not preserve a *Booker* error.

United States v. Walters, 418 F.3d 461 (5th Cir. 2005). The court concluded that the government failed to show harmless error when the district court indicated that the within-guidelines sentence was too harsh and that it would impose a lesser sentence if the guidelines were declared unconstitutional.

F. Waiver of Right to Appeal Sentence

United States v. Jacobs, 635 F.3d 778 (5th Cir. 2011). A plea agreement in which a defendant generally waived his right to appeal his sentence, but preserved his right to appeal an upward departure from the Sentencing Guidelines, does not authorize him to appeal an upward variance by the district court at sentencing.

United States v. Burns, 433 F.3d 442 (5th Cir. 2005). "[A]n otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* or *Fanfan* issue (whether or not that issue would have substantive merit), merely because the waiver was made before *Booker*." *But see United States v. Harris*, 434 F.3d 767 (5th Cir. 2005) ("The sentence 'Defendant reserves the right to appeal a sentence in excess of the [g]uidelines' does not unambiguously waive a complaint that the wrong guidelines were applied, and any ambiguity must be construed in favor of the defendant's right to appeal. . . . The phrase 'in excess of the [g]uidelines' does not clearly establish that the defendant agreed that inapplicable guidelines would be the benchmark by which his right to appeal would be measured."); *United States v. Reyes-Celestino*, 443 F.3d 451 (5th Cir. 2006) (determining that the appellant did not waive his *Fanfan* error where his plea agreement stated that he "'*explicitly consents to be sentenced pursuant to the applicable [s]entencing [g]uidelines*'" because the "plea agreement [did] not specify whether [the defendant] consented to a mandatory or advisory application of the . . . [g]uidelines").

United States v. McKinney, 406 F.3d 744 (5th Cir. 2005). The court held that an appeal waiver in which the defendant waived the right to appeal unless the district court upwardly departed from the guidelines remains valid post-*Booker*.

VII. Revocation

United States v. Breland, 647 F.3d 284 (5th Cir. 201), *vacated*, 132 U.S. 1096 (2012) . The Fifth Circuit held that a district court may consider a defendant's rehabilitative needs (such as the defendant's need for drug rehabilitation) when revoking the defendant's supervised release and imposing a term of imprisonment.

United States v. McKinney, 520 F.3d 425 (5th Cir. 2008). Post-*Booker*, when imposing a sentence during revocation due to a violation of supervised release, the district court must consider the factors enumerated in § 3553(a) and the non-binding policy statements found in Chapter Seven of the guidelines.

United States v. Hinson, 429 F.3d 114 (5th Cir. 2005). The court held that a defendant is not entitled to have a jury determine the facts giving rise to the revocation of supervised release, or the facts that underlie the duration of the sentence imposed upon revocation.

VIII. Retroactivity

United States v. Gentry, 432 F.3d 600 (5th Cir. 2005). "Because the *Booker* rule does not fall into either of the two *Teague* exceptions for non-retroactivity, we determine that *Booker* does not apply retroactively on collateral review to a federal prisoner's initial 28 U.S.C. § 2255 motion." *See also In re Elwood*, 408 F.3d 211 (5th Cir. 2005) (holding that *Booker* does not apply retroactively on collateral review for purposes of a successive § 2255 motion).

IX. Crack Cases

United States v. Cooley, 590 F.3d 293 (5th Cir. 2009). The district court need not mention consideration of the 18 U.S.C. § 3553(a) factors when determining a reduction under 18 U.S.C. § 3582.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001). "If there is no guideline for a particular offense . . . the court is to use 'the most analogous offense guideline.'" *See also United States v. Sanchez*, 527 F.3d 463 (5th Cir. 2008) (finding procedural error and a "misapplication of the guidelines" in a case in which the defendant received a sentence nearly twice that of a sentence calculated under the proposed (but not yet enacted) sentencing guideline).

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

United States v. Ortiz, 613 F.3d 550 (5th Cir. 2010). The conduct of a co-participant is not part of a "common scheme or plan" merely because the co-participant and the defendant shared "the general goal of selling drugs for profit." Additionally, in a drug trafficking case, any other, unadjudicated drug trafficking offenses are not "relevant conduct" when the evidence shows only that "two different drugs were in the same place at the same time."

United States v. Ekanem, 555 F.3d 172 (5th Cir. 2009). A defendant's "mere awareness" that another is operating a similar criminal scheme is insufficient to hold the defendant responsible for another's actions. In this case, the defendant received "start-up and operational support" for his Medicare scheme from another, but the district court nonetheless erred in finding that the defendant was responsible for the loss created by the other schemer.

United States v. Elizondo, 475 F.3d 692 (5th Cir. 2007). When the circuit court makes determinations on appeal that affect only whether sufficient evidence was adduced at trial to support a conviction, the sentencing court on remand must consider all evidence to properly assess defendant's relevant conduct for sentencing purposes. The law of the case doctrine is subordinate to the *Booker* requirement that the sentencing court consider the guidelines before imposing any sentence.

United States v. Hinojosa, 484 F.3d 337 (5th Cir. 2007). Where a defendant objected to the loss figure calculated to include an uncharged Ponzi scheme that post-dated the charged conduct, the court of appeals concluded that the uncharged conduct was part of the "same course of conduct or common scheme or plan" and contemplated by §1B1.3. The defendant argued that the uncharged conduct did not involve the same victims or accomplices and was conducted much later than the charged conduct, however, the court noted that the two offenses need only be "substantially connected . . . by at least one common factor," and found that both offenses shared both a common purpose and a similar modus operandi. This was sufficient for the district court to conclude that the uncharged conduct was relevant conduct. *See also United States v. Wright*, 496 F.3d 371 (5th Cir. 2007).

United States v. Reinhart, 357 F.3d 521 (5th Cir. 2004). A coconspirator's sexual exploitation of two minors on videotape did not meet §1B1.3's reasonable foreseeability requirement where the videotape was created before the defendant entered into the conspiracy to commit sexual exploitation of children.

United States v. Brummett, 355 F.3d 343 (5th Cir. 2003). A sentencing judge may consider non-adjudicated offenses—offenses for which the defendant has neither been charged nor convicted—that occur after the offense of conviction if they constitute relevant conduct under §1B1.3. Relevant conduct includes offenses that are sufficiently connected or related to each other as to warrant the conclusion that they are part of an ongoing series of offenses. In this case, the district judge enhanced the defendant's sentence based on his possession of two firearms found at the time of the offense of conviction and two other firearms found during subsequent searches of the defendant's home. Although the defendant possessed the four firearms on three separate occasions within a nine month period, his pattern of behavior in

possessing firearms and the time period between the offenses supported the district court's conclusion that the firearms possessions were part of an ongoing series of offenses. Thus, the district judge properly relied on the four firearms as relevant conduct in enhancing the defendant's sentence. *See United States v. Cade*, 279 F.3d 265 (5th Cir. 2002).

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

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). Although relevant conduct includes all reasonably foreseeable acts of coconspirators committed in furtherance of the conspiracy, the reasonable foreseeability of all drug sales does not necessarily flow from membership in a conspiracy. To calculate the quantity of drugs for participation in a drug conspiracy, the district court must determine: "(1) when the defendant joined the conspiracy; (2) the quantities of drugs that were within the scope of the agreement; and (3) the quantities the defendant could reasonably foresee being distributed by the conspiracy." Because the evidence in this case showed that the defendant had participated in the conspiracy for nearly two years and that he could have foreseen the sale of at least one kilogram of heroin, the district judge properly relied on the one kilogram as relevant conduct in calculating the quantity of drugs.

United States v. Roberts, 203 F.3d 867 (5th Cir. 2000). A police officer's discharge of a firearm constituted relevant conduct for a 7-level enhancement under §2B3.1(b)(2) (discharge of a firearm during a robbery) because the defendant aided his cohort in wrestling the police officer to gain control of the gun, causing the officer to discharge his weapon. *See also United States v. Rodriguez*, 278 F.3d 486 (5th Cir. 2002)(holding that "unless a defendant is convicted under money laundering statute, money laundering cannot be used against him as relevant conduct").

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

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

United States v. Hammond, 201 F.3d 346 (5th Cir. 1999). The base offense level for embezzlement is calculated based on the dollar amount of the loss caused by the embezzlement. To calculate the dollar amount of the loss, the sentencing judge must determine the losses due to the defendant's own conduct as well as for those due to the defendant's relevant conduct. Under §1B1.3, a defendant's relevant conduct includes the conduct of others that was both: "(1) in furtherance of the jointly undertaken criminal activity; and (2) reasonably foreseeable in connection with that criminal activity." In this case, the sentencing judge failed to make specific findings that the defendant agreed with third parties to participate in an embezzling scheme, to explain how the actions of the third parties furthered any joint undertaking of criminal activity, or to indicate how those actions fell within the scope of any agreement to embezzle. As a result, the record did not demonstrate that the actions of third parties that the judge considered as relevant conduct were in furtherance of the jointly undertaken criminal activity, or that the defendant should have reasonably foreseen the losses resulting from the actions of the third parties.

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998). Although a sentencing judge is not precluded from considering conduct that occurred in another country, such conduct must still meet the definition of relevant conduct to be used in calculating the defendant's sentence. Section 1B1.3 defines relevant conduct as "all acts and omissions committed . . . or willfully caused by the defendant; and . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." In this case, the defendant did not commit the offenses that occurred in a foreign country during the commission of his crimes of conviction, in preparation for his crimes of conviction, or in the course of attempting to avoid detection or responsibility for his crimes of conviction. As a result, the defendant's foreign offenses did not qualify as relevant conduct.

United States v. Rosogie, 21 F.3d 632 (5th Cir. 1994). "[I]nformation from a pending state prosecution on a related offense may be used as relevant conduct."

§1B1.4 <u>Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)</u>

United States v. Ramirez, 271 F.3d 611 (5th Cir. 2001). "At sentencing, '[t]he district court may consider any information which has sufficient indicia of reliability to support its probable accuracy.' This includes findings regarding drug quantities that do not implicate *Apprendi*, testimony of a probation officer and even hearsay."

§1B1.8 <u>Use of Certain Information</u>

United States v. Harper, 643 F.3d 135 (5th Cir. 2011). The government breached its plea agreement with the defendant, in which it granted the defendant use immunity in exchange for his cooperation, by using immunized statements to establish the applicable drug quantities for purposes of sentencing. In reaching this decision, the court relied upon §1B1.8 as supporting its conclusion that a defendant's immunized statements "shall not be used in determining the applicable guideline range, except to the extent provided in the [plea] agreement."

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001). "At sentencing, information provided under a use immunity agreement may be considered but shall not be used in determining the applicable guideline range except to the extent provided in the agreement. . . . Use of such information is acceptable if the information was 'known to the government prior to entering into the cooperation agreement. . . .'" "Generally, a [Presentence Report] bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. 'The [Presentence Report], however, cannot just include statements, in the hope of converting such statements into reliable evidence, without providing any information for the basis of the statements.' Normally, the defendant has the burden to show that the information relied on in a [Presentence Report] is inaccurate. The rebuttal evidence presented by the defendant must show that the [Presentence Report's] information is materially untrue, inaccurate or unreliable . . . [But] when a use immunity agreement is involved, and the defendant questions the sources of the evidence used against him at sentencing, the burden is on the government to show that the evidence is from outside sources."

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

United States v. Solis, 675 F.3d 795 (5th Cir. 2012). Amendment 651 does not apply retroactively. The Fifth Circuit reasoned that the Commission neither expressly stated that Amendment 651 is a clarifying amendment, nor did it list Amendment 651 among the amendments to be applied retroactively in §1B1.10(c). Moreover, Amendment 651 not only altered the language of the relevant guidelines' commentary, but also made substantial revisions to the guidelines themselves. The Fifth Circuit thus concluded that it was a substantive, rather than clarifying, amendment.

United States v. Garcia, 655 F.3d 426 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1124 (2012). USSG §1B1.10's limitations on the court's ability to reduce a sentence pursuant to 18 U.S.C. § 3582(c) does not violate separation-of-powers principles. The relevant statutes "are a sufficient delegation," according to the Fifth Circuit, because "Congress has set forth an intelligible principle: It gave the Commission the discretion to determine . . . 'in what circumstances and by what amount' a sentence may be reduced . . . and that reductions should further the purposes of [18 U.S.C.] § 3553(a)."

United States v. Henderson, 636 F.3d 713 (5th Cir. 2011). On motion to modify a defendant's sentence pursuant to 18 U.S.C. § 3582(c), a district court must conduct a two-step inquiry. Step one requires a court to follow the instructions set forth in the guidelines "to determine whether the prisoner is eligible for a sentence modification and the extent of reduction authorized, [and] [s]tep two requires the court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction . . . is warranted in whole or in part under particular circumstances of the case." "In response to a § 3582(c)(2) motion, the district court must conduct a contemporaneous review of the § 3553 factors," and may consider a prisoner's post-conviction conduct. "However, a sentencing court is not required to explain its application of those factors or its reasons for denying the motion." *See also United States v. Larry*, 632 F.3d 933 (5th Cir. 2011).

United States v. Carter, 595 F.3d 575 (5th Cir. 2010). As a matter of first impression, the court considered whether a defendant whose statutory minimum trumped the applicable guideline range is eligible for a sentence reduction under § 3582(c)(2) after the Commission lowered the applicable guideline range. The defendant's distribution count of conviction had generated a 87-108 month guideline range, which was trumped by the mandatory minimum penalty of 120 months. The district court imposed a 36 month sentence, after granting a departure pursuant to the government's substantial assistance motion. The district court denied the defendant's motion for a sentence reduction under § 3582 because the defendant's sentence was based on a statutory minimum rather than the guideline range and thus did not qualify under §1B1.10. The court of appeals held that when a defendant is subject to a statutory minimum sentence above the upper end of his guideline range, even if the district court departs downwardly from that minimum under a statutory exception, 18 U.S.C. § 3582(c)(2) provides no authority to the district court to later modify the sentence based on amendments to the guideline range.

United States v. Doublin, 572 F.3d 235 (5th Cir. 2009). On appeal, the defendant argued that the district court erred by concluding that it could not reduce the defendant's sentence below the new guideline range. The Fifth Circuit rejected the defendant's argument, and joined eight other circuits by holding that *Booker* does not apply to 18 U.S.C. § 3582(c)(2) hearings and that the limitations in §1B1.10 are mandatory. The court gave two reasons for its rejection of the Ninth Circuit's decision in *Hicks*. First, the court pointed out that the Ninth Circuit decided *Hicks* prior to the 2008 amendments to §1B1.10, which generally bar reductions below the amended guideline range. Second, "[t]o the extent *Hicks* is not distinguished by the subsequent amendments" to §1B1.10, the court simply found *Hicks* "unpersuasive." According to the court, while the guidelines are now advisory during a full sentencing hearing, a reduction under 18 U.S.C. § 3582(c)(2) is not a full resentencing of the defendant. Quoting the Tenth Circuit's decision in *United States v. Rhodes*, the court stated that "there are clear and significant differences between original sentencing proceedings and sentence modification proceedings." Notably, the court stated, a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) does not involve a sentencing increase. And "reductions under 18 U.S.C. § 3582(c)(2) are not mandatory; th[e] section merely gives the district court discretion to reduce a sentence under limited circumstances." The court affirmed the defendant's sentence, concluding that "'neither the Sixth Amendment nor *Booker* prevents Congress from incorporating a guideline provision as a means of defining and limiting a district court's authority to reduce a sentence under § 3582(c).'" *See also United States v. Evans*, 587 F.3d 667 (5th Cir. 2009) ("*Booker* does not alter the mandatory character of . . . §1B1.10's limitation on sentence reductions").[1]

United States v. Wallace, 2008 WL 4948617 (5th Cir. 2008) (unpublished). The defendant preserved arguments regarding crack and powder cocaine sentencing disparity during his initial sentencing hearing. The court concluded that subsequent retroactive sentencing amendments coupled with this preservation of error "entitled" the defendant to have a resentencing wherein the district court analyzes the applicable §3553(a) factors. *See also United*

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[1]*See Dillon v. United States*, 130 S. Ct. 2683 (2010) (holding that *Booker* does not apply to proceedings under section 3582(c)(2) and that §1B1.10 is binding on courts reducing sentences under that provision).

States v. Burns, 526 F.3d 852 (5th Cir. 2008).

§1B1.11 Use of Guideline Manual in Effect at Sentencing (Policy Statement)

United States v. Castillo-Estevez, 597 F.3d 238 (5th Cir.), *cert. denied*, 131 S. Ct. 457 (2010). For the first time on appeal, the defendant claimed the use of an improper, post-*Booker* guideline version and mounted an *ex post facto* challenge to the application of a more onerous sentencing provision. The court held that such an application does not qualify as plain error and noted the circuit split on the question whether such challenges arise only in context of mandatory ("binding") law: the Sixth and Seventh Circuits conclude that *Booker* makes the guidelines advisory and thus outside the *ex post facto* clause's ambit; the Eighth and D.C. Circuits conclude that the clause does apply to such applications of the advisory guidelines. Declining to decide whether *ex post facto* claims arising from the application of evolving sentencing guidelines are viable after *Booker*, the court held that because the issue is unsettled, the error cannot be plain.

United States v. Rodarte-Vasquez, 488 F.3d 316 (5th Cir. 2007). The court found that applying the 2003 Sentencing Guidelines would violate the *ex post facto* clause when those guidelines broadened the application of an enhancement over prior guidelines. In this case, the defendant would not have received an enhancement under the prior version of §2L1.2(b)(1)(A)(vii) for an earlier conviction of "alien smuggling . . . committed for profit." The subsequent amendment of the Guidelines deleted the element of "for profit" and thus widened the application of the enhancement.

United States v. Olis, 429 F.3d 540 (5th Cir. 2005). "Courts are required to 'use the Guidelines Manual in effect on the date that the offense of conviction was committed.' The guidelines add, 'If a defendant is convicted of two offenses, one before and one after the effective date of the revised edition of the guidelines, the revised edition applies to both offenses.'" "[C]onspiracy 'is a continuing offense' and '[s]o long as there is evidence that the conspiracy continued after the effective date of the [amendments to the] guidelines, the *Ex Post Facto* Clause is not violated.' Moreover, unless a conspirator effectively withdraws from the conspiracy, he is to be sentenced under the amendments to the guidelines, even if he did not commit an act in furtherance of the conspiracy after the date of the new guidelines, or did not know of acts committed by other co-conspirators after the date of the new guidelines, where it was foreseeable that the conspiracy would continue past the effective date of the amendments." *See also United States v. Arledge*, 553 F.3d 881 (5th Cir. 2008) (holding the defendant committed at least one overt act that extended beyond 2001; thus, is was not error for the court to use the 2006 version of the guidelines instead of the 2001 version).

United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir. 2003). "'A sentencing court must apply the version of the sentencing guidelines effective at the time of sentencing unless application of that version would violate the *Ex Post Facto* Clause of the Constitution.' Such a violation occurs when application of a current guideline 'results in a more onerous penalty' than would application of a guideline in effect at the time of the offense."

United States v. Domino, 62 F.3d 716 (5th Cir. 1995). "Section 1B1.11 of the Sentencing Guidelines instructs a sentencing court to use the guidelines manual in effect on the date that a

defendant is sentenced, unless the court determines that 'use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution,' in which case the court should use the version of the guidelines in effect on the date that the offense of conviction was committed. 'A criminal law is *ex post facto* if it is retrospective and disadvantages the offender by altering substantial personal rights.' A sentence that is increased pursuant to an amendment to the guidelines effective after the offense was committed violates the *ex post facto* clause."

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.2 Second Degree Murder

See United States v. Hicks, 389 F.3d 514 (5th Cir. 2004), §2K2.1.

§2A2.2 Aggravated Assault

United States v. Williams, 520 F.3d 414 (5th Cir. 2007). In a case of first impression where the defendant held a dangerous weapon and "swung it" at the victim, the court adopted the Eighth and Third Circuit test for what constitutes "otherwise used" under §2A2.2(b)(2)(B), that is "instances involving pointing a weapon" require enhancement for "otherwise used" and amount to conduct that is more than mere "brandishing."

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001). The district court did not err in sentencing the defendant under the most analogous guideline, §2A2.2, for an offense of intoxication assault rather than under §2A1.4. Looking to other circuits, the court found that the Eighth Circuit in particular has held that both guidelines, in different cases, were the most analogous to the crime of vehicular battery.

United States v. Perrien, 274 F.3d 936 (5th Cir. 2001). "'More than minimal planning' [under §2A2.2] includes, among other things, taking 'significant affirmative steps . . . to conceal the offense.'" In this case, the Fifth Circuit determined the district court did not err in applying a two-level sentencing enhancement for the defendant based on "more than minimal planning." The defendant was convicted of assault within the "special maritime and territorial jurisdiction of the United States" after he was determined to have abused his two daughters. The Fifth Circuit determined the enhancement was proper because the defendant acknowledged hurting the children, not seeking medical attention, and initially claiming not to know what was wrong with the children. These acts constituted sufficient affirmative actions to conceal his crime.

United States v. Price, 149 F.3d 352 (5th Cir. 1998). The district court appropriately applied the 6-level enhancement for "permanent or life-threatening bodily injury" rather than the 4-level enhancement for "serious bodily injury" where damage to the victim's hand was permanent and had resulted in a 15 to 25 percent loss of function. The court of appeals rejected the defendant's claim that the 6-level enhancement should be reserved for the most serious

injuries, concluding that the plain language of Application Note 1(h) to §1B1.1[2] encompasses injuries that may not be terribly severe but are permanent. The enhancement punishes not just the severity of the injury, but its duration.

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

United States v. Bowman, 632 F.3d 906 (5th Cir. 2011). In upholding a 4-level enhancement under USSG § 2A3.1(b)(1), the Fifth Circuit noted that such enhancement was not barred merely because the defendant was also convicted of brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c). Although a gun was present during the crime, the court found that there was force independent of the gun used to commit the aggravated sexual abuse.

United States v. Roberts, 270 F. App'x 349 (5th Cir. 2008). The court determined that §2A3.1 was the appropriate guideline to apply to sexual acts coerced by a jailer.

United States v. Bell, 367 F.3d 452 (5th Cir. 2004). The court considered a challenge to application of the 2-level enhancement under §2A3.1 for "the victim sustain[ing] serious bodily injury." The guidelines define the term §1B1.1, Application Note 1(I) as "injury . . . requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." The facts supporting the enhancement included the police officer's determination that the victim needed to be taken to the hospital because of his physical condition, the victim's overnight hospitalization with a variety of medical complaints, and the swelling of the victim's face as though he had been beaten. The court concluded that the district court did not err in enhancing the defendant's sentence for causing serious bodily injury.

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). "The Criminal Sexual Abuse Guideline, §2A3.1(b)(5), states, under the Specific Offense Characteristics subsection, that '[i]f the victim was abducted, increase by 4 levels.' The Criminal Sexual Abuse Guideline itself does not define 'abduction.' However, the commentary to the Application Instructions defines 'abducted' to mean 'that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute abduction.'" "[T]he term 'forced to accompany' was not meant to preclude adjustments where the force applied was by means of 'veiled coercion' rather than brute physical strength." In this case, the court of appeals determined that the enhancement was proper when the defendant tricked a seven-year-old girl into performing oral sex on him and telling her that what occurred was their little secret. The court of appeals explained that defendant "was able to isolate the victim by dominating her lack of intellectual ability, and also by appealing to the credulous nature of a seven-year-old."

[2]"Permanent or life-threatening bodily injury" is now defined in Application Note 1(J). *See* USSG App. C, Amend. 651.

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

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

Part B Basic Economic Offenses

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

Loss Issues (§2B1.1(b)(1))

United States v. Hebron, ___ F.3d ___, 2012 WL 2161406 (5th Cir. 2012). In this government benefits fraud case, the Fifth Circuit held that the district court did not err by including some amounts of legitimately obtained benefits in the loss calculation, because it was not reasonably practicable to distinguish the fraudulently obtained benefits from those benefits that were legitimately obtained. "[A]lthough the government generally bears the burden of showing that the alleged intended loss was garnered by fraudulent means, where the government has shown that the fraud was so extensive and pervasive that separating legitimate benefits from fraudulent ones is not reasonably practicable, the burden shifts to the defendant to make a showing that particular amounts are legitimate. Otherwise, the district court may reasonably treat the entire claim for benefits as intended loss."

United States v. Bernegger, 661 F.3d 232 (5th Cir. 2011). A district court clearly errs in calculating the loss amount for purposes of USSG §2B1.1(b)(1) when it relies on the PSR's bare assertions. "Although a PSR 'maybe considered as evidence by the court when making sentencing determinations,' bare assertions made therein are not evidence standing alone. In the absence of evidence supporting its characterization of the loans, the PSR is inadequate to support the inclusion of the loan amounts in the loss calculation." (quoting *United States v. Ford*, 558 F.3d 371, 376 (5th Cir. 2009)).

United States v. Lige, 635 F.3d 668 (5th Cir. 2011). The use of the retail prices of the cellular phones, rather than the wholesale prices, was the proper method to determine intended loss under USSG § 2B1.1(b)(1) for purpose of sentencing a defendant convicted of illegal possession of unauthorized access devices relating to a fraudulent scheme to obtain cellular phones from telecommunications providers. The court found that the retail price was a valid

measure of the pecuniary value of the intended loss of the phones, as providers offered the phones for sale in the retail market.

United States v. McMillan, 600 F.3d 434 (5th Cir.), *cert. denied*, 131 S. Ct. 504 (2010). The court held that where a trial court could not reasonably calculate the defendants' inflicted losses on a company which, although victimized by fraud, was already struggling financially, the court was justified in calculating loss based upon the defendants' salaries. The latter represented the gain to the defendants from their various offenses.

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009). Intended loss in a case where a sitting state judge received a bribe to rule in favor of one of the parties could be reduced by "the intrinsic value that case may have had if litigated before an impartial judge."

United States v. Brown, 354 F. App'x 216 (5th Cir. 2009). The fact that a co-defendant was acquitted of conspiracy in a scheme to defraud Medicare does not, on its own, mean the defendant will not be responsible for the relevant conduct (and losses) of the entire scheme. The defendant must provide evidence to rebut the government's evidence of her participation in the overall scheme.

United States v. Crawley, 533 F.3d 349 (5th Cir. 2008). When a local union official committed fraud to be elected president of the local labor union, the sentencing judge determined that the intended loss constituted the defendant's salary and pension for a several year period. On appeal, the circuit court concluded that the sentencing judge's reasonable estimate of the intended loss was not "clearly erroneous." The defendant also argued that any loss figure should be reduced by the amount of "legitimate services" he provided the union, but the sentencing judge determined that there were no "legitimate services" provided since he procured the position by fraud. The Fifth Circuit concluded that this determination by the sentencing judge was a "reasonable conclusion."

United States v. Goss, 549 F.3d 1013 (5th Cir. 2008). In a mortgage fraud case the sentencing judge disallowed credit for collateral over which the defendant had no control or ownership interest, relying upon circuit precedent for this determination. The Fifth Circuit concluded that the real property involved in the instant case was distinguishable from the movable collateral that was the subject of the circuit precedent. The Fifth Circuit held that immovable collateral, whether or not pledged by the defendant, should be credited against the loss calculation. The court remanded this case for further proceedings to determine actual loss, specifically for the sentencing judge to determine what collateral was likely recoverable and what that collateral's fair market value was at the time of the initial sentencing so that the defendant's loss figure could be reduced by the amount recoverable at the time of initial sentencing.

United States v. Klein, 543 F.3d 206 (5th Cir. 2008). A doctor who improperly over-billed insurance carriers for medicine he provided to patients should still get credit for the value of medicine properly delivered to patients. The sentencing judge's failure to do so was reversible error.

United States v. Neal, 294 F. App'x 96 (5th Cir. 2008). In a case where the actual loss was calculated at $150,000 but the intended loss was over $11 million, inclusion of the intended loss was "proper" under §2B1.1, particularly in view of the nature of the scheme which sought to leave thousands of workers without worker's compensation coverage. Moreover, the sentencing court's decision to sentence at the high end of the range was not an abuse of discretion given the sentencing court's careful consideration of the sentencing factors.

United States v. Austin, 479 F.3d 363 (5th Cir. 2007). The defendant argued that assets pledged as a result of bankruptcy proceedings "relate back" to when the bankruptcy petitions were filed (prior to the discovery of the instant fraud) and he should receive a credit against loss for those assets. The defendant also argued that once the bankruptcy proceedings were initiated, through no fault of his own, he could not pledge assets to the creditor victims until the bankruptcy reorganization plan was approved subsequent to discovery of the instant fraud. The court rejected this argument, stating that "a good faith intent to repay" does not satisfy the credit against loss rule.

United States v. Holbrook, 499 F.3d 466 (5th Cir. 2007). A defendant who pled guilty to mail fraud objected to the sentencing court's calculation of loss which did not include "collateral value" of a software company the victim bank acquired via lien prior to discovery of the fraud. At the time of sentencing, the software company did have value; however, the software company was not producing a profit prior to the time the victim bank took it over via lien and, subsequently, the victim bank had to invest $10 million to make the company profitable. The defendant pointed to the commentary under §2B1.1, Application Note 3(E)(ii), which states that loss shall be reduced by "the amount the victim has recovered at the time of sentencing." The defendant did not contest the sentencing court's finding that the value of the software company at the time of the sentencing was "either entirely or almost entirely" due to the victim bank's investment, but rather argued for a "literal interpretation" of Note 3(E)(ii). The court declined to share the defendant's interpretation of the guideline application note and stated that the victim bank's subsequent investment into the software company was "not part of the collateral" since it was not part of the property the defendant initially pledged to the victim bank.

United States v. Geeslin, 447 F.3d 408 (5th Cir. 2006). "Under subsection 2B1.1(b), the amount of loss is a factor in determining the appropriate sentence. The application notes define loss as the greater of the actual loss and the intended loss. Actual loss, the only loss relevant here, is 'the reasonably foreseeable pecuniary harm that resulted from the offense.'" The guidelines provide for a credit against loss where the victim of the fraud receives money or the fair market value of the property from the defendant or other persons acting jointly with the defendant before the offense was detected. The application notes define a victim as "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."

United States v. Olis, 429 F.3d 540 (5th Cir. 2005). "Although otherwise amended in 2001, the guideline covering securities fraud has continuously provided that a sentencing court should use the greater of actual or intended loss. The guidelines measure criminal culpability in theft and economic crimes according to their pecuniary impact on victims. Actual loss, which is

at issue here, 'means the reasonably foreseeable pecuniary harm that resulted from the offense.' Moreover, actual loss 'incorporates [a] causation standard that, at a minimum, requires factual causation (often called 'but for' causation) and provides a rule for legal causation (*i.e*., guidance to courts regarding how to draw the line as to what losses should be included and excluded from the loss determination).'" In calculating loss in a "cook the books" securities fraud case, the sentencing court must consider the "numerous extrinsic market influences as well as the soundness of other business decisions by the company." This case includes a fairly thorough discussion about how to calculate loss in different types of securities fraud cases.

United States v. Onyiego, 286 F.3d 249 (5th Cir. 2002). "'Section 2B1.1(b)(1) increases the base offense level on a graduated scale according to the amount of the victims' loss.' . . . 'Loss' under this sentencing guideline provision means 'the value of the property taken, damaged, or destroyed.' Typically, this value is the 'fair market value of the particular property at issue.'" In this case, the defendant argued that the value written on the stolen blank airline tickets did not reflect the fair market value of the tickets. He maintained that the fair market value was better estimated by the amount he actually received for the stolen tickets. The court of appeals explained that "[t]he black market value of the blank airline tickets—*i.e*., [the] proceeds from the sale of the tickets—is not the same as the fair market value of those tickets." The court of appeals reasoned that "[o]ne assumes that the black market price of a stolen good will reflect a discount from the fair market price (*i.e*., value) of that good" and that "[f]ew, if any, persons knowingly pay the full market price for a stolen good." The court of appeals explained that when the district court has little evidence of the fair market value of the stolen property, the application notes to the guidelines "allow the sentencing court to use other reasonable means to ascertain the level of loss to the victim." In this case, "the district court measured the loss as the amount billed by the airlines to the victim." The court of appeals determined that "[c]alculating losses in this fashion was entirely appropriate."

Victim Table (§2B1.1(b)(2))

United States v. Isiwele, 635 F.3d 196 (5th Cir. 2011). A defendant convicted of health care fraud is eligible for the mass marketing enhancement under USSG §2B1.1(b)(2)(A)(ii) on the basis of the face-to-face recruitment of Medicare/Medicaid beneficiaries by a "recruiter" he instructed.

United States v. Setser, 568 F.3d 482 (5th Cir. 2009). The court held that in a Ponzi scheme, it was proper for the district court to give the defendant credit for the money that was returned to investors, but to offset those credits when the money was reinvested into the scheme. The court held that it was also "reasonable to conclude that investors became 'victims' again when they reinvested." Thus, the court stated, it was proper for the district court to count as victims investors who had initially invested before the defendant became involved in the conspiracy, but who reinvested while the defendant was part of the conspiracy.

United States v. Conner, 537 F.3d 480 (5th Cir. 2008). Credit account holders fully reimbursed by the credit account companies for fraudulent charges to their accounts are not "victims" under §2B1.1(b)(2). The court so reasoned because such account holders have not ultimately suffered any pecuniary harm. The court refused to adopt the Eleventh Circuit's

interpretation of the term "victim" to include anyone who suffers a loss due to the fraud, no matter how fleeting.

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008). The court noted that the sentencing judge correctly identified the number of victims through the use of the indictment. The number of victims, for the purposes of multiple victim enhancement or loss calculation, should not be limited to those who testify at trial.

United States v. Telles, 272 F. App'x 415 (5th Cir. 2008). The sentencing judge did not err when he determined that the defendant was responsible for over 250 victims in a case that involved theft from a mailbox, relying upon the specific rules with respect to theft of mail from panel or cluster boxes discussed in §2B1.1. Application Note 4(C)(ii)(II) makes clear that the number of victims for a mail theft is presumed to be the number of mailboxes "in each cluster box or similar receptacle." The defendant failed to rebut the presumption created by the commentary.

Theft From the Person of Another (§2B1.1(b)(3))

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

Misrepresentation (§2B1.1(b)(9))

United States v. Reasor, 541 F.3d 366 (5th Cir. 2008). The court examined the scope of the enhancement under §2F1.1(b)(4)(A) (now §2B1.1(b)(9)), a 2-level enhancement for an offense that involves a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. The court determined that the application of the enhancement does not require that the solicitation or conduct exploit the victim's altruistic impulses. Thus, a defendant bookkeeper who used her access to church bank accounts to enrich herself was misrepresenting that she was "acting wholly on behalf" of the victim and the sentencing court properly applied the enhancement.

Financial Institution (§2B1.1(b)(15))

United States v. Sandlin, 589 F.3d 749 (5th Cir. 2009). When applying the enhancement under (b)(14)(A) for a defendant who derived more than $1 million in gross receipts from a financial institution "as a result of the offense" the government must show that the receipts were derived as a result of the violation of the statute. "This inquiry focuses on the actions of the bank." Finding that the record was largely devoid of evidence related to this issue, the Fifth Circuit reversed and remanded for resentencing.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds,* 130 S. Ct. 2896 (2010). The sentencing judge erred when he applied the 4-level enhancement under §2F1.1(b)(8)(A) (2000).[3] The court reasoned that the 4-level enhancement for jeopardizing the safety and soundness of a financial institution did not apply because the "retirement plans" effected by the defendant's actions were not "financial institutions." While Application Note 19[4] specified that "pension funds" are considered "financial institutions" for the purposes of enhancement, the court declined to include retirement plans within the scope of pension funds. The court found that the retirement funds differ from pensions because there is no defined benefit, and further noted that the retirement funds have no registration requirement with the SEC or CFTC. Based on the aforementioned, the court stated, "We are unprepared to declare every corporate retirement vehicle a 'financial institution.'"

United States v. Gharbi, 510 F.3d 550 (5th Cir. 2007). A defendant argued that the enhancement under then §2B1.1(b)(13)(A) (now (b)(15)(A)) for deriving more than $1 million in "gross receipts" from one or more financial institutions should not apply. The defendant noted that a significant amount of the proceeds of fraudulently obtained loans went to pay off legitimate pre-existing mortgages and liens on the properties which were subject to the fraudulent loans. The court concluded that what the defendant suggested would be "net receipts," not the "gross receipts" called for in the guideline enhancement. The court noted that the defendant "borrowed the full amount listed," and even if the funds to extinguish liens did not go to him directly, he enjoyed the benefit.

§2B3.1 <u>Robbery</u>

United States v. Gonzales, 642 F.3d 504 (5th Cir. 2011), *cert. denied,* 132 S. Ct. 1091 (2012). The guideline covering conspiracies, USSG §2X1.1, applies in calculating a defendant's guideline range for conspiring to interfere with commerce by robbery in violation of the Hobbs Act, rather than a robbery guideline.

United States v. Johnson, 619 F.3d 469 (5th Cir. 2010). For purposes of §2B3.1(b)(4)(A), a person is "abducted" if he is "forced to accompany an offender to a different

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[3]Section 2F1.1 was deleted by consolidation with §2B1.1. *See* USSG App. C, Amend. 617.

[4]Now *see* Application Note 1 of §2B1.1.

location." The court held that a person may be "abducted" and the enhancement applied "even though the victim remained within a single building."

United States v. Aguirre, 277 F. App'x 521 (5th Cir. 2008). The defendant objected to the application of the 3-level enhancement under §2B3.1(b)(2)(E) for using his hand under his shirt as if it were a concealed weapon and argued that it was "unwarrantedly harsh." The court disagreed and stated that a concealed hand may serve as an object which appears to be a dangerous weapon. *See also United States v. Dunigan*, 555 F.3d 501 (5th Cir. 2009) (upholding the sentencing court's determination that a BB gun pointed at the head of a bank teller was both a "dangerous weapon" and "otherwise used" for purposes of applicable guideline sentencing enhancements).

United States v. Mitchell, 366 F.3d 376 (5th Cir. 2004). In this appeal, the Fifth Circuit determined that §2B3.1(b)(3) operates as a strict liability provision. The court stated that the guideline requires an increase if any victim sustained bodily injury because the guideline "contains no requirement that the injury be reasonably foreseeable or that the defendant be culpable for the injury beyond committing the base offense." In addition, the court stated, §1B1.3(a)(3) "states that determinations are to be based on 'all harm that resulted from the acts and omissions specified in subsection (a)(1) and (a)(2).'" The court explained that these "guidelines contain no additional culpability requirement." Consequently, the court determined that a defendant is strictly liable for any injury a victim suffers as a result of his acts.

United States v. Franks, 230 F.3d 811 (5th Cir. 2000). "Sentencing Guideline §2B3.1(b)(2)(A-F) provides enhancements for sentencing in a robbery conviction for the use of a firearm, use of a dangerous weapon, or for an express threat of death made by the defendant during the course of a robbery. However, Application Note 2 to §2K2.4 provides that where a defendant convicted of robbery is also convicted under 18 U.S.C. § 924(c) or § 929(a) for the use of a firearm in connection with a robbery and sentenced under the mandatory provisions for those offenses, 'any specific offense characteristic for the possession, use, or discharge of a firearm (*e.g.*, §2B3.1(b)(2)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense.' [I]t is clear that under the[se] sentencing guideline provisions. . . ., the offense level for robbery may not be enhanced for the use of a firearm if the defendant has also been convicted of using a firearm during that robbery, which carries a mandatory sentence." In this case, the court of appeals determined that "an express threat of death may not be used to enhance a defendant's sentence under §2K2.4 when he is also convicted of a violation of § 924(c) if the threat of death is related to 'the possession, use, or discharge' of the firearm for which he was convicted under § 924(c)."

§2B5.3 <u>Criminal Infringement of Copyright or Trademark</u>

United States v. Beydoun, 469 F.3d 102 (5th Cir. 2006). For the purposes of calculating loss in a trafficking in counterfeit goods case, the value of goods "made or controlled" is used, not the value of goods actually sold. Even if the defendant never sold a single counterfeit item, he remains accountable for infringing items produced with the intent of sale.

United States v. Yi, 460 F.3d 623 (5th Cir. 2006). While a sentencing judge may base the loss figure in a trafficking in counterfeit goods case on the retail value of the infringed (bona fide) item to "provide[] a more accurate assessment of the pecuniary harm" to the trademark owner, this cannot be done without evidence of the pecuniary harm to the victim companies.

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

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

United States v. Barraza, 655 F.3d 375 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1590 (2012). Application of §2C1.1(b)(2)'s 4-level enhancement for having been an elected public official or any public official in a high-level decision-making or sensitive position is not impermissible double-counting.

United States v. Barraza, 655 F.3d 375 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1590 (2012). The district court may consider uncharged additional bribes, where they are relevant conduct attributable to the charged bribery offense, in applying the 2-level increase for offenses involving more than one bribe under §2C1.1(b)(1).

United States v. Guzman, 383 F. App'x 493 (5th Cir. 2010). After a jury convicted the defendant, a prison guard, of accepting inmates' family members' bribes in exchange for smuggling contraband, the district court determined he was a "public official in a high-level decision-making or sensitive position" and enhanced his guideline range by four levels pursuant to §2C1.1(b)(3). On appeal, the court concluded that §2C1.1(b)(3) reaches prison guards, who necessarily are public officials occupying "sensitive" positions with power to affect the integrity and/or workings of the judicial and law enforcement systems. "Such power within the judicial system makes the position of prison guard a sensitive position under the sentencing guidelines."

United States v. Mann, 493 F.3d 484 (5th Cir. 2007). Even when convictions for extortionate acts are reversed or acquitted, those acts may still form the basis of an enhancement for "more than one bribe or extortion" under §2C1.1(b)(1). This conduct still constitutes "relevant conduct" for the purposes of enhancement.

United States v. Snell, 152 F.3d 345 (5th Cir. 1998). A juror qualifies as a "government official" in a "high-level, decision-making or sensitive position" within the meaning of §2C1.1(b)(2)(B). The defendant pled guilty to a charge of bribery under 18 U.S.C. § 201(b)(2)(A) for taking a bribe from criminal defendants on whose jury he sat as a foreman. The sentencing court enhanced the defendant's sentence by eight levels under §2C1.1(b)(2)(B). The Fifth Circuit upheld the enhancement, stating that jurors occupy a central position in the criminal

justice system that is at least equivalent to that of the other public service officers, such as judges and prosecutors, explicitly mentioned in the application note.[5]

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))

United States v. Greenough, 669 F.3d 567 (5th Cir. 2012). "We . . . hold that U.S.S.G. § 2D1.1(a)(2) applies only when the second prong [], i.e. that death or serious bodily injury results, is also part of the crime of conviction."

United States v. Carbajal, 290 F.3d 277 (5th Cir. 2002). "Section 2D1.1(a)(2) establishes a base offense level of 38 if the defendant is convicted of drug trafficking under 21 U.S.C. § 841(b) 'and the offense of conviction establishes that death or serious bodily injury resulted from use of the substance.'" In this appeal, the Fifth Circuit determined that this provision is "a strict liability provision that applies without regard for common law principles of proximate cause or reasonable foreseeability." Based on this determination, the court upheld an enhancement based on two overdose deaths that resulted from the use of heroin sold by the defendant's organization.

Drug Quantity (§2D1.1(a)(5))

United States v. Conn, 657 F.3d 280 (5th Cir. 2011). In calculating drug quantity, "the determination of the quantity of pseudoephedrine to be used to calculate an offender's base offense level is a question of fact."

United States v. Tushnet, 526 F.3d 823 (5th Cir. 2008). The court ruled that use of the "presumed weight" of 250 mg per MDMA pill suggested by the typical weight per unit table in the application notes of §2D1.1 was appropriate even when the DEA had determined that the pills analyzed contained 100mg of MDMA. The Court noted that the guidelines reflect that the weight of a "controlled substance" refers to the entire weight of any mixture or substance containing a detectible amount of MDMA as well as any fillers or other ingredients.

United States v. Culverhouse, 507 F.3d 888 (5th Cir. 2007). The fact that two occurrences both involve the same substance (methamphetamine) but are otherwise remote temporally (over three years apart), have "no distinct similarities," and lack "a common source, supplier, destination or *modus operendi*," would not support a finding of similarity and inclusion of the remote amount into relevant conduct for enhancement. *See also United States v. Rhine*, 583 F.3d 878 (5th Cir. 2009) (where a defendant's earlier alleged conduct involved large

[5]The enhancement set for in §2C1.1(b)(2)(B) is currently located in §2C1.1(b)(3) and provides for a 4-level enhancement or a minimum offense level of 18. *See* USSG App. C, Amend. 666.

quantities and the charged conduct involved small quantities, a common purpose seems to be lacking).

United States v. Clark, 389 F.3d 141 (5th Cir. 2004). A district court may properly consider drug amounts intended for personal use when calculating the base offense level for a defendant convicted of participating in a drug conspiracy.

United States v. McWaine, 290 F.3d 269 (5th Cir. 2002). The district court did not err in applying §2D1.1(c)(1) to determine the base offense level for a defendant convicted of 21 U.S.C. § 841(b)(1)(c) (2001). The defendant asserted that the application of §2D1.1(c)(1) to convictions under 21 U.S.C. § 841(b)(1)(c), is to evade *Apprendi*. The defendant argued that Application Note 10 and the background information in §2D1.1 make clear that the different subsections providing base offense levels for differing drug quantities correspond to the different drug quantity levels provided for in section 841(b)(1)(A)-(C). Therefore, the defendant maintained that the district court had the discretion to determine the base offense level for his conviction within the range allowed by §2D1.1(c)(8)-(14) only. The defendant also claimed that the use of §2D1.1 to determine his base offense level was unconstitutional because that subsection is only applicable when a defendant is convicted under section 841(b)(1)(A). The court looked to *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000), to reject the defendant's arguments. In *Doggett*, the court held that "if the government seeks enhanced penalties based on the amount of drugs under 21 U.S.C. § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt." The *Doggett* court further "held that *Apprendi* only applies when the defendant is sentenced above the statutory maximum and that *Apprendi* has no effect on the district court's determination of drug quantity under [§2D1.1]." Based on *Doggett*, the Fifth Circuit held that the district court did not err in applying §2D1.1 to determine McWaine's offense level because McWaine was not sentenced to more than the statutory maximum that section 841(b)(1)(c) permits.

United States v. Allison, 63 F.3d 350 (5th Cir. 1995). "If the district court is sentencing the defendant based on the size and capability of the [methamphetamine] laboratory, it is the size and production capacity of the laboratory, not the actual amount of methamphetamine seized, that is the touchstone for sentencing purposes."

United States v. Pardue, 36 F.3d 429 (5th Cir. 1994). In this appeal, the Fifth Circuit determined that Amendment 488 to §2D1.1(c), which incorporated a new method for calculating the quantity of Lysergic Acid Diethylamide (LSD) to be used in determining a defendant's offense level and guideline range, operates retroactively. Thus, the defendant could move to reduce his sentence on grounds that he was sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered.

Dangerous Weapon (§2D1.1(b)(1))

United States v. Zapata-Lara, 615 F.3d 388 (5th Cir. 2010). "Before a sentencing court can apply § 2D1.1(b)(1), the government must prove weapon possession by a preponderance of the evidence. It can do that in two ways. First, it can prove that the defendant personally possessed the weapon, by showing a temporal and spatial relationship of the weapon, the drug

trafficking activity, and the defendant. To make that showing, the government must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred. . . . 'Alternatively, when another individual involved in the commission of an offense possessed the weapon, the government must show that the defendant could have reasonably foreseen that possession.'" A sentencing court errs by applying the enhancement without making the requisite findings that the defendant personally possessed the weapon or that the defendant could reasonably have foreseen a co-participant's possession of the weapon.

United States v. Molina, 530 F.3d 326 (5th Cir. 2008). The defendant argued that the guidelines are internally inconsistent and lead to disparity because the conduct of carrying a firearm in relation to a drug trafficking crime can either be prosecuted as a separate substantive criminal offense (18 U.S.C. § 924(c)) or as a two-level sentencing enhancement at the prosecutor's discretion. The court disagreed and stated that this does not create an unwarranted sentencing disparity as the Commission was "fully aware" of 18 U.S.C. § 924(c) when it constructed the guidelines and any disparity resulting from the government's charging decisions is not unwarranted as long as the decision is not based on an unjustifiable standard such as race. Substantial deference is granted to the government's charging decisions, including what measurement of punishment to seek, and since the defendant does not argue any vindictive motive in the government's decision, the court declined to accept his argument.

United States v. Bustos-Useche, 273 F.3d 622 (5th Cir. 2001). "The [s]entencing [g]uidelines provide for a two-level increase in a defendant's offense level for possession of a dangerous weapon. The commentary suggests adjusting the offense level if the weapon was present during the commission of the offense, 'unless it is clearly improbable that the weapon was connected with the offense.' 'Possession of a firearm will enhance a defendant's sentence . . . where a temporal and spatial relationship exists between the weapon, the drug-trafficking activity, and the defendant.'" In this case, the defendant maintained the enhancement was improper because he did not possess the weapon to assist himself in committing the offense and that he never used the weapon or showed it to anyone during the commission of his offense. The court of appeals observed that the defendant had the weapon with him when he boarded a vessel upon which cocaine was loaded, the defendant was responsible for accounting for the cocaine, and the firearm remained in the defendant's possession until he threw it overboard. The court viewed this evidence as establishing a sufficient connection between the weapon and the offense. The court of appeals stated that it would not reverse the enhancement simply because the defendant did not "display or brandish" the firearm. *See also United States v. Cisneros-Gutierrez*, 517 F.3d 751 (5th Cir. 2008) (holding that a firearm located in the bedroom closet of a residence, along with illegal narcotics, will sustain an enhancement for possession of a dangerous weapon under §2D1.1(b)(1).); *United States v. Partida*, 385 F.3d 546 (5th Cir. 2004) ("[A] §2D1.1 enhancement is proper when a law enforcement agent possesses a weapon at the time he uses his official position to facilitate a drug offense. . . . [T]his enhancement applie[s] even when the officer does not brandish, display, or have active use of the firearm during the offense."); *United States v. Cooper*, 274 F.3d 230 (5th Cir. 2001) (stating that although firearms are "tools of the trade" in drug conspiracies, the government must still "demonstrate that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant" for the enhancement to apply).

Craft or Vessels Carrying a Controlled Substance (§2D1.1(b)(3)(C))

United States v. Bautista-Montelongo, 618 F.3d 464 (5th Cir. 2010). Application of the 2-level enhancement pursuant to USSG §2D1.1(b)(2)[(C)] (now found at §2D1.1(b)(3)(C)) for acting, *inter alia*, as a "pilot [or] captain . . . aboard any craft or vessel carrying a controlled substance" does not require that the defendant possess any special skills or licenses. The district court's application of the enhancement was properly supported by its finding that the defendant drove a boat containing contraband.

Importation of Amphetamine or Methamphetamine (§2D1.1(b)(5))

United States v. Rodriguez, 666 F.3d 944 (5th Cir. 2012). The Fifth Circuit affirmed the district court's application of the §2D1.1(b)(4) enhancement for an offense involving the importation of methamphetamine (now found at §2D1.1(b)(5)), even though the defendant took possession of the drugs after they had already been imported, because "[t]he scope of actions that 'involve' the importation of drugs is larger than the scope of those that constitute the actual importation." The Fifth Circuit did not resolve whether the enhancement includes an implicit *mens rea* knowledge requirement because, it held, there was adequate evidence to infer that the defendant knew the methamphetamine she possessed had been imported from Mexico.

United States v. Serfass, ___ F.3d ___, 2012 WL 2161401 (5th Cir. 2012). The §2D1.1(b)(5) sentencing enhancement for the importation of amphetamine or methamphetamine contains no scienter requirement. The enhancement applies "regardless of whether the defendant had knowledge" of the importation.

Unlawful Discharge, Emission, or Release (§2D1.1(b)(13)(A)).

United States v. Sauceda, 596 F.3d 279 (5th Cir. 2010). For §2D1.1(b)(10)(A)'s 2-level enhancement for an unlawful discharge to properly lie (now found at §2D1.1(b)(13)(A)), the government must prove by a preponderance that the unlawful discharge violated one (or more) of the statutes listed in Application Note 19.

Safety Valve (§2D1.1(b)(16))

United States v. Leonard, 157 F.3d 343 (5th Cir. 1998). A drug defendant need not face a mandatory minimum sentence in order to be entitled to a downward sentencing adjustment under §2D1.1(b)(6) (now (b)(16)). The provision, providing for a decrease of two offense levels if the criteria of §5C1.2 ("safety valve") are met, applies on its face, as a "specific offense characteristic," regardless of whether or not the defendant is subject to a mandatory minimum sentence.

§2D2.1 <u>Unlawful Possession; Attempt or Conspiracy</u>

United States v. Dodson, 288 F.3d 153 (5th Cir. 2002). "One goal of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which 21 U.S.C. § 851 is a part, was to make the penalty structure for drug offenses more flexible. Whereas the prior version of the

statute made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions. Accordingly, the statute established in § 851 includes the requirement that the government inform defendants of its decision to seek enhancement and the prior convictions to be relied upon in the proposed enhancement. Although the information in the indictment and PSI might serve to inform [the defendant] of the government's knowledge of his prior conviction, it does not accomplish the main purpose of § 851 which is to inform the defendant that the government intends to seek a sentencing enhancement based on that conviction. [A defendant's] lack of surprise and admission of his prior conviction cannot overcome the government's failure to file the information required by § 851."

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit[6]

United States v. Miles, 360 F.3d 472 (5th Cir. 2004). Medicare is not a financial institution under §2F1.1 in the 2001 version of the *Guidelines Manual*. In this case, the government conceded that under *United States v. Soileau*, Medicare is not a financial institution within the meaning of the relevant guideline. The court observed that the provision at issue in *Soileau* was identical in the 2001 Guidelines. *See also United States v. Soileau*, 309 F.3d 877 (5th Cir. 2002).

United States v. Magnuson, 307 F.3d 333 (5th Cir. 2002). "Former . . . §2F1.1(b)(3) has since been repealed and replaced by current . . . §2B1.1(b)(2)(A)(ii)." In this case, the defendant contended that a two-level enhancement under §2F1.1(b)(3) for using "mass-marketing" in the commission of his offense was improper because his act of placing a newspaper advertisement is passive, unlike solicitation by telephone, mail, or the Internet. "The sentencing guidelines define mass-marketing as a 'plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; . . . or (C) invest for financial profit." The Fifth Circuit stated that the "definition of 'mass-marketing' is not limited to the listed mediums—it explicitly contemplates 'other means' of mass-marketing." The court explained that "§2F1.1(b)(3) merely requires advertising that reaches a 'large number of persons.'"

United States v. Brown, 186 F.3d 661 (5th Cir. 1999). The court held that an adjustment to restitution does not necessarily affect loss enhancement. The defendant pled guilty to wire fraud which resulted from a fraudulent warranty claim. The district court applied a 6-level enhancement because of its determination that the loss was $75,104.18. After the sentencing was completed, the government advised the court that the restitution to the victim insurance companies and individuals was actually lower and it gave the figure of $67,938.72. The district court lowered the restitution amount accordingly. The defendant argued that this moved him out of the $70,000 to $120,000 range and that he should only have received a 5-level enhancement for the loss. The Fifth Circuit rejected that argument because adjustments in a restitution figure

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

do not necessarily translate into corresponding decreases in the loss amount. In this case, the court determined that the defendant's loss amount still exceeded $70,000 because there was no adjustment in the amount defendant owed to one of the victims.

United States v. Izydore, 167 F.3d 213 (5th Cir. 1999). A bankruptcy trustee's fees are not to be included in the calculation of the amount of loss from a bankruptcy fraud. Section 2F1.1 defines loss as "the value of the money, property, or services unlawfully taken." Bankruptcy trustees' fees are consequential damages, according to the Fifth Circuit, and the commentary to §2F1.1 makes clear that, as a general rule, consequential losses are not to be included in a loss calculation. Because consequential losses are to be considered in certain circumstances enumerated by the commentary to §2F1.1, the court stated that this evidenced an intent by the Sentencing Commission to omit consequential damages from the general loss definition. In this case, the trustees' fees were incurred after the defendant's criminal conduct was completed and, therefore, should not have been included in the defendant's loss determination.

United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996). "The language of [former] §2F1.1(b)(6) [was] mandatory, directing the court to 'increase by 4 levels' if the factual predicates of the enhancement are met." In this case, the district court did not apply the enhancement because the victim insurance company was insolvent due to the failure of its reinsurer prior to the fraud and prior to the defendant's involvement in the conspiracy. The district court reasoned that once an institution becomes insolvent, it has no 'safety' or 'soundness' which may be substantially jeopardized. The court of appeals disagreed and determined that the enhancement applied. The court of appeals explained that "[a] defendant who perpetrates fraud with respect to an already insolvent institution may still 'substantially reduce benefits to . . . insureds' or cause the institution to be unable 'on demand to refund fully any deposit, payment, or investment' over and above the consequences of the initial insolvency." The court of appeals stated that "[a]lthough the language 'as a consequence of the offense' mandates a causal connection between the fraud and the loss, . . . this language [does not] require that all losses associated with a given institution be directly attributable to fraud."

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). "Application Note 7(b) to [former] §2F1.1 provide[d] that '[i]n fraudulent loan application cases . . . the loss is the actual loss to the victim. . . . However, where the intended loss is greater than the actual loss, the intended loss is to be used.'" Thus, the district court must calculate the "intended" amount of loss in order to apply the guideline.

United States v. Godfrey, 25 F.3d 263 (5th Cir. 1994). "Section 2F1.1(b)(2) allows a two-level increase if the defendant (A) engaged in more than minimal planning *or* (B) engaged in a scheme to defraud more than one victim." In this appeal, the defendant maintained that the district court "improperly 'double counted' in adjusting his sentence level upward by four levels for being a leader or organizer under . . . §3B1.1(a) and by two levels for more than minimal planning and for involvement in a scheme to defraud more than one victim under §2F1.1(b)(2)." The court of appeals explained that the guidelines "do not forbid all double counting. Double counting is impermissible only when the particular guidelines in question forbid it." Because neither §3B1.1 nor §2F1.1 forbid double-counting with each other, the court stated that increases

under both of those sections are permitted.

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

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

United States v. Alfaro, 555 F.3d 496 (5th Cir. 2009). The court determined that the 2-level enhancement for exercising custody, care, or control over the victim minor applied in this case where the defendant was the brother-in-law of the victim and that the enhancement was meant to "apply broadly" to the actual relationship between the victim and the defendant rather than the legal custody of the victim.

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

United States v. Goluba,only (5th Cir. 2012). A sentencing court may refuse to apply the §2G2.2(b)(1) adjustment based on the defendant's uncharged conduct. According to the court, subsection (b)(1) applies "only when a defendant's *conduct* was limited to the receipt or solicitation of material involving the sexual exploitation of a minor that the defendant did not intend to distribute. Nothing in its language suggests that the *conduct* must be limited to the conduct expressly constituting the charged offense."

United States v. Bacon, 646 F.3d 218 (5th Cir. 2011). The defendant's admitted molestation of two of his daughters was sufficient for the "pattern of activity involving the sexual abuse or exploitation of a minor" enhancement under §2G2.2(b)(5) to apply to his conviction for child pornography possession, regardless of when it occurred or whether it was "related" to his possession of child pornography. The court noted that "all that is necessary under the plain language of [the enhancement] and its commentary are two or more separate instances of sexual abuse or exploitation of a minor."

United States v. Perez, 484 F.3d 735 (5th Cir. 2007). In a case where the defendant claimed he had not seen "most" of the child pornography found on CD-ROM discs at his home, the court reasoned that there was still sufficient evidence that the defendant intended to possess "prepubescent and sadistic/masochistic images or had reckless disregard for his possession of them" based on his admission to having seen some of the files, that the titles of the files had names summarizing the contents, and that some files were labeled "kiddie porn."

United States v. Willingham, 497 F.3d 541 (5th Cir. 2007). While Sentencing Commission statistics may show a disparity between the average §2G2.2 sentence and the advisory guideline range, there is "no indication that the disparity is unwarranted." National

averages that do not include details underlying the sentence are "unreliable" to determine disparity because they do not reflect the aggravating and mitigating factors that distinguish individual cases. Such statistical evidence from a broad range of cases is "basically meaningless" with regard to a particular defendant. In this case, a sentencing court's departure based on sentencing data that showed an average sentence lower than the calculated guideline range was ruled to be clear error.

United States v. Paul, 274 F.3d 155 (5th Cir. 2001). The district court did not err in applying §2G2.2 as the appropriate sentencing guideline rather than §2G2.4 because the government showed sufficient proof that there was an indication of the defendant's intent to traffic in child pornography. The district court found that email exchanges between the defendant and another man in which the defendant spoke about posting on pornographic websites and about sending the other man copies of books containing child pornography were sufficient evidence of an intent to traffic in child pornography. The defendant argued that the books he intended to send constituted a gift and that he really did not intend to send the books. The defendant also argued that the government failed to prove that the books themselves actually contained child pornography. The Fifth Circuit found that the defendant's arguments lacked merit because he obtained hundreds of images of child pornography from the Internet and there were significant indications that he posted images on a child pornography website at some point. *See also United States v. Simmonds*, 262 F.3d 468 (5th Cir. 2001) (holding that "even purely gratuitous dissemination of child pornography is considered 'distribution'"); *United States v. Hill*, 258 F.3d 355 (5th Cir. 2001).

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[7]

United States v. Buchanan, 485 F.3d 274 (5th Cir. 2007). Encrypted computer files which contain multiple image files hidden within them are not to be counted as "items" for enhancement under §2G2.4(b). Rather, the number of image files themselves, contained within an encrypted file, shall be counted individually for purposes of enhancement.

United States v. Gonzalez, 445 F.3d 815 (5th Cir. 2006). "The . . . provision, §2G2.4(b)(5), was enacted in the 2003 PROTECT Act, which failed to address, and thus left undisturbed, its predecessor from 1991, §2G2.4(b)(2). . . . We are satisfied that the PROTECT Act, which became effective on April 30, 2003, and includes the new, graduated scale of enhancements inserted as §2G2.4(b)(5) of the [g]uidelines, superseded §2G2.4(b)(2). There is a distinguishing difference between the routine tweakings of the [g]uidelines scheme by the Sentencing Commission acting on its own and changes expressly wrought by a direct congressional amendment with an effective date set by Congress. And, the Sentencing Commission itself subsequently recognized that the PROTECT Act's insertion of §2G2.4(b)(5) 'superceded' §2G2.4(b)(2)." *See also United States v. Paul*, 274 F.3d 155 (5th Cir. 2001); *United States v. Simmonds*, 262 F.3d 468 (5th Cir. 2001), at §2G2.2.

[7]Deleted by consolidation with §2G2.2

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release[8]

United States v. Dadi, 235 F.3d 945 (5th Cir. 2000). The enhancement under this guideline "can only be imposed after sufficient notice has been given to the defendant by either the government or the court. Notice must be given at the time of the defendant's release from custody in order to be deemed sufficient. . . . [F]ailure by the releasing judge to give the defendant notice of the § 3147 enhancement bars the sentencing judge from applying it later."

Part K Offenses Involving Public Safety

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

United States v. Smith, 354 F.3d 390 (5th Cir. 2003). In a case of first impression, the Fifth Circuit, consistent with the Third, Sixth, and Eleventh Circuits, determined that a hotel room counts as a "dwelling" within the meaning of §2K1.4(a)(1)(B), regardless of whether it is occupied at the time of the crime.

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

Base Offense Level (§2K2.1(a))

United States v. Price, 516 F.3d 285 (5th Cir. 2008). The court adopted the reasoning developed in *United States v. Gonzalez*, 484 F.3d 712 (5th Cir. 2007), when applying an enhancement based on a prior "drug trafficking offense" under §2L1.2(b)(1)(A)(I). In this case, the defendant received an alternate base offense level of twenty pursuant to §2K2.1(a)(4)(A) based on a prior "controlled substance offense." The court of appeals noted that the prior offense, a violation of Texas state law, included a broader range of offenses than a "controlled substance offense" under the guidelines. The court determined, as in *Gonzalez*, that the Texas statute criminalized "offers to sell" which are not covered in the guideline definition of "controlled substance offense." Further noting that the guideline definitions of "controlled substance offense" under §2K2.1 and "drug trafficking offense" under §2L1.2 have "nearly the same definition," and neither would include an "offer to sell" as suggested under the Texas statute, the court stated that "the language of the indictment allowed [for a] conviction for offering to sell" and since such a conviction does not fit within the definition an enhancement for such a prior conviction is in error.

United States v. Ford, 509 F.3d 714 (5th Cir. 2007). The defendant received an alternate base offense level of 20 pursuant to §2K2.1(a)(4)(A) based on a prior "controlled substance offense." Objecting to the enhancement, the defendant suggested that his prior Texas state court conviction for "possession with intent to deliver" had previously been ruled to fall outside the definition of "controlled substance offense" as defined under §2K2.1 (and also under

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

§2L1.2(b)(1)(A)(I), defining "drug trafficking offense"). The court distinguished this case by noting that the prior cases examined charges of "delivery" or "transportation" under the Texas statute in question, rather than "possession with intent to deliver" specifically, which, the court reasoned is sufficiently analogous to the guideline definition of "controlled substance offense" which includes offenses that prohibit "possession . . . with intent to . . . distribute." *See also United States v. Le*, 512 F.3d 128 (5th Cir. 2007).

United States v. McCowan, 469 F.3d 386 (5th Cir. 2006). The defendant argued that because there was no evidence that he possessed the firearm and marijuana simultaneously, the district court erroneously applied the enhancement for "unlawful user of a controlled substance" under §2K2.1(a)(6). On appeal, the court noted that "unlawful user" as defined in 27 C.F.R. § 478.11 states "a person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person [. . .] possesses a firearm." The court also noted that the evidence in the case showed that the defendant had recently tested positive for use and admitted daily use of the drug and therefore implicitly fell into the category of "unlawful user."

United States v. Riva, 440 F.3d 722 (5th Cir. 2006). Section 2K2.1 "provides for a base offense level of 24 if a defendant has at least two prior felony convictions for crimes of violence. That section adopts the definition of 'crime of violence' as provided in U.S.S.G. §4B1.2 and its commentary." "In determining whether a prior conviction is a 'crime of violence' under the residual clause of §4B1.2(a)(2), th[e] court takes a categorical approach and may only look to the relevant statute and in certain circumstances to the conduct alleged in the charging document. . . . [A] prior conviction is considered a crime of violence under the residual clause 'only if, from the fact of the indictment, the crime charged or the conduct charged presents a serious potential risk of injury to a person. Injury to another need not be a certain result, but it must be clear from the indictment that the crime itself or the conduct specifically charged posed this serious potential risk.' When a statute provides a list of alternative methods of committing an offense, [the court] may look to the charging papers to determine by which method the crime was committed in a particular case." In this appeal, the court of appeals determined that the defendant's prior conviction for "unlawful restraint of a person less than 17 years of age is a crime of violence under the residual clause of §4B1.2(a)(2) because it 'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" *See United States v. Turner*, 305 F.3d 349 (5th Cir. 2002), at §4B1.2.

United States v. Kirk, 111 F.3d 390 (5th Cir. 1997). As an issue of first impression, the Fifth Circuit determined that a conviction for the Texas offense of sexual indecency with a child involving sexual contact constituted a crime of violence. The court referred to the definition of "crime of violence" in §4B1.2(a)(2), which states that a crime of violence is an offense punishable by imprisonment for a term exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The court analogized to an opinion about 18 U.S.C. § 16, indecency with a child involving sexual contact. The reasoning in such cases presumes that adults are larger and stronger than children, and there is always the risk that an adult will use physical force to ensure his victim's compliance. Whenever there exists a risk of physical force, there exists a risk that physical injury will result. The court explained the threat of violence in such cases is inherent in the size, age and authority position of an adult dealing with a

child. The facts of this case were such that the defendant lured his victim, an eight-year-old boy, into a secluded area of a local park using deceit and then sexually molested the boy. The court characterized this conduct as a crime of violence. *See also United States v. Mohr*, 554 F.3d 604 (5th Cir. 2009) (holding that a South Carolina conviction for stalking was a "crime of violence" for the purposes of enhancement under §2K2.1(a)(4)(A) under the categorical approach, because the defendant's indictment showed that he was charged with placing the victim "in reasonable fear of great bodily injury" and that such conduct met the definition of crime of violence as it presented a "serious potential risk of physical injury to another").

Number of Firearms (§2K2.1(b)(1))

United States v. Houston, 364 F.3d 243 (5th Cir. 2004). "Section 2K2.1(b)(1)(A) . . . imposes a two-level enhancement if a firearms-offense 'involved' between three and seven firearms. For purposes of calculating the number of firearms 'involved' in a given offense, courts are to consider only those firearms unlawfully possessed. Possession may be actual or constructive. 'Constructive possession' is ownership, dominion, or control over the item itself, or control over the premises in which the item is concealed. Although a defendant's exclusive occupancy of a place may establish his dominion and control over an item found there, his joint occupancy of a place cannot, by itself, support the same conclusion. In cases of joint occupancy . . . constructive possession [exists] only where there is evidence supporting a plausible inference that the defendant had knowledge of, and access to, the item." In this case, the defendant was arrested in a hotel room. He advised the arresting officer about two firearms in the room. The officers, however, found a third firearm in the purse of the defendant's wife. The court of appeals determined that no evidence indicated that the defendant had constructive possession of the pistol in the purse. "The gun was not in plain view, [the wife]—not [the defendant]—disclosed the location of the gun, and [the defendant] expressed to the officers his belief that the room contained two, rather than three, firearms." The "district court's finding of constructive possession rests solely upon [the defendant's] statement during a presentence interview that he had 'the pistol' for protection because his wife had been previously raped." The court of appeals determined that "without more, [the statement] in no way indicates his knowledge of, and access to, the . . . . pistol in [the] purse." As a result, application of the enhancement was improper.

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

United States v. Gifford, 261 F. App'x 775 (5th Cir. 2008). The defendant argued that he should receive a 2-level reduction under §2K2.1(b)(2) because he was simply collecting firearms. While the defendant claimed that he had inherited his father's firearms collection, he then pawned numerous firearms over the course of several months, an act the sentencing court found inconsistent with his stated goal of serving only as caretaker for the collection. Moreover, the defendant admitted that his pawning was done for the purpose of obtaining money, which is not for use in sporting or collection. The court found that the reduction was properly rejected by the sentencing court. *See also United States v. Leleaux*, 240 F. App'x. 666 (5th Cir. 2007) (stating that the defendant was not entitled to the reduction when his stated purpose was to "get rid of" the firearm in question, which indicated that the possession was not for sport or collection, and holding that "§2K2.1(b)(2) requires [the defendant] to show, at least, that his act of possession

was solely for the sporting or collection purposes of some other person").

Stolen Firearm (§2K2.1(b)(4)(A))

United States v. Williams, 365 F.3d 399 (5th Cir. 2004). The enhancement may be applied without a showing that the defendant knew that the firearm was stolen. Moreover, because the adjustment occurs during sentencing when the court's discretionary authority is broad, the adjustment does not offend due process. Here, the defendant was convicted of possessing a firearm while under indictment for a felony. The sentencing court increased his offense level by two levels under §2K2.1(b)(4) because the firearm was stolen. The defendant challenged the enhancement, asserting that application of the enhancement violated his due process rights because he did not know the gun was stolen. The Fifth Circuit upheld the enhancement.

Altered or Obliterated Serial Number (§2K2.1(b)(4)(B))

United States v. Perez, 585 F.3d 880 (5th Cir. 2009). For the purposes of enhancement under 2K2.1(b)(4), where the serial number of a weapon has been "altered or obliterated," the serial number may still be readable for the enhancement to apply. In this case, the defendant possessed a weapon where the serial number appeared to be altered and there was evidence of an attempt to "scratch the numbers off."

Trafficking of Firearms (§2K2.1(b)(5))

United States v. Juarez, 626 F.3d 246 (5th Cir. 2010). The district court's finding that the defendant, who was a straw purchaser of firearms for a third-party, had "knowledge" or "reason to know" that the third-party would unlawfully dispose of the firearms was not clearly erroneous where, among other facts, the transfers occurred near the border, involved over two dozen military-style assault weapons, and were of a dubious nature (e.g., the defendant knew the third-party only by a nickname).

United States v. Green, 360 F. App'x. 521 (5th Cir. 2010). The defendant challenged the application of §2K2.1(b)(5)'s 4-level sentencing enhancement, arguing that the government completely failed to prove the defendant's knowledge that she trafficked firearms to an individual who would use them unlawfully. The defendant bought five Beretta pistols in Texas and then smuggled them to her husband in Mexico. The government objected to the PSR's *lack* of the enhancement and the district court assessed the enhancement after observing that it was "common knowledge" that these type of guns are used by drug-traffickers. On appeal, the court vacated and remanded after noting that "based upon the record before us the Government failed to meet the preponderance of evidence standard to warrant" the enhancement. It further noted "the record is devoid of any evidence showing that [the defendant] knew or had reason to believe that [the gun recipients] intended to use or dispose of the firearms unlawfully."

Use of a Firearm in Connection with Another Offense (§2K2.1(b)(6))[9]

United States v. Juarez, 626 F.3d 246 (5th Cir. 2010). The only offense excluded from the definition of "another felony offense" is the possession or trafficking offense that serves as the basis for the defendant's conviction; thus, another person's illegal possession or trafficking of firearms may serve as the basis for an enhancement under § 2K2.1(b)(6).

United States v. Caldwell, 448 F.3d 287 (5th Cir. 2006). "The plain language of the guideline dictates that the government need not prove that the firearm was actually used in a specific other felony offense; it is enough that a defendant had reason to believe that it would be. While our circuit has not had occasion to examine this particular language of §2K2.1(b)(5)[[10]] in the past, several cases from other circuits support our holding." In this case, the Fifth Circuit explained that although no direct evidence conclusively established the defendant's "understanding of the future use of the firearms, the sentencing court is permitted to make common-sense inferences from the circumstantial evidence." *See also United States v. Condren*, 18 F.3d 1190 (5th Cir. 1994) (holding that the district court correctly found that a firearm located in close proximity to narcotics, fully loaded and readily available to the defendant to protect drug-related activities, was a firearm used in connection with the drug offense); *United States v. Jackson*, 453 F.3d 302 (5th Cir. 2006) (stating that a "felony" for the purposes of §2K2.1(b)(5) will mean any offense (federal, state, or local) punishable by a term of imprisonment exceeding one year whether or not a conviction was obtained and regardless of whether the defendant had been formally charged of any felony offense); *United States v. Villegas*, 404 F.3d 355 (5th Cir. 2005) (finding that the enhancement applies only when the defendant's use or possession of the firearm may have facilitated or made more dangerous the other felony offense, and that, in this case, the possession of the firearm did nothing to facilitate the defendant's use of fraudulent documents or make it a more dangerous crime); *United States v. Luna*, 165 F.3d 316 (5th Cir. 1999) (stating that a defendant who is convicted of possession of stolen firearms, in violation of 18 U.S.C. § 922(j), is not subjected to impermissible double-counting when the sentencing court enhances his offense level under §2K2.1 on the basis of both the fact that he possessed firearms in connection with the burglary in which he stole them, §2K2.1(b)(5), and the fact that the firearms he possessed were stolen, §2K2.1(b)(4)); *United States v. Hughs*, 284 F. App'x 138 (5th Cir.

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[9] This specific offense characteristic was redesignated as §2K2.1(b)(6) effective November 1, 2006. *See* USSG App. C., Amend. 691. In 2006, the Commission also amended §2K2.1(b)(5) (now §2K2.1(b)(6)) to resolve a circuit split concerning the application of the enhancement for the use of a firearm in connection with a burglary and drug offense. In the case of a burglary offense, the enhancement applies to a defendant who takes a firearm in the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In the case of a drug trafficking offense, the enhancement applies where the firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. *See* USSG App. C, amend. 691.

[10] This specific offense characteristic was redesignated as §2K2.1(b)(6) effective November 1, 2006. *See* USSG App. C., Amend. 691.

2008) (concluding that a loaded shotgun in the defendant's van was readily available for use in "drug-related activities").[11]

Cross Reference (§2K2.1(c))

United States v. Hicks, 389 F.3d 514 (5th Cir. 2004). In the course of a police pursuit of his vehicle, the defendant fired shots and a police officer was killed. The defendant was convicted in federal court of possession of firearms and ammunition while subject to a domestic restraining order. The district court applied the cross reference in §2K2.1(c)(1)(B) and used the guideline for second-degree murder (§2A1.2) when sentencing the defendant. He challenged his sentence on appeal, arguing that the court should have applied the involuntary manslaughter guideline (§2A1.4). The Fifth Circuit disagreed, holding that by firing his weapon at the police cruiser which the defendant likely knew to be occupied, he displayed the requisite extreme recklessness and disregard for human life that constitutes malice under federal law sufficient for a finding of second-degree murder. The fact that a state jury acquitted the defendant of capital murder does not mean that he did not commit second-degree murder under federal law. *But see United States v. Johnston*, 559 F.3d 292 (5th Cir. 2009) (holding that the cross reference did not apply when the defendant admitted that she transferred the gun to her boyfriend with the knowledge that it would be possessed in connection with his escape, but not with the knowledge or intent that it would be used in connection with attempted murder).

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

§2K2.4 <u>Use of Firearms or Armor-Piercing Ammunition or Explosive During or in Relation to Certain Crimes</u>

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

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[11] With Amendment 691 in November 2006, the Commission added Application Note 14, which explained that a firearm was used "in connection with" another offense when the firearm facilitated, or had the potential to facilitate another offense.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

Base Offense Level (§2L1.1(a))

United States v. Garcia-Mendez, 420 F.3d 454 (5th Cir. 2005). A prior Texas conviction for second-degree burglary of a habitation qualified as a crime of violence under §2L1.1 because the offense was equivalent to burglary of a dwelling, an enumerated offense under that guideline.

Substantial Risk of Death or Bodily Injury (§2L1.1(b)(6))

United States v. Rodriguez, 630 F.3d 377 (5th Cir. 2011). In finding that the reckless endangerment enhancement set forth in USSG § 2L1.1(b)(6) did not apply, the Fifth Circuit noted that it considers "five [nonexhaustive] factors that determine the propriety of applying § 2L1.1(b)(6)'s reckless-endangerment enhancement: 'the availability of oxygen, exposure to temperature extremes, the aliens' ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs.'" The court noted that the enhancement did not apply merely because there were three aliens in an SUV's cargo area or because the defendant made a U-turn across an interstate highway.

United States v. Mata, 624 F.3d 170 (5th Cir. 2010). The application of USSG §2L1.1(b)(6) "requires a fact-specific inquiry." In applying the 2-level enhancement, district courts should look to five nonexhaustive factors: the availability of oxygen, exposure to temperature extremes, the alien's ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs. "Out of this fact-bound area of the law a few guiding principles have emerged. As to the fourth factor, we have affirmed the enhancement in situations in which it would have been difficult for the alien to extricate herself from the vehicle in the event of an emergency because the alien was jammed into a compartment or wedged into a tight space. We have also upheld the imposition of the enhancement where the aliens, who were being transported in a van, were completely surrounded by boxes 'practically piled up to the top of the van' that were too big for the aliens to easily move. As to the fifth factor, the enhancement is proper only if the aliens would be in greater danger if an accident occurred than 'an ordinary passenger not wearing a seatbelt in a moving vehicle.' As a result, the mere fact that an alien is transported in a portion of the car that is not designed to hold passengers is not, without more, sufficient to support the enhancement."

United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008). It is not error to award a 2-level enhancement for creating a substantial risk of death or serious bodily injury under §2L1.1(b)(5) or an 8-level enhancement under §2L1.1(b)(6),[12] when a defendant arranged for the smuggling of 24 unlawful aliens in south Texas during the summer months. The court concluded that it was "reasonably foreseeable" such harm would come in the harsh environment of the

[12]These sections were renumbered (b)6) and (b)(7) effective November 1, 2006. *See* USSG App. C, Amend. 692.

border in the summertime, even if the defendant did not know the exact methods to be employed by the guides.

United States v. Mateo Garza, 541 F.3d 290 (5th Cir. 2008). Transporting aliens though the brush along the border does not automatically involve a "substantial risk of death or bodily injury," and the court must determine the "entire picture" to justify the 2-level enhancement under §2L1.1(b)(6).

United States v. Rodriguez-Mesa, 443 F.3d 397 (5th Cir. 2006). A smuggled alien's inability to extricate himself from a compartment built in the center console of a minivan may serve as an additional aggravating factor to support an six-level enhancement under §2L1.1(b)(5)[13] for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. In this case, the "compartment was located between the front seats of the vehicle, and there was a door located on top of the compartment. The compartment covered half of [the smuggled alien's] body, including his head and his torso, but his legs extended on to the floorboard of the front passenger's side of the vehicle." The court of appeals explained that the smuggled alien "could not have easily extricated himself from a position where 'his head and upper body were stuffed in the console, and his feet were twisted around underneath the glove compartment.'"

United States v. Villanueva, 408 F.3d 193 (5th Cir. 2005). Section 2L1.1 provides for a 2-level increase where the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. As examples of creating a substantial risk of death or serious bodily injury, the application note for §2L1.1 lists transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, and harboring persons in a crowded, dangerous, or inhumane condition. In this case, the defendant acted as a guide in smuggling 140 undocumented aliens into the United States in a tractor-trailer. The vehicle contained many more passengers than its rated capacity and the trailer was dangerous because of a lack of ventilation. Because this is precisely the conduct addressed by the example, the enhancement was appropriate. *See also United States v. Villagran*, 274 F. App'x 390 (5th Cir. 2008) (stating that the enhancement applied where three aliens traveling in a sealed box under a bunk in the sleeping compartment of tractor-trailer faced "a greater risk than ordinary passengers" in the compartment); *United States v. Richardson*, 275 F. App'x 346 (5th Cir. 2008) (affirming the application of the enhancement where the defendant transported 15 illegal aliens standing in the sleeper compartment of his tractor-trailer while holding on to the walls and ceiling to maintain balance because the risk to the aliens was "greater than that of an ordinary passenger traveling without a seatbelt"); *United States v. Garza*, 587 F.3d 304 (5th Cir. 2009) (affirming the application where two aliens were hidden under the back passenger seat and a child was placed on top of the seat). *But see United States v. Torres*, 601 F.3d 303 (5th Cir. 2010) (enhancement reversed where child hidden in truck's sleeping compartment was near her mother, could speak with her and driver, was not exposed to extreme temperatures, suffered no adverse breathing conditions, and easily exited the truck); *United States v. McKinley*, 272 F. App'x 412 (5th Cir. 2008) (stating that placing four illegal

[13] *Id.*

aliens under a 15 pound mattress in the sleeper compartment of a tractor-trailer *did not* create a "substantial risk" of death or injury, so the enhancement did not apply).

United States v. Cuyler, 298 F.3d 387 (5th Cir. 2002). Transporting four illegal aliens in the bed of a pickup truck on the highway intentionally or recklessly created a substantial risk of death or serious bodily injury to the aliens, justifying an enhancement under §2L1.1, even though state law did not prohibit adults from riding in the bed of a pickup truck. Unrestrained passengers in the bed of a pickup can easily be thrown from the truck and almost certainly would be injured in the event of an accident. *But see United States v. Solis-Garcia*, 420 F.3d 511 (5th Cir. 2005) ("Transporting four aliens lying in the cargo area of a minivan, with no aggravating factors, [does not] constitute an inherently dangerous practice such as to create a substantial risk of death or serious bodily injury to those aliens" to support an enhancement under §2L1.1. Unrestrained passengers in a van are protected by the passenger compartment of the vehicle, have access to oxygen, are not exposed to extreme heat or cold, and can easily extricate themselves from the van.).

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

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

United States v. Bustillos-Pena, 612 F.3d 863 (5th Cir. 2010). The 16-level enhancement provided at §2L1.2(b)(1)(A)(i) is ambiguous as applied to a defendant who was deported before being sentenced to more than thirteen months of imprisonment on a conviction that predated his deportation. Accordingly, in those circumstances, the rule of lenity applies and the district court may not apply the enhancement.

United States v. Henao-Melo, 591 F.3d 798 (5th Cir. 2009). A prior violation of 21 U.S.C. § 843(b), for the use of a telephone to facilitate the commission of a narcotics offense, will not necessarily act as an enhancing prior offense since the statute prohibits some conduct that falls outside of the drug trafficking definition. In such cases the government has the burden to establish that the prior violation falls within the definition.

United States v. Lopez-Sales, 513 F.3d 174 (5th Cir. 2008). This case presented the court with an issue of first impression and the subject of a circuit split, that is, whether a state court legislature's presumption that an offense involved an intent to distribute based on the amount of drugs involved can create a "drug trafficking offense" under the guidelines. The Fifth Circuit agreed with the reasoning of the Sixth, Ninth, and Tenth Circuits and held that the defendant's North Carolina conviction for "sell[ing], manufactur[ing], deliver[ing], transport[ing], or possess[ing] a certain quantity of marijuana" does not constitute a drug trafficking offense under §2L1.2(b)(1)(A)(i). Because the statute included elements, such as "transporting," that could not

be considered under the categorical approach and since the indictment simply tracked the statute and did not offer any specificity, the enhancement did not apply.[14]

United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007). Prior conviction for drug possession, although a felony under Texas law, could not support an 8-level enhancement under §2L1.2(b)(1)(C) because mere possession of a controlled substance is not a felony under the Federal Controlled Substances Act.[15] *But see United States v. Herrera-Garduno*, 519 F.3d 526 (5th Cir. 2008) (holding that a court could consider a defendant's prior Texas drug conviction if it chose to impose a non-guidelines sentence, even if that prior conviction did not qualify for an enhancement as a "drug trafficking offense" under §2L1.2).

United States v. Gonzalez, 484 F.3d 712 (5th Cir. 2007). The defendant's prior Texas conviction for delivery of a controlled substance is not a drug trafficking offense for the purposes of enhancement under §2L1.2(b)(1)(A)(i). "Deliver" as defined in the statute "includes offering to sell a controlled substance." The Fifth Circuit had previously held that offering to sell a controlled substance lies outside §2L1.2's definition of drug trafficking offense. *But see United States v. Ford*, 509 F.3d 714 (5th Cir. 2007) (finding that the same Texas delivery statute at issue in *Gonzales* supports the trafficking enhancement because the indictment specifically referenced the "intent to deliver" portion of the statute, and explaining that "[t]he significant distinction in this case is . . . the conviction here was for possession with the intent to deliver rather than just delivery or transportation."); *United States v. Garcia-Arellano*, 522 F.3d 477 (5th Cir.2008) (holding that a conviction under the Texas state statute for drug trafficking could include conduct, such as delivery of a controlled substance ("offer to sell"), that would not sustain an enhancement for a drug trafficking offense under §2L1.2, but stating that because in this case the defendant produced a written judicial confession that he "knowingly" possessed and transferred a controlled substance, the enhancement applied); *United States v. Sandoval-Ruiz*, 543 F.3d 733 (5th Cir. 2008) (stating that a prior Illinois conviction for "solicitation" to possess a controlled substance is an offense worthy of enhancement because the Illinois statute did not allow for conviction for solicitation or offer to sell without commission of a delivery offense).[16]

United States v. Gutierrez-Bautista, 507 F.3d 305 (5th Cir. 2007). Generally, a prior Georgia conviction for selling and possessing 28 grams or more of methamphetamine (This quote comes from the headnotes, not the actual case) was not a drug trafficking offense under §2L1.2(b)(1)(A)(i) because the Georgia statute included elements that could not be considered "trafficking" under the categorical approach. However, because the indictment in this particular

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[14] The Commission promulgated an amendment to §2L1.2, Application Note 7, with an effective date of November 1, 2008, which includes an upward departure provision in cases where "the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use."

[15] *See supra* Note 14.

[16] The Commission promulgated an amendment to §2L1.2, Application Note 1(B)(iv), with an effective date of November 1, 2008, which adds the term "offer to sell" to the definition of trafficking a controlled substance.

case included enough facts to show that the defendant had admitted to conduct that was specifically covered by the enhancement, the court properly applied the 16-level enhancement.[17]

United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005). A sentencing court may not rely exclusively on a shorthand description of a conviction like an abstract of judgment to determine whether a prior conviction for violating § 11352(a) of the California Health & Safety Code was a "drug trafficking offense." The Supreme Court explained in *Shepard v. United States*, 544 U.S. 13 (2005), that a court is generally limited to examining the statutory definition of the offense, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented in determining whether a prior conviction qualifies as a violent felony. A California abstract of judgment is generated by the court's clerical staff and is not an explicit factual finding by the state trial judge under *Shepard*.

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

United States v. Najera-Mendoza, 683 F.3d 627 (5th Cir. 2012). The district court erroneously concluded that the defendant's prior conviction for kidnapping under Oklahoma law was a "crime of violence" under §2L1.2(b)(1)(A)(ii), because it does not constitute any of the enumerated offenses, nor does it have an element of physical force.

United States v. Esparza-Perez, 681 F.3d 228 (5th Cir. 2012). The defendant's prior conviction under Arkansas law for aggravated assault was not a crime of violence for purposes of §2L1.2(b)(1)(A)(ii), because the particular sub-section of which the defendant was convicted did not match the general contemporary definition of "aggravated assault," nor does it have an element of physical force.

United States v. Diaz-Corado, 648 F.3d 290 (5th Cir. 2011). The district court properly applied the sixteen-level enhancement under §2L1.2(b)(1)(A)(ii) because his prior conviction for the Colorado offense of unlawful sexual contact is a "crime of violence," and specifically, a "forcible sex offense" as defined in the Application Note 1(B)(iii) to §2L1.2. The prior offense "necessarily involved contact with the victim whom [the defendant] knew did not 'cooperate in act or attitude'" with that contact, and thus met the commentary's definition of "forcible sex offense" because of the absence of consent.

United States v. Flores-Vasquez, 641 F.3d 667 (5th Cir.), *cert. denied*, 132 S. Ct. 361 (2011). To determine whether illegal reentry defendant was subject to a 16-level sentence enhancement under §2L1.2 for having previously been convicted of a "crime of violence," on theory that prior offense was one of offenses enumerated in guidelines commentary, the court should employ a "common sense" approach, and examine whether the prior conviction was an enumerated offense, as those offenses were understood in their "ordinary, contemporary, and common meaning."

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[17] *See supra* Note 16.

United States v. Cruz-Rodriguez, 625 F.3d 274 (5th Cir. 2010). The court held that the California offense of wilful infliction of corporal injury is a crime of violence for purposes of §2L1.2(b)(1)(A)(ii) because it punishes the intentional use of force against another person. However, the court held that the California offense of making a criminal threat, like a similar state offense addressed in *United States v. Ortiz-Gomez*, 562 F.3d 683 (5th Cir. 2009), is not a crime of violence for purposes of §2L1.2(b)(1)(A)(ii) because the offense does not necessarily require the threatened use of physical force against another person.

United States v. Martinez-Garcia, 625 F.3d 196 (5th Cir. 2010). The district court properly applied a 16-level enhancement pursuant to§2L1.2(b)(1) where the defendant was convicted of the Georgia offense of burglary, and the record of conviction showed the defendant was specifically charged with burglarizing a "dwelling house." Although §2L1.2 does not permit an enhancement for burglarizing the curtilage of a dwelling, the Fifth Circuit concluded that Georgia law does not include curtilage within the definition of a "dwelling house."

United States v. Mendez-Cesarez, 624 F.3d 233 (5th Cir. 2010). Prior convictions for solicitation can serve as predicate offenses for application of a 16-level enhancement pursuant to §2L1.2(b)(1)(A). Application Note 5 to §2L1.2 provides a non-exhaustive list of offenses (e.g., aiding and abetting, conspiracy, and attempt) that permit the enhancement, to which solicitation is sufficiently similar. The district court did not err in applying a 16-level enhancement based on defendant's prior North Carolina conviction for solicitation to commit assault with a deadly weapon inflicting serious injury.

United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010). On plain-error review, the court held that Texas's injury to a child statute (Tex. Pen. Code. Ann. § 22.04(a)) does not qualify as a crime of violence under §2L1.2. That provision's crime of violence enhancement requires that an offense "have as an element the use, attempted use, or threatened use of physical force." Because the Texas statute could be violated by acting intentionally but *without use of physical force, e.g.*, "putting poison or another harmful substance in a child's food or drink," the offense does not meet this requirement. Therefore, the correct guideline range is 10-16 months and not the erroneously-calculated 51-63 months range used to assess the 60-month sentence. The lack of overlap, coupled with the severe disparity in sentence imposed, compelled remand and resentencing.

United States v. Hernandez-Morales, 378 F. App'x 377 (5th Cir. 2010). Michigan's 3rd degree attempted criminal sexual conduct statute (Mich. Comp. Laws Ann.§ 750.520(d)(1)(b)) qualified for §2L1.2's 16-level enhancement for crime of violence even though the offense can be committed with coercion and not just from the application of physical force.

United States v. Gutierrez, 371 F. App'x 550 (5th Cir. 2010). California's willful infliction of corporal injury statute (Cal. Penal Code Sec. 273.5) qualifies for §2L1.2's 16-level enhancement for crime of violence. Relying on a plain-text reading of the statute criminalizing "willful[] inflict[ion] of . . . corporal injury resulting in a traumatic injury,"and the Ninth Circuit's published opinion in *United States v. Laurico-Yeno*, 590 F.3d 818, 820 (9th Cir. 2010), the court concluded it could not discern "any plausible set of facts that could actually lead to a conviction under Section 273.5 without the use of violent or destructive force."

United States v. Velez-Alderete, 569 F.3d 541 (5th Cir. 2009). The court held that the defendant's prior Texas conviction for arson is a crime of violence pursuant to §2L1.2. The court concluded that "the generic meaning of arson involves the willful and malicious burning of property."

United States v. Guerrero-Robledo, 565 F.3d 940 (5th Cir. 2009). The court held that a prior South Carolina conviction for assault and battery of a high and aggravated nature is a crime of violence pursuant to §2L1.2.

United States v. Munoz-Ortenza, 563 F.3d 112 (5th Cir. 2009). The court held that the defendant's prior California conviction for oral copulation of a minor was not a crime of violence within the meaning of §2L1.2. The court concluded that the crime did not fit within the generic definition of sexual abuse of a minor because it included consensual acts with all persons under age 18, not 16 or 17 like most states.

United States v. Ortiz-Gomez, 562 F.3d 683 (5th Cir. 2009). The court held that the defendant's prior Pennsylvania conviction for a terroristic threat was not a crime of violence for purposes of §2L1.2. The court stated that "[t]here is a realistic probability that [the] Pennsylvania courts would hold that a threat to commit arson with intent to terrorize another would constitute a violation of [the statute]. That crime does not have as an element the use, attempted use, or threatened use of force against a person."

United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009). The defendant's prior New Jersey conviction for aggravated assault is a crime of violence for the purposes of §2L1.2. The court determined there was no practical difference between the Model Penal Code element of "serious bodily injury" and the New Jersey offense's element of "significant bodily injury."

United States v. Ayala, 542 F.3d 494 (5th Cir. 2008). The defendant's prior Texas conviction for indecency with a child constituted sexual abuse of a minor for purposes of §2L1.2, Application Note 1(B)(iii) even if the victim was 17 years old and would be of age for legal consent in some states.

United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008). A prior New York conviction for manslaughter in the second degree without documentation identifying the specific section of the statute violated will not sustain a 16-level enhancement for crime of violence because the New York manslaughter statute includes a broader scope of criminal behavior than the conduct proscribed in the model penal code definition of manslaughter.

United States v. Lopez-DeLeon, 513 F.3d 472 (5th Cir. 2008). The defendant's prior California conviction for sexual intercourse with a minor did not constitute statutory rape for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii) because the statute was too broad. Nevertheless, because the indictment appropriately narrowed the scope of the prior offense, the enhancement was determined to apply. *But see United States v. Castro-Guevarra*, 575 F.3d 550 (5th Cir. 2009) (concluding the defendant's prior conviction under the Texas statute penalizing consensual sexual intercourse with a child qualified for the enhancement as statutory rape or as sexual abuse of a minor).

United States v. Moreno-Florean, 542 F.3d 445 (5th Cir. 2008). The defendant's prior California conviction for kidnapping did not constitute kidnapping for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii) because the statute swept too broadly and could include conduct that does not "substantial[ly] interfere with the victim's liberty" or "expos[e] the victim to a substantial risk of bodily injury," both of which are elements of the Model Penal Code definition of kidnapping.

United States v. Najera-Najera, 519 F.3d 509 (5th Cir. 2008). The defendant's prior Texas conviction for indecency with a child was sexual abuse of a minor for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii).

United States v. Rosas-Pulido, 526 F.3d 829 (5th Cir. 2008), *superseded by regulation as stated in United States v. Diaz-Corado*, 648 F.3d 290 (5th Cir. 2011). The defendant's prior Minnesota conviction for unlawful sexual conduct was not a crime of violence since the offense could be committed through coercion, and conduct that was not forcible as that term is commonly understood would not merit the enhancement.[18]

United States v. Tellez-Martinez, 517 F.3d 813 (5th Cir. 2008). The defendant's prior California conviction for robbery constituted robbery for purposes of the 16-level "crime of violence" enhancement under §2L1.2(b)(1)(A)(ii) because the California definition of robbery falls within the generic or contemporary meaning of robbery.

United States v. Balderas-Rubio, 499 F.3d 470 (5th Cir. 2007). A prior Oklahoma conviction for indecency or lewd acts with a child constituted sexual abuse of a minor for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii).

United States v. Carbajal-Diaz, 508 F.3d 804 (5th Cir. 2007). A prior Missouri conviction for burglary did not constitute burglary of a dwelling for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii) because the statute sweeps too broadly and includes other structures besides dwellings. Nevertheless, because the indictment narrowed the scope of the prior offense, the enhancement was appropriately applied.

United States v. Castillo-Morales, 507 F.3d 873 (5th Cir. 2007). A prior Florida conviction for "burglary" did not constitute burglary of a dwelling for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii) because the Florida statute includes curtilage around the home in the definition of "dwelling," making the statute broader than the common definition of "burglary of a dwelling." Because the defendant stipulated to entering a residence during his plea colloquy, however, the enhancement was properly applied. The court held that when a defendant stipulates that "a factual basis" for his plea is present in "court documents," courts may use any uncontradicted facts in those documents to establish an element

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[18] The Commission promulgated an amendment to §2L1.2, Application Note 1, with an effective date of November 1, 2008, which specifically notes that "forcible sex offenses" include conduct "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced."

of a prior conviction. *See also United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007) (reversing application of the enhancement for a Florida conviction for burglary because the defendant could have been convicted of merely entering a dwelling's curtilage).

United States v. Gonzalez-Ramirez, 477 F.3d 310 (5th Cir. 2007). The defendant's prior Tennessee conviction for attempted kidnapping constituted kidnapping for purposes of the 16-level "crime of violence" enhancement under §2L1.2(b)(1)(A)(ii), because the statute did not "sweep more broadly than the generic, contemporary meaning of 'kidnapping.'"

United States v. Herrera-Montes, 490 F.3d 390 (5th Cir. 2007). Burglary under the Tennessee burglary statute (Tenn. Code Ann. §39-14-402(a)(3)) does not require that the defendant intend to commit a crime at the time of the unlawful entry and therefore such an offense does not meet the definition of a crime of violence for enhancement purposes. *See also United States v. Castro*, 272 F. App'x 385 (5th Cir. 2008) (holding that a burglary conviction under Texas Penal Code §30.02(a)(3) is not a crime of violence under §2L1.2); *United States v. Constante*, 544 F.3d 584 (5th Cir. 2008) (holding that burglary conviction under Texas Penal Code §30.02(a)(3) is not a violent felony for the purposes of enhancement under 18 U.S.C. § 924(e)(1)).

United States v. Muniga-Portillo, 484 F.3d 813 (5th Cir. 2007). The defendant's prior Tennessee conviction for aggravated assault constituted an aggravated assault for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii). The court held that "minor differences" between the state statute of conviction and the model code are acceptable. In this case, the fact that the state code defined "reckless" differently than the Model Penal Code is not fatal to the analysis. *See also United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007) (applying the enhancement based on the Texas "aggravated assault" statute).

United States v. Neri-Hernandes, 504 F.3d 587 (5th Cir. 2007). A prior New York conviction for attempted assault in the second-degree was not automatically a crime of violence (aggravated assault) under §2L1.2(b)(1)(A)(ii). Nevertheless, the enhancement applied because the certificate of disposition established the specific subsection of the statute under which the defendant was convicted.

United States v. Ortega-Gonzaga, 490 F.3d 393 (5th Cir. 2007). A California conviction for entry into a building with intent to commit larceny was not burglary of a dwelling for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii), because the underlying statute lacked the element of "unlawful or unprivileged entry into" the dwelling.

United States v. Rojas-Gutierrez, 510 F.3d 545 (5th Cir. 2007). The defendant's prior California conviction for assault with intent to commit a felony constituted an aggravated assault for purposes of the 16-level crime of violence enhancement under §2L1.2(b)(1)(A)(ii).

United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2006), *superseded by rule as stated in United States v. Rodriguez-Juarez*, 631 f.3d 192 (5th Cir. 2011). In this appeal, the Fifth Circuit determined that the defendant's conviction for the Texas offense of sexual assault did not constitute a crime of violence under §2L1.2(b)(1)(A) because the offense did not require the use

of force as an element. The court explained that Texas Penal Code §22.011 criminalizes assented-to-but-not-consented-to conduct and that the element of force is absent from the applicable subsection of the statute. Consequently, the Fifth Circuit concluded that the district court erred in applying the 16-level enhancement under §2L1.2. *But see United States v. Gomez-Gomez*, 547 F.3d 242 (5th Cir. 2008) (determining that sex offenses committed "using constructive force that would cause a reasonable person to succumb" are "forcible sex offenses," and noting that "force" can mean "pressure" other than physical force, such as psychological intimidation), *superseded by regulation as stated in United States v. Diaz-Corado*, 648 F.3d 290 (5th Cir. 2011).[19]

United States v. Meraz-Enriquez, 442 F.3d 331 (5th Cir. 2006). In this appeal, the Fifth Circuit determined that the defendant's conviction for the Kansas offense of attempted aggravated sexual battery did not constitute a crime of violence under §2L1.2 because the offense did not require the use of force as an element. The court explained that the applicable Kansas statute—Kan. Stat. Ann. §21-3518—provides for some methods of committing the offense that do not require the use of force. Consequently, the Fifth Circuit concluded that the district court erred in applying the 16-level enhancement under §2L1.2.[20]

United States v. Murillo-Lopez, 444 F.3d 337 (5th Cir. 2006). "In determining whether a prior offense is equivalent to an enumerated offense that is not defined in the Guidelines, like 'burglary of a dwelling,' we have said that 'we must define [the enumerated offense] according to its 'generic, contemporary meaning'." "Applying a common sense approach and the ordinary, contemporary and common meaning of the word 'dwelling,' we conclude that *Taylor's* definition of generic burglary, although instructive, does not strictly apply to the specific offense 'burglary of a dwelling' as used in the [g]uidelines. Instead, 'burglary of a dwelling' includes the elements of generic burglary as stated in *Taylor* but it also includes, at a minimum, tents or vessels used for human habitation." The court of appeals determined in this case that the district court could consider the defendant's California burglary conviction as described in the criminal complaint as equivalent to "burglary of a dwelling" and thus could apply §2L1.2's enhancement for a "crime of violence." *See also United States v. Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008) (holding that the defendant's prior California burglary conviction did not constitute burglary of a dwelling for purposes of the 16-level "crime of violence" enhancement under §2L1.2(b)(1)(A)(ii) because the California statute has no subsection requiring "unlawful entry").

United States v. Torres-Diaz, 438 F.3d 529 (5th Cir. 2006). The Fifth Circuit explained that it uses a common sense approach to determine whether a prior conviction constitutes an aggravated assault, and thus a crime of violence, under §2L1.2. The court then compared the meaning of assault in the Model Penal Code with the Connecticut statute—under which the defendant was convicted—for assault in the second degree. Because the court found that the Connecticut statute for assault in the second degree almost exactly tracked the Model Penal Code

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[19] *See supra* Note 18.

[20] *See supra* Note 18.

definition of aggravated assault, it concluded that the defendant's conviction was a crime of violence.

United States v. Alfaro, 408 F.3d 204 (5th Cir. 2005). A prior conviction for the Virginia offense of shooting into an unoccupied dwelling was not a crime of violence for the purposes of a 16-level enhancement under §2L1.2. The Fifth Circuit explained that a sentencing court must look to the elements of a prior offense, not to the facts of the conviction, when classifying a prior offense for enhancement purposes. To determine whether a prior conviction is a crime a violence, "the statute of conviction, not the defendant's underlying conduct, is the proper focus." Shooting into an occupied dwelling is not one of the enumerated offenses that qualify as a crime of violence and the Virginia statute does not have, as a necessary element, the use, attempted use, or threatened use of force against another.

United States v. Garcia-Mendez, 420 F.3d 454 (5th Cir. 2005). The defendant's prior Texas conviction for burglary of a habitation (Texas Penal Code §30.02) is equivalent to the enumerated offense of burglary of a dwelling under §2L1.2. *See also United States v. Cardenas-Cardenas*, 543 F.3d 731 (5th Cir. 2008) (holding that the intervening decision in *James v. United States*, 550 U.S. 192 (2007), did not overrule *Garcia-Mendez*).

United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005). A prior conviction for the North Carolina offense of taking indecent liberties with a child constituted sexual abuse of a minor for purposes of the crime of violence enhancement under §2L1.2. It was not necessary to determine whether the underlying statute of conviction "has as an element the use, attempted use, or threatened use of physical force against another" because sexual abuse of a minor was a specifically enumerated offense under §2L1.2. Instead, the court used a common sense approach in determining whether taking indecent liberties with a child constituted sexual abuse of a minor. Under a common sense approach, "[t]aking indecent liberties with a child to gratify one's sexual desire constitute[d] 'sexual abuse of a minor' because it involves taking undue or unfair advantage of the minor and causing such minor psychological—if not physical—harm." *But see United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc).

United States v. Valenzuela, 389 F.3d 1305 (5th Cir. 2004). Under the applicable state statutes, convictions for the Florida offenses of DUI/bodily injury and DUI/manslaughter did not require the intentional use of force, and thus, prior convictions for those offenses did not justify an 16-level enhancement under §2L1.2 for having been previously convicted of a crime of violence.

United States v. Acuna-Cuadros, 385 F.3d 875 (5th Cir. 2004). A prior conviction for the Texas crime of retaliation does not have as "an element the use, attempted use, or threatened use of physical force against the person of another" for purposes of the 16-level crime of violence enhancement under §2L1.2. Although the actual conduct described in the indictment alleged the use of physical force against the person of another, those allegations were irrelevant in determining whether physical force was an element of the offense. Instead, the court must look to the applicable statute to determine the elements of the offense.

United States v. Dominguez-Ochoa, 386 F.3d 639 (5th Cir. 2004). A prior conviction for the Texas crime of criminally negligent homicide was not equivalent to manslaughter which is an enumerated crime of violence under §2L1.2. Criminally negligent manslaughter did not employ the recklessness *mens rea* necessary for generic manslaughter—criminally negligent homicide was not manslaughter's equivalent.

United States v. Martinez-Paramo, 380 F.3d 799 (5th Cir. 2004). The defendant pled guilty to unlawfully remaining in the United States after a previous deportation. The district court imposed a 16-level crime of violence enhancement pursuant to §2L1.2(b)(1)(A)(ii) for defendant's prior Pennsylvania conviction for making terroristic threats. The Fifth Circuit remanded, stating the record was insufficient to make the determination. The Pennsylvania statute contains three subsections, one which arguably qualifies as a crime of violence and two which arguably do not. Fifth Circuit precedent permits a court to look beyond the fact of conviction to determine the elements of the statute to which defendant pled guilty. Here, however, the record was devoid of an information or indictment charging the defendant with the elements of the terroristic threats offense.

United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2004). The defendant's prior convictions for burglary of a building and unauthorized use of a motor vehicle were not crimes of violence. Neither offense was listed in Note 1(B)(ii)(II) to §2L1.2 as a crime of violence, nor did they require proof of force in order to convict. Accordingly, the district court erred in applying the 16-level crime of violence enhancement.

United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004). A prior conviction for the Texas offense of intoxication assault was not a crime of violence for enhancement purposes under §2L1.2 because it does not have the intentional use of force as an element of the crime. "[T]he intentional use of force must be an element of the predicate offense if the predicate offense is to enhance a defendant's sentence."

United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002). The defendant's prior Texas conviction for injury to a child was not a crime of violence for the purposes of a 16-level enhancement under §2L1.2. Section 22.04(a) of the Texas Penal Code, the statute criminalizing injury to a child, does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child. Moreover, there is no substantial risk that physical force will be used to effectuate the offense because a defendant can be convicted of this crime based upon omissions rather than conscious acts.

United States v. Trejo-Galvan, 304 F.3d 406 (5th Cir. 2002). The defendant's three prior misdemeanor convictions for driving under the influence were not "crimes against the person" that triggered the enhanced penalty provision under 8 U.S.C. § 1326. Because the statute did not define "crimes against the person," the Fifth Circuit considered the common law definition and determined that a "crime against the person" is an "offense that, by its nature, involves a substantial risk that the offender will intentionally employ physical force against another person." Driving under the influence is not a crime against the person because it does not involve a substantial risk that the offender will intentionally use force against another person.

United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001). A prior conviction for the Texas offense of felony driving while intoxicated (DWI) is not a crime of violence. "The crime . . . is committed when the defendant, after two prior DWI convictions, begins operating a vehicle while intoxicated. *Intentional* force against another's person or property is virtually never employed to commit this offense."

United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001). The defendant's prior conviction for the Texas offense of unlawfully carrying a firearm in an establishment licensed to sell alcoholic beverages was not a crime of violence for enhancement purposes under §2L1.2. The Fifth Circuit explained that it does not matter if the defendant's conduct created a risk of violence—what matters is the nature of the crime itself. Rather than requiring physical force, the Texas criminal code required only that the defendant, with intent, knowledge or recklessness, carried a handgun into an establishment which is licensed or permitted to sell alcoholic beverages.

United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001). The defendant's prior conviction for the Texas offense of criminal mischief did not constitute a crime of violence or an aggravated felony. The court recognized that it had previously held "force," within the definition of crime of violence, was "synonymous with destructive or violent force," but stated that in this instance, graffiti was not the type of destructive force considered in those prior cases. Graffiti posed no substantial risk that the defendant was going to use "destructive or violent force" in the commission of the offense.

Aggravated Felony (§2L1.2(b)(1)(C))

United States v. Asencio-Perdomo, 674 F.3d 444 (5th Cir. 2012). The defendant's prior conviction of theft under Indiana law was an "aggravated felony" for purposes of §2L1.2(b)(1)(C). Section 2L1.2(b)(1)(C) incorporates the statutory definition of "aggravated felony" located at 8 U.S.C. § 1101(a)(43), which states that aggravated felonies include "a theft offense . . . for which the term of imprisonment [is] at least one year." The Fifth Circuit held that the statutory "term of imprisonment" language "refers to the actual sentence imposed," rather than the minimum term of imprisonment that may be imposed for committing the prior offense.

United States v. Rios-Cortes, 649 F.3d 332 (5th Cir.), *cert. denied*, 132 S. Ct. 1740 (2011). For purposes of determining whether a prior conviction resulted in a term of imprisonment of at least one year, and thus an "aggravated felony" under §2L1.2(b)(1)(C), the district court appropriately applied the enhancement where: the defendant was previously convicted of a theft offense, he was originally sentenced to two years of imprisonment that was probated for five years, and, upon violation of the terms of probation, he received a reduced sentence to 180 days of imprisonment. In those circumstances, the district court may look to the length of the original, probated sentence in applying the enhancement.

United States v. Portillo-Covos, 373 F. App'x 476 (5th Cir. 2010). Colorado's trespass of an automobile offense (Col. Rev, Stat. 18-4-502) does not qualify for §2L1.2's 8-level aggravated felony enhancement, because "an offender may, in [the] ordinary case, commit the trespass to an automobile offense without any likelihood of employing intentional force against the person or property of another." The court explained that its 1999 opinion in *United States v. Delgado-*

Enriquez, 188 F.3d, 592 (5th Cir. 1999), which held that the same statute does qualify for the same enhancement, did so because the statute consists of two parts and *Delgado-Enriquez* addressed one of those other parts (unlawful entry into a dwelling). The panel further explained that *Delgado-Enriquez* relied, at least in part, on circuit precedents that have since been overruled.

United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009). The court held that, post-*Begay*, the defendant's prior Texas conviction for unauthorized use of a motor vehicle is not an aggravated felony.

United States v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002). A prior conviction for a "misdemeanor" can be used as an aggravated felony under §2L1.2 if it involves a term of imprisonment of at least one year.

United States v. Valdez-Valdez, 143 F.3d 196 (5th Cir. 1998). A Texas deferred adjudication may be considered as a conviction for a felony under §2L1.2.

Felony Conviction (§2L1.2(b)(1)(D))

United States v. Rodarte-Vasquez, 488 F.3d 316 (5th Cir. 2007). The court found that applying the 2003 Sentencing Guidelines would violate the *Ex Post Facto* Clause when those guidelines deleted an element from an enhancement that broadened the category of offenders covered. In this case the defendant would not have received an enhancement under the earlier version of §2L1.2(b)(1)(A)(vii) for an earlier conviction of "alien smuggling . . . committed for profit." The subsequent amendment of the Guidelines deleted the element of "for profit" and thus widened the application of the enhancement.

United States v. Lopez-Coronado, 364 F.3d 622 (5th Cir. 2004). The defendant, who pled guilty to illegal reentry after deportation, received a 4-level enhancement pursuant to §2L1.2(b)(1)(D) for deportation after a felony conviction. After the defendant was sentenced, the commentary to Note 1(A)(iv) to §2L1.2 was amended to provide that the enhancement in subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was 18 years of age unless such a conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. The amendment was not included in the list of retroactive amendments. The Fifth Circuit ruled that the amendment was substantive and therefore did not apply to the defendant retroactively. The court properly counted the defendant's juvenile adjudications as felony convictions under the 2002 guidelines.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 <u>Escape, Instigating or Assisting Escape</u>

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

level reduction provided in §2P1.1(b)(3) because the drunk driving offense for which he was convicted while on escaped status was punishable by a term of one year or more under state law. The defendant acknowledged that the guideline was subject only to rational basis review, and that there was a legitimate governmental purpose for denying offense level reductions to defendants who commit crimes after escaping from federal custody. He argued, however, that the criteria for denying the reduction–focusing on the maximum penalty allowed, rather than the penalty received–was not a rational means for accomplishing this goal. The circuit court disagreed, concluding that the guideline's focus on maximum possible penalty was rational because it reflected the localized determinations of the seriousness of offenses, and such determinations play a significant role in imposing a sentence for escape from federal custody.

Part S Money Laundering and Monetary Transaction Reporting

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

United States v. Charon, 442 F.3d 881 (5th Cir. 2006). In this appeal, the Fifth Circuit determined that it was proper for the district court to consider conduct relevant to the defendant's drug-dealing conduct in calculating the defendant's base offense for his money laundering offense. The defendant maintained that the district court erred by calculating his base offense level for money laundering based on conduct that was related to his drug-dealing conduct rather than based only on the drugs that were directly related to his money laundering offense. The court of appeals explained that "relevant conduct is inherent in the grouping rules under §3D1.2(d)," and reasoned that "analysis under §3D1.2(d) necessarily takes into account the 'relevant conduct' provisions of the [g]uidelines, and §2S1.1(a)(1) [do] not require the court to do anything differently." The defendant in this case also objected to an enhancement for sophisticated money laundering under §2S1.1(b)(3). The court of appeals rejected this argument, explaining that "[§]2S1.1(b)(3) provides that if the offense involved 'sophisticated laundering,' the offense level may be increased by two levels." In this case the defendant gave a third party $20,000 in cash from his drug proceeds, had the third party obtain a cashier's check in the third party's name, and then used that check as a down payment on a piece of property. The Fifth Circuit viewed these actions as a sophisticated scheme to conceal or disguise the defendant's cocaine trafficking proceeds and impede the discovery of his offense.

United States v. McIntosh, 280 F.3d 479 (5th Cir. 2002). Amendment 634, which lowered the base offense levels for money laundering convictions was a substantive amendment, not a clarifying amendment. As a result, the amendment is not applied retroactively.

United States v. Rodriguez, 278 F.3d 486 (5th Cir. 2002). "[U]nless a defendant is convicted under the money laundering statute, money laundering cannot be used against him as relevant conduct to enhance his sentence. However, monies relating to a conviction under the money laundering statute may be considered, and a greater amount of money than is charged in the indictment or proven beyond a reasonable doubt could be considered if it relates to the conviction. In order for the greater amount of money to be considered, the government must prove by a preponderance of the evidence that the money was laundered."

Part X Other Offenses

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

See United States v. Gonzales, 642 F.3d 504 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1091 (2012), §2B3.1.

United States v. John, 597 F.3d 263 (5th Cir. 2010). The court ruled that, in a conspiracy theft case involving improper access to and manipulation of commercial credit account data, a §2X1.1 partially-completed offense reduction was appropriate where numerous acts required for completion of the offenses had yet to occur. The offense conduct, which generated an intended loss of approximately $1.5 million, involved the defendant's access and manipulation of credit account information for over 70 account holders. But the record demonstrated that, as to all but a small handful of those victims, the defendant had yet to take necessary steps to commit the charged crimes as evinced by the district court's finding only the intent to access their credit. The court observed that §2B1.1 Commentary Note 17 directs courts to §2X1.1 when addressing partially-completed offenses. Although the defendant's trial counsel didn't object to the PSR's (erroneous) conclusion that the defendants had completed all necessary acts as to all the victims, the court found error that survived plain-error review. The 3-level reduction plainly applied and, because the record made no suggestion that the district court would have imposed the same (above-guideline) sentence had it considered the correct guideline range, remand was required.

United States v. Cabrera, 288 F.3d 163 (5th Cir. 2002). "Section 2X1.1(a) directs the sentencing court to use the base offense level from the guideline for the substantive offense and to apply 'any adjustments from [that] guideline for any intended offense conduct that can be established with reasonable certainty.'" The reasonable-certainty standard applies only to conduct that was allegedly intended to occur, not to conduct that allegedly did occur.

United States v. Virgen-Moreno, 265 F.3d 276 (5th Cir. 2001). The district court did not err in increasing the defendant's offense level based on factual findings that he was a leader/organizer of the conspiracy. The court held that the record contained ample evidence of his aggravating role, such as the defendant introducing others into the conspiracy. Wouldn't this case be better under §3B1.1?

§2X5.1 Other Offenses

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

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Wilcox, 631 F.3d 740 (5th Cir.), *cert. denied*, 131 S. Ct. 2921 (2011). The district court did not plainly err where it applied the vulnerable victim enhancement set forth in §3A1.1(b)(1) when sentencing a defendant convicted of felony kidnapping of three minors. The Fifth Circuit rejected the defendant's claim that permitting the enhancement based upon the age of the victims resulted in double counting because the statute of conviction explicitly required that the victims be under 18.

United States v. Angeles-Mendoza, 407 F.3d 742 (5th Cir. 2005). A victim must be unusually vulnerable for the enhancement under §3A1.1 to apply. Here, the evidence established that the aliens were physically restrained until payment for their transport was received. The Fifth Circuit determined that the holding of aliens pending payment was not an unusual practice and the record did not establish that the illegal aliens smuggled by the defendants were more unusually vulnerable to being held captive than any other smuggled alien. The court reversed application of the vulnerable victim enhancement and remanded for resentencing.

United States v. Dock, 426 F.3d 269 (5th Cir. 2005). The Fifth Circuit upheld the vulnerable victim enhancement where the defendant helped smuggle 50 undocumented aliens from Mexico by transporting them in a tractor-trailer—many in a two-to-three foot crawl space. During the trip, temperatures inside the trailer reached an estimated 150 degrees. The court explained that a person's illegal status alone does not make a person a vulnerable victim, but here the aliens faced desperate circumstances—they were held in isolation in cramped quarters in New Mexico for almost two weeks waiting for transport; once the smugglers locked them in the truck, they were susceptible to criminal conduct for 12 hours; and they were desperate because they were so far from the border.

United States v. Garza, 429 F.3d 165 (5th Cir. 2005). "[S]usceptibility to the defendant's scheme *alone* is not enough to qualify victims as unusually vulnerable. The victims must also be 'vulnerable . . . members of society' and 'fall in the same category' as 'the elderly, the young, or the sick.'" In this case, the court determined that the victims of the defendant's mail fraud scheme—undocumented aliens—were unusually vulnerable because of their poverty, language problems, and fears of deportation.

United States v. Brugman, 364 F.3d 613 (5th Cir. 2004). "For the two-level enhancement under §3A1.1(b)(1) to apply, the victim must be 'unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct.'" In this case, the defendant, a Border Patrol agent, was convicted of depriving an illegal alien of his constitutional rights while acting under color of law. The victim had been apprehended by other agents and was sitting on the ground when he was kicked by the defendant. The defendant also assaulted a second alien. The Fifth Circuit affirmed a §3A1.1(b)(1) vulnerable victim increase

based on fact that victim alien was immobile, sitting on the ground, and under the supervision of another Border Patrol agent when defendant took advantage of this susceptibility and assaulted him.

United States v. Lambright, 320 F.3d 517 (5th Cir. 2003). "The sentencing guidelines provide for a two-level increase in the base offense level '[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim.' For the enhancement under §3A1.1(b)(1) to apply, the victim must be 'unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct.'" In this case, the defendant-prison-guard assaulted an inmate and maintained on appeal that the district court erred in finding that the inmate was a vulnerable victim. The Fifth Circuit disagreed and explained that the enhancement was appropriate because the inmate "was completely dependent upon the care of the correction officers, . . . was locked in his cell prior to the assault, and . . . could not protect himself from the assault."

§3A1.2 Official Victim

United States v. Williams, 520 F.3d 414 (5th Cir. 2008). The court resolved an issue of first impression by holding that the enhancement under §3A1.2(b) for an assault "motivated by" the "status of the victim" of the offense (when the victim is a government officer), would apply even in a case where the defendant assaulted a prison guard who the defendant felt had improperly touched him. The court reasoned that the sole reason the otherwise personal dispute between the defendant and victim arose was due to the victim's employment and thus concluded that the enhancement properly applied.

United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001). Section 3A1.2 calls for a 3-level enhancement where the victim was a government officer or employee. In this case, the court upheld the enhancement where the evidence showed that the defendant endangered police officers during a high-speed chase by making threatening moves with his car towards police vehicles and almost striking a patrol car.

United States v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994). The defendant argued that this adjustment should not apply because his offense was a victimless crime, relying upon Application Note 1. The court determined that Note 5, rather than Note 1, governs the application of §3A1.2(b). Note 5 explicitly applies to subsection (b); it was added to the guidelines at the same time as subsection (b). Thus, the court concluded that the district court properly applied the adjustment for assault on a law enforcement officer.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Bringier, 405 F.3d 310 (5th Cir. 2005). Section §3B1.1 calls for a 2-level enhancement where the defendant was an organizer, leader, manager, or supervisor in any criminal activity involving less than five participants. In this case, the court found sufficient evidence to show that the defendant was a leader or organizer in a drug scheme. The evidence

showed that the defendant bought and sold over $12 million worth of cocaine, used a courier to transport hundreds of thousands of dollars and approximately 100 kilograms of cocaine, hired cooks to convert cocaine into crack, and paid for a house to use for cooking cocaine. The court also found sufficient evidence to show that the defendant was a leader or organizer in a money laundering scheme. The evidence showed that the defendant recruited someone to purchase property for him, paid that person to purchase the property, and continued to exercise control over the person by using him as an intermediary with respect to the property. The evidence also showed that the defendant recruited someone to purchase a car in his name for the defendant's use, and directed the person with regard to the purchase.

United States v. Turner, 319 F.3d 716 (5th Cir. 2003). A sentence enhancement under §3B1.1(c) is appropriate when the evidence shows the defendant directed another in his drug trafficking activities.

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001). "Proof that the defendant supervised only one other culpable participant is sufficient to make the defendant eligible for the enhancement under [§3B1.1]. There can also be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." *See also United States v. Boutte*, 13 F.3d 855 (5th Cir. 1994) (holding that individuals involved in a criminal activity other than the defendant need not be charged or convicted with the defendant in order to count as participants under §3B1.1).

§3B1.2 <u>Mitigating Role</u>

United States v. Guillermo Balleza, 613 F.3d 432 (5th Cir. 2010). District court did not err by denying a minor role adjustment, where PSR showed that the defendant transported narcotics, counted drug proceeds, personally distributed five kilograms of cocaine, and helped direct the activities of others in the offense.

United States v. Partida, 385 F.3d 546 (5th Cir. 2004). Section 3B1.2(a) calls for a 4-level reduction if the defendant was a minimal participant in a multi-participant criminal activity. In this case, the Fifth Circuit determined that a defendant's assistance in transporting 300 pounds of marijuana by driving a marked patrol car as an escort vehicle was not a minimal contribution to a larger criminal enterprise which trafficked 600 pounds of marijuana. It did not matter that the defendant did not devise the drug trafficking scheme. *See also United States v. Martinez-Larraga*, 517 F.3d 258 (5th Cir. 2008); *United States v. Jenkins*, 487 F.3d 279 (5th Cir. 2007) (stating that a drug courier is not necessarily a "minor participant").

United States v. Atanda, 60 F.3d 196 (5th Cir. 1995). "[W]hen a sentence is based on an activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal."

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

United States v. Pruett, 681 F.3d 232 (5th Cir. 2012). The district court did not clearly err in applying the 2-level enhancement for abuse of a position of trust under §3B1.3 where the defendant, who as the sole shareholder and officer of a corporation, "used his position" to facilitate the corporation's commission of Clean Water Act violations.

United States v. Ollison, 555 F.3d 152 (5th Cir. 2009). An employee who embezzles or steals from his or her employer is never automatically abusing a "position of trust," because merely having access to an opportunity that is not available to the general public is not sufficient. The inquiry should be whether the defendant had a position that required "professional or managerial discretion" and "minimal supervision." The court concluded that Ollison's duties were clerical in nature and did not provide her with "substantial discretionary judgement."

United States v. Ikechukwu, 492 F.3d 331 (5th Cir. 2007). An enhancement under §3B1.3 for an employee of the US Postal Service who steals undelivered mail, which is specifically noted in Application Note 2(A), does not apply to a contractor or third party who has access to undelivered mail but is not "an employee" of the US Postal Service.

United States v. Kay, 513 F.3d 432 (5th Cir. 2007). An enhancement for "abuse of trust" is appropriate in cases involving the Foreign Corrupt Practices Act because it is similar to the court's previous holdings in fraud and embezzlement cases. A company official who bribes a foreign government official occupies a "position of trust" with respect to the foreign government and the shareholders of his company. The foreign government and the company's shareholders need not be "the main victims" of the offense for the enhancement to apply. The court noted that the defendant, based on his authority within the company, "significantly facilitated" the offense and the sentencing court committed no error in applying the enhancement.

United States v. Wright, 496 F.3d 371 (5th Cir. 2007). The court concluded that a mortgage broker occupied a "position of trust" with mortgage lenders even though there was no legally recognizable relationship of trust between the two. The court reasoned that mortgage lenders rely "to some degree" on statements made by brokers in fraudulent lending applications. Thus the enhancement for "abuse of trust" would apply.

United States v. Partida, 385 F.3d 546 (5th Cir. 2004). Section 3B1.3 calls for a 2-level enhancement if the defendant abused a position of public or private trust. In this case, the Fifth Circuit rejected the defendant's argument that the enhancement constituted double-counting with the guideline for his substantive offense, §2C1.1 (extortion under the color of official right). The court explained that the upward adjustment was applied to the defendant's drug offense—§2D1.1—not to the base offense for his extortion offense. Because the base offense levels under §2D1.1 do not account for a position of trust, the court upheld the enhancement under §3B1.3.

United States v. Buck, 324 F.3d 786 (5th Cir. 2003). The guidelines provide that an adjustment may not be applied under §3B1.3 if an abuse of trust or skill is included in the base offense level or specific offense characteristic. The defendant argued that the enhancement did

not apply to her fraud conviction because fraud inherently includes an abuse of trust. The court determined that the enhancement applies to a fraud sentence "where the defendant employed discretionary authority given by her position in a manner that facilitated or concealed the fraud." The court explained that "whether a defendant occupied a position of trust must be assessed from the perspective of the victim." The court determined that the enhancement applied in this case because the defendant was in a unique position, in terms of discretion and ability, to conceal her false reports from the government.

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). The enhancement applied where the evidence showed that the defendant, while acting as police chief, participated in transporting marijuana for a friend and failed to take action against his friend's illegal drug trafficking.

United States v. Iloani, 143 F.3d 921 (5th Cir. 1998). An enhancement under §3B1.3 is appropriate for a physician who acts in concert with his patients to conduct a fraudulent billing scheme on the basis of the physician's relationship with an insurance company. The physician abuses his position of trust with an insurance company by fraudulently billing the company for medical care. *See also United States v. Sidhu*, 130 F.3d 644 (5th Cir. 1997) (stating that an enhancement under §3B1.3 is appropriate for a doctor who abuses the trust of his patients.).

§3B1.4 <u>Using a Minor to Commit a Crime</u>

United States v. Girod, 646 F.3d 304 (5th Cir. 2011). The district court appropriately applied the 2-level enhancement for using a minor to commit the offense pursuant to §3B1.4 (specifically, health care fraud offenses involving fraudulent reimbursement claims) where the evidence showed that the defendant and her children completed false claims forms together, and that those forms were later submitted for reimbursement. This evidence, according to the Fifth Circuit, showed that the defendant's children "were much more than mere passive observers" of the criminal acts and that the defendant "took 'some affirmative action to involve' her minor children" in the offense.

United States v. Robinson, 654 F.3d 558 (5th Cir. 2011). The district court did not err in applying a 2-level enhancement for using a minor in the offense pursuant to §3B1.4, where the evidence showed that the defendant used a minor as a straw purchaser for a cellular phone, which the defendant then used to commit the offense conduct (making a bomb threat). The enhancement, which applies when the defendant used or attempted to use a minor "to commit the offense or assist in avoiding detection of, or apprehension for, the offense," applied because the defendant had the minor purchase the cellular phone in order to avoid detection. The Fifth Circuit further explained that it does not matter that the defendant could have used an adult for the same purpose: "Nothing in the text of §3B1.4 supports the argument that the use of the minor must be tied to her status as a minor."

United States v. Mata, 624 F.3d 170 (5th Cir. 2010). "[A] defendant who makes a decision to bring a minor along during the commission of a previously planned crime as a diversionary tactic or in an effort to reduce suspicion is subject to having her sentence enhanced under §3B1.4. . . . Intentionally using a minor as a decoy is 'use' of a minor under § 3B1.4."

Part C Obstruction

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

United States v. Girod, 646 F.3d 304 (5th Cir. 2011). The district court correctly applied the two-level enhancement for obstruction of justice, even though the defendant's false statements to investigators did not hamper the investigation, because "[s]ection 3C1.1 also provides for a two-level enhancement for *attempted* obstruction or impeding justice."

United States v. Olguin, 643 F.3d 384 (5th Cir.), *cert. denied*, 132 S. Ct. 439 (2011). The sentencing guidelines make clear that obstructive conduct, for purposes of a sentencing enhancement under §3C1.1, can occur at any time in the proceedings, including prior to sentencing. Thus, a defendant's ordering retaliatory hits after his conviction, but before his sentencing, against those who testified for the government, could be characterized as obstruction of justice, supporting an enhancement of his sentence.

United States v. Flores, 640 F.3d 638 (5th Cir.), *cert. denied sub nom by Johnson v. United States*, 132 S. Ct. 336 (2011). The 2-level sentencing enhancement for obstruction of justice under §3C1.1 was warranted for defendants convicted of aiding and abetting possession with intent to distribute phencyclidine (PCP) based on their trial testimony denying any involvement in the production, receipt, or handling of PCP, and denying knowledge or involvement with government witnesses who had been arrested while transporting PCP.

United States v. Alexander, 602 F.3d 639 (5th Cir. 2010). The defendant appealed the application of a 2-level increase for obstruction of justice and argued that a §3C1.1 enhancement should not apply to obstructive conduct that sought to impede a state inquiry which only later gave rise to a federal investigation. The court adopted its earlier reasoning in an unpublished decision to conclude that: "Although the federal investigation may not have been underway when [Alexander] made the [obstructive] phone call, we have previously held . . . that obstruction of a state investigation based on the same facts as the eventual federal conviction qualifies for enhancement even if the obstructive conduct occurred before federal authorities commenced their investigation."

United States v. Trujillo, 502 F.3d 353 (5th Cir. 2007). A defendant who falsely told a probation officer in his presentence interview that he was born in the United States (in an attempt to avoid deportation) was given a 2-level increase for obstruction of justice. While the defendant argued that the statement was not "material," the court concluded that it was material because it could have affected the terms of his supervised release regarding deportation.

United States v. Wright, 496 F.3d 371 (5th Cir. 2007). A defendant that has been told he is "about to be arrested," who then closes the front door, flees out of the back door, and remains out of custody for six weeks will not receive an enhancement for obstruction of justice as he was never in custody. The court ruled that to be liable for an obstruction enhancement for avoiding arrest or escape the defendant must have been under "formal control or restraint."

United States v. Ahmed, 324 F.3d 368 (5th Cir. 2003). The guidelines call for a 2-level enhancement under §3C1.1 if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the offense of conviction. A defendant willfully obstructs or impedes, or attempts to obstruct or impede, an investigation if he makes material statements to law enforcement officers that significantly impede the investigation. In this appeal, the court found no evidence that the defendant's statements caused the law enforcement agents "to go on a 'wild goose chase,' or in any other way misled the agents in the sort of manner that has traditionally been the basis for enhancement."

United States v. Searcy, 316 F.3d 550 (5th Cir. 2002). A "threat not directly communicated to the intended target may serve as the basis for a §3C1.1 enhancement." "[N]othing in the text of the guideline or commentary . . . restricts application of §3C1.1 only to situations in which the defendant directly threatens a witness or communicates the threat to a third party with the likelihood that it will in turn be communicated to the witness."

United States v. Greer, 158 F.3d 228 (5th Cir. 1998). A defendant who unsuccessfully feigns incompetence in order to delay or avoid trial and punishment qualifies for an offense level enhancement for obstruction of justice. So long as the obstruction is willful, the enhancement may apply to defendants with psychological problems or personality disorders. *See also United States v. Juarez-Duarte*, 513 F.3d 204 (5th Cir. 2008) (holding that falsely claiming the need for an interpreter is a "material falsehood" that calls for the enhancement when the false claim "raises uncertainty" in the court's mind as to the validity of the defendant's arraignment, guilty plea, and other proceedings).

§3C1.2 <u>Reckless Endangerment During Flight</u>

United States v. Gould, 529 F.3d 274 (5th Cir. 2008), *cert. granted*, 130 S. Ct. 1284 (2010), and *affirmed sub nom. Abbott v. United States*, 131 S. Ct. 18 (2010). The court determined that simply running from armed officers who had instructed the defendant to stop was not sufficient to sustain the enhancement for reckless endangerment.

United States v. Southerland, 405 F.3d 263 (5th Cir. 2005). Section 3C1.2 provides for a 2-level enhancement if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. Because §1B1.3(a)(1) specifically requires the connection of the enhancement not only to commission, preparation, or evasion, but also to the specific offense of conviction, the court determined that a nexus must exist between the underlying offense and the reckless endangerment during flight for an enhancement under §3C1.2 to apply. The court explained that "[t]he government need not demonstrate that the underlying offense caused either the reckless endangerment during flight or the flight itself, only that a sufficient nexus lie between the underlying offense and the reckless flight."

United States v. Gillyard, 261 F.3d 506 (5th Cir. 2001). The Fifth Circuit upheld the enhancement under §3C1.2 where the defendant's "high-speed chase endangered both police officers and others."

§3C1.3 Commission of Offense While on Release

United States v. Dison, 573 F.3d 204 (5th Cir. 2009). The court held that the sentencing court properly concluded that the guidelines permit the application of the enhancement at §3C1.3 to a conviction for violating 18 U.S.C. § 3146 (failure to surrender for service of sentence). The court found the language of the statute to be "unambiguous" and that it did not lead to an "absurd" result.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Simmons, 649 F.3d 301 (5th Cir.), *cert. denied*, 132 S. Ct. 857 (2011). The defendant was convicted of thirteen counts of using an instrument of interstate commerce to threaten to damage or destroy a building by means of an explosive. Those thirteen counts related to thirteen telephone bomb threats directed at buildings at an army depot, which resulted in twelve evacuations "affecting thousands of employees who were evacuated while security searched for the bombs." The district court did not err in refusing to group the counts of conviction into a single group for sentencing purposes pursuant to §3D1.2, even though the threats were directed at a single army depot, because there were multiple victims of the offenses. Specifically, the Fifth Circuit noted that he threatened the multiple individual recipients of the phone calls and his conduct resulted in "the evacuation of thousands of people from multiple buildings."

United States v. Davidson, 283 F.3d 681 (5th Cir. 2002). The court determined that guidelines Amendment 615, which added text to §3D1.2, may not be retroactively applied because the amendment substantively changed the guideline and the commentary does not classify the amendment as a clarifying amendment.

United States v. Runyan, 290 F.3d 223 (5th Cir. 2002). Section 3D1.2 provides that counts of conviction must be grouped "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Here, the district court erred in grouping three of the defendant's four counts of conviction. The Fifth Circuit stated that the district court incorrectly considered count one, sexual exploitation of a child, by itself, while grouping the three remaining counts, receipt, distribution, and possession of child pornography, together. The defendant received a 5-level enhancement for "engaging in a pattern of activity involving . . . sexual exploitation of a minor" for the group of offenses, thus double-counting the defendant's exploitation offense. The Fifth Circuit stated that the "double counting" increased Runyan's sentence and remanded the case for resentencing.

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). Under §3D1.2, the sentencing judge must group all counts involving substantially the same harm together into a single group. Grouping of money laundering counts with drug trafficking counts is appropriate where the defendant knew that the laundered funds were the proceeds of an unlawful activity involving the distribution of drugs. *See also United States v. Rice*, 185 F.3d 326 (5th Cir. 1999) (holding that defendant's convictions for drug trafficking offenses should be grouped, under §3D1.2, with his

convictions for laundering the proceeds of the drug trafficking).

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

United States v. Martinez, 263 F.3d 436 (5th Cir. 2001). "Under §3D1.3(a) . . . , when counts are grouped together, the applicable offense level is the highest offense level of the counts in the group."

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Williamson, 598 F.3d 227 (5th Cir. 2010). The court addressed the defendant's challenge to the district court's denial of the 1-level reduction for acceptance of responsibility under §3E1.1(b). The defendant had elected trial and, although found guilty, successfully appealed. After the case was remanded, he timely pleaded guilty. Notwithstanding the government's agreement (and motion) that the defendant was entitled to the third point for his timely notification of his intent to plead guilty, the district court refused to award the guideline adjustment. The district court denied that motion after concluding that Williamson's initial decision to elect trial adversely impacted the government and the court's judicial resources. The court found no error in the district court's determination that the defendant did not qualify for the additional reduction. *See also United States v. Tello*, 9 F.3d 1119 (5th Cir. 1993) ("[T]he timeliness required for the defendant to be entitled to the extra 1-level decrease [under §3E1.1(b)(2)] applies specifically to the governmental efficiency to be realized in two-but only two-discrete areas: 1) the prosecution's not having to prepare for trial, and 2) the court's ability to manage its own calendar and docket, without taking the defendant's trial into consideration.").

United States v. Douglas, 569 F.3d 523 (5th Cir. 2009). The court held that "'lack of remorse' and 'acceptance of responsibility' can be separate factors and that a district court may consider each independently of the other." The district court "clearly distinguished the two, first stating that it awarded [the defendant] the §3E1.1 . . . reduction for acceptance of responsibility" because the defendant pleaded guilty, then stating that "it continued to be troubled by various statements by [the defendant] indicating that he 'ha[d] no remorse about what he ha[d] done.'" According to the court, "[a]cceptance of responsibility accounts for the defendant's guilty plea, which relieves the government of the burden of being put to its proof. It is not inconsistent for the district court to have determined that [the defendant] accepted and admitted his culpability for the crime but at the same time demonstrated a lack of remorse for his conduct."

United States v. Newson, 515 F.3d 374 (5th Cir. 2008). The prosecution's failure to move for an additional 1-level acceptance of responsibility sentencing decrease for timely notice of defendant's intention to plead guilty, based solely on defendant's refusal to waive his right to appeal and other postjudgment relief, was not arbitrary or capricious, nor did it amount to unconstitutional motive. The prosecution's decision was rationally related to a purpose of the sentencing decrease, which was to conserve prosecutorial and judicial resources.

United States v. Partida, 385 F.3d 546 (5th Cir. 2004). "[A] defendant is not automatically precluded from receiving a reduction for acceptance of responsibility if he exercises his right to trial." Here, the court explained that a defendant may demonstrate an acceptance of responsibility even though he proceeds to trial if he does so to assert and preserve issues unrelated to factual guilt. In this case, the defendants asserted that they went to trial to preserve the legal issue of entrapment. The court determined the defendants were not entitled to an adjustment for acceptance of responsibility because the entrapment defense challenges criminal intent and thus culpability.

United States v. Outlaw, 319 F.3d 701 (5th Cir. 2003). "[A] district court lacks discretion to deny the additional 1-level reduction under subsection (b) if the defendant is found to have accepted responsibility under subsection (a), the offense level prior to this 2-level reduction is sixteen or greater, and the defendant has complied with the conditions specified in either subsection (b)(1) or subsection (b)(2)." "[A]lthough subsection (b) is part of the 'acceptance of responsibility' guideline, the measure of a defendant's acceptance of guilt or contrition is generally irrelevant to the subsection (b) inquiry. Rather, while the key inquiry for purposes of subsection (a) is whether the defendant has truly demonstrated contrition, once the district court finds the defendant evinces adequate acceptance of his guilt, the inquiry under subsection (b) focuses instead on the functional issues of timeliness and efficiency, with timeliness being 'at the very heart of the third element, assisting authorities.'" *See also United States v. Leal-Mendoza*, 281 F.3d 473 (5th Cir. 2002) ("[A] sentencing judge's reluctance in awarding the two-point reduction for acceptance of responsibility under . . . §3E1.1(a) [has no] bearing on the independent inquiry of whether to award another level reduction under . . . §3E1.1(b).").

United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). "A defendant cannot accept responsibility within the meaning of the sentencing guidelines if his acceptance is the product of repeated warnings by the judge at the sentencing hearing."

United States v. Chung, 261 F.3d 536 (5th Cir. 2001). The Fifth Circuit explained that an obstruction-of-justice enhancement usually means the defendant has not accepted responsibility, but that a defendant's sentence may be both enhanced for obstruction of justice and adjusted for acceptance of responsibility in an extraordinary case.

United States v. Pierce, 237 F.3d 693 (5th Cir. 2001). "In determining acceptance of responsibility, . . . the sentencing judge is not limited to the narrowest set of facts constituting the offense, but may consider Defendant's statements regarding 'relevant conduct' as well."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Henry, 288 F.3d 657 (5th Cir. 2002). Section 4A1.1 permits a sentencing court to add two criminal history points in its calculation "for each prior sentence of

imprisonment" of at least 60 days and not exceeding one year and one month. The rule defines "prior sentence" as "any sentence previously imposed upon adjudication of guilt" if the sentence is "for conduct not part of the instant offense." Here, the district court erroneously included two points in the defendant's criminal history calculation for a prior sentence that was imposed upon an adjudication of guilt for conduct that was part of the offense of conviction. The defendant's federal conviction for possession of a firearm while under a restraining order and state conviction for criminal trespass had resulted from the same conduct.

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

United States v. Brooks, 166 F.3d 723 (5th Cir. 1999). In the Fifth Circuit, physical confinement distinguishes a "sentence of imprisonment" from other types of sentences. In this case, the defendant argued that his boot camp time should not be considered as a term of imprisonment under §4A1.1. The court of appeals disagreed, explaining that the time in boot camp counted as a sentence of imprisonment because the defendant was not free to leave the boot camp.

United States v. Corro-Balbuena, 187 F.3d 483 (5th Cir. 1999). "A two point enhancement under §4A1.1(d) may . . . be applied to increase a §1326 [illegal reentry] defendant's criminal history score when the district court finds . . . that the defendant was under a criminal justice sentence at any time during the pendency of the continuing §1326 offense." "Each or any of [a defendant's] multiple surreptitious and illegal reentries may be used, either as part of the instant offense or as relevant conduct, to support the . . . application of §4A1.1(d)."

United States v. Mota-Aguirre, 186 F.3d 596 (5th Cir. 1999). In this appeal, the court determined that a defendant's conditional pardon acts as the functional equivalent of parole for the purposes of calculating his criminal history score under §4A1.1. The court reasoned that Texas law generally classifies parole as a conditional pardon and parole qualifies under §4A1.1(d) as a criminal justice sentence.

United States v. Robinson, 187 F.3d 516 (5th Cir. 1999). A defendant's prior offenses are part of a common scheme or plan for the purposes of §4A1.1 if they were jointly planned or if it would have been evident that the commission of one would entail the commission of the other.

United States v. Holland, 26 F.3d 26 (5th Cir. 1994). "Under §4A1.2(d)(2)(B), the district court may look to any sentence—juvenile or adult—that was imposed within five years of that date."

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

United States v. Espinoza, 677 F.3d 730 (5th Cir. 2012). The district court erred in treating two of the defendant's prior convictions separately for purposes of calculating his criminal history score under §4A1.2(a)(2) because there was no intervening arrest between the sentences, and the prior convictions were neither charged in the same charging instrument nor were the sentences for those convictions imposed on the same day. The Fifth Circuit held that the district court plainly erred in doing so, even though the two prior convictions were for "demonstrably different offenses."

United States v. Hernandez, 634 F.3d 317 (5th Cir. 2011). In determining whether a defendant's prior crime is "similar to" one of the offenses listed under §4A1.2(c) as being excluded in computing criminal history, the guidelines adopt a common-sense approach which "considers several factors, including (i) a comparison of punishments imposed for the listed and unlisted offenses, (ii) the perceived seriousness of the offense as indicated by the level of punishment, (iii) the elements of the offense, (iv) the level of culpability involved, and (v) the degree to which the commission of the offense indicates likelihood of recurring criminal conduct." The court determined that the defendant's prior state offense of "obstructing a highway or other passageway" was not similar to the offense of "loitering."

United States v. Jasso, 587 F.3d 706 (5th Cir. 2009). The court determined that for the purposes of calculating criminal history points under §4A1.2, the terms "sentence of imprisonment" in §4A1.2(e) and "term of imprisonment" in §4A1.2(k) have substantially the same meaning. Thus, a defendant cannot be given criminal history points for a probationary sentence that falls outside of the time-barred limits even if there is a revocation at a later date.

United States v. Sanchez-Cortez, 530 F.3d 357 (5th Cir. 2008). The court held that the military offense of being absent without leave (AWOL) was not similar to the excluded prior offense of truancy and therefore should be counted when calculating criminal history.

United States v. Lamm, 392 F.3d 130 (5th Cir. 2004). The defendant's prior petty theft conviction was not sufficiently similar to the insufficient funds check offense listed in §4A1.2 to exclude it from the defendant's criminal history. "The offenses are meaningfully different because petty theft poses a risk of physical confrontation, placing others at risk. This risk is heightened if the offender is apprehended during the attempted theft. There is much less risk of physical confrontation for theft by check, just as there is much less risk for [an] insufficient funds check" case. Moreover, in an insufficient funds check offense not involving use of a false name or non-existent account, the identity and account information of the person issuing the check is known, whereas the perpetrator of petty theft is more difficult to apprehend.

United States v. Cade, 279 F.3d 265 (5th Cir. 2002). "[T]he definition of the term 'prior sentence' in §4A1.2 controls the meaning of the term in §4A1.3: 'prior sentence' does not include relevant conduct."

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). "[O]ffenses are part of a common scheme or plan where 'commission of one crime entailed the commission of the other,' *i.e.*, the

second offense could not have occurred but for the first offense." In this case, the defendant complained that the district court failed to treat his prior conviction for tax evasion and his prior federal conviction for drug trafficking as related cases under §4A1.2(a)(2). The court of appeals determined that the offenses should have been considered part of a common scheme or plan because the defendant would not have had the money that he failed to report on his income tax return if not for the drug trafficking.

United States v. Ashburn, 20 F.3d 1336 (5th Cir. 1994), *reinstated in part en banc*, 38 F.3d 803 (5th Cir. 1994). Although the defendant's Youth Corrections Act conviction was "set aside," it is not an "expunged" conviction under §4A1.2(j), and is counted in calculating the defendant's criminal history category.

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

United States v. Gutierrez, 635 F.3d 148 (5th Cir. 2011). "The district court did not plainly err in failing to calculate an upward departure using the methodology set forth in §4A1.3 of the Guidelines prior to imposing a non-Guidelines sentence."

United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009). In this case the sentencing judge misapplied an upward departure under §4A1.3 for inadequacy of criminal history by adding additional offense levels rather than adapting the defendant's criminal history category to better reflect the impact of the prior offense. The court determined that this was in error. Additionally, the court noted that a sentencing judge may also not invoke §5K2.0 to address inadequacy of criminal history as §4A1.3 is the proper mechanism to do so.

United States v. Jones, 444 F.3d 430 (5th Cir. 2006). "The Guidelines expressly provide in a policy statement that '[a] prior arrest record itself shall not be considered for purposes of an upward departure. . . .' While the [g]uidelines contemplate that a district court may base an upward departure on '[p]rior similar adult criminal conduct not resulting in a criminal conviction,' they also contemplate that there must be 'reliable information' of such conduct. Arrests, standing alone, do not constitute reliable information under either the [g]uidelines or our precedent pre-dating the [g]uidelines." As a result, the district court in this case erred when it considered the defendant's prior arrests, without finding that the defendant was actually convicted, in deciding to impose the maximum sentence.

United States v. Cade, 279 F.3d 265 (5th Cir. 2002). "Relevant conduct is part of the instant offense . . . and therefore is not a 'prior sentence' under §4A1.3(a)." "[W]hen a district court determines that a sentence is relevant conduct to the instant offense, and considers it as a factor in adjusting the offense level, such sentence cannot then be considered as a basis for a criminal history category departure under §4A1.3(a)."

United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994). In this appeal, the Fifth Circuit determined that a sentencing court may consider conduct that formed the basis for counts of an indictment dismissed under a plea agreement in departing upward from the guidelines. The court reasoned that neither §4A1.3 nor its commentary "suggests that an exception exists for prior similar criminal conduct that is the subject of dismissed counts of an indictment." The court

explained "no statute, guidelines section, or decision of th[e] court . . . preclude[s] the district court's consideration of dismissed counts of an indictment in departing upward."

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Cashaw, 625 F.3d 271 (5th Cir. 2010). A defendant who qualifies for an alternative offense level as a career offender pursuant to USSG §4B1.1 is ineligible for any Chapter Three offense-level adjustments, except the acceptance of responsibility adjustment as explicitly permitted by §4B1.1(b).

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). "§4B1.1 provides enhanced punishment for any 'career offender,' which includes criminals with at least two prior felony convictions for either a crime of violence or a controlled substance offense. Under §4A1.2(a)(2), prior sentences imposed in 'related cases' are to be considered as one sentence when calculating a defendant's criminal history score. The Commentary to this section instructs that a sentencing court should consider previous cases to be related if they occurred on a single occasion, were part of a single scheme, or 'were consolidated for trial or sentencing.' The Commentary adds that '[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e*., the defendant is arrested for the first offense prior to committing the second offense).'" In this case, the defendant contended that the prior convictions that served as the basis for the enhancement should have been considered related because his distribution conviction in one district involved his conspiracy-to-distribute conviction in another district. The Fifth Circuit disagreed, explaining that the defendant's "two prior convictions occurred in different districts and involved separate drug distributions on different days involving different cooperating individuals."

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

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

United States v. Moore, 635 F.3d 774 (5th Cir. 2011). Because Louisiana's aggravated battery statute required serious risk of potential physical harm to another and was similar to the enumerated offense of aggravated assault, the defendant's conviction for aggravated battery with a motor vehicle qualified as "crime of violence" under the residual clause of the definition set forth in USSG §4B1.2.

*United States v. Lipscom*b, 619 F.3d 474 (5th Cir. 2010). Conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), is a "crime of violence" supporting application of the career offender enhancement.

United States v. Marquez, 626 F.3d 214 (5th Cir. 2010). Conviction of a state offense of possession of a deadly weapon by a prisoner is a "crime of violence" supporting application of the

career offender enhancement because "[a] prisoner in possession of a deadly weapon within a penal institution is significantly more likely to attack or physically resist an apprehender, such as a guard, or another inmate."

United States v. Neal, 578 F.3d 270 (5th Cir. 2009). The court held that the district court erroneously relied on the defendant's prior conviction for possession of narcotics to enhance the defendant's sentence under §4B1.4. According to the court, "[m]ere possession of illegal drugs, without more, is not a 'controlled substance offense' for these purposes."

United States v. Believ, 492 F.3d 314 (5th Cir. 2007). The court ruled that the Louisiana molestation statute is categorically a "crime of violence" as defined in §4B1.2, specifically a "forcible sex offense," because it includes as an element "forcible compulsion."

United States v. Valenzuela-Quevedo, 407 F.3d 728 (5th Cir. 2005). The court of appeals looks "only to the face of the indictment in deciding whether a crime presents a serious potential risk of injury to a person." "Where the defendant's actual conduct is not clear from the face of the charging document, [the court] proceed[s] 'under the assumption that his conduct constituted the least culpable act satisfying the count of conviction.'" In this appeal, the charging document set out two ways of committing the offense of conviction—*i.e.*, discharging a firearm from a vehicle. The court determined that under the least culpable means—"with intent to intimidate or harass another, did discharge a dangerous weapon or firearm from an automobile or other vehicle, from, upon, or across a highway, in the direction of any vehicle"—the defendant's conduct posed a serious potential of risk of physical injury to another. The court concluded that the offense constituted a crime of violence under §4B1.2(a)(2), explaining that "[f]iring a weapon from, on, or across a highway at another is a dangerous activity, especially when the motivation for the act is a desire to intimidate or harass." *See also United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) ("[A] crime is a crime of violence under §4B1.2(a)(2) only if, from the face of the indictment, the crime charged or the conduct charged presents a serious potential risk of [physical] injury to a person.").

United States v. Golding, 332 F.3d 838 (5th Cir. 2003). The offense of unlawfully possessing a machine gun in violation of 18 U.S.C. § 922(o) is a "crime of violence" because it constitutes conduct that presents a serious risk of physical injury to another. With respect to the defendant's argument that "possession" is not "conduct," the court stated that this contention is foreclosed by its decision in *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002), in which it recognized that possession, though often passive, constitutes conduct.

United States v. Turner, 349 F.3d 833 (5th Cir. 2003). Where the defendant pleaded guilty to a lesser included offense, and was not reindicted on that lesser count, the indictment for the charged offense is not applicable to the analysis of whether the conviction was a conviction of a crime of violence. Where no relevant indictment exists, the court will examine the elements of the lesser included offense of which the defendant was convicted under the second prong of §4B1.2(a)(2). When the court examined the elements of burglary of a building, it determined that the elements of the offense were not sufficient to present a serious potential risk of physical injury to another as required by §4B1.2(a)(2).

United States v. Deville, 278 F.3d 500 (5th Cir. 2002). Under §4B1.2, "a sentencing court should consider previous cases to be related if they occurred on a single occasion, were part of a single scheme, or 'were consolidated for trial or sentencing.'"

United States v. Turner, 305 F.3d 349 (5th Cir. 2002). In this appeal, the court explained that a two-prong analysis applies to determining whether a prior conviction constituted a crime of violence under §4B1.2—first, whether the elements of the offense include the use of physical force; and second, whether the offense is in the enumerated list of crimes, involves explosives, or meets the "otherwise" part of the definition of crime of violence. Because the defendant's prior conviction for burglary of a building did not involve explosives nor was it an enumerated offense, the court had to determine whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." The charging document, however, was not part of the record to make this determination so the court remanded the case to the district court to determine whether the conduct set out in the charging document presented a serious potential risk of physical injury to another.

§4B1.4 Armed Career Criminal

United States v. Hughes, 602 F.3d 669 (5th Cir. 2010). The court concluded that, under the Armed Career Criminal (ACCA) statute's residual clause, a federal escape conviction from an institution to which a defendant has been confined qualifies as a "violent felony." The panel applied a "modified categorical" analysis–which permits review of certain charging documents to determine the actual basis of conviction–to learn that Hughes had been charged with escaping from an institution to which he had been confined. It distinguished this behavior from the "non-reporting to prison" conduct in *Chambers*, to conclude that "breaking out of confinement" is an offense contemplated by ACCA: purposeful behavior of a type such that, had the defendant had a firearm, he might well have used it in the offense's commission.

United States v. Stapleton, 440 F.3d 700 (5th Cir. 2006). The Louisiana crime of false imprisonment with a dangerous weapon is not a violent felony under the Force Clause of the Armed Career Criminal Act, but is a violent felony under the Otherwise Clause. The court explained that "[a] crime does not meet the requirements of the Force Clause if it can be committed without the use, attempted use, or threatened use of physical force. The basic offense of false imprisonment in Louisiana does not necessarily involve the use, attempted use or threatened use of force by the offender in every case. That crime requires only that the offender intentionally confine or detain the victim without consent or legal authority." The court explained the Otherwise Clause requires a different analysis. "The Otherwise Clause is triggered by conduct creating a serious potential risk of physical harm to another, and we believe that such a risk is inherent in the commission of false imprisonment with a dangerous weapon under either prong of 'dangerous weapon' recognized by the Louisiana Supreme Court in *Gould* and *Robinson*."

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

United States v. Garcia-Ortiz, 310 F.3d 792 (5th Cir. 2002). The Fifth Circuit explained that the permissive wording in §5C1.1(d) gives the district court "virtually complete discretion to impose a split sentence . . . ." In fact, the district court's exercise of this discretion is not reviewable unless the district court believed it did not have the discretion, under the guidelines, to award a split sentence based upon the defendant's status as an illegal alien. Because the transcript in this case was ambiguous as to whether the district court was exercising its discretion, the appellate court remanded to permit the district court to reconsider its sentence.

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

United States v. McCrimmon, 443 F.3d 454 (5th Cir. 2006). "[The defendant] has the burden of showing that he is entitled to the safety-valve adjustment. [In this case, the] government's narcotic agent testified at the resentencing hearing that [the defendant] was evasive during an interview, regarding [the defendant's] own offense. The agent questioned [the defendant's] candor during the proffer session . . . . Consequently, the district court found both that [the defendant] had not been truthful regarding his own role in the offense and that he had not provided all of the information within his knowledge about the offense." The court of appeals determined that "district court's finding that [the defendant] had been less than truthful [was] not clearly erroneous. The agent's testimony was sufficient to support the district court's independent determination that [the defendant] was not entitled to the safety-valve adjustment."

United States v. Phillips, 382 F.3d 489 (5th Cir. 2004). A defendant convicted of an offense under 21 U.S.C. § 860 (distribution or manufacturing in or near schools and colleges) is not eligible for safety valve treatment under § 3553(f).

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

United States v. Wilson, 105 F.3d 219 (5th Cir. 1997). "[I]n determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators." "The commentary to §5C1.2(2) provides that '[c]onsistent with [U.S.S.G.] §1B1.3 (Relevant Conduct),' the use of the term 'defendant' in §5C1.2(2) 'limits the accountability of the defendant to his own conduct and conduct that he

aided or abetted, counseled, commanded, induced, procured, or willfully caused.' This language mirrors §1B1.3(a)(1)(A). Of import is the fact that this language omits the text of §1B1.3(a)(1)(B) which provides that 'relevant conduct' encompasses acts and omissions undertaken in a 'jointly undertaken criminal activity,' *e.g*. a conspiracy."

United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996). "The defendant has the burden of ensuring that he has provided all the information and evidence regarding the offense to the Government." According to the court, the defendant has the burden of providing this information regardless of whether the government requests such information. *See also United States v. Ivester*, 75 F.3d 182 (4th Cir. 1996) (holding that the burden is on the defendant to demonstrate that he has supplied the government with truthful information regarding the offenses at issue).

United States v. Stewart, 93 F.3d 189 (5th Cir. 1996). Section 5C1.2(5)'s requirement to provide truthful information does not unconstitutionally subject the defendant to cruel and unusual punishment or involuntary servitude. "The fact that a more lenient sentence is imposed on a defendant who gives authorities all of the information possessed by the defendant does not compel that defendant to risk his or his family's lives nor does it compel a defendant to work for the Government."

United States v. Rodriguez, 60 F.3d 193 (5th Cir. 1995). "[T]he probation officer is, for purposes of §5C1.2, not the Government. The purpose of the safety valve provision was to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences. A defendant's statements to a probation officer do not assist the Government."

Part D Supervised Release

§5D1.1 <u>Imposition of a Term of Supervised Release</u>

United States v. Garcia-Rodriguez, 640 F.3d 129 (5th Cir. 2011). For purposes of determining the commencement of a term of supervised release under 18 U.S.C. § 3624(e), "administrative detention by ICE does not qualify as imprisonment," and therefore, the defendant was "'released from imprisonment' the moment he was transferred from BOP custody to ICE custody to await deportation."

United States v. Moreci, 283 F.3d 293 (5th Cir. 2002). Section 3583(b)(2) of Title 18 limits a term of supervised release for Class C felonies to "not more than three years." In this case, the sentencing court orally sentenced the defendant to five years of supervised release, but the written judgment provided for three years of supervised release. "When there is a conflict between a written sentence and an oral pronouncement, the oral pronouncement controls. If, however, there is merely an ambiguity between the two, the entire record must be reviewed to determine the intent of the court. The difference in the term of supervised release reflected here is a conflict, not an ambiguity." Because the defendant faced five years of supervision for a Class C felony, the court of appeals modified the defendant's supervised release to the statutorily mandated three-year term.

§5D1.2 Term of Supervised Release

United States v. Gonzalez, 445 F.3d 815 (5th Cir. 2006). "For purposes of the recommended upward departure under U.S.S.G. §5D1.2, a 'sex offense' is 'an offense, perpetrated against a minor. . . .' [In this case, the defendant contended] that mere consumption—as opposed to production—of child pornography does not qualify because it is not an offense perpetrated directly against a minor. [The Fifth Circuit recognized] no such fine distinction. In fact, [the Fifth Circuit] previously rejected the argument that the consumption of child pornography is only an indirect offense, observing that 'there is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other. . .' [The Fifth Circuit determined that the defendant's] possession of child pornography in violation of 18 U.S.C. § 2252A [was] a 'sex offense' within the meaning of U.S.S.G. §5D1.2, qualifying him for upward departure."

§5D1.3 Conditions of Supervised Release

United States v. Bigelow, 462 F.3d 378 (5th Cir. 2006). When the written judgement included requirements of supervised release that conflicted with the oral pronouncement at the time of sentence, the oral pronouncement controls and the written judgement has to be conformed to the oral pronouncement. *But see United States v. Warden*, 291 F.3d 363 (5th Cir. 2002).

United States v. Cothran, 302 F.3d 279 (5th Cir. 2002). "The district court has the discretion to impose conditions 'reasonably related' to 'the history and characteristics of the defendant' or his general rehabilitation." In this appeal, the defendant complained about two conditions of supervised release: (1) he was prohibited from gambling or visiting gambling establishments, and (2) he had to be treated for substance abuse if directed by the probation office. As for the first condition, the court of appeals explained that "[a] district court does not abuse its discretion . . . by restricting a criminal defendant with a history of excessive gambling from visiting casinos or gambling during supervised release." As for the second condition, the court explained that a district court "can require participation in a substance abuse program if it has reason to believe that the defendant abuses controlled substances." Here, the defendant had been previously convicted for possession of marihuana and later charged with possession of suspected crack cocaine. Although the latter charge was dismissed and the defendant denied drug use, the court concluded that the district court had a reasonable basis to give the probation department the authority to order the defendant into drug treatment.

United States v. Warden, 291 F.3d 363 (5th Cir. 2002). "[A]ny conflict between the oral pronouncement of sentence and the written sentence must be resolved in favor of the oral pronouncement." In this case, the defendant complained that the district court erred by imposing new conditions in its written judgment that were not discussed at the sentencing hearing, specifically his responsibility to pay for the costs of drug treatment and counseling, sex offender counseling, and anger management counseling. The court of appeals explained that the difference between the oral pronouncement and the judgment created an ambiguity at most. The court then looked to the intent of the district court and determined that the requirement for the defendant to bear the costs of the ordered treatments was consistent with the district court's intent that the defendant attend drug treatment, sex offender, and anger management counseling. The court of

appeals upheld the judgment because the requirement to pay costs was consistent with the district court's intent in imposing the conditions.

United States v. Paul, 274 F.3d 155 (5th Cir. 2001). "A district court has wide discretion in imposing terms and conditions of supervised release. However, this discretion is limited by 18 U.S.C. § 3583(d), which provides that a court may impose special conditions of supervised release only when the conditions meet certain criteria. First, special conditions of supervised release must be reasonably related to the factors set forth in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) including: (1) 'the nature and circumstances of the offense and the history and characteristics of the defendant,' (2) the need 'to afford adequate deterrence to criminal conduct,' (3) the need 'to protect the public from further crimes of the defendant,' and (4) the need 'to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner.' In addition, supervised release conditions cannot involve a greater deprivation of liberty than is reasonably necessary to achieve the latter three statutory goals." In this case, the defendant pleaded guilty to knowingly possessing child pornography and the court of appeals upheld the following conditions: (1) avoid direct and indirect contact with minors; (2) do not engage in any paid occupation or volunteer service which exposes the defendant either directly or indirectly to minors; (3) avoid places, establishments, and areas frequented by minors; (4) do not possess or access computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image; and (5) do not use photographic equipment and audio/video equipment.

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). Section 3583(d) of Title 18 authorizes sentencing courts to order that a defendant be surrendered to immigration officials for deportation proceedings as a condition of supervised release, but not to order the defendant's deportation. The circuit court noted that the language of the statute authorizes district courts to "provide," not "order," that an alien be deported and remain outside the United States. Congress's use of the verb "order" elsewhere in the statute implies that the choice of the verb "provide" was intentional in this situation. Further, the circuit court recognized Congress's tradition of granting the Executive Branch sole power to institute deportation proceedings. The circuit court noted its unwillingness to conclude that Congress intended to change this tradition through silence. The circuit court held that the district court exceeded its statutory power under § 3853(d) in ordering that the defendant be deported as a condition of supervised release.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 <u>Restitution</u>

United States v. Onyiego, 286 F.3d 249 (5th Cir. 2002). Section 3663A of Title 18 provides for the mandatory award of restitution in certain cases. "This section limits the restitution award to either (1) the value of the property on the date of the damage, loss, or destruction or (2) the value of the property on the date of the sentencing less the value (as of the date the property is returned) of any part of the property that is returned." Here, the defendant complained that the district court ordered him to pay the legal fees his victim incurred defending collection actions that resulted from the defendant's actions. The court explained that it had previously interpreted the discretionary statute to preclude the award of consequential damages

and determined that recovery losses cannot be included in a discretionary restitution award. The court applied the same reasoning to the victim's legal fees in this case and determined that a mandatory restitution order cannot include those costs under section 3663A.

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001). "Under the Victim and Witness Protection Act, restitution may be ordered to victims of an offense. An order of restitution must be limited to the loss stemming from the specific conduct supporting the conviction. Section 3664(j)(2) provides that '[a]ny amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim' in any state or federal civil proceeding."

§5E1.2 Fines for Individual Defendants

United States v. Brantley, 537 F.3d 347 (5th Cir. 2008). Imposing a fine in lieu of restitution was not error when the PSR identified that the defendant had the ability to pay restitution of a similar amount and restitution was not ordered.

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997). A defendant may rely on the PSR to establish his inability to pay a fine. "'[W]hen a sentencing court adopts a PSR which recites facts showing limited or no ability to pay a fine the government must come forward with evidence showing that a defendant can in fact pay a fine before one can be imposed.'" In this case, the defendant contended that the imposition of a $10,000 fine was erroneous because he was insolvent. The court of appeals agreed, observing that the PSR showed only a limited ability to pay a fine, if not a total inability to pay, and the government did not present evidence that showed the defendant could pay the fine.

§5E1.4 Forfeiture

United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997). "[M]erely pooling tainted and untainted funds in an account does not, without more, render that account subject to forfeiture." But if the government demonstrates that the defendant pooled illegitimate funds to disguise the nature of those funds, the forfeiture of commingled funds—whether legitimate or illegitimate—is appropriate.

Part G Implementing the Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001). "Section 5G1.2(d) instructs a court to impose consecutive sentences as an enhancement only if the sentence derived from a single count cannot achieve the 'total punishment.' The decision to impose consecutive sentences up to the level of 'total punishment' would be an enhancement. Imposing consecutive sentences above the level of 'total punishment' would be an upward departure." In this case, the court explained that the 'total punishment' calculation excludes departures.

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

United States v. Londono, 285 F.3d 348 (5th Cir. 2002). "Application Note 3 to §5G1.3 requires the court to consider the factors set forth in 18 U.S.C. § 3584. Section 3584 directs the court to consider the factors detailed in 18 U.S.C. § 3553(a), which lists seven categories of concern, together with accompanying subcategories, that a district court must take into account when imposing a sentence." The court explained that the sentencing court must, at the time of sentencing, state in open court its reasons for imposing the sentence.

United States v. Hernandez, 64 F.3d 179 (5th Cir. 1995). "Subsection (a) [of §5G1.3] applies if the defendant commits the instant offense while serving an undischarged term of imprisonment or after sentencing, but before serving the sentence, and subsection (b) applies if the conduct resulting in the undischarged term of imprisonment is taken into account in determining the offense level for the instant offense." If neither (a) nor (b) applies, the district court must apply subsection (c). That subsection "provides that, in any case other than those covered under subsections (a) and (b), 'the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.'" The court explained that subsection (c) "is binding on district courts because it completes and informs the application of a particular guideline."

Part H Specific Offender Characteristics

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

United States v. Castillo, 430 F.3d 230 (5th Cir. 2005). "[A] defendant's HIV-positive status alone does not constitute an extraordinary medical condition warranting a downward departure under §5H1.4."

§5H1.5 Employment Record (Policy Statement)

United States v. Ardoin, 19 F.3d 177 (5th Cir. 1994). Section "5H1.5 specifically reject[s] . . . employment record as grounds for departure."

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

United States v. Peltier, 505 F.3d 389 (5th Cir. 2007). The court found that while the sentencing court did mention the defendant's socioeconomic status during sentencing, "any erroneous reliance on socioeconomic status was neither plain nor so essential to the judgment as to affect Peltier's substantial rights."

United States v. Stout, 32 F.3d 901 (5th Cir. 1994). Guideline §5H1.10 provides that socioeconomic status is not relevant in the determination of a sentence. In this case, the

sentencing judge departed upward, in part, because of the defendant's socioeconomic status—*i.e.*, his excessive lifestyle. Although the sentencing judge erred in considering the defendant's excessive lifestyle, the court of appeals upheld the sentence because four other acceptable reasons existed that supported the upward departure.

Part K Departures

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

United States v. Desselle, 450 F.3d 179 (5th Cir. 2006). "Although judges have latitude under §5K1.1, they must 'conduct[ ] a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence.' Section 5K1.1 requires the court to state its reasons for imposing the departure, and . . . . [a]lthough the enumerated reasons are not the *only* factors a court may consider in determining the extent of the §5K1.1 departure, a court must begin to assess a §5K1.1 departure using the criteria listed by the Guidelines. Further, the additional factors a court may consider must be related to determining the 'nature, extent, and significance of assistance.' We thus join the majority of circuits in holding that the extent of a §5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns."

United States v. Solis, 169 F.3d 224 (5th Cir. 1999). Persuaded by the Third Circuit's reasoning in *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), the Fifth Circuit held that §5K2.0 does not give district courts any additional authority to consider substantial assistance departures without a government motion. Because the government did not bargain away its discretion to refuse to offer a §5K1.1 motion and the defendant did not allege that the government refused to offer the motion for unconstitutional reasons, the Fifth Circuit held that the district court erred by granting a 5-level downward departure.[21]

United States v. Underwood, 61 F.3d 306 (5th Cir. 1995). In considering an issue of first impression, the court held that the promulgation of policy statement §5K1.1 was not an *ultra vires* act of the Sentencing Commission. The defendant argued on appeal that the Sentencing Commission exceeded its authority when it promulgated §5K1.1 as a "policy statement" because

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

Congress mandated the creation of a "guideline" in 28 U.S.C. § 994(n). The circuit court noted that Congress's instructions to the Sentencing Commission fall into four general categories: issue guidelines, issue policy statements, issue guidelines or policy statements or implement a certain congressionally determined policy in the guidelines as a whole. The court recognized that the specific language of each subsection of section 994 determines into which of the four categories the instruction falls. After comparing the language in the subsections dealing with "guidelines" and "policy statements," the court ruled that Congress was not mandating the promulgation of a specific guideline for downward departure based on substantial assistance in section 994(n). Rather, Congress was instructing that the guidelines as a whole should "reflect" the appropriateness of a downward departure based on substantial assistance.

United States v. Johnson, 33 F.3d 8 (5th Cir. 1994). "When the government files a section 5K1.1 motion, the sentencing court may depart below the guideline range if it finds that substantial assistance was rendered to the government. The propriety and extent of the departure must be determined by the court, based on its evaluation of the facts and circumstances of the case. The government's evaluation and recommendation, while deserving substantial weight, is but one factor to be considered in this equation." "The court is charged with conducting a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence." *See also United States v. Cooper*, 274 F.3d 230 (5th Cir. 2001) ("A district court has almost complete discretion to determine the extent of a departure under §5K1.1. The district court also has almost complete discretion to deny the government's §5K1.1 motion.").

§5K2.0 <u>Grounds for Departure</u> (Policy Statement)

United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009), §4A1.3.

United States v. Barrera-Saucedo, 385 F.3d 533 (5th Cir. 2004). "[I]t is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody."

United States v. Castillo, 386 F.3d 632 (5th Cir. 2004). The defendant, convicted of being unlawfully in the United States after deportation, was granted a downward departure based on cultural assimilation. The defendant had lived in the United States since age three; continuously lived in the United States; was educated and worked in the United States; and was fluent in English. The Fifth Circuit, reviewing the departure for plain error, affirmed. *See also United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001) (noting that cultural assimilation is a factor not mentioned in the guidelines that is sufficient to allow the case to be taken out of the heartland of the particular guideline).

United States v. Phillips, 382 F.3d 489 (5th Cir. 2004). "[A] district court may impose a sentence of imprisonment below a statutory minimum for a drug crime only if: (1) the Government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the Government; or (2) the defendant meets the 'safety valve' criteria set forth in 18 U.S.C. § 3553(f)." In this case, the district court departed from the mandatory minimum sentence

relying in part on the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). On appeal, the government argued that *Koon* did not authorize the district court to depart downward from the minimum statutory sentence. The court of appeals agreed, explaining that *Koon* did not give the district court general authority to disregard the statutory mandatory minimum sentence.

United States v. Froman, 355 F.3d 882 (5th Cir. 2004). If a factor for departure is not mentioned by the guidelines, the court can depart if it considers the structure and theory of relevant individual guidelines and the guidelines as a whole and then decides the factor takes the case out of the heartland. Here, the defendant challenged an upward departure. He was charged with conspiracy to knowingly transport, receive, and distribute child pornography in interstate commerce via the computer; receipt of child pornography in interstate commerce via computer; and possession of child pornography transported in interstate commerce via computer. At sentencing, the district court gave a 2-level enhancement under §2G2.1 because one of his victims was between ages 12 and 16, and a 2-level enhancement for the fact that defendant was the parent of one of the exploited victims. The district court also granted a motion for an upward departure under §§5K2.0 and 5K2.8 resulting in an offense level of 34 and in a guideline range of 151-180 months. On appeal, defendant challenged the upward departure, arguing that the basis for the upward departure did not place the case outside the "heartland" of cases under §2G2.1, and that the district court failed to notify defendant of its intention to depart upward. The Fifth Circuit noted that the district court was not required to provide notice of the possibility of departure where the opposing party had so moved. The court further stated that defendant's substantive objection to the departure was also unpersuasive. In the instant case, the number of images transmitted and the extent of the distribution of images of defendant's 12-year-old daughter were considered particularly heinous aspects of the crime, and thus placed this case outside the heartland of general child pornography cases. The court noted that the Sentencing Commission had neither forbidden nor discouraged consideration of such factors. The extremity of the conduct was a factor sentencing courts were authorized to consider under §5K2.8. Furthermore, the degrading effect on defendant's daughter from the mass distribution of these images was not contemplated by §2G2.1. The Fifth Circuit affirmed the sentence.

United States v. Garay, 235 F.3d 230 (5th Cir. 2000). A defendant's status as a deportable alien, "as an element of the crime for which he was sentenced, is not an 'aggravating or mitigating circumstance of a kind or degree not adequately taken into consideration by the [Sentencing] Commission' and therefore is not a permissible basis for departure" in an illegal reentry case. In this case, the appellate court upheld the district court's refusal to depart downward on the basis of defendant's alienage. The district court stated that there was nothing "atypical" about the defendant's case that would take it outside the "heartland" of immigration cases to which the guideline applied. The cases upon which defendant relied were noted by the court of appeals as cases which involved aliens convicted of crimes other than immigration cases. The court determined that the defendant's status as a deportable alien, as an inherent element of his crime, has already been considered by the Commission in formulating the applicable guideline.

United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000). In determining whether a case falls outside of the heartland so as to warrant a departure from the guidelines, the sentencing court must consider the following questions: "'(1) What features of this case, potentially, take it

outside the Guidelines' 'heartland' and make it a special, or unusual case?[;] (2) Has the Sentencing Commission forbidden departure based on those features? [;] (3) If not, has the Commission encouraged departures based on those features?[; and] (4) If not, has the Commission discouraged departures based on those features?'" In this case, the court of appeals found that the district court did not articulate an acceptable reason for a downward departure. First, the district court's disagreement with the guidelines was not an acceptable basis for departure. Second, the case did not fall out of the "heartland" of possession-of-child-pornography cases simply because the defendant did not have a record of harm to others. The fact that the defendant "had not abused any child, and had no inclination, predisposition or tendency to do so, and had not produced or distributed any child pornography, and had no inclination, predisposition, or tendency to do so, [did] not suffice to take his case out of the heartland" possession-of-child-pornography cases.

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

§5K2.1 Death (Policy Statement)

United States v. Rodriguez, 553 F.3d 380 (5th Cir. 2008). The court concluded that an upward departure based on the deaths of multiple victims was proper in a case where the defendant had already received specific offense characteristic adjustments for both the number of victims (§2L1.1(b)(2)) and the death (§2L1.1(b)(6)). The upward departure took into account the 18 deaths not accounted for by the referenced enhancements.

United States v. Singleton, 49 F.3d 129 (5th Cir. 1995). The court explained that a 4-level enhancement for permanent or life threatening injury awarded under §2B3.1(b)(3)(c) does not preclude an upward departure for the death of the victim. *See also United States v. Billingsley*, 978 F.2d 861 (5th Cir. 1992).

United States v. Davis, 30 F.3d 613 (5th Cir. 1994). "A district court is not required to find that all of the §5K2.1 factors exist in order to impose an upward departure. 'The only "mandatory" language in the section is that the judge "must" consider matters that "normally distinguish among levels of homicide," such as state of mind.'" In this case, an employee of one of the gas stations the defendant robbed suffered an aneurysm at the base of her brain as a result of the trauma of robbery. The district court specifically considered the mandatory factors when it concluded that although the defendant did not intend to kill the employee, he should have anticipated that his conduct could result in serious injury or death. The circuit court additionally rejected the defendant's argument that the consecutive sentences he received on the firearms counts adequately accounted for the employee's death.

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

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). The court upheld an upward departure based upon the extreme psychological injury suffered by a seven-year-old sexual abuse

victim who was forced to squeeze the defendant's "private" and to place his penis in her mouth. The victim's treatment manager testified that the victim will suffer long-term psychological effects, such as lack of trust (especially of adults), that are excessively severe. The doctor indicated that the victim's trauma was the most severe of anybody she had ever worked with. When asked to talk about the incident, the victim became physically ill—crying, vomiting, and experiencing a fever—which is similar to those suffering from Post Traumatic Stress Disorder.

§5K2.21 Dismissed and Uncharged Conduct (Policy Statement)

United States v. Stephens, 373 F. App'x 457 (5th Cir. 2010). Confronted with a defendant's multiple robberies in which the government declined to bring 18 U.S.C. § 924(c) charges, the district court enhanced the robbery convictions for firearm usage pursuant to §2B3.1(Robbery) and upwardly departed under §5K2.21 (Uncharged Conduct) to account for the uncharged § 924(c) conduct. The defendant appealed the departure and the court of appeals concluded that the district court did not properly compute the guideline sentence or departure. It "goes against the policy behind §2K2.4 (Using Firearm) to take this action. Guideline 2K2.4's Application Note 4 states that '[i]f a sentence under this guideline [for a § 924(c) violation] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possessing, brandishing, use, or discharge . . . when determining the sentence for the underlying offense.'" Because the district court enhanced the underlying offense for brandishing or possessing a firearm(s) under §2B3.1, the district court could not directly assess a § 924(c) punishment. Thus, it would be improper to indirectly punish that same conduct under a §2K2.21 upward departure.

§5K3.1 Early Disposition Programs (Policy Statement)

United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008). The fact that "fast track" early disposition programs were not available in the sentencing jurisdiction of the defendant, while a disparity, was a "warranted disparity," and did not affect the defendant's sentence.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

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

United States v. Silva-Torres, 293 F. App'x 316 (5th Cir. 2008). The court rejected the defendant's argument that the district court's failure to provide prior notice of an upward variance prior to sentencing was a violation of §6A1.3. The court concluded that the decision in *Irizarry v. United States*, while not directly addressing §6A1.3(a), would still apply and foreclose the need to give notice.

United States v. Londono, 285 F.3d 348 (5th Cir. 2002). "[A] defendant challenging the findings of the [Presentence Report] . . . bears the burden of showing that the information in the [Presentence Report] 'cannot be relied on because it is materially untrue, inaccurate, or

unreliable.' In general, the [Presentence Report] bears 'sufficient indicia of reliability to be considered as evidence' by the district court, 'especially when there is no evidence in rebuttal.'" Here, the defendant claimed that a California conviction he committed as a juvenile should not have been calculated into his criminal history category. The evidence demonstrating the validity of the conviction was its presence in the PSR and the probation officer's testimony that she gathered the information about the conviction from a Texas "rap sheet." The defendant claimed that the rap sheet was unverified and was not the proper place for his juvenile conviction to appear. The Fifth Circuit held that the defendant failed to bear the burden of showing that the information in the PSR "cannot be relied on because it is materially untrue, inaccurate, or unreliable," necessary to successfully challenge the findings of a PSR.

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001). "Generally, a [Presentence Report] bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. 'The [Presentence Report], however, cannot just include statements, in the hope of converting such statements into reliable evidence, without providing any information for the basis of the statements.' Normally, the defendant has the burden to show that the information relied on in a [Presentence Report] is inaccurate. The rebuttal evidence presented by the defendant must show that the [Presentence Report's] information is materially untrue, inaccurate or unreliable. . . . [But] when a use immunity agreement is involved, and the defendant questions the sources of the evidence used against him at sentencing, the burden is on the government to show that the evidence is from outside sources."

United States v. Williams, 22 F.3d 580 (5th Cir.1994). An indictment standing alone may not be considered in the sentencing analysis:

> An indictment is merely a charge and does not constitute evidence of guilt. That elementary rubric has long been a bedrock of instructions provided to jurors on voir dire examination and again in the final charge. It would be ill-advised to discard this principle in sentencing procedures. Grand juries enjoy broad latitude in the conduct of their proceedings, free from restrictive evidentiary rules and other protective incidents of our treasured adversary proceedings. Such latitude to grand juries is acceptable because the consequences of an erroneous indictment are tempered before or at trial. No such safeguard inures to a count which has been dismissed, as in the instant case.

Part B Plea Agreements

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

United States v. Foy, 28 F.3d 464 (5th Cir. 1994). "No statute nor any of the Federal Rules of Criminal Procedure or the Sentencing Guidelines require a statement of reasons for rejecting a plea agreement. . . . [A] district court's decision to reject a plea agreement is proper as long as the record as a whole renders the basis of the decision reasonably apparent to the reviewing court and a decision on that basis is within the district court's discretion." In this appeal, the defendant complained that the district court rejected his plea agreement because he refused to admit to the relevant conduct alleged in the Presentence Report, but the government

maintained that the district court rejected the agreement based on its belief that the bargained-for sentence was too lenient. The Fifth Circuit explained that a district court "may properly reject a plea agreement based on undue leniency" and that "absent some special circumstance it would ordinarily be an abuse of discretion for a court to reject a plea agreement based on a defendant's refusal to acquiesce in the findings of a Presentence Report." The Fifth Circuit reasoned that because §6A1.3 gives a defendant the right to object to the Presentence Report, "a district court decision to reject a plea agreement based on a defendant objecting to a [Presentence Report] and refusing to admit culpability for other offenses, would normally constitute unjustifiable coercion of a defendant to forgo his right to object to a [Presentence Report] in order to preserve his plea bargain." The Fifth Circuit declined to adopt a "hard and fast rule" that required the district court to expressly state its reasons for rejecting a plea agreement. Instead, the Fifth Circuit explained, it will uphold the district court's decision to reject a plea agreement "as long as the record as a whole renders the basis of the decision reasonably apparent to the reviewing court and a decision on that basis is within the district court's discretion."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Kippers, ___ F.3d ___, 2012 WL 2345023 (5th Cir. 2012). The court of appeals continues to review sentences imposed upon revocation of probation using the "plainly unreasonable" standard. The Fifth Circuit observed that relevant circuit precedent as well as the statute establishing that standard (18 U.S.C. § 3742(a)(4)) "persists beyond *Booker*."

United States v. Shabazz, 633 F.3d 342 (5th Cir. 2011). The federal statute permitting a court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for [that] offense" does not impose an aggregate cap on the amount of revocation imprisonment a defendant can receive but, rather, "limits only the amount of revocation imprisonment the revoking court may impose each time it revokes a defendant's supervised release."

United States v. Davis, 602 F.3d 643 (5th Cir. 2010). The court held that a 24-month sentence for supervised release violations imposed after consideration of an erroneous 15-21 month advisory range survives plain error review regardless of: (1) the "no overlap" between the erroneous range and the correct 6-12 month advisory range, and (2) the substantial "gap" between the imposed sentence and the correct advisory range. While the district court plainly erred by considering the erroneous range, the defendant could not demonstrate a reasonable probability that, but for the error, he would have received a lower sentence. The district court had commented extensively upon the serious nature of the violations when imposing the sentence, and the record lacked any reasons to infer that the sentence was tied to the erroneous advisory range.

United States v. Jones, 484 F.3d 783 (5th Cir. 2007). The court declined to decide if a *Booker* "reasonableness review" would apply to a sentence revocation. Instead, the court noted

that even prior to *Booker* the policy statements in the guidelines regarding revocation were merely advisory, and since the sentencing judge considered (and then rejected) those policy statements there was no legal error.

United States v. Moody, 277 F.3d 719 (5th Cir. 2001). "[Title 18,] [s]ection 3583(h) authorizes a court, upon revocation of a defendant's supervised release, to impose a new term of supervised release to follow a term of imprisonment. Section 3583(h), however, limits the duration of supervised release a court can impose: [t]he length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." *See also United States v. Jackson*, 559 F.3d 368 (5th Cir. 2009) (holding that "the plain language of § 3583(h) conditions the maximum new term of supervised release on the term authorized for the original criminal offense" and that the "general maximums in § 3583(b) do not apply to revocation sentencing when the original offense was a conviction under § 841(b)(1)(C)").

United States v. Stiefel, 207 F.3d 256 (5th Cir. 2000). In this appeal, the defendant argued "that the district court did not have authority pursuant to 18 U.S.C. § 3583(e) & (h) to incarcerate him for a second violation of supervised release because those provisions do not speak of second revocations." The court determined that §§ 3583(e) & (h) do permit more than one revocation of supervised release reasoning that the grant of statutory authority in § 3583(e) refers to the district court's general power to revoke a term of supervised release after considering certain factors. Hence, the issue under § 3583(e) is not whether a second revocation may occur, but whether the district court, after considering certain factors, believes that revocation is appropriate for a defendant on supervised release. If a defendant is on supervised release and the district court believes that revocation is appropriate pursuant to § 3583(e)(3), then the district court may require the defendant to serve prison time.

United States v. Mathena, 23 F.3d 87 (5th Cir. 1994). "That Congress gave the Sentencing Commission the choice to issue guidelines or policy statements evidences Congress' intent that the policy statements regarding the revocation of supervised release be advisory only. That the Sentencing Commission itself termed the provisions of Chapter 7 'advisory policy statements' which would provide 'greater flexibility to both the Commission and the courts,' bolsters the view that the policy statements of Chapter 7 were intended to be advisory only."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Rosario, 306 F. App'x 75 (5th Cir. 2009). While the court acknowledged that the sentencing judge failed to provide the defendant with proper notice of an upward departure pursuant to Rule 32(h), the defendant failed to preserve the error below. On appeal, the defendant did not bear "his burden of persuasion with respect to prejudice," and had not shown that the error affected the outcome of his sentencing.

United States v. Mejia-Huerta, 480 F.3d 713 (5th Cir. 2007). "[W]e conclude that sentencing courts are not required to give pre-sentencing notice of their *sua sponte* intention to impose a non-Guidelines sentence, regardless of the pre-*Booker* pronouncements of . . . Rule 32(h)."

United States v. Andrews, 390 F.3d 840 (5th Cir. 2004). "The touchstone of rule 32 is *reasonable* notice, so the fact that the [sentencing] court [does] not specifically delineate that it would use [particular] factors should not make the notice defective; . . . mentioning factors in the context of upward departure notice puts the factors 'in play' so as to allow [defense] counsel adequately to prepare for sentencing. On the other hand, the court fail[s] to give adequate notice of other factors ultimately used in calculating an upward departure, by failing to reference them at all at the initial hearing when the notice of upward departure was given. The . . . argument[] that sufficient notice was given as a result of the court's generally discussing 'victim-related' and 'offense-related' factors . . . goes against the plain meaning of rule 32(h), requiring that the court ". . . *specify* any ground on which the court is contemplating a departure.' Allowing the court broadly to open the door to use any victim- or offense-related departure factor merely by mentioning one when notice of departure is given, provides defense counsel no guidance and thus tramples on the objectives of rule 32(h) . . . ." *See also United States v. Chinchilla-Galvan*, 242 F. App'x 228 (5th Cir. 2007).

United States v. Chung, 261 F.3d 536 (5th Cir. 2001). "Rule 32(c)(1) only requires the district court to make findings on timely objections and on objections that it considers in its discretion." In this appeal, the defendant complained that the district court erred by failing to consider the supplemental objections to the PSR that he filed on the day of his sentencing hearing. The court of appeals determined that the supplemental objections were distinct from the defendant's earlier objections and that the district court was free to disregard them because they were untimely.

<u>Rule 35</u>

United States v. Meza, 620 F.3d 505 (5th Cir. 2010). The district court's reformulation of the defendant's sentence "made within the same hearing, on the same day, within moments of the original pronouncement" was an "unbroken sequence of actions" that did not modify her sentence within the scope of Rule 35.

United States v. Ross, 557 F.3d 237 (5th Cir. 2009). The court held that a district court does not have authority under Rule 35(a) to modify a previously imposed sentence so it can "impose what is, in its view, a more reasonable one." *But see United States v. Meza*, 620 F.3d 505 (5th Cir. 2010). Since this case is already discussed, is it necessary to have the string cite?

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924(e)(1)

United States v. Gore, 636 F.3d 728 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1633 (2012). As a felon in possession of a firearm, defendant's prior Texas offense of conspiracy to commit aggravated robbery constituted a "violent felony" under the Armed Career Criminal Act (ACCA). The court reached this holding regardless of the fact that conspiracy to commit aggravated robbery did not have "as an element the use, attempted use, or threatened use of physical force against the person of another," because a conviction under that Texas statute was a crime that presented serious potential risk of physical injury to another.

United States v. Harrimon, 568 F.3d 531 (5th Cir 2009). The court held that the defendant's prior Texas conviction for evading arrest or detention by use of a vehicle is a "violent felony" for purposes of the Armed Career Criminal Act. The court concluded that fleeing by vehicle is purposeful, violent, and aggressive, and likened it to "the behavior underlying an escape from custody, which, as the Supreme Court noted in *Chambers*, is 'less passive' and 'more aggressive' than that likely underlying failure to report." The court noted, however, that the circuits are split on this issue post- *Begay*.

United States v. Constante, 544 F.3d 584 (5th Cir. 2008). A burglary conviction under Texas Penal Code §30.02(a)(3) is not a "violent felony" for the purposes of enhancement under 18 U.S.C. § 924(e)(1). Using the *Taylor* categorical approach, the court concluded that the Texas statute did not meet the *Taylor* definition of a "generic burglary" since the Texas offense could be completed without the requisite intent to commit another felony.

21 U.S.C. § 841

United States v. Doggins, 633 F.3d 379 (5th Cir. 2011). The Fair Sentencing Act, which raised the amount of crack cocaine that a defendant had to possess from 50 to 280 grams for the 20-year mandatory minimum to apply, does not apply retroactively to defendants sentenced prior to its enactment.

United States v. Rains, 615 F.3d 589 (5th Cir. 2010). The defendant's conviction under 18 U.S.C. § 924(c) was a "felony drug offense" for purposes of § 841 because his § 924(c) conviction involved a drug trafficking crime rather than another predicate offense. "Section 924(c) may more appropriately be considered a firearms statute, but, if so, it is a firearm statute that, at least in some situations, prohibits conduct related to drugs."

United States v. Moody, 564 F.3d 754 (5th Cir. 2009). The court held that "an earlier conviction from the same conspiracy can be used to enhance mandatory minimums. A defendant should not benefit in sentencing because he continued in a criminal enterprise *even after he was already arrested and convicted for the same enterprise*." Thus, the court concluded, it was proper for the district court to use the defendant's prior conviction for conduct in furtherance of a conspiracy to enhance the statutory penalty for a later arrest under the same conspiracy.

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